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## First Amendment Speech Right of Government Employees: Trends and Problems in Supreme Court and Fifth Circuit Decisions

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# FIRST AMENDMENT SPEECH RIGHTS OF GOVERNMENT EMPLOYEES: TRENDS AND PROBLEMS IN SUPREME COURT AND FIFTH CIRCUIT DECISIONS

*by Richard H. Hiers\**

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The First Amendment generally favors the marketplace testing of ideas and information rather than their arbitrary control by the government. As it is, the government itself, and especially its top officials, speak loudly in our society. Such volume is tolerable in part because the government does not speak in one voice. The First Amendment ensures that under most circumstances even the most junior government clerk typist can criticize the speech and acts of the top officials in her office as freely as any citizen can.<sup>1</sup>

## I. INTRODUCTION

SINCE Judge Goldberg so wrote in 1979, both the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have considerably narrowed the range of circumstances under which public or government employees<sup>2</sup> can speak freely, assured that the first amendment will protect them from reprisals by their superiors in office. Such employees now may be at risk not only for criticizing the speech and acts of higher officials; they may be at risk for merely daring to suggest changes in institutional policies or proceedings, for innocently communicating relevant information to other governmental agencies, and even for keeping secret diaries containing critical comments.

To understand how this narrowing process has occurred, this Article first reviews relevant Supreme Court decisions going back to 1968. These decisions have created a complex structure of steps (or hurdles) that government employees must surmount in order to prevail on claims alleging violations of their first amendment speech rights. The Court's current test particularly leaves in doubt a major category of speech most typical of employee discourse: speech concerning the policies and operations of the government agencies where the employees themselves work.

Largely because of major uncertainties in the Supreme Court's analytical framework, the Fifth Circuit has developed supplemental doctrines and criteria, some of which constitute additional hurdles to government employees trying to vindicate their first amendment speech rights. Part III traces this development. Part IV then explores a number of issues as to the adequacy of current Supreme Court and Fifth Circuit<sup>3</sup> jurisprudence with respect to the first amendment speech rights of government employees.

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1. *Porter v. Califano*, 592 F.2d 770, 779 (5th Cir. 1979).

2. This article is concerned only with speech rights of public employees who are unaffected by civil service systems. Thus it does not consider special statutory limitations on expression such as 5 U.S.C. §§ 7324-7328 (1988) and similar state or local laws, or special procedures and protections mandated for civil servants such as 5 U.S.C. §§ 7501-7543 (1988, amended 1990) and any equivalent state or local laws.

3. The Fifth Circuit is particularly significant for several reasons. During the 1960s and 1970s it decided many leading civil rights cases. See generally H. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 (1981); F. READ, LET THEM BE JUDGED; THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978). Four major Supreme Court cases concerning first amendment speech rights of government employees originated in the Fifth Circuit. See *infra* notes 28, 51-156 and accompanying text. In recent years the Fifth Circuit has decided numerous such cases and developed several additional doctrines and tests. Fifth Circuit case law

## II. SUPREME COURT CONSTRUCTIONS AND LIMITATIONS

By 1968, first amendment protection of public employee speech had come a long way since the days of Mr. Justice Holmes' *ipse dixit*, "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>4</sup> In 1967, the Supreme Court expressly rejected the sweeping proposition that public employees may be required to surrender first amendment rights as a condition of employment.<sup>5</sup> But what was the extent of public employees' first amendment rights? The Court undertook to answer that question the following year.

### A. *Pickering v. Board of Education*<sup>6</sup>

Mr. Pickering, a high school teacher, wrote a letter to a local newspaper criticizing the manner in which the school board and superintendent had handled plans to raise new school revenue through a bond election. Pickering's letter also criticized the board's allocation of resources and charged that the superintendent had attempted to prevent teachers from criticizing the proposed bond issue. The board dismissed Pickering on the grounds that some of the statements he had made in the letter were false and that its publication had been "detrimental to the efficient operation and administration" of the schools of the district.<sup>7</sup> The state supreme court upheld Pickering's dismissal on the theory that accepting a teaching position in a public school obliged a teacher "to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.'"<sup>8</sup>

Justice Marshall, writing for the *Pickering* Court, firmly rejected the state supreme court's position "to the extent that [it] may be read to suggest 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 in connection with the operation of the public schools in which they work."<sup>9</sup> On the other hand, the Court opined that a state "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."<sup>10</sup> Thus, with two conflicting interests before it, the Court determined that the way to resolution was through bal-

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amply illustrates the difficulties lower federal courts have experienced in construing and applying the Supreme Court's various pronouncements as to government employees' speech rights.

4. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), quoted in *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting).

5. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). See generally *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990). For a critique of earlier developments, see generally Emerson, *Toward a General Theory of the First-Amendment*, 72 YALE L.J. 877 (1962).

6. 391 U.S. 563 (1968).

7. *Id.* at 564.

8. *Id.* at 567.

9. *Id.* at 568. The Court cited its prior holdings in *Keyishian*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); and *Wieman v. Updegraff*, 344 U.S. 183 (1952).

10. *Pickering*, 391 U.S. at 568. The Court cited no authority for this proposition.

ancing. "The problem in any case is to arrive 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."<sup>11</sup> What constitutes a matter of public concern became a critical focal point in subsequent first amendment public employee speech jurisprudence. Concern for efficiency (here expressly related to public services performed by the state) also became centrally important.<sup>12</sup>

The Court had no difficulty finding that the balance tipped in favor of Pickering's first amendment rights. Noting the "enormous variety of fact situations" in which public employee first amendment claims arise, the Court declined to lay down a general standard for balancing.<sup>13</sup> It undertook, however, to set forth some guidelines for future analysis.<sup>14</sup> In doing so, the Court did not indicate any particular order in which that analysis should proceed.

The Court found that school funding is a matter of "legitimate" public interest, to which "free and open debate is vital to informed decision-making by the electorate."<sup>15</sup> Later cases, building, perhaps, on the adjective legitimate, added that speech regarding "significant" or important matters of public concern was entitled to greater protection than speech concerning matters of minimal public interest.<sup>16</sup> Noting that teachers generally "have informed and definite opinions" as to how school funds should be spent, the Court concluded, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."<sup>17</sup> It also observed that the school board could have used less intrusive means to correct any possible harm.<sup>18</sup>

The Court began discussion of its general analytical guidelines by inquiring whether Pickering's statements had had any negative impact on the efficiency or orderly administration of the schools. The Court set out three types of considerations. One type addressed possible harm to close working relationships. The Court observed that Pickering's statements had not been

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11. *Id.* Whether the employee's interest in so commenting is the same as his First Amendment speech right, the Court did not say. Later cases leave this question conceptually uncertain as well. See *infra* note 118.

12. Concern for such efficiency appears to derive from the school board's claim that Pickering's conduct had been "detrimental to the efficient operation and administration of the schools of the district." *Id.* at 564. The Court has not explained how such concern achieved implicit constitutional status. The Court did not seem to consider that *employees* might also properly be concerned with their agency's efficiency in performing public services. See *infra* note 230 and accompanying text.

13. *Id.* at 569.

14. *Id.*

15. *Pickering*, 391 U.S. at 571-72. See *infra* note 394.

16. See *infra* notes 388-99 and accompanying text.

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

18. "The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise." *Id.* A later Fifth Circuit case likewise noted that the government employer could have utilized less intrusive means. See *infra* notes 560-61 and accompanying text.

aimed at persons with whom he would normally come into contact in the course of his teaching activities.

Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and . . . with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.<sup>19</sup>

In a footnote, the Court speculated that in some circumstances public statements about or public criticisms of one's superior might harm working relationships:

It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.<sup>20</sup>

Several of the expressions quoted here became important criteria in subsequent cases.

The Court next turned to the type of harm allegedly resulting from false statements in Pickering's letter.<sup>21</sup> The Court found that the particular false statements were not per se detrimental to the interest of the schools, and that certain of these statements would have had no impact on the schools' operation beyond their tendency to anger the Board.<sup>22</sup> Implicitly, the Court seemed to be saying that false statements that anger higher officials do not, as such, impair the efficiency of a public agency's operation. The Court even suggested that false statements might be protected under the first amend-

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19. *Id.* at 570.

20. *Id.* at 570 n.3.

21. In an Appendix, the Court not only reproduced Pickering's published letter, but also undertook to determine which statements in it were false. In this Appendix the Court also sets out the following standards of review for first amendment government employee free speech cases.

This Court has regularly held that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case. [citations omitted.] However, even in cases where the upholding or rejection of a constitutional claim turns on the resolution of factual questions, we also consistently give great, if not controlling, weight to the findings of the state courts.

*Id.* at 578 n.2. As phrased, it is unclear whether the Court meant to enunciate one standard of review or two, or what precisely that standard (or those standards) are. The independent examination standard mentioned in the first quoted sentence appears similar to, if slightly more deferential than, *de novo* review. The "great, if not controlling weight" standard articulated in the second sentence, however, appears to be only somewhat less deferential than the clearly erroneous standard. The Court does not refer to this great, if not controlling weight standard in later cases. The relation between questions of law and questions of fact in Supreme Court and Fifth Circuit review remains somewhat uncertain. See *infra* notes 88-89 and accompanying text.

22. *Pickering*, 391 U.S. at 571.



ment, provided they were not knowingly false or recklessly made.<sup>23</sup>

The Court concluded its balancing analysis (and, evidently, its discussion of guidelines) by stating that Pickering's statements neither had been "shown nor can be presumed to have in any way either impeded his proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."<sup>24</sup> The expressions "impeded" workers' performance and "interfered" with institutions' operations are picked up in balancing formulae in later cases. Curiously, the Court's holding did not mention the possibly harmful impact of statements on the efficiency of schools' operations: "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."<sup>25</sup>

Partly because of its disjointed structure, *Pickering* was difficult to apply.<sup>26</sup> For instance, *Pickering* provides no guidance as to where courts should begin their analysis of public employee's first amendment claims. Later Supreme Court cases organized *Pickering*'s various statements into a somewhat more coherent pattern of analysis. Most of *Pickering*'s components reappear in the tests articulated in later cases, albeit in considerably revised format. These later cases also supplement new elements that add obstacles for first amendment plaintiffs. The first major supplement occurred in the area of causation, a matter not considered in *Pickering*.

#### B. Mt. Healthy City School District Board of Education v. Doyle<sup>27</sup>

For almost a decade, *Pickering* remained virtually the sole standard for appraising public employees' first amendment claims.<sup>28</sup> Then, in 1977, the

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23. *Id.* at 574. See *infra* note 25 and accompanying text. In a footnote, the Court adds that it was an open question whether even a statement that is knowingly or recklessly false, but without harmful effects, would be protected by the first amendment. *Id.* at 574 n.6. In later cases, the Fifth Circuit has suggested that negligently false speech by agency or institutional employees is not necessarily protected by the first amendment. *Neubauer v. City of McAllen*, 766 F.2d 1567, 1579-82 (5th Cir. 1985); *Megill v. Board of Regents*, 541 F.2d 1073, 1082-86 (5th Cir. 1976).

24. *Pickering*, 391 U.S. at 572-73 (footnote omitted).

25. *Id.* at 574 (footnote omitted). Presumably the Court meant this holding to apply only to the question whether employees' false speech was within the first amendment. In *Moore v. City of Kilgore*, 877 F.2d 364, 376 (5th Cir.), *cert. denied*, 110 S. Ct. 562-63 (1989), the Fifth Circuit read *Pickering* to mean that knowingly or recklessly false statements are not protected.

26. See *Gonzalez v. Benavides*, 774 F.2d 1295, 1299 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). See generally Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365, 365-404 (1977) (discussing application of *Pickering* balancing test).

27. 429 U.S. 274 (1977).

28. Other cases contributed particular doctrines during this period. In *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) the Court established that even though an academic employee without tenure could have been discharged for no reason whatever, he might be entitled to reinstatement if the decision to terminate his employment was made on the basis of his exercising constitutionally protected first amendment freedoms. *Perry* had originated in the Fifth Circuit. Later decisions extended this doctrine to other categories of probationary employees and persons employed at will. In *Elrod v. Burns*, 427 U.S. 347 (1976), addressing the question of patronage dismissals, the Court held that a "nonpolicymaking, nonconfidential governmental employee [cannot] be discharged or threatened with discharge from a job that he

Court decided *Mt. Healthy City School District Board of Education v. Doyle*,<sup>29</sup> another case in which a school board had terminated a public school teacher. The teacher, Mr. Doyle, had called a radio station and reported the contents of a new dress code that the school board was about to promulgate. The board apparently formulated the dress code in order to gain public support for pending bond issues.<sup>30</sup> In addition, Doyle had been involved in several incidents, including arguing with school cafeteria employees about their service, referring to certain students as sons of bitches, and making an obscene gesture at two female students who failed to follow his instructions.<sup>31</sup> The board's statement of reasons for the termination charged: "You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."<sup>32</sup> The statement referred to two particular incidents: notifying the radio station regarding the board's proposed dress code, and using obscene gestures to handle students in the cafeteria incident.<sup>33</sup> The district court found that the first amendment protected Doyle's communication to the media. The court concluded that since this episode had played a substantial part in the Board's termination decision, Doyle was entitled to reinstatement with back pay.<sup>34</sup> The Court of Appeals affirmed.

Applying the *Pickering* balancing test, the Supreme Court accepted the district court's conclusion that Doyle's call to the radio station was protected speech. The Court, however, was not satisfied with the lower court's holding that "[i]f a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permissible grounds—the decision may not stand."<sup>35</sup> Now the Court confronted an issue not addressed in *Pickering*: causation. The critical question was whether a government employer's decision to terminate an employee's contract based in substantial part on retaliation against the employee for engaging in constitutionally protected speech would justify remedial action.<sup>36</sup> Writing for the Court, Justice Rehnquist concluded that remedial action was not justified.<sup>37</sup> Instead, analogizing to a line of criminal cases relating to admissibility of involuntary confessions, the Court created a new two-part proof of causation text, equipped with shifting burdens:

Initially, in this case, the burden was properly placed upon respondent [Doyle] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or to put it in other

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is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375 (Stewart, J., concurring). Fifth Circuit patronage dismissal cases are reviewed in *infra* notes 198-207 and accompanying text.

29. 429 U.S. 274 (1977).

30. *Id.* at 282.

31. *Id.*

32. *Id.* at 283 n.1.

33. *Id.* at 282-83.

34. *Mt. Healthy*, 429 U.S. at 284.

35. *Id.*

36. *Id.* at 285.

37. *Id.*

words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.<sup>38</sup>

The Court then vacated the district court's judgment, remanding so that the lower court could apply this new, second-level causation test in further proceedings.<sup>39</sup>

The effect of this added causation test has been to permit government employers<sup>40</sup> to retaliate against employees for exercising their first amendment speech rights so long as the employers can convince the trial court that they would have dismissed or otherwise sanctioned the employees for other reasons.<sup>41</sup> Obviously this result poses a new hurdle for public employees seeking redress for violation of their first amendment speech rights. The first part of the *Mt. Healthy* causation test appropriately requires that employee plaintiffs show that they were terminated (or otherwise sanctioned) *because* they exercised a protected right. The "substantial factor" or the arguably less stringent "motivating factor" test is a necessary part of the order of proof.

The Court's policy reasoning in imposing the further stage, which allows the offending employer to escape liability by showing that it would have made the same decision anyway, is highly questionable. The Court explained its rationale as follows: "[T]he proper test to apply in the present context is one which . . . protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."<sup>42</sup> The "undesirable consequence" the Court visualized was that, under the "substantial factor" test alone, an employee who was

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38. *Id.* at 287.

39. *Mt. Healthy*, 429 U.S. at 287.

40. The term "governmental employer" is necessarily ambiguous. "The government" (ultimately, in a democracy, the public) could be said to employ all of its personnel from highest elected officials and agency heads through the lowest ranking workers. Thus officials and supervisors who hire and fire on behalf of the government are, themselves, "employees." In this article, the terms "government," "governmental employers," "employers," "supervisors," and agency "superiors" are used interchangeably. The courts have only rarely observed that the interests of "the government," and the interests of governmental officials or agency supervisors are not necessarily identical. For example, see *supra* note 22 and accompanying text and *infra* notes 170-79, 403, 426 and accompanying text.

41. Although *Mt. Healthy* is silent on the point, later Fifth Circuit cases have established that both stages or steps in the *Mt. Healthy* causation process are regarded as questions of fact for determination by the trier of fact, subject to appellate review on the clearly erroneous standard. *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 281 n.10 (5th Cir. 1990); *Coats v. Pierre*, 890 F.2d 728, 732-33 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 70, 112 L. Ed. 2d 44 (1990); *Frazier v. King*, 873 F.2d 820, 826-27 (5th Cir.), *cert. denied sub nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989); *Brawner v. City of Richardson*, 855 F.2d 187, 193 (5th Cir. 1988); *Kelleher v. Flawn*, 761 F.2d 1079, 1084-85 (5th Cir. 1985); *Bowen v. Watkins*, 669 F.2d 979, 984, 987 (5th Cir. 1982). *But see Price v. Brittain*, 874 F.2d 252, 259-60 (5th Cir. 1989) (suggesting that the appellate court might engage in its "own review of the record," to some degree "*de novo*").

42. *Mt. Healthy*, 429 U.S. at 287.

otherwise due to be terminated might engage in constitutionally protected conduct, and thereby prevent his employer from deciding not to rehire on the basis of his performance record.<sup>43</sup> Such an employee would then be "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."<sup>44</sup> The Court's hypothetical scenario appears rather implausible: a cunning employee, otherwise destined for well-deserved termination, shrewdly clings to his job by deliberately setting out to "commit" a constitutionally protected exercise of his right to speak freely. Even if such a scenario should occur, one might expect that a reasonable employer could dismiss the employee on appropriate grounds without, in the process, punishing him for exercising his first amendment rights. It strains credulity to suggest that an employee's exercise of such rights could *prevent* the government employer from dismissing him for otherwise sufficient, constitutionally permissible reasons.<sup>45</sup> It is not apparent that the second or "but for" part of the Court's *Mt. Healthy* causation test "protects against the invasion" of public employees' first amendment rights. What it assures is that a government employer *can* punish an employee for exercising such rights. It also opens the door for such employers later to invent pretexts for so doing, and thereby escape liability.<sup>46</sup>

The Court should have affirmed the lower courts' holding and remanded only for determination of the appropriate remedy. Doing so would have had the desirable consequence of making clear that public employers may not sanction employees for a mixed bag of reasons that include retaliation for the exercise of first amendment speech rights. This consequence would have been "desirable" because it would have assured, rather than undermined,

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43. *Id.* at 286.

44. *Id.* at 285. The Court added: "This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord 'tenure[.]' . . . [the] long-term consequences of [which] are of great moment both to the employee and to the employer." *Id.* at 286. It is unclear to what the expression "the current decision to rehire" refers. The Court did not explain what the long-term consequences of an award of tenure might be. Possibly, the Court was under the mistaken impression that a tenured faculty member's employment could not be terminated for cause. Evidently it did not consider that relief could take any form other than reinstatement with tenure. See *infra* notes 46-48 and accompanying text. The possibility that the Court was actuated by pro-management or pro-government bias is suggested by the fact that what the Court considered "undesirable," *id.* at 287, was "undesirable" only from the standpoint of the government employer who has violated an employee's first amendment speech rights. Such bias surfaced plainly in a later decision. See *infra* notes 80, 118.

45. See *Megill v. Board of Regents*, 541 F.2d 1073 (5th Cir. 1976). As one commentator points out, "the Court apparently failed to recognize that it is the state's attempt to punish constitutionally protected behaviour, not the employee's exercise of a constitutional right, that places the worker in a better position under the district court's test." Note, *supra* note 27, at 378. As to *Megill*, see *id.* at 382-83.

46. See Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3, 18-20 (1987). See also Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 393 (1979). The writer endorses *Mt. Healthy's* "substantive cause" test, but urges discontinuation of its employer rebuttal or "but for" test: "The standard of 'substantial or motivating factor' would focus a court's attention on the actual decision to remove the employee, asking whether constitutionally improper considerations played a significant, important, or appreciable part in the decision. It would discourage pro-defendant speculation on conjectural alternative causes." *Id.*

first amendment protection of public employees' speech. That protection is important not only to enable employees to express themselves, but also to assure "the market place testing of ideas and information rather than their arbitrary control by the government."<sup>47</sup> Appropriate relief could have included some or all of the full range of remedies available under section 1983, such as reinstatement,<sup>48</sup> back pay, lost income or other damages, and attorney's fees or punitive damages for dismissals in bad faith.<sup>49</sup>

In addition, affirming the decision below would have benefited the judicial system by encouraging government employers to "do it right the first time."<sup>50</sup> The emerging process of proofs and balancing was complicated enough without requiring the courts to determine what government employers might have done if they had not improperly retaliated against an employee's exercise of constitutionally protected rights. Both the first amendment and judicial economy would have been better served if the Court had refrained from inventing this second stage of causation proof, one that could only benefit persons or agencies already shown to have violated the constitutional rights of public employees.

### C. *Givhan v. Western Line Consolidated School District*<sup>51</sup>

Here, again, a school district terminated a school teacher for a mixed bag of reasons.<sup>52</sup> Among the grounds for dismissal produced by the school district at trial was the contention that, in several private encounters with the principal in his office, Ms. Givhan had "made 'petty and unreasonable demands' in a manner variously described by the principal as 'insulting,' 'hostile,' 'loud,' and 'arrogant.'" <sup>53</sup> The district court, however, found that certain of these demands or complaints were neither petty nor unreasonable because they concerned employment policies and practices Givhan considered racially discriminatory. Moreover, the district court "concluded that 'the primary reason for the school district's failure to renew [Givhan's] contract was her criticism of the policies and practices of the school district, especially [of] the school to which she was assigned to teach.'" <sup>54</sup> The court held that the school district's actions had violated Givhan's first amendment

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47. See *supra* note 1 and accompanying text.

48. Reinstatement need not have resulted in instant tenure: the district court might have ordered the tenure process deferred for an additional period, during which Doyle could have continued as a probationary employee.

49. *Gonzalez v. Benavides*, 774 F.2d 1295, 1298 n.7 (5th Cir. 1985). See Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L.J. 350, 394-95 (1980). Wolly argues that some relief, if only nominal, "is necessary to ensure that the constitutional violation is not trivialized to the point of irrelevancy." *Id.* at 395 (footnote omitted).

50. "[S]ome relief . . . should be granted so that the employer who escapes having to reinstate the employee is nevertheless put on notice that the decision-making process he followed was improper." Wolly, *supra* note 49, at 394.

51. 439 U.S. 410 (1979).

52. On special factors relating to teachers' speech rights, see generally Eagle, *First Amendment Protection For Teachers Who Criticize Academic Policy*, 60 CHI.-[KENT L. REV. 229 (1984).

53. *Givhan*, 439 U.S. at 412.

54. *Id.* at 412-13.

rights as identified in *Perry v. Sindermann*<sup>55</sup> and *Pickering* and ordered her reinstated.<sup>56</sup> The Fifth Circuit reversed, in relevant part, on the ground that private expression (i.e., Givhan's statements to the school principal in his office) was not constitutionally protected.<sup>57</sup> The Supreme Court vacated the appellate court's judgment in part, and remanded to the district court, to apply the second part of its new *Mt. Healthy* causation test.<sup>58</sup>

What *Givhan* added to the Court's emerging first amendment jurisprudence was explicit recognition that not only public, but also private speech is within its protection: "The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."<sup>59</sup> As will be noted, some subsequent Fifth Circuit opinions failed to remain cognizant of this clear statement.<sup>60</sup> The Court's holding was, to some extent, qualified in a footnote setting forth certain additional factors that might be applicable in balancing the right to private expression against a government office's need for "efficiency":

Although the first amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." [Citation omitted.] Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.<sup>61</sup>

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55. 408 U.S. 593 (1972). See *supra* note 28 and accompanying text.

56. *Givhan*, 439 U.S. at 414.

57. *Ayers v. Western Line Consol. School Dist.*, 555 F.2d 1309, 1318 (5th Cir. 1977), *vacated in part*, 439 U.S. 410 (1979). The Fifth Circuit's other ground for reversal was its conclusion that "there is no constitutional right to 'press even "good" ideas on an unwilling recipient.'" *Givhan*, 439 U.S. at 413. The Supreme Court tersely rejected this "captive audience" rationale: "Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the 'unwilling recipient' of her views." *Id.* at 415.

58. "[W]hile the District Court found that petitioner's 'criticism' was the 'primary' reason for the School Board's failure to rehire her, it did not find that she would have been rehired *but for* her criticism." *Givhan*, 439 U.S. at 417. The district court's judgment antedated the Court's *Mt. Healthy* decision. Writing for the Court in *Givhan*, Justice Rehnquist, who had also authored *Mt. Healthy*, did not limit the necessity for this new level of proof to situations in which reinstatement purportedly would have resulted in awarding tenure. See *supra* note 44 and accompanying text. There is no indication in the report that reinstating Ms. Givhan would have accorded her tenured status.

59. *Id.* at 415-16.

60. See *infra* notes 288-95, 301-09 and accompanying text.

61. *Givhan*, 439 U.S. at 415 n.4. The footnote did not explain what was meant by "personally confronts," or how such confrontation might affect institutional efficiency. See *infra* notes 80, 447 and accompanying text.

It is noteworthy that these new, post-*Pickering* factors of "manner, time, and place," were meant to apply only to analysis of the effects on institutional efficiency of *private* speech when "a government employee *personally confronts* his immediate superior." A few years later, the Supreme Court imported these same factors into another formula for balancing first amendment rights involving *public* speech against institutional efficiency without apparently noting the change in context.<sup>62</sup>

#### D. Connick v. Myers<sup>63</sup>

Ms. Myers had served for over five years as an assistant district attorney in New Orleans. Mr. Connick was the district attorney. Upon learning that she might be transferred to a different section of the office, Myers objected on the basis that her new assignment would result in a conflict of interest.<sup>64</sup> She expressed her views to various superiors including Connick. She was then notified formally that the transfer would take place. Myers further discussed this and some additional office matters with another superior who suggested that other staff in the office did not share her concerns.<sup>65</sup> Myers then prepared a questionnaire on these matters and distributed it to fifteen other assistant district attorneys, assuring them of anonymity. The questions covered "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."<sup>66</sup>

Connick later told Myers that she was being dismissed because she refused to accept the transfer, because distributing the questionnaire amounted to "insubordination," and because certain questions contained in the questionnaire were objectionable. Myers sued under Section 1983, alleging violation of her first amendment speech rights. The district court found that "the facts showed that the questionnaire was the real reason for her termination," and held that it "involved matters of public concern" and that the state had not "clearly demonstrated" that its distribution "substantially interfered" with the office's operations. The court then ordered Myers reinstated with back pay, damages, and attorney's fees. The Fifth Circuit affirmed.<sup>67</sup>

The Supreme Court reversed by a 5-4 vote.<sup>68</sup> In doing so, the majority fabricated an intricate assortment of considerations for weighing public em-

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62. *Connick v. Myers*, 461 U.S. 138, 152-53 (1983). See *infra* notes 104-08 and accompanying text. In *Rankin*, the Court applied these factors even though the employee had *not* personally confronted her superior. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); see *infra* note 150 and accompanying text. Lower courts have been criticized for applying these factors in public speech analysis prior to *Connick*. Note, *First Amendment—Public Employees May Speak A Little Evil*, 3 W. NEW ENG. L. REV. 289, 307, 309-10 (1980).

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

64. *Myers v. Connick*, 507 F. Supp. 752, 753 (E.D. La.), *aff'd*, 654 F.2d 719 (5th Cir. 1981), *rev'd* 461 U.S. 138 (1983).

65. *Connick*, 461 U.S. at 140-41.

66. *Id.* at 141.

67. *Id.* at 141-42.

68. Justice Brennan wrote a lengthy dissent, joined by Justices Marshall, Blackmun, and Stevens. *Id.* at 156 (Brennan, J., dissenting).

ployee free speech interests against appropriate governmental interests. These new considerations constituted further formidable obstacles for public employees seeking vindication of their first amendment speech rights. Justice White wrote the opinion for the Court.

*Connick* has two principal foci. First, the Court discusses the kinds of public employee speech entitled to constitutional protection. Second, the court sets out criteria for weighing government interests against public employee free speech rights.

### 1. *Matters of Public Concern*

What kinds of public employee speech are protected? The Court intimates that only speech pertaining to matters of public concern comes within the protection of the first amendment. Its formula, however, appears to divide employee speech into only two categories: matters of public concern and matters of purely personal interest.<sup>69</sup> Some speech relating to matters of public concern is more important than other such speech, and, accordingly, can be outweighed only by matters of greater governmental importance.<sup>70</sup> Both of these basic doctrines and the factors the Court sets forth for their analysis present serious conceptual as well as practical difficulties. Some of these difficulties are suggested in what follows.

#### a. *Sine Qua Non?*

*Pickering* identified speech on matters of public concern as a basic element of the balancing analysis, but did not treat its presence *vel non* as the threshold question. *Connick* came closer to asserting that only speech regarding matters of public concern is worthy of first amendment protection,<sup>71</sup> hinting that inquiry on this point might be the threshold of the public employee free speech analysis.<sup>72</sup> The Court's "matter-of-public-concern" language does not purport to be the holding in the case.<sup>73</sup> Nevertheless, virtually all commentators credit (or blame) *Connick* for establishing the "matters of public concern" inquiry as the threshold question.

The *Connick* Court insisted that each of its previous public employee speech cases, *Pickering*, *Perry*, *Mt. Healthy*, and *Givhan*, had dealt with "matters of public concern."<sup>74</sup> In other earlier cases, too, it had "invali-

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69. See *infra* note 79 and accompanying text.

70. See *infra* notes 85-87 and accompanying text.

71. *Connick*, 461 U.S. at 146. The most explicit intimation is the following: "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." *Id.* The Court's statement of its holding on the next page, however, excludes from first amendment protection only speech "upon matters only of personal interest," and not necessarily all such speech. *Id.* at 147. See *infra* notes 79-81 and accompanying text.

72. *Id.* at 146-47. The *Connick* Court observed that the district court had viewed the issue whether Myers' speech related to a matter of public concern as a "threshold inquiry" but did not endorse that characterization or adopt it as a necessary element in its formula for review. *Id.* at 149-50.

73. See *supra* note 71 and accompanying text.

74. *Connick*, 461 U.S. at 145-46. But see Note, *Beyond "Public Concern": New Free*



dated statutes and actions [which] sought to suppress the rights of public employees to participate in public affairs."<sup>75</sup> Having reviewed these cases, the majority concluded: "When employee expressions cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officers should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment."<sup>76</sup> This statement left in doubt whether to qualify as a "matter of political, social or other concern to the community" the subject must *already be* a topic discussed in the community, or whether it might be one that, should it come to public attention, probably *would be* of interest to the community. Nor did it indicate the kinds of matters with which the community might be concerned. Nor did it specify the scope of the interested community; local neighborhood, municipality, state, or nation. Nor did it say whether its concern to protect agency officials from "intrusive oversight"<sup>77</sup> meant that supervisors' decisions affecting employee speech on all other matters would be exempt from judicial review.

*b. Matter of Public Concern vs. Only Personal Interest: Who Decides and How?*

It is not clear from *Connick* whether first amendment protection extends only to public employee speech relating to a "matter of public concern."<sup>78</sup> The Court's only statement phrased in terms of a *holding* is as follows:

We hold only that when a public employee speaks not as a citizen upon

*Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 256 (1990): "But the fact that these previous cases had involved speech of public concern was not the reason, in itself, to *limit* constitutional protections to speech of public concern." *Pickering* had not stated that only such speech was protected. "*Pickering* specifically referred to "matters of public concern" because the speech at issue concerned a highly publicized local referendum. The *Pickering* Court had no reason to discuss other issues about which employees might speak." *The Supreme Court, 1982 Term—Constitutional Law—Freedom of Speech, Press and Association*, 97 HARV. L. REV. 70, 167 (1983). We see here an instance of a familiar pattern in appellate jurisprudence: in one decision, a court notes a sufficient condition; later the court construes the condition as necessary. See Hiers, *Normative and Ostensibly Norm-Neutral Conventions in Contemporary Judicial Discourse*, 14 LEGAL STUD. F. 107, 120-24 (1990).

75. *Connick*, 461 U.S. at 144-45.

76. *Id.* at 146.

77. The *Connick* majority implicitly meant to promote the interest of the courts by reducing judicial involvement in employee speech litigation. See Note, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U.L. REV. 429, 454 n.7 (1984). The writer predicted, however, that because of its various uncertainties *Connick* would actually *increase* such litigation. As will be seen, there has been no lack of post-*Connick* litigation in the Fifth Circuit. But is it appropriate to sacrifice employee's first amendment rights in order to reduce courts' case loads? See Massaro, *supra* note 46, at 68:

[I]t is no answer to say that the courts are too busy to hear the feared deluge of free speech cases brought by disgruntled workers—any more than the courts should claim they are too busy to hear securities cases, or any other category of cases within their jurisdiction. If a baseless or frivolous suit is filed or pursued, the federal court can impose sanctions on the litigant or the attorney.

See also Note, *supra* note 46, at 397: "Overload of the federal courts should be dealt with by means other than discouraging the vindication of constitutional rights."

78. Nevertheless, later cases commonly state that *Connick* held that whether speech in question dealt with matters of public concern was to be the threshold test in First Amendment analysis. See *Thompson v. City of Starkville*, 901 F.2d 456, 466 n.11 (5th Cir. 1990).

matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, 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.<sup>79</sup>

This awkward, negatively phrased holding is strangely ambiguous and raises more questions than it resolves.<sup>80</sup>

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79. *Connick*, 461 U.S. at 147. Oddly, the Court refers to "the employee's behavior" rather than to his or her speech. See *infra* notes 94, 96 and accompanying text, and *supra* note 44 and accompanying text, where the Court designates speech as "conduct."

80. The Court went on to say that while it had the duty "to ensure that citizens are not deprived of fundamental rights by virtue of working for the government[,] this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Id.* (emphasis added). Justice White's choice of words here suggests that he viewed expression of "employee grievances," without more, as quasi-criminal in nature. The quoted language clearly implies that in the majority's view, government employees should have no right to discuss job-related matters for the reason that private sector employees enjoy no such right under the first amendment.

Commentators have sharply criticized the Court's reasoning and assumptions in this connection. See Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 53-72 (1990); Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597 (1988); Note, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start*, 55 U. CIN. L. REV. 449 (1986); *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1756-71 (1984); *Supreme Court, 1982, supra* note 74, at 164-72.

These commentators make several important points. One is that the "state action doctrine" rests upon the basic distinction "between actions taken by the state, which are subject to constitutional scrutiny, and private conduct, against which the Constitution 'offers no shield.'" *Supreme Court, 1982, supra* note 74, at 169-70. To say that public employees have no more rights than private sector employees is simply to ignore the first amendment and first amendment jurisprudence. See Lieberwitz, *supra*, at 668 ("The Court has effectively deconstitutionalized or privatized the public sector workplace, leaving public employees with little more constitutional speech protection than private sector employees."). Commentators also emphasize the public's interest as investor in, and beneficiary of, public institutions receiving information about the operations of these institutions from employees at all levels. In particular, these commentators criticize the *Connick* majority's assumption that a hierarchical model of management is the only acceptable organizational scheme in modern public—and private—institutional life.

Courts should recognize the managerial theories underlying asserted efficiency interests and should examine the validity of those theories. Justice White's opinion . . . in *Connick* . . . purported simply to defer to the employer's judgment, but it actually was premised on a particular managerial theory—that rigidly hierarchi[c]al management maximizes workplace efficiency. Such a theory supports the presumption that, when an employee speaks in response to the application of an office policy, her speech threatens "the authority of the employer" and thereby impedes efficiency.

*Developments—Public Employment, supra*, at 1767. On this theory expressions by lower-ranking employees on agency operations are viewed as *per se* acts of insubordination or lese majeste. The theory fails to recognize the crucial distinction between loyalty to an agency superior and loyalty to the agency and the larger public interest it supposedly serves. Agency efficiency and other public interests may better be served by less authoritarian management models. "[T]he Court's addition of a public concern test is a doctrinal innovation whose effect, ironically, is reactionary. The test's likely impact on public employees is in part attributable to the outdated assumptions on which Justice White's definition of public concerns relies." *Supreme Court, 1982, supra* note 74, at 169. Critics suggest that the *Connick* majority was more concerned to perpetuate a feudal economic model of organization once favored in the private sector, than to encourage (or permit) the political model of public virtue and self-government characteristic of American democracy. See Lieberwitz, *supra*, at 646 ("Instead of

In the first place, the holding seems to contemplate two mutually exclusive alternatives which purport to define the entire world of employee discourse. Either an employee speaks "as a citizen on matters of public concern," or "as an employee upon matters only of personal interest." This dichotomous doctrine presents obvious difficulties. What if an employee speaks as an employee on matters of public concern? Or as a citizen on matters of personal interest? Or as either a citizen or employee about matters of both personal interest and other matters? Are all subjects *either* "matters of public concern" or "matters of only personal interest"? How should speech relating to the efficiency of the agency's operations, or its policies, plans, and internal procedures be classified? Such subjects cannot aptly be characterized as "matters only of personal interest." Yet in *Connick* itself, and in later Fifth Circuit decisions, we often find employee speech on such matters so labeled. Unfortunately, *Connick*'s holding does not address these various questions. Oddly, much of the Court's analysis in *Connick* is irrelevant under the standard the Court enunciated in this "holding."<sup>81</sup>

Moreover, the quoted holding leaves in doubt the status of speech on matters of only personal interest. According to this holding, a federal court *may* review a public agency's personnel decisions in reaction to an employee's speech upon matters of personal interest under unusual circumstances. The Court provided no guidance as to what such circumstances might be. Later cases usually cite *Connick* for the proposition that the first amendment protects public employee speech only if that speech relates to "matters of public concern." That, however, is not *Connick*'s stated holding.<sup>82</sup>

The *Connick* Court introduced a set of three new factors to ascertain whether a public employee's speech relates to a matter of public concern: "the content, form, and context of a given statement, as revealed by the whole record."<sup>83</sup> The Court cited no authority for its new "content, form, and context" criteria; nor does it offer any rationale for these additional factors. Evidently the Court intended that the "matters of public concern" inquiry would apply these three factors. Such inquiry was to be a matter of law, and thus subject to *de novo* review on appeal.<sup>84</sup> But this was not all. The content of public interest speech was to be scrutinized as to its *importance* to or for the public.

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measuring the utility of speech against the values of a democratic political system, the Court measures the utility of public speech against the values underlying the economic system.")

81. See *infra* note 118.

82. Every commentator on *Connick* located in the course of this research concludes that it was wrongly decided. Its defects are too many and too profound to explore thoroughly in this article. Some of its features are examined further, *infra* note 118.

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

84. "The inquiry into the protected status of speech is one of law, not fact." *Id.* at 148 n.7; *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 276-77 (5th Cir. 1990) (court of appeals may review *de novo* the trial court's determination that the speech was not entitled to first amendment protection); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 798 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2620, 110 L. Ed. 2d 641 (1990); *Moore v. City of Kilgore*, 877 F.2d 364, 369 (5th Cir.), *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989); *Matherne v. Wilson*, 851 F.2d 752, 760 (5th Cir. 1988). But see *supra* note 21, and compare *infra* note 88.

c. *Degrees of Importance*

Prior Supreme Court opinions had not attempted to measure the content of speech on matters of public concern in terms of relative degrees of importance. In *Connick* the Court for the first time intimated that speech on matters of greater public concern is entitled to more protection than speech regarding matters of lesser public concern. The Court suggested a kind of sliding scale for balancing employee speech interest with governmental interest in suppressing speech: "*Pickering* unmistakably states, and respondent [Myers] agrees, that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."<sup>85</sup> The Court did not attempt to indicate where *Pickering* "unmistakably" so states,<sup>86</sup> but instead, it cited Myers' brief and oral submission where she conceded that the "degree of the importance" of her speech, or "whether it affects a matter of great public concern or only a very narrow internal matter," is an appropriate consideration in *Pickering* balancing.<sup>87</sup> The Court gave no rationale for distinguishing between speech about greater and lesser matters of public concern. Nor did it suggest what normative standard should be applied in measuring the "importance" of each matter of public concern.

2. *The Balancing Inquiry: New Factors and New Doctrine*

In its balancing analysis, the Court focused on the nature of governmental interests that could justify discharging an employee on account of her speech. *Connick*'s balancing standard remained ambiguous if not obscure.<sup>88</sup> Curiously, the Court did not mention the standard of review articulated in *Pickering*, which suggested some measure of deference to findings by the trier of fact.<sup>89</sup>

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85. *Connick*, 461 U.S. at 150. See also *id.* at 152 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.").

86. See *supra* notes 15, 16 and accompanying text.

87. *Connick*, 461 U.S. at 150 n.9.

88. "[W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made . . . [W]e cannot 'avoid making an independent constitutional judgment on the facts of the case.'" *Id.* at 150 n.10 (citations omitted). Fifth Circuit panels have struggled to derive a workable standard of review from this language. See *McPherson v. Rankin*, 786 F.2d 1233, 1237 (5th Cir. 1986), *aff'd*, 483 U.S. 378 (1987) ("The precise fit of the clearly erroneous standard of review and our duty to make 'an independent constitutional judgment on the facts of the case' . . . is not altogether clear."). The court went on to suggest that when dispute centers on the content of speech, appellate review would invoke the clearly erroneous standard to determine *what* was said, and determine its constitutional status by "independent review," but would be less deferential to trial court findings when there is a factual dispute about the speech's context. *Id.* It is unclear whether these somewhat amorphous standards were meant to apply to the *balancing* process, or only to determining whether the employee's speech addressed a matter of public concern. See *supra*, note 84. The Supreme Court's review of *McPherson* alluded only to the approach used in determining "matters of public concern," and its import was far from transparent. *McPherson*, 483 U.S. at 385 n.8 ("[A]ny factual findings subsumed in the 'public concern' determination are subject to constitutional fact review"). The precise relation between fact and law determinations remains to be clarified.

89. See *supra* note 21.

a. *Governmental Interests or Goals*

*Pickering*, it will be recalled, identified the government's interest in restricting employee speech as "promoting the efficiency of the public services it performs through its employees."<sup>90</sup> Invoking *Pickering* and a nineteenth century decision, *Connick* added other governmental interests or goals to its emerging balancing formula.

The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in "promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service."<sup>91</sup>

In this context, "effective" is probably only a synonym for "efficient." "Integrity in the discharge of official duties" is an interest which, in balancing, could either favor an employee whose speech calls into question the honesty or fairness of agency operations, or justify sanctions against an employee whose conduct was lacking in this respect. "Discipline" was already included in *Pickering's* balancing analysis but only as a consideration incidental to the government interest "in promoting the efficiency of the public service" the agency performs "through its employees."<sup>92</sup> In this quotation, however, *Connick*, suggests that integrity and discipline, and perhaps efficiency as well, are values in themselves, or values related only to office operations, independent of their effect on the delivery of public services.<sup>93</sup>

b. *New Evils: The Disruptive Employee, Impairment of Office Efficiency, and Undermining Office Relationships*

Quoting with approval from a concurring opinion in an earlier decision, the *Connick* majority wrote:

The Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately

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90. See *supra* note 11 and accompanying text.

91. *Connick*, 461 U.S. at 150-51, (citing *Ex Parte Curtis*, 106 U.S. 371, 373 (1882)).

92. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

93. See Note, *supra* note 46, at 382:

Mr. Justice Douglas has questioned the uncritical use of the justification of efficiency for limiting employees' rights. He suggests that many administrators may be more concerned with such internal institutional values as a "pleasant manner, promotion of staff harmony, servility to the cadre, and promptness, civility, and submissiveness" than with efficient performance. [citation omitted.] Though such institutional values might be justified as instrumental to the goal of efficient service, they need not have that effect and may instead become ends in themselves. Hence the very foundation on which the constitutional limitation of public employees' rights rests may be infirm."

impair the efficiency of an office or agency.<sup>94</sup>

Here we see the emergence of new terms and factors: the “disruptive” employee, and concern for “morale in the work place.” Possibly the Court had in mind that ultimately, such disruption could adversely affect the government’s “effective and efficient fulfilment of its responsibilities to the public.”<sup>95</sup> In the statement quoted here, however, “disruption” (including, the Court seems to suggest, speech) will justify sanctions if it merely affects “the efficiency” of *the office*. It is strange that the Court simply applied earlier language regarding disruptive *conduct* to the context of *speech* by public employees, as if the first amendment afforded no special protection for *speech* as distinct from nonexpressive conduct.<sup>96</sup>

In *Pickering* the Court suggested that in some situations the superior-subordinate employee relationship could be so “personal and intimate” that the subordinate’s public criticism of the superior would seriously “undermine” the working relationship between them.<sup>97</sup> Curiously, the *Connick* Court made no effort to determine whether the relationship between Myers and Connick was “personal and intimate.” Instead, without explanation, the Court extended the scope of “undermining” from effects on the superior-subordinate relationship to also include effects on “office relationships” or “relations” generally.<sup>98</sup> The Court thus abandoned *Pickering*’s “personal and intimate nature” requirement, and its limitation to relationships between superior and subordinate employees. In doing so, the Court widened the range of employer justifications for retaliation against employee expression.

*c. Demonstrated or Merely Feared Potential Adverse Impact?*

In concluding its balancing analysis, the *Pickering* Court found that Pickering’s statements had not *impeded* the performance of his own duties or *interfered* with the schools’ operation.<sup>99</sup> Evidently the *Pickering* Court meant that demonstrable harm must occur before a public employer could justify discharging an employee on the basis of the latter’s speech. In *Connick*, the Court agreed with the district court’s conclusion that there was no evidence the questionnaire had impeded Myers’ ability to perform her responsibilities; nor did the Court conclude that Myers’ “speech” had interfered with office operations.<sup>100</sup> Nevertheless, the Court overruled the district court and the Fifth Circuit by inventing a new rule: a government employer may immediately discharge an employee if, in the employer’s judgment, the employee’s speech had the *potential* for undermining or destroying

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94. *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

95. *Id.* at 150.

96. See *supra* note 79 and accompanying text where the Court oddly alludes to speech as “behaviour.” See also *id.* at 154 (where the Court labelled speech as “action”).

97. See *supra* note 20 and accompanying text.

98. *Connick*, 461 U.S. at 152.

99. *Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (1968). See *supra* note 24 and accompanying text.

100. *Connick*, 461 U.S. at 151-53.

office relationships.<sup>101</sup> Thus the governmental employer or superior official need not show that the employee's speech actually "undermined office relationships," but only that the employer or officer reasonably *feared* that the employee's speech might do so.<sup>102</sup> Commentators have severely criticized this "mere fear" standard.<sup>103</sup>

*d. Manner, Time, Place, and Context*

In assessing whether such a superior officer had a reasonable basis for so fearing, the *Connick* Court then introduced some additional factors: "the manner, time, and place" of the employee's "message," and the "context in which the dispute arose."<sup>104</sup>

In *Pickering* the Court had expressed concern that in certain situations an employee's *public* criticism of her administrative superior could "undermine" the effectiveness of their working relationship.<sup>105</sup> The *Connick* Court's discussion of Myers' questionnaire and its impact on office relations indicated that the Court thought the questionnaire was in the nature of public criticism.<sup>106</sup> In *Givhan*, on the other hand, the Court stated that the *private* expression of a government employee personally confronting an immediate superior may threaten the agency's efficiency "by the manner, time, and place in which it was delivered."<sup>107</sup> The *Connick* Court quoted *Givhan* on this point, but then, without any explanation for so doing where there was no personal confrontation, proceeded to analyze Myers' speech in terms of these elements in order to determine whether "Connick's fears that the functioning of his office was endangered" were justified.<sup>108</sup> In effect, *Connick* extracted the "manner, time, and place" considerations from the limited, private context in *Givhan*, and added these considerations to the growing number of factors that courts might consider in determining whether public employers' interests override employees' speech rights in a

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101. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 152. To explain adding this new factor to balancing analysis, the Court cited earlier Supreme Court holdings to the effect that proof of future disruption was not necessary to justify denying access to a nonpublic forum on the ground that such access might "disrupt the property's intended function." *Id.* at 152 n.12. By finding *Connick* justified in discharging Myers *immediately* upon learning about the questionnaire, the Court also abandoned its earlier view that only *prolonged* retention of a disruptive employee could adversely impact on governmental interests. See *supra* note 94 and accompanying text.

102. *Id.* at 152-54. See *infra* note 118.

103. See, e.g., Note, *supra* note 80, at 468-69. See *infra* note 455.

104. *Connick*, 461 U.S. at 152-53.

105. See *supra* note 20 and accompanying text.

106. *Connick*, 461 U.S. at 147-54. In fact, the questionnaire was circulated only among other assistant district attorneys and consisted entirely of questions and an open-ended invitation to "express comments or feelings." *Id.* at 155-56. The Court declared the district court's finding on the latter point irrelevant: "Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in *Connick* and his supervisors." *Id.* at 152.

107. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415 n.4 (1979) (emphasis added).

108. *Connick*, 461 U.S. at 152-53.

public setting. All that was needed to trigger application of these added elements was the superior official's asserted fear that the employee's speech might have adversely affected the functioning of the office.

Without explanation or citation to authority, the *Connick* Court additionally declared that the context in which "the dispute arises" is also significant in assessing a supervisor's fear that a lower ranking employee's speech threatened his authority.<sup>109</sup> It is curious that the Court referred here to the context of "the dispute" rather than that of the speech. Perhaps the Court did so because it was about to conclude that Myers' entire questionnaire was merely a work dispute, "an employee grievance concerning internal office policy."<sup>110</sup> Thus, in *Connick* the speech's "context" was limited to a situation where, in the Court's view, the challenged speech clearly related to a "dispute" between the employee and her supervisor. Later the Supreme Court would treat the speech's context as a relevant factor in assessing the impact of employee speech on governmental interests even where there was no such "dispute."<sup>111</sup>

### 3. *The Emerging Connick Balancing Test*

*Connick* did not lay out a structured series of tests for determining the circumstances in which the first amendment protected public employee speech from retaliatory actions by higher officials. Nevertheless, *Connick* represents a more systematic approach to the balancing of interests than did *Pickering*. In developing its approach, the *Connick* Court added a number of factors or elements, most of which make it easier for courts to find that governmental interests outweigh employee first amendment speech rights. *Connick* also suggests a certain order of proof to be followed by trial courts, which is at the same time the order of analysis to be followed by appellate courts.

*Connick* has commonly been read to say that a court must first determine whether the speech in question addresses a matter of public concern or merely one of only personal interest. This determination is a matter of law, implicitly for *de novo* review by the appellate court.<sup>112</sup> In deciding this question, the appellate court should consider the statement's content, form, and context. If the speech concerned only personal matters, it will not ordinarily be protected. Speech on matters of public concern may be protected. Some speech on matters of public concern may be of greater importance than other such speech. Presumably, the appellate court would decide at this point which matters were more important than others. Speech on a matter of greater public concern is entitled to more protection than speech on matters of lesser public concern.

Second, *Connick* set out various considerations to be used in determining

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109. *Id.* at 153. Concern for "context" seems redundant if "manner, time, and place" are also to be considered.

110. *Id.* at 154. See *infra* note 118.

111. See *infra* notes 147-50 and accompanying text.

112. See *supra* note 84.



the nature and extent of the government employer's interests. Appropriate governmental interests or goals include not only "the effective and efficient fulfillment of its responsibilities to the public," but also "promoting . . . integrity in the discharge of official duties," and "maintaining discipline in the public service."<sup>113</sup> The efficiency of an office could be impaired by prolonged retention of "disruptive" employees since doing so could adversely affect "discipline and morale," and "foster disharmony."<sup>114</sup> The supervisor need no longer wait until actual adverse harm has occurred; she can instantly discharge employees if she fears their speech has the *potential* for undermining office relations. In determining whether the supervisor's judgment was justified, a court should examine the manner, time, and place in which the employee's statement was made, and, if that statement was in connection with a "dispute," the context in which the dispute arose.

The third step in *Connick* is the balancing itself. Under the Court's sliding scale formula, the supervisor or government bears less of a burden to justify a dismissal if the employee's speech addressed a matter of public concern which the court viewed as of small importance. Conversely, the government shoulders a greater burden of justification if the speech addressed a more important matter of public concern.<sup>115</sup>

Applying this three-step analysis to the facts, the Court found that only one of Myers' questionnaire items fell "under the rubric of matters of 'public concern.'"<sup>116</sup> That was the question whether other assistant district attorneys felt pressured to work in certain political campaigns.<sup>117</sup> But this concern was outweighed by *Connick's* concerns about the potential harm to the office, his authority, and close working relationships that might result from circulation of Myers' questionnaire as a whole.<sup>118</sup>

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113. *Connick*, 461 U.S. at 150-51.

114. *Id.* at 151. See *supra* note 94 and accompanying text.

115. *Id.* at 152.

116. *Id.* at 148.

117. *Id.* at 149.

118. *Connick*, 461 U.S. at 154. The Court offered the following rationale for its holding in *Connick*: "Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities invoked in the administration of a government office." *Id.* *Connick* makes no effort to indicate the constitutional source or status of the governmental interests that are to be weighed against employees' first amendment rights.

The *Connick* opinion presents several other peculiarities. One is that much of the analysis it contains is irrelevant under the standard enunciated in its holding. According to that holding, a federal court is not the place to review a public employer's personnel decision made in response to an employee's speaking "upon matters only of personal interest." *Id.* at 147. Yet the Court initially stated that the question before it was "whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs." *Id.* at 140. It is not obvious that circulating such a questionnaire constitutes speech only upon matters of personal interest; indeed, the Court found that one item in Myers' questionnaire did address a matter of public concern. Perhaps the Court meant to say that a federal court is not the place to review a public employer's personnel decision made in response to an employee's speech unless that speech had to do with matters of public concern. But it did not say that. The Court's confusion over the appropriate threshold standard may account for other tendencies manifested in the *Connick* opinion. For instance, the opinion is laden with overstatements, reductionisms, and conclusory pronouncements.

Overstatements and exaggerations appear throughout the opinion. *Pickering's* emphasis on

*Connick* did not address the matter of causation, though it did refer to *Mt.*

"matters of public concern," the *Connick* Court says reflects "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. None of the cases before the Court, of course, involved "every employment decision," but only those where employees were fired because of their speech. Other instances of hyperbole characterize the opinion. For example: "While as a matter of good judgment, public offices should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149. Obviously distributing a questionnaire on matters of office policy to fellow assistant district attorneys and requiring an office to be run as a round table for employee complaints are significantly distinguishable undertakings. The Court evidently deferred to *Connick's* judgment that by circulating the questionnaire, Myers had instigated a "mini-insurrection." *Id.* at 151-52. By flailing straw scenarios, the majority avoided having to consider the actual facts before it.

A related tendency in *Connick* is to reduce all subjects that might be of possible public concern to merely internal office affairs, personnel, or grievance questions. Having done so, the Court further endeavored to reduce such questions to matters "of only *personal* concern." The Court implies that only employee expressions relating to matters of "political, social, or other concern to the community" should be protected by the first amendment. *Id.* at 146. The Court then took a quite narrow view of the kinds of questions that interest "the community": "[Q]uestions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee" were not questions "of public import in evaluating the performance of the District Attorney as an elected official." *Id.* at 148. Yet on the same page, the Court acknowledged that employee speech concerning "discipline and morale in the workplace" would relate to matters of public concern inasmuch as it relates "to an agency's efficient performance of its duties." *Id.* (emphasis added). See *infra* note 570 and accompanying text. The difference was that in the majority's view, the "focus" of Myers' questionnaire was not to evaluate the performance of the office, but only to pursue "controversy with her superiors." *Id.* The majority did not explain how it *knew* that Myers would not use information derived from the questionnaire to evaluate the agency's performance under *Connick* or that she was only interested in controversy for the sake of controversy. Cf. Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CALIF. L. REV. 1109, 1118 (1988):

Myers' questionnaire should have met the *Pickering* public concern requirement since it concerned the operation of a government office and arguably contained information necessary for "informed decision-making" by the electorate. A questionnaire revealing low office morale and disclosing that assistant district attorneys do not have confidence in their supervisors would be helpful to the public in deciding whether to reelect the district attorney. Specifically, the public might vote against a district attorney who could not command employees' trust and confidence.

Most of the questions Myers asked were, the Court asserted, "mere extensions of [her] dispute over her transfer." *Connick*, 461 U.S. at 148. In a somewhat sweeping conclusory reduction, the Court speculated: "Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." *Id.* (The Court had earlier observed that *Connick* had objected to the "question concerning pressure to work in political campaigns which he felt would be damaging if disclosed by the press," *id.* at 141, and went on to identify this question as a matter of public concern, *id.* at 149.) Finally, in a conclusory summation, the Court declared: "Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154. See Note, *Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339, 359 (1985) [hereinafter Note, *New Restrictions*]:

[T]he majority . . . [determined] that, even though one question on the survey pertained to a matter of public interest, the survey, as a whole, was merely an extension of Myers' personal grievance. . . . *Connick* apparently invites future courts to blend speech of significant public interest with other, more "private" expression when determining whether or not the speech focused on a matter of general concern.

The Court never considered whether Myers' original contention that the proposed transfer

*Healthy's* first stage of proof.<sup>119</sup> *Mt. Healthy* remained in place, and was supplemented by *Connick's* revision of *Pickering's* account of competing interests and balancing. Thus, in the aftermath of *Connick*, *Mt. Healthy's* two-part causation order of proof (or of analysis) would complete the analytical model. Courts would now:

(1) determine whether the employee's speech had to do merely with a matter of personal interest, or with a matter public concern, and if the latter, evaluate its importance; (2) identify and appraise affected government interests, including supervisors' fears as to potential effects; (3) balance the employee's speech interest with the government interests affected by it, using the sliding scale; (4) examine causation (a) to see whether the employee's speech was a substantial or motivating factor in the supervisor's decision to sanction the employee, and (b) if so, whether the government or supervisor could nevertheless show that it, he, or she would have so sanctioned the

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would involve her in a conflict of interest might have been a matter of public concern. See *supra* note 64 and accompanying text. Numerous commentators have criticized *Connick* for dramatically narrowing the range of issues deemed to relate to matters of public concern. See *id.* at 354 ("Denying a discharged public employee an opportunity to demonstrate that his speech affected neither his own performance nor the operations of the agency because his expression is not of public concern, as the *Connick* decision does, is a drastic and dangerous extension of the *Pickering* rationale"). See also Note, *Public Employees and the First Amendment: Connick v. Myers*, 15 LOY. U. CHI. L.J. 292 (1984), and other studies cited *infra* note 455.

In its "balancing" analysis, the Court never even attempted to identify the nature or weight of Myers' interest in her "speech" regarding possible pressure on staff attorneys to work for certain political candidates. Instead, it devoted its balancing discussion entirely to contemplating *adverse* potentialities *the questionnaire as a whole* might have had (in *Connick's* judgment) upon working relationships in the office. The Court was evidently willing to credit as "reasonable" *Connick's* rather extreme characterizations of Myers' speech and his exaggerated fears as to dire consequences that might have followed. *Connick*, 461 U.S. at 151-54, 151 n.11.

One of the new doctrines articulated by the *Connick* Court was that when an employer punishes an employee for exercising her speech right solely on the basis of the employer's fears of possible disruption, "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152. Myers' question whether other assistant district attorneys felt pressured to work in political campaigns on behalf of certain candidates should have been treated as a matter of substantial public concern. "It is difficult to think of a statement that more clearly presents a matter of public concern than this question, which focuses on federal statutory policy." Lieberwitz, *supra* note 80, at 645. Yet the Court never undertook to balance Myers' interest in speech *on this matter of public concern* against *Connick's* interest in suppressing *that speech*. Nor did the Court suggest that *Connick* should have been required to come forward with any showing that *this speech* threatened to undermine office relationships. Instead, it summarily characterized the entire questionnaire as touching upon matters of public concern "in only a most limited sense," and in the final analysis, as only "an employee grievance concerning internal office policy." *Connick*, 461 U.S. at 154. By exaggerating the adverse potential impact of the questionnaire on "office relationships" and by minimizing the extent to which the questionnaire referred to matters of public interest, the Court found it an easy matter to hold that the governmental interests trumped the employee's first amendment speech rights.

Given its numerous linguistic and conceptual complications and uncertainties, it is not surprising that lower courts experienced great difficulty in applying *Connick* in subsequent cases.

119. *Connick*, 461 U.S. at 153-54. The *Connick* majority obviously was interested in making new law. The Court easily could have found that *Connick* had violated Myers' first amendment speech interest on the question of pressure to work in political campaigns, and then remanded for findings as to the *Mt. Healthy* "but for" causation question, that is, whether *Connick* would have fired Myers anyway.

employee anyway for permissible reasons.<sup>120</sup> A later Supreme Court decision added some further refinements to this model.

### E. Rankin v. McPherson<sup>121</sup>

Four years after *Connick*, the Supreme Court had occasion to apply the emerging *Pickering/Connick* balancing test. In doing so, the Court gave more definite structure to the earlier analytical guidelines, added some new controlling principles or formulae, and possibly trimmed back some of the complexities that had sprouted since *Pickering*. Justice Marshall wrote the opinion of the Court.<sup>122</sup>

Ms. McPherson was a probationary employee in the Harris County, Texas, constable's office. Mr. Rankin was the constable. She worked at a computer terminal in a room removed from public access. Though appointed a "deputy," as were all office employees, she was not a commissioned peace officer, and her duties were entirely clerical. A commissioned deputy's responsibilities were primarily limited to serving process. McPherson is black, and at the time of the incident was nineteen years old. On March 30, 1981, McPherson and a co-worker, Mr. Jackson, learned that some one had tried to assassinate President Reagan. McPherson and Jackson engaged in a brief discussion in which McPherson observed that some of the President's policies had impacted adversely on many blacks, and concluded, "If they go for him again, I hope they get him." Another deputy, whose presence McPherson had not noticed, overheard her statement. This deputy reported McPherson's statement to Rankin, who then asked McPherson if she had made it. She told him she had, but that she "didn't mean anything by it." Rankin then fired her.<sup>123</sup> McPherson sued in federal district court under section 1983,<sup>124</sup> alleging a violation of her first amendment right to speech.<sup>125</sup> The district court twice ruled in Rankin's favor; the Fifth Circuit respectively vacated and reversed the district court's rulings.<sup>126</sup>

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120. See *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 276 (5th Cir. 1990).

121. 483 U.S. 378 (1987).

122. The majority opinion was joined by Justices Brennan, Blackmun, Powell, and Stevens. Justice Powell also wrote a brief concurring opinion. Justice Scalia wrote a dissenting opinion, which was joined by Chief Justice Rehnquist and Justices White and O'Connor. *Id.* at 379.

123. *Rankin*, 483 U.S. at 380-82.

124. 42 U.S.C. § 1983 (1988).

125. In view of the "incorporation" of the first amendment into the fourteenth amendment, public employee free speech complaints against state and local governmental employers are filed under 42 U.S.C. § 1983 (1988). Many of these cases therefore turn on typical § 1983 issues such as eleventh amendment immunity of the governmental entities and qualified immunity of the governmental officials involved. The eleventh amendment issue was addressed in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 281-82 (1977); see also *Frazier v. King*, 873 F.2d 820, 827 (5th Cir.), *cert. denied sum nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989). The qualified immunity issue figures in several Fifth Circuit cases. See *Thompson v. City of Starkville*, 901 F.2d 456, 468-70 (5th Cir. 1990); *Frazier*, 873 F.2d at 827; *Brawner v. City of Richardson*, 855 F.2d 187, 190-93 (5th Cir. 1988); *Matherne v. Wilson*, 851 F.2d 752, 755-59 (5th Cir. 1988).

126. *Rankin*, 483 U.S. at 382-83.

### 1. Further Preliminary Principles

The Supreme Court initially observed that under *Perry*,<sup>127</sup> even though McPherson was merely a probationary employee who could otherwise have been discharged for any or no reason, she could not be discharged for exercising her constitutional right of free expression.<sup>128</sup> The Court thereby expressly extended this principle beyond the sphere of nontenured academic employees. Before commencing its balancing analysis, the Court reiterated an important governing principle applicable in reviewing public employee free speech violation claims: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."<sup>129</sup> Thus public employers could not censure employees or censor their ideas solely on the basis of the content of their speech.

### 2. Matters of Public Concern

In *Rankin*, for the first time, the Court specifically characterized the question whether an employee claimant's speech dealt with "a matter-of-public-concern" as "the threshold question."<sup>130</sup> The Court thus tacitly abandoned *Connick's*, albeit ambiguous, holding to the effect that the first amendment protects all speech except that relating to matters of only personal concern.<sup>131</sup> In its review of the case, the Fifth Circuit had held that "the life and death of the President are obviously matters of public concern."<sup>132</sup> The Supreme Court evidently agreed, but emphasized that its finding was based upon consideration of the *context* in which the statement was made. The Court considered it significant that McPherson spoke "in the course of a conversation addressing the policies of the President's administration," and immediately following "a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President."<sup>133</sup> The Court enunciated another general principle in connection with "matter of public concern" analysis: the statement's appropriateness or controversiality is "irrelevant" in determining whether it is a matter of public concern.<sup>134</sup>

The Court re-emphasized its holding in *Givhan* that private speech is within the first amendment's protection: "The private nature of the state-

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127. See *supra* note 28 and accompanying text.

128. *Rankin*, 483 U.S. at 383-84.

129. *Id.* at 384. See *supra* note 22 and accompanying text.

130. "The threshold question . . . is whether McPherson's speech may be 'fairly characterized as constituting speech on a matter of public concern.'" *Id.* at 384 (citation omitted).

131. See *supra* notes 71, 72 and accompanying text. Nevertheless, the Court quoted *Connick* to the effect that speech on other matters could, under "the most unusual circumstances," also be protected. *Id.* at 384 n.7.

132. *Id.* at 385 (quoting *McPherson v. Rankin*, 786 F.2d 1233 (5th Cir. 1986)). See *infra* notes 208-212 and accompanying text.

133. *Rankin*, 483 U.S. at 386. The Court understood that this inquiry involved questions of both fact and law, but did not delineate their boundaries. See *supra* note 88.

134. *Id.* at 387. Cf. *supra* note 129 and accompanying text.

ment does not . . . vitiate the status of the statement as addressing a matter of public concern."<sup>135</sup> In his concurring opinion, Justice Powell stated that it would be an unusual case where an employer would be justified in punishing such private speech.<sup>136</sup> The majority agreed "that a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee."<sup>137</sup> The Court suggests that its analysis would have ended here but for Rankin's claim that McPherson's speech implicated the serious state interest of her suitability as an employee of a law enforcement agency.<sup>138</sup> To assess that claim, the Court proceeded to the next stage of analysis.<sup>139</sup>

### 3. *Balancing Governmental Interests with Employee Speech Rights*

For the first time, *Rankin* expressly stated that in cases involving employee speech on matters of public concern, the government "bears [the] burden of justifying [a] discharge on legitimate grounds."<sup>140</sup> Unlike *Connick*, where the Court had identified a series of loosely related governmental interests or goals,<sup>141</sup> *Rankin* emphasized only the one basic state interest articulated in *Pickering*: workplace efficiency.<sup>142</sup> Referring to the various related considerations or factors mentioned in *Pickering*,<sup>143</sup> the *Rankin* Court rephrased the central inquiry as to the government's interest: the impact of the employee's speech "on the effective functioning of the employer's enterprise."<sup>144</sup> This phrasing does not specifically relate to the ultimate performance of public services as did *Pickering*.<sup>145</sup> On the other hand, by directing analysis to the effective functioning of the governmental enterprise, *Rankin* avoids the tendency in *Connick* to treat such matters as "discipline," "morale," "office relations," and "working relationships" as ends in themselves.<sup>146</sup>

In *Givhan*, the Court had held that "the manner, time, and place" in which employee speech was made should be considered in determining its effect on institutional efficiency only "when a government employee person-

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135. *Id.* at 386-87 n.11.

136. Justice Powell wrote as follows:

If a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful.

*Id.* at 393 (Powell, J., concurring).

137. *Id.* at 388 n.13.

138. *Id.*

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

140. *Id.* at 388. *Cf.* *Connick v. Myers*, 461 U.S. 138, 149-51 (1983).

141. *See supra* notes 88-111 and accompanying text.

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

143. *Id.*

144. *Id.*

145. *Pickering v. Board of Educ.*, 391 U.S. 563, 568-70 (1968). *See supra* notes 11-12 and accompanying text.

146. *See supra* notes 93, 90-98, 114 and accompanying text.

ally confronts his immediate superior."<sup>147</sup> In *Connick*, the Court abstracted these factors from that context and held them applicable in determining whether an employee's public statement had undermined or could potentially undermine office relations even though there had been no personal confrontation.<sup>148</sup> *Connick* also had stated that the context which gave rise to the dispute was significant.<sup>149</sup> *Rankin* went further and declared these factors—manner, time, place, and context—relevant considerations in appraising the impact of speech on governmental interests and in the general balancing analysis generally. Consequently, these factors were now applied even though there was no "undermining" of office relations and no "dispute."<sup>150</sup> Proceeding to balancing, the Court noted that there was no record evidence that McPherson's statement had interfered with the function of the constable's office or that it had made her unfit to perform her work.<sup>151</sup> The only possible adverse impact the statement could have had was that it might "somehow [have] undermine[d] the mission of the public employer."<sup>152</sup> The Court then addressed a new consideration: the employee's responsibilities within the work place.<sup>153</sup> It then went on to create a new sliding scale in this connection: "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails."<sup>154</sup> This new formula possibly derives from the manner, time, place, and context factors the Court had earlier evoked. On the basis of this new formula, the Court concluded that McPherson posed little danger to the office's functioning because her position did not involve matters of confidentiality or public policy.<sup>155</sup> The Court then held that such a minimal threat to the agency's functioning did not outweigh McPherson's rights under the First Amendment.<sup>156</sup>

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147. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415 n.4 (1979). For a case where the Fifth Circuit applied at least one of these criteria in such a situation, see *Gonzalez v. Benavides*, 774 F.2d 1295, 1303 (5th Cir. 1985).

148. *Connick v. Myers*, 461 U.S. 138, 152-53 (1983). See *supra* notes 104-108 and accompanying text.

149. *Id.* at 153. See *supra* notes 109-10 and accompanying text.

150. *Rankin*, 483 U.S. at 388. One commentator suggested that *Rankin's* importance lies in its extension of *Pickering/Connick* balancing/public concern analysis beyond the realm of fact situations where the employee's speech had criticized her supervisor or ultimate employer. Note, *supra* note 74, at 255.

151. *Rankin*, 483 U.S. at 388-89.

152. *Id.* at 390. Note the broadened scope of the "undermined" language here. See *supra* notes 97-98 and accompanying text.

153. *Id.* at 390.

154. *Id.* at 390-91.

155. *Id.* One commentator objects that this new formula unnecessarily "opens the door for protection of any speech made by an employee who is not involved in a confidential or policymaking role," thereby allowing "seemingly infinite protection of non-policymaking employees." Dennison, *Constitutional Law—First Amendment Right to Freedom of Speech—Infringement Upon Public Employees' Right to Speak on Matters of Public Concern*, 55 TENN. L. REV. 175, 200-01 (1987). The writer appears to assume that the new formula would protect employee speech even if the supervisor could show that the speech had adversely affected agency operations. *Id.*

156. *Rankin*, 483 U.S. at 391-92. Here the Court hints that a governmental employee might have a first amendment speech right apart from any social utilitarian value such speech might afford the community. *Id.* See also *id.* at 388 (where the Court refers, rather in passing,

As will be noted, fact situations vary widely. Because of this variation, and also because of the varied, if not amorphous, character of the Supreme Court's several pronouncements in its decisions from *Pickering* to *Rankin*, the lower federal courts have experienced serious difficulty in determining when a public employee's speech is protected from retaliatory sanction by government officials.<sup>157</sup> The Fifth Circuit's cases since *Connick* amply illustrate these difficulties.<sup>158</sup>

### III. PUBLIC EMPLOYEE FIRST AMENDMENT SPEECH RIGHTS IN FIFTH CIRCUIT CASE LAW SINCE CONNICK

Most Fifth Circuit post-*Connick* employee speech cases have focused on the first level of analysis, whether the speech in question had to do with "matters of public concern" or only with "purely personal interests."<sup>159</sup> In the aggregate, these cases have found that certain kinds of matters were of public concern, but that many were not, including a large number that purportedly related only to employees' "personal" or "private" interests. In reaching these findings, the court<sup>160</sup> applied, expanded upon, and added to the several tests and factors articulated in *Connick* and the other Supreme Court cases from *Pickering* to *Rankin*. These new tests and factors have made it even more difficult for public employees to show that their speech was entitled to first amendment protection. The Fifth Circuit's application of the *Connick/Rankin* "matters-of-public-concern" threshold test, especially where such "matters" are narrowly conceived, clearly demonstrates that this test is incompatible with first amendment policy articulated by the Supreme Court itself<sup>161</sup> for it has enabled agency supervisors to discharge employees solely because the latter's speech embarrassed, angered, or otherwise displeased the supervisors, without any showing or even contention that

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to "McPherson's interest in making her statement"). See *infra* notes 527-33 and accompanying text.

157. See Allred, *From Connick to Confusion: the Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988). Allred did identify certain situations where lower courts would be likely (though not certain) to hold post-*Connick* speech related to matters of public concern: Where the speech addressed an issue already debated in the community; where the speech alleged malfeasance or abuse of office; and where the speech dealt with public safety and welfare, the quality of public education, or racial or gender based discrimination. See also Note, *supra* note 74, at 257-62 (reviewing complex and confusing tests for defining "matters of public concern" developed in various circuit courts of appeal).

158. "The cases demonstrate the difficulties involved in applying the Supreme Court's balancing test, which is unusually vague and complex even for a Supreme Court balancing test." Rees, *The First Amendment*, 16 TEX. TECH L. REV. 187, 188 (1985).

159. Often these cases were presented in the posture of appeals from a grant or denial of motion for summary judgment relative to the "matter of public concern" issue. See *Thompson v. City of Starkville*, 901 F.2d 456, 457 (5th Cir. 1990); *Brawner v. City of Richardson*, 855 F.2d 187, 190 (5th Cir. 1988); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021 (5th Cir. 1988); *Page v. DeLaune*, 837 F.2d 233 (5th Cir. 1988); *Brown v. Texas A&M Univ.*, 804 F.2d 327 (5th Cir. 1986).

160. In this article, the U.S. Court of Appeals, Fifth Judicial Circuit, is referred to simply as "the court" or, in the case of panel decisions, "the panel." The U.S. district court from which a case is appealed is designated simply as "the district court" or "the trial court."

161. See *supra* notes 22, 129 and accompanying text.



the "offending" speech interfered with the efficient performance of public services.

Some Fifth Circuit cases have focused upon the nature and weight of the government's interest in preventing (or punishing) employee speech on matters of public concern. Again, the court evoked a series of expanded and new tests or factors for appraising government interests. Most of these tests or factors give public employers additional opportunities to show that purported governmental interests outweigh employees' speech interests. A few cases added new considerations to the third, balancing phase of the *Connick* analysis.<sup>162</sup> Relatively few cases were decided on the basis of the fourth step in *Connick*, the *Mt. Healthy* causation analysis.

At some point, the Supreme Court may take cognizance of the confusion and other deleterious consequences deriving from its government employee speech jurisprudence as this has played out in the lower courts. In the meantime, the Fifth Circuit may wish to revisit the area of public employees' first amendment speech rights so as to simplify and better structure the proliferation of diverse criteria set out in its many panels' decisions. The court may also wish to consider whether some of these criteria unnecessarily encroach upon employees' own first amendment rights as well as upon related societal interests in "the marketplace testing of ideas and information."<sup>163</sup>

#### A. *Matters of Public Concern, Purely Personal Interest, or Tertium Quid?*

The Fifth Circuit has found that certain subjects may constitute matters of public concern, but that others fall short on this "threshold" test.<sup>164</sup> Possibly because *Connick* had said that, ordinarily, only speech on matters of purely personal interest was unprotected by the first amendment,<sup>165</sup> the court sometimes strained to so characterize whatever speech fell outside the realm of "matters of public concern." In other cases, the court was content to say that the speech in question did not address a matter of public concern. In these cases the Fifth Circuit read *Connick* to mean that all other speech was unprotected, even if it went beyond matters of purely personal interest. *Connick* left in limbo the status of public employee speech on *tertium quid* matters that fit neither the public concern nor the private interest category. The Fifth Circuit has tended to resolve doubt by denying first amendment protection.

##### 1. *Subjects Qualifying as Matters of Public Concern*

Although the court refrained from setting down a list of matters that

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162. In particular, the doctrine emerged that the greater the matter of public concern, the greater the disruptive effect of the speech must be in order for the government's interest to outweigh the employee's first amendment rights. See *Frazier v. King*, 873 F.2d 820, 826 (5th Cir.), cert. denied sub nom. *Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989).

163. See *supra* note 1.

164. See *supra* notes 71-72, 130 and accompanying text.

165. See *supra* note 79 and accompanying text.

would always be "matters-of-public-concern," it did find certain types of speech to generally so qualify.<sup>166</sup> The Court held that one type of employee speech, in view of its context, was "inherently" a matter of public concern: testimony "before an official government adjudicatory or fact finding body."<sup>167</sup> The court expressed concern that the threat of retaliation would chill an employee's willingness to give true and voluntary testimony, and thereby "compromise the integrity of the judicial process."<sup>168</sup>

Another Fifth Circuit panel found that "[t]he quality of nursing care given to any group of people, including inmates, is a matter of public concern."<sup>169</sup> In addition, the cases have uniformly held that employee whistleblower speech relates to matters of public concern, at least if the employee sought to bring wrongdoing on the part of public officials to the attention of either the media or appropriate officials *outside* the governmental agency where he or she worked. But some panels have taken a restrictive view of the types of wrongdoing that may be of concern to the public.

*a. Whistleblower Speech: Public and Private*

In every case where the court has found employee speech properly characterized as whistleblowing, it has concluded that such speech addressed a matter of public concern. This has been true both in a pre-*Connick* case decided under *Pickering*,<sup>170</sup> and in later cases based on *Connick*.<sup>171</sup> Likewise, the court has found that employee speech exposing an agency's or agency official's wrongdoing to persons outside the agency qualifies under the "matters of public concern" test even where the employee's conduct was not designated "whistleblowing."<sup>172</sup> These several cases encompass a wide range of concerns. A state mental health worker informed state police and the F.B.I. about drug-pushing at the facility where he worked.<sup>173</sup> A registered nurse working at a state correctional center reported violations of medical and nursing care standards to state officials and the state board of nursing.<sup>174</sup> A justice of the peace wrote an open letter to county officials complaining that the district attorney and the county court had been revers-

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166. See *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 277 n.3 (5th Cir. 1990) (reviewing Fifth Circuit cases finding speech on matters of public concern).

167. *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 718, 107 L. Ed. 2d 738 (1990). See also *Neubauer v. City of McAllen*, 766 F.2d 1567, 1572-73 n.5 (5th Cir. 1985).

168. *Johnston*, 869 F.2d at 1578.

169. *Frazier v. King*, 873 F.2d 820, 825 (5th Cir.), *cert. denied sum nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989). See also *Price v. Brittain*, 874 F.2d 252, 258 (5th Cir. 1989) ("Without doubt, the welfare of the patients [at a state mental health] facility and the protection of their civil rights are matters of serious public concern.").

170. *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979).

171. *Price*, 874 F.2d at 256; *Frazier*, 873 F.2d at 826; *Brown v. Texas A&M Univ.*, 804 F.2d 327, 336 (5th Cir. 1986).

172. See *Scott v. Flowers*, 910 F.2d 201, 203-04, 211 (5th Cir. 1990). See also *Brawner v. City of Richardson*, 855 F.2d 187, 191 (5th Cir. 1988); *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. 1982).

173. *Price*, 874 F.2d at 254-55, 257-58.

174. *Frazier v. King*, 873 F.2d 820, 822 (5th Cir.), *cert. denied sum nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989).

ing traffic convictions and discounting fines for those "in the know."<sup>175</sup> A police officer's attorney wrote a letter to the city manager with copies to elected city officials and newspaper reporters charging the police department with keeping secret investigative files on non-criminal activities by citizens, including candidates for office.<sup>176</sup> A police officer publicly complained that the police department was giving special, favorable treatment to a particular city subdivision and its private security force.<sup>177</sup> A university research director publicly criticized his institution's misuse or misallocation of research funds.<sup>178</sup> A federal agency employee wrote and distributed copies of a letter charging that certain agency officials had engaged in private business on government time and showed favoritism to those employees who took part in this business.<sup>179</sup> In each case, these public employees succeeded in bringing official wrongdoing to public attention.

On the other hand, public employees who attempted to correct what they perceived as wrongdoing on the part of other agency employees by going through internal channels were not always found to have addressed matters of public concern. One panel, faithful to the Supreme Court's decision in *Givhan*,<sup>180</sup> insisted that employees concerned about internal wrongdoing need not voice their concerns outside of the workplace in order for their speech to come within the shelter of the first amendment. In that case a university accountant informed his administrative superiors that a faculty member had possibly engaged in self-dealing with university funds.<sup>181</sup> The court declared that underlying first amendment policy concerns protect public employee speech whether such speech was published openly or spoken in private:

If whistleblowing were not within the protective bosom of the First Amendment, our government would be shorn of many of the instruments of investigation, which effectively have led to the elimination of a few bad apples among the barrels of very efficient, effective, honorable and honest public servants. Public employees are uniquely qualified to reveal unseemly machinations by their fellow employees because they observe them on a daily basis. A paramount priority of the First Amendment is to protect expression relating to "the manner in which government is operated or should be operated."<sup>182</sup> The need for First Amendment protection of expression which seeks to expose, and hopefully to alleviate, scurrilous governmental conduct has gained renewed emphasis by the tragic events of Watergate. The fact that the speech was delivered privately to Brown's superiors, rather than to Bob Woodward and Carl Bernstein, does not necessarily render the speech any less protected.

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175. *Scott*, 910 F.2d at 203-04.

176. *Brawner*, 855 F.2d at 189-90.

177. *Thomas v. Harris County*, 784 F.2d 648, 653 (5th Cir. 1986).

178. *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 562 (5th Cir. 1982).

179. *Porter v. Califano*, 592 F.2d 770, 771, 774-75 (5th Cir. 1979).

180. *See supra* notes 51-59 and accompanying text.

181. *Brown v. Texas A&M Univ.*, 804 F.2d 327 (5th Cir. 1986).

182. *Mills v. Alabama*, 384 U.S. 214 (1966).

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."<sup>183</sup>

Some other Fifth Circuit panels, however, have been less willing to accord whistleblower status to public employees who criticize or oppose unseemly machinations by fellow-employees or administrative superiors. In so finding, these panels have applied various new standards or tests, in addition to the *Connick* factors, for identifying whether privately communicated speech about wrongdoing constitutes speech on "matters of public concern."

One such case involved four employees of a state-sponsored day care center who had complained in a private communication concerning another employee who brought a gun to work and about another incident that was contrary to the center's rules.<sup>184</sup> The panel found the complaint to be only a "personal grievance," and not of public concern.<sup>185</sup> Several other Fifth Circuit cases have reached the same conclusion. A county appraiser advised the county appraisal board members that they had exceeded their legal authority by asking him to review certain types of property valuations.<sup>186</sup> The court concluded that the appraiser thereby addressed only "a personal dispute with his employers."<sup>187</sup>

In another case, *Davis v. West Community Hospital*,<sup>188</sup> a surgeon wrote confidential letters to hospital supervisors alleging ineffective patient treatment by another physician, that hospital officials were condoning or overlooking that other physician's ineffective care, and that certain hospital board members had engaged in nepotism.<sup>189</sup> The Fifth Circuit held that the surgeon's complaints "concerned individual personnel disputes and did not address matters of public concern."<sup>190</sup>

Thus, notwithstanding *Givhan*, some Fifth Circuit panels have found privately communicated charges of wrongdoing less clearly protected under the first amendment than whistleblower speech addressed to persons outside the government agency.<sup>191</sup> The policy consequence is to punish employees who go through agency channels, and to provide incentives for "going public" instead. Of course, in these and other cases, there may be only a blurry line between "wrongdoing" by fellow employees or officers and merely arbitrary, unfair, counter-productive or inefficient practices. The court generally has been reluctant to find speech about such latter subjects within the sphere of

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183. *Brown*, 804 F.2d at 337. Citations and footnotes omitted.

184. *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989) [hereinafter *Moore v. MVSU*]. See *infra* notes 266-76 and accompanying text.

185. *Id.* at 551.

186. *McAdams v. Matagorda County Appraisal Dist.*, 798 F.2d 842, 844 (5th Cir. 1986).

187. *Id.* at 846.

188. 755 F.2d 455 (5th Cir. 1985).

189. *Id.* at 459-60.

190. *Id.* at 462.

191. More recent decisions have reemphasized the *Givhan* decision. See *Thompson v. City of Starkville*, 901 F.2d 456, 466-67 (5th Cir. 1990); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 800 (5th Cir. 1989).

"matters of public concern."<sup>192</sup> As will be seen, the Fifth Circuit has sometimes taken a restrictive view as to what kinds of matters are or might be "of public concern."

*b. Political Speech and Speech on Matters of Public Policy*

In two pre-*Connick* cases, *Elrod v. Burns*<sup>193</sup> and *Branti v. Finkel*,<sup>194</sup> the Supreme Court addressed the then-current practice of patronage dismissals.<sup>195</sup> In *Elrod*, the Court held that a "nonpolicymaking, nonconfidential government employee" could not "be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."<sup>196</sup> Later, in *Branti*, the Court extended *Elrod* to bar dismissal based on political party affiliation.<sup>197</sup> The Fifth Circuit soon had occasion to apply these decisions in situations involving public employee political expression.

Shortly after *Branti*, a Fifth Circuit panel upheld the firing of a public employee who had supported the opposition mayoral candidate.<sup>198</sup> The panel reasoned that *Elrod* applied only to political *beliefs*, that *Branti* applied only to political *affiliation*, and that neither had held political *activity* protected under the first amendment.<sup>199</sup> Later the en banc court endorsed these positions.

Once *Connick* was decided, the Fifth Circuit had to determine whether its tests and factors governed *Elrod* and *Branti* analysis. In *McBee v. Jim Hogg County*,<sup>200</sup> the court's most recent en banc decision on first amendment rights of public employees, a divided Fifth Circuit held that *Connick* does so control.<sup>201</sup> Having been elected pursuant to a one-party primary, the new sheriff made space for his own political supporters by declining to rehire several former deputies who had campaigned for his predecessor. He also terminated the employment of another deputy, Ms. McBee, who had complained to county authorities about the new sheriff's unfair treatment of the others.<sup>202</sup> Although the court was mainly concerned with the weight to be

192. See *infra* notes 267-73, 296-97, 301-06 and accompanying text.

193. 427 U.S. 347 (1976).

194. 445 U.S. 507 (1980).

195. *Elrod*, 427 U.S. at 356-57; *Branti*, 445 U.S. at 513-17.

196. *Elrod*, 427 U.S. at 375 (Stewart, J., concurring).

197. "[I]t is manifest that continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government." *Branti*, 445 U.S. at 519. The Supreme Court recently extended *Elrod* and *Branti* to protect governmental employees from adverse hiring, promotion, transfer, and recall decisions based on their political affiliation or activity. See generally *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 227-30 (1990) (containing discussion of caselaw dealing with freedom of speech, press, and association).

198. *McCormick v. Edwards*, 646 F.2d 173, 175, 179 (5th Cir.), cert. denied, 454 U.S. 1017 (1981).

199. *Id.* at 178; *Matherne v. Wilson*, 851 F.2d 752, 757-58 (5th Cir. 1988).

200. 730 F.2d 1009 (5th Cir. 1984) (en banc).

201. *Id.* at 1013-17.

202. The *McBee* court held that *Elrod* was inapplicable because it only protected employees from patronage dismissals based on their unexpressed personal political beliefs, and that *Branti* applied only to dismissals based on party affiliation. *Id.* at 1011-13. The dissent vigor-

accorded various competing balancing factors, it held, *sub silentio*, that political activity on behalf of a candidate for public office constituted speech on a matter of public interest.<sup>203</sup>

More recently, the Fifth Circuit considered a case in which a sheriff fired one of his deputies for being present at a meeting of the rival candidate's campaign workers.<sup>204</sup> Here the panel specifically identified the threshold question as "whether an employee's speech addresses a matter of 'public concern,'" and found that the deputy's "speech" did so.<sup>205</sup> In another case, a divided panel held that a school superintendent's support of opposition school board members addressed a matter of public concern.<sup>206</sup> These post-*Connick* political speech cases suggest that the Fifth Circuit will probably find such speech to address "matters of public concern" and, thus, to pass the "threshold" test. Whether it will also be found to outweigh the affected government interests, of course, is another question.<sup>207</sup>

Only one Fifth Circuit public employee speech case has involved matters of possible national concern. This was *McPherson v. Rankin*.<sup>208</sup> Here a deputy constable had overheard part of a private conversation prompted by the attempted assassination of President Reagan. In this conversation, Ms. McPherson, a clerical worker, had said to another constable's office employee, "[I]f they go for him again, I hope they get him."<sup>209</sup> The Fifth Circuit found that this statement, without more, addressed "matters of public concern," namely, "the life and death of the President."<sup>210</sup> It also noted that the statement may have been "an hyperbolic expression of unhappiness with the President's policies," which also would have related to serious matters of public concern.<sup>211</sup> Either way, the court insisted, the first amendment protects speech on matters of public concern, "however loathsome" the content

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ously opposed the majority's narrow construction of *Elrod* and *Branti* on these points. *Id.* at 1017-23 (Rubin, J., dissenting, joined by Randall [King] and Higginbotham, JJ.). Commentators have criticized *McBee*. See Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals* 39 AM. U.L. REV. 11, 33-35 (1989); Note, *McBee v. Jim Hogg County: On Balance A Risky Business*, 45 LA. L. REV. 1094, (1988)(suggesting that the court should have applied *Elrod/Branti* rather than *Connick* analysis). See also Note, *Politics and the non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558 (1985).

203. The closest the majority came to so stating explicitly was in its discussion of *Connick* analysis: "On the one hand, the court should consider to what degree the deputies' participation in the election campaign or Ms. McBee's actions involve 'public concerns.'" *McBee*, 730 F.2d at 1016. Since the court then proceeded with its *Connick* balancing analysis, it may reasonably be inferred that it found the employees' "participation" and "actions" to be speech relating to "matters of public concern." *Id.* at 1016-17.

204. *Matherne v. Wilson*, 851 F.2d 752, 754-55 (5th Cir. 1988).

205. *Id.* at 760, 761 n.53. Although the report gives no indication that the deputy had taken part in the meeting, the court evidently concluded that the sheriff had fired him for doing so, and that this activity, which may or may not have involved "speaking," was expression within the meaning of the first amendment.

206. *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 277-79 (5th Cir. 1990).

207. See *infra* notes 389-80, 407-16 and accompanying text.

208. 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 483 U.S. 378 (1987). See *supra* notes 121-56 and accompanying text.

209. *McPherson*, 786 F.2d at 1234.

210. *Id.* at 1236.

211. *Id.* at 1238.

might be.<sup>212</sup> Presumably statements on state and local governmental policy would also constitute speech on matters of public concern.<sup>213</sup> The court has held that the "political context" in which speech occurs is an important factor weighing in favor of finding that the speech relates to matters of public concern, especially where elected officials are involved.<sup>214</sup> We shall see, however, that the Fifth Circuit has been reluctant to so categorize public employee speech concerning policies and practices of the government agency where the employee works.

The cases examined to this point yield two categories of public employee speech that the Fifth Circuit has held to relate to "matters of public concern": whistleblower speech, and speech on behalf of political candidates or public policies. The Fifth Circuit has also found a few other instances of public employee speech to relate to matters of public concern.

*c. Social or Other Concern to the Community*

*Connick* suggested that employee expression "relating to any matter of political, social, or other concern to the community" might be considered speech on a matter of public concern.<sup>215</sup> Arguably, "or other" could embrace a wide range of community interests. A few Fifth Circuit post-*Connick* cases involving public employee speech on matters of their agency's or agency official's policies or practices appear to fall within the "social" or "other concern" category.

Speech by public school personnel on matters of educational policy has been found within the realm of matters of public concern in two cases. One such case is *Wells v. Hico Independent School District*.<sup>216</sup> A group of teachers, including Ms. Wells and Ms. Braune, appeared before the school board to advocate continuation of a "Right to Read" program in which they taught. Braune expressed concern about lack of administrative and teacher support for the program and about "discriminatorily" low evaluations received by its teachers.<sup>217</sup> The board subsequently did not renew Wells' and Braune's contracts. The district court held that the board had violated the teachers' first amendment rights, and the Fifth Circuit affirmed. The latter

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212. *Id.*

213. Matters of public concern may include "any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

214. *Brinkmeyer v. Thrall Indep. School Dist.*, 786 F.2d 1291, 1295 (5th Cir. 1986). Ms. Brinkmeyer, a teacher's aid, was asked by a school board member whether the superintendent had made a particular remark criticizing his position before the faculty. She confirmed that the superintendent had made the remark. Thereafter, her contract was terminated. The Fifth Circuit panel noted that the remark was made in the context of "a hotly contested dispute among elected officials and the superintendent," and found that Brinkmeyer's speech did address a matter of public concern. *Id.* at 1292-95. Had it not so found, Brinkmeyer evidently would have been dismissed solely because she had truthfully answered an inquiry by an administrative superior. The case nicely illustrates the irrelevancy of the "public concern" threshold test and the likelihood that, as applied, it may serve merely to enable supervisors to punish lower level employees for innocent speech they happen to find embarrassing or threatening to their abnormally tender egos.

215. *Connick*, 461 U.S. at 146 (emphasis added).

216. 736 F.2d 243 (5th Cir. 1984), *cert. dismissed*, 473 U.S. 901 (1985).

217. *Id.* at 247.

was impressed by the fact that in addressing the board, Braune had stated her understanding of the school district's commitment to the program, her concern that the program was not receiving adequate support, and her perception that the program's basic concept, individualized instruction, "was the key to improving education."<sup>218</sup> Evidently the panel considered each of these features of Braune's speech related to matters of public concern.<sup>219</sup>

Two years later, in *Jett v. Dallas Independent School District*,<sup>220</sup> another panel found a school employee's speech on educational policies within the first amendment. Mr. Jett, a white, was athletic director and head football coach at a school that had become predominantly black. The principal, Mr. Todd, a black, had criticized Jett's speech and actions on various occasions. Then a newspaper quoted Jett as having said that only two of the school's athletes were qualified to meet proposed NCAA academic eligibility requirements. Todd then took action culminating in Jett's removal from the school. The jury found that Jett was removed because of his protected speech,<sup>221</sup> and a Fifth Circuit panel affirmed. The panel did not analyze the quoted statement, but simply concluded, "This remark, which concerns the academic development of public high school football players and their potential eligibility for playing college football, certainly addresses matters of concern to the community."<sup>222</sup> Recently, another panel held that a college professor's assertions that some of his colleagues "showed favoritism in grading toward athletes and pre-med students and exchanged grades for sex" also involved matters of public concern and not merely a personal dispute or grievance.<sup>223</sup>

In *Gonzalez v. Benavides*<sup>224</sup> the court found speech relating to administration of federally funded anti-poverty programs likewise within the first amendment. This case involved a dispute between Mr. Gonzalez, director of a county Community Action Agency (CAA), and the County Commissioners' Court. Gonzalez had discharged the deputy director, Mr. Chavez. The commissioners thereupon reinstated Chavez, publicly reprimanded Gonzalez for exceeding his authority, and initiated an investigation into his job performance. Gonzalez publicly told the commissioners that the CAA's regulations authorized him to dismiss Chavez, and that their investigation of his job performance constituted a CAA violation that could result in loss of federal funding. The commissioners ordered Gonzalez to acknowledge their authority to evaluate his performance. Upon his refusal to do so, they fired him.

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218. *Id.* at 249.

219. *See id.*

220. 798 F.2d 748 (5th Cir. 1986), *aff'd in part*, 491 U.S. 701 (1989). (The Supreme Court held that a municipality may not be vicariously liable for its employees' violations of 42 U.S.C. § 1981 (1988)).

221. *Id.* at 752.

222. *Id.* at 758.

223. *Coats v. Pierre*, 890 F.2d 728, 732 (5th Cir. 1989).

224. 774 F.2d 1295 (5th Cir. 1985). This opinion written by Judge Wisdom presents a useful review of relevant Supreme Court decisions regarding public employee speech rights from *Keyashian* to *Connick*. *Id.* at 1299-1300.



The Fifth Circuit found that Gonzalez's speech was important to him as an employee. It expressly held, however, that a private matter can also involve issues of public concern.<sup>225</sup> Where the employee speech related to "mixed" issues of public and private concern, the court would so recognize and proceed with further analysis.<sup>226</sup> Several other panels, however, have taken the position that if a public employee's speech in any way involved a "personnel dispute" or "grievance," it would be treated as a matter of only personal interest, and, thus, excluded from the realm of protected speech even if the speech also related to matters of public concern.<sup>227</sup>

The court identified three features of Gonzalez's statements that dealt with matters of public concern. First, he had suggested that the commissioners' violations could lead to loss of federal funding for the program. Had that occurred, needy county residents would have lost federal assistance in excess of a million dollars a year. This possible, though unlikely, catastrophe "raised the issue to a matter of significant public concern."<sup>228</sup> Second, the court concluded that whether the commissioners' court had complied with the CAA regulations also raised a question of significant public concern.<sup>229</sup> Finally, the court found that uncertainty as to distribution of authority and responsibility among the commissioners' court, the director, and other entities was a matter of public concern because it had "generated friction and reduced the efficiency of the agency."<sup>230</sup> Thus Gonzalez's speech regarding this uncertainty also came within the first amendment.

In *Moore v. City of Kilgore*<sup>231</sup> the court found that a fireman's remarks to the press regarding possible understaffing in the city's fire department related to matters of public concern. In October, 1985, the city had laid off fifteen firefighters. Controversy ensued in the media. Moore, who was president of the local firefighters' union, publicly opposed the lay-offs. In December, while fighting a house fire, a fireman died and another was seriously injured. The next day, following a press conference called by the city, media representatives asked Moore for comments. Moore stated in response that the incident showed the department lacked sufficient manpower, and, alluding to his October contentions regarding the lay-offs, added "I just want to say 'I told you so.'"<sup>232</sup> The city manager imposed various sanctions, including a 30-day suspension without pay and demotion. The city manager also ordered Moore to refrain from making further public statements regarding the policies or actions taken by the city.<sup>233</sup>

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225. *Id.* at 1300-01.

226. *Id.* at 1301. *See also* *Thompson v. City of Starkville*, 901 F.2d 456, 463-64 (5th Cir. 1990); *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988).

227. *See infra* notes 271-317 and accompanying text.

228. *Gonzalez*, 774 F.2d at 1301.

229. *Id.*

230. *Id.* Here the court recognized that employee speech might address the efficiency of agency operations. The *Pickering* formula had implied that only "the state" was interested in efficiency. *See supra* note 11 and accompanying text. *Compare infra* note 249 and accompanying text.

231. 877 F.2d 364 (5th Cir.), *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989).

232. *Id.* at 366-67.

233. *Id.* at 368.

The Fifth Circuit panel found that the content of Moore's speech regarding a possible shortage of firefighters addressed a matter of public concern stating that "the public, naturally, cares deeply about the ability of its Fire Department to respond quickly and effectively to a fire. If staffing shortages potentially threaten the ability of the Fire Department to perform its duties, people in the community want to receive such information."<sup>234</sup> The panel emphasized that the first amendment freedom of speech clause protects not only a speaker's interest but also that of listeners, a point not developed in previous post-*Connick* Fifth Circuit public employee speech cases.<sup>235</sup> The panel noted that in *Pickering* the Supreme Court had observed that teachers, as a class, were likely to have informed and definite opinions regarding the allotment of funds for school operations. The court then applied the underlying principle to firefighters: "Moore's comments and insights constituted powerful knowledge concerning the effectiveness of the public entity, the Fire Department," and were therefore "likely to help produce a fire department that is increasingly responsive to the needs of the citizenry."<sup>236</sup>

In *Thompson v. City of Starkville*<sup>237</sup> the court likewise found that a public employee's speech about matters touching on public safety dealt with a matter of public concern.<sup>238</sup> Like Brawner,<sup>239</sup> Thompson was a police officer who had attempted to correct other officers' misconduct by going through channels. As in *Gonzalez*,<sup>240</sup> the court held that an employee's private concerns may also address issues of public concern.<sup>241</sup> It found that Thompson's allegations went far beyond recognized internal grievances about working conditions such as "the length of time on the job, the number of breaks employees received and so forth."<sup>242</sup> It emphasized that several items in Thompson's complaint showed that he "stood to gain little personally through his grievance."<sup>243</sup> Here the court narrowed the scope of "personal" or "private concern" and, by implication, broadened the range of matters of public concern.<sup>244</sup> Not all panels, as we shall see, were so concerned with benefits the community could derive from employees' comments and insights concerning their agencies' performance.<sup>245</sup>

The categories of speech found to refer to matters of public concern imperceptibly shade into one another. In *Wells* and *Gonzalez*, public employees charged their respective superiors with wrongdoing, specifically, with failing to meet their commitments to adequately support a program and

234. *Id.* at 370.

235. The court cited in this connection a line of five Supreme Court decisions upholding citizens' first amendment right to hear or receive information. *Id.* at 370.

236. *Moore*, 877 F.2d at 372.

237. 901 F.2d 456 (5th Cir. 1990).

238. *Id.* at 467.

239. *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988).

240. *See supra* notes 224-30 and accompanying text.

241. *Thompson*, 901 F.2d at 464.

242. *Id.* at 467 (quoting *Piver v. Board of Educ.*, 835 F.2d 1076, 1079 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988)).

243. *Thompson*, 901 F.2d at 465. *See also id.* at 466.

244. *Compare* cases cited *infra* notes 266-317 and accompanying text.

245. *See infra* notes 301-17 and accompanying text.

with violating agency regulations. In these respects, *Wells*, *Gonzalez*, and *Thompson* could be seen as "whistleblower" cases similar to those considered above.<sup>246</sup> Yet, as will be observed below, the court has sometimes found public employees' criticisms of agency officials' conduct outside the realm of matters of public concern.<sup>247</sup> *Wells* and *Gonzalez* might also be regarded as political speech cases because in both cases employees publicly addressed elected officials regarding their policies or actions. Likewise, in *Moore* a public employee commented through the media on a city manager's decision regarding the allocation of public funds.<sup>248</sup> Of course, to be a matter of public concern, an employee's speech need not fall neatly into one of these categories, but it appears that if speech can be categorized as whistleblowing or as speech relating to political issues, it is likely to be found within the circle of matters of public concern. Otherwise, public employees may find that a casual comment, or even an expression of concern with respect to such matters as agency efficiency, may cost them their jobs.<sup>249</sup>

Under *Connick*, all public employee speech seemingly is divided into two parts, speech relating to matters of public concern, and speech relating to matters of only personal interest.<sup>250</sup> A great deal of public employee speech does not fit this procrustean scheme, and there is at least a *tertium quid*. Before turning to cases illustrative of this point, this Article reviews some of the topics or concerns that the Fifth Circuit has held represent matters of only, or "purely", personal interest.

## 2. Matters of Only Personal Interest

*Connick* held that the sole category of public employee speech ordinarily *unprotected* by the first amendment is that relating to "matters of only personal interest."<sup>251</sup> It is understandable that the Fifth Circuit has frequently focused at the first stage of its *Connick* analysis on whether the speech in question should be so characterized. The court has often found that employee speech did relate to personal concerns, though seldom to "only" personal or private interests.<sup>252</sup> Occasionally the court has had to strain in order to reduce speech on matters of conceivably greater interest to fit into this box.

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246. See *supra* notes 172-79 and accompanying text.

247. See *infra* notes 266-73, 310-14 and accompanying text. In these cases, the employees' speech had not yet been made publicly.

248. See *supra* notes 231-36 and accompanying text. The *Moore* panel specifically addressed the nature of Moore's speech interest: "A speaker hopes that his or her speech will set afire the political conscience of the community" and, in the long term, result in the agency's becoming "increasingly responsive to the needs of the citizenry." *Moore v. City of Kilgore*, 877 F.2d 364, 372 (5th Cir.) *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989).

249. See *infra* notes 282-306 and accompanying text.

250. See *supra* notes 79-81 and accompanying text.

251. See *supra* note 79 and accompanying text.

252. See generally *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 277-78 n.3 (5th Cir. 1990) (reviewing cases where the Fifth Circuit had found speech addresses private or personal matters). The court's most recent such case is *Ayoub v. Texas A&M Univ.*, 927 F.2d 834 (5th Cir. 1991).

a. *Only Personal Interest*

The first post-*Connick* case in which the Fifth Circuit found that a public employee's speech related only to matters of personal interest was *Davis v. West Community Hospital*.<sup>253</sup> Davis was a surgeon whose staff privileges were suspended in response to letters he had written to hospital officials containing various criticisms.<sup>254</sup> The court found that most of the points addressed in these letters were only of personal interest, namely, "his demand of apologies from a nurse and an anesthetist," and his complaint that he had been deprived of his usual parking space.<sup>255</sup> The panel cited a Ninth Circuit decision to support its conclusion that personnel disputes and grievances against other staff members constitute matters of purely personal interest<sup>256</sup> and stated that "[s]peech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies."<sup>257</sup> The Ninth Circuit did not say that personnel disputes and grievances were, *ipso facto*, not of public concern; nor did it say that personnel disputes and grievances were only matters of personal interest. Rather, the Ninth Circuit held that such speech would not qualify as relating to matters of public concern unless it would be relevant to the public's evaluation of a governmental agency's performance.<sup>258</sup> Nevertheless, some later Fifth Circuit cases follow *Davis* in equating "personnel" matters and "grievances" with "matters of purely personal interest." These cases typically ignore the additional requirement in the Ninth Circuit formula that the information involved "be of no relevance to the public's evaluation of the performance of governmental agencies."<sup>259</sup>

A few months later, in *Day v. South Park Independent School District*<sup>260</sup> another panel addressed the denial of an employee's continuing employment because she filed a grievance. Dissatisfied with her annual teaching evaluation, Ms. Day invoked the district's formal grievance procedure. Under dis-

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253. 755 F.2d 455, 461 (5th Cir. 1985). See *supra* note 188 and accompanying text. Some more recent cases refer to matters of *private* rather than *personal* concern. *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 795, 797-800 (5th Cir. 1989).

254. *Davis*, 755 F.2d at 459.

255. *Id.* at 461. Other aspects of *Davis* are discussed *infra* notes 296-97, 353-61 and accompanying text.

256. *Id.*

257. *Id.* (emphasis added) (citing *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)). Here the employee's speech related to such matters as how management's relations with city employees affected discipline, morale, efficiency, and diversity of viewpoints within the agency. On *McKinley*, see Handler, *First Amendment II*, 1984-85 SURV. AM. L. 291, 319-20. See also Note, *New Restrictions*, *supra* note 118, at 339, 355-56 ("Employee criticism, even that relating to personal grievances, may bring to light deficiencies in office management which, if corrected, could increase the public agency's efficiency and effectiveness.").

258. *Davis*, 755 F.2d at 461.

259. See *infra* notes 266-97 and accompanying text.

260. 768 F.2d 696 (5th Cir. 1985). See generally Allred, *supra* note 158, at 72-75 (reviewing lower federal court decisions where speech was found related to "matters of purely personal interest") and Massaro, *supra* note 46, at 20-21 n.95.

strict policy, however, the evaluation was not grievable,<sup>261</sup> and Day's contract was not renewed. The trial court found that the nonrenewal was based on her having filed the grievance, but that it pertained to "a purely private matter."<sup>262</sup> The particular issue before the panel on appeal was "whether a public employee's complaint to her superior about her teacher evaluation is protected by the petition clause of the first amendment."<sup>263</sup> Because the Supreme Court previously held that the petition clause is not implicated absent violation of some other first amendment right, such as assembly or speech,<sup>264</sup> the court had to determine whether Day's first amendment speech right had been violated. The court applied the Ninth Circuit formula, including the "relevance to public evaluation" test, and affirmed the district court's finding that Day's complaint was "purely a personal matter" and therefore not within the first amendment.<sup>265</sup> It seemed that the *Davis* and *Day* panels had adopted the full Ninth Circuit test. Subsequent Fifth Circuit cases, however, appear to have ignored or forgotten it.

In *Moore v. Mississippi Valley State University*<sup>266</sup> the court held that written complaints concerning alleged favoritism by a day care agency director constituted "a personal grievance."<sup>267</sup> Here, the employees had complained about uncompensated overtime and their director's behavior and treatment of employees.<sup>268</sup> The court did not inquire whether this information would be relevant "to the public's evaluation of the performance of governmental agencies."<sup>269</sup> Conceivably, the public would have found it relevant whether the agency required employees to work overtime without compensation or otherwise treated employees in ways that would adversely affect staff morale and efficiency. Other items in their complaint might have been of even greater possible interest to the public in evaluating the agency's performance.

b. "Only Personal Interest?"

The employees in *Moore v. MVSU* also complained that another employee, a Ms. Davis, once brought a gun with her to the day care center and that Davis also had paddled a child, contrary to center rules.<sup>270</sup> The court did not consider whether this information "would be of relevance to the public's evaluation" of the agency's performance. Instead, it concluded that the complaints were "written in terms of showing 'favoritism' to Davis by permitting such activity, not that this was a matter of public concern and ought to be stopped."<sup>271</sup> Thus, even though the court recognized that "some

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261. *Day*, 768 F.2d at 698.

262. *Id.* at 699.

263. *Id.*

264. *Id.* at 701-02.

265. *Id.* at 700 n.11. See *supra* notes 256-57 and accompanying text.

266. 871 F.2d 545 (5th Cir. 1989).

267. *Id.* at 551.

268. *Id.* at 547-48 n.3.

269. See *supra* note 257 and accompanying text.

270. *Moore v. MVSU*, 871 F.2d at 547-48 n.3.

271. *Id.* at 551.

of the events complained of might be of interest to the public," it did not hold them to be of public concern.<sup>272</sup> Consequently, the court found that the complaint only charged favoritism, making it a mere personal grievance.<sup>273</sup> The court hinted that at least part of the complaint might have been protected speech had it been framed in terms of whistleblowing on a fellow-employee's hazardous or unlawful activity. Interestingly, the court did not find that the complaint was a matter of *only* or *purely* personal concern. Given the confusingly bifurcated standard set out in *Connick*, the panel may have thought it insufficient to find that the complaint was not a matter of public concern. The panel seemed to think it important to characterize it as a "personal" grievance. It is unclear why the *Moore v. MVSU* panel expended judicial attention upon the first step in *Connick* analysis when the case could have been decided on the basis of a separate, dispositive consideration. The trial court had found that "the four employees made no showing that the grievances were ever presented to the MVSU board or that the MVSU board acted in retaliation because of these grievances."<sup>274</sup> The court could easily have held that it need not decide the "public concern"/"private interest" issue because the trial court's finding as to causation<sup>275</sup> was not clearly erroneous.<sup>276</sup> Similarly, in *McAdams v. Matagorda Appraisal District*,<sup>277</sup> another panel engaged in extensive *Pickering/Connick* analysis even though it eventually agreed with the district court that the employee had not been fired because of his speech.<sup>278</sup>

In earlier cases, the court also found speech on various matters outside the realm of matters of public concern and so fit only to be dropped into the basket labeled "personal interest," if not "only personal interest."<sup>279</sup> In some of these cases, the panels reached particularly strange results.<sup>280</sup> New criteria or factors used by the panels in reaching these conclusions are re-

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272. *Id.*

273. *Id.* See also *Thompson v. City of Starkville*, 901 F.2d 456, 465-66 n.9 (5th Cir. 1990) (commenting on *Moore v. MVSU*).

274. *Moore v. MVSU*, 871 F.2d at 550.

275. See *supra* notes 35-38 and accompanying text.

276. *Moore v. MVSU*, 871 F.2d at 549. See *Kelleher v. Flawn*, 761 F.2d 1079, 1084 (5th Cir. 1985) (causation is a question of fact to be reviewed under the clearly erroneous standard of FED. R. CIV. P. 52(a)). Compare *Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 876 (5th Cir. 1991) (since the employer's decision was not made in response to the employee's speech, the court decided it was unnecessary to reach the "public concern" question); *Coats v. Pierre*, 890 F.2d 728 (5th Cir. 1989) (after determining that the employee's speech touched on a matter of public concern, the court disposed of the case based on the absence of the requisite *Mt. Healthy* causation showing), *cert. denied*, 111 S. Ct. 70, 112 L. Ed. 2d 44 (1990). See also *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 550 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982) (record showed no evidence of causation but showed that plaintiff's employment would have been terminated anyway).

277. 798 F.2d 842 (5th Cir. 1986).

278. *Id.* at 846. Here the court evidently felt that the earlier stages of *Connick* analysis were necessary in order to determine whether an express or implied refusal to perform a task requested by one's employer is considered speech within the first amendment. *Id.* at 847. The court held that it was not. *Id.* at 847 (citing *Berry v. Bailey*, 726 F.2d 670 (11th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985)).

279. See *infra* notes 184-87, 282-85 and accompanying text.

280. See *infra* notes 282-87, 296-97 and accompanying text.

viewed below.<sup>281</sup>

*i. Gomez v. Texas Department of Mental Health*<sup>282</sup>

Mr. Gomez was a probationary employee at a state center for treatment of mentally ill and retarded persons. His work involved counseling patients and arranging for patient transfers to the nearby county center, which provided outpatient services. A state center administrator issued a memorandum captioned "Preparation for Briefer Client Lengths of Stay" that advised state center staff of the need to adjust treatment planning and modalities in order to prepare for reduced length of patient stay at the state center.<sup>283</sup> Nothing in the report suggested that the memorandum specified that its contents were confidential or that its proposals were merely a possibility pending finalization. Shortly afterwards in the course of a routine meeting Gomez mentioned to Mr. Gonzales, an employee of the county center, that state center employees had been instructed to prepare patients for shorter stays. Gonzales expressed surprise and asked if Gomez had anything in writing about the coming change, whereupon Gomez gave Gonzales a copy of the memorandum.<sup>284</sup> The memorandum later came to the attention of the director of the county center, who called the director of the state center. Controversy between the two directors ensued, and as a result, Gomez was fired.

Because the court found that Gomez's speech did not address a matter of public concern, it noted that it did not need to balance competing First Amendment and government interests.<sup>285</sup> The *Gomez* court intimated that Gomez's speech really concerned only a personal matter:

Plainly, Gomez' purpose in relating the information was to advise the employee of expected reductions in the length of time patients would remain at the State Center and to warn of the additional burden the change would place on Gomez' interlocutor and on the County Center generally. . . . [T]he employees of the agencies involved . . . quite naturally were interested in any job-related changes they might personally experience under the proposed policy.<sup>286</sup>

As in *Moore v. MVSU*, the *Gomez* court did not go so far as to say that Gomez's speech concerned *only* a personal interest. That aspect of *Connick*'s holding seemed to have been forgotten.<sup>287</sup> Nor did the court contend that Gomez's speech concerned a matter that was of purely personal interest *to him*, though it did say that the proposed change would be of interest both to state and county center employees. Again, *Connick*'s ambiguous holding seems to have prompted the court to try to fit an employee's speech into the

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281. See *infra* notes 319-76 and accompanying text.

282. 794 F.2d 1018 (5th Cir. 1986).

283. *Id.* at 1019.

284. *Id.* at 1019-21.

285. *Id.* at 1021.

286. *Id.* The court evidently imputed exclusively self-serving motivations to "the employees" entirely on the basis of its own speculation as to employee concerns generally.

287. See *supra* note 79 and accompanying text.

“personal interest” box, lest it not be enough, under *Connick*, that the speech was deemed outside the scope of matters of public concern.

ii. Page v. DeLaune<sup>288</sup>

Ms. Page supervised an ex-offender program operating under state and federal auspices. Ms. DeLaune was Page’s immediate supervisor. There had been some question as to the adequacy of Page’s work. Ms. Turner, DeLaune’s immediate supervisor, addressing a staff meeting attended by Page and other employees, announced an “open door” policy, and invited observations or complaints about the ex-offender program.<sup>289</sup> In a later telephone conversation with another staff member, Page and the other employee expressed interest in speaking with Turner. DeLaune overheard the conversation and fired both employees. The district court granted DeLaune’s motion for summary judgment on the ground that Page’s statement that she intended to contact Turner did not address a matter of public concern. The Fifth Circuit quoted *Connick’s* holding that courts “will not interfere with personnel decisions ‘when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest,’ ”<sup>290</sup> and held that Page’s “decision to bypass normal communication channels is clearly a personnel matter internal to the program, not a matter of public concern.”<sup>291</sup>

The court did not explicitly state that Page’s speech was of purely personal interest, but did find it to be only a personnel matter. In effect, the panel seemed to read “personnel” to mean the same thing as “personal.” The court here had moved some distance from the Ninth Circuit test it seemingly embraced in *Davis* and *Day*.<sup>292</sup> Curiously, the panel did not consider *the content* of Page’s speech at all, let alone inquire whether it related only to individual disputes and grievances.<sup>293</sup> Instead, the panel considered only her “*decision* to bypass normal communication channels.”<sup>294</sup> Actually, Page had not yet “bypassed” such channels. The court apparently did not consider it relevant that even had she done so she merely would have been acting in response to her superior’s explicit invitation. The *Page* opinion also makes no mention of the second prong of the *Davis-Day* inquiry: here, for example, whether the public would find it relevant, in evaluating the program’s performance, to know that employees could respond to a higher official’s invitation for comments and complaints about the program only at peril of losing their jobs. Characterizing Page’s speech, or “decision,” as a “personnel matter” rather than one “of public concern” avoided the task of engaging in a balancing analysis.<sup>295</sup> It seems unlikely that such balancing

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288. 837 F.2d 233 (5th Cir. 1988).

289. *Id.* at 235.

290. *Id.* at 237.

291. *Id.* at 238.

292. See *supra* notes 256-65 and accompanying text.

293. See *supra* note 249 and accompanying text.

294. *Page*, 837 F.2d at 238 (emphasis added).

295. “Only if the employee crosses this initial hurdle *need* the court address other ques-



would have shown that the two employees' private speech had adversely affected the agency's efficiency in providing public services.

Similarly, in *Davis* the court insisted that a surgeon's expression of concern regarding the adequacy of another physician's patient care and the possible conflicts of interest on the part of certain hospital board members were only matters of a personal concern.<sup>296</sup> Curiously, the *Davis* panel did not apply the second part of the Ninth Circuit test, which it seemingly had endorsed only a few sentences earlier. Under the second part of the test the critical inquiry would have been whether it was relevant to the public's evaluation of the hospital's performance to know if one of its physicians was providing inadequate patient care, or if its board members were engaging in self-dealing or nepotism.<sup>297</sup>

### 3. *Neither Personal Interest nor Public Concern: The Anomalous Status of Tertium Quid Speech*

*Connick*, it will be recalled, identified only two types of public employee speech: one dealing with matters of public concern, the other dealing with matters of only personal interest. Moreover, *Connick* held that speech would be protected unless it fell into the latter category, and even then, it might in some circumstances still be protected.<sup>298</sup> In the cases reviewed so far, the Fifth Circuit has, on several occasions, tried to categorize employee speech as pertaining to (if not only to) matters of personal interest. But often the speech for which employees were punished fell into neither category. Typically, such speech dealt with questions of agency policy or procedures, including matters relating to the agency's efficiency in delivering services. Nevertheless, the court frequently held that such speech failed to qualify<sup>299</sup> under the *Connick-Rankin* "threshold test."<sup>300</sup> Whether it failed

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tions, such as whether the speech was a substantial factor in the employer's decision, or whether certain interests of the employer counterbalanced the employee's free-speech interest." *Id.* at 237 (emphasis added). Page is considered further *infra* notes 307-08, 333-36 and accompanying text.

296. *Davis v. West Community Hosp.* 755 F.2d 455, 461-62 (5th Cir. 1985). Compare *Frazier v. King*, 873 F.2d 820, 825 (5th Cir.), *cert. denied sub nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989) (court stated that the "quality of nursing care given to any group of people . . . is a matter of public concern.").

297. See *Davis*, 755 F.2d at 460. *Davis* is considered further, *infra* notes 353-61 and accompanying text.

298. See *supra* note 79-81 and accompanying text.

299. See *infra* note 301-18 and accompanying text. Compare cases described *supra* notes 170-83, 216-19, 224-49 and accompanying text.

300. The Supreme Court first characterized inquiry whether speech related to matters of public concern or only to those of personal interest as "the threshold question" in *Rankin*. See *supra* notes 130-31 and accompanying text. There it evidently followed the Fifth Circuit's doctrine enunciated in the same case: "Only when a government employee engages in expression addressed to 'matters of public concern' does the first amendment protect him from termination for such expression." 786 F.2d at 1235. The *Rankin* Court tacitly abandoned *Connick*'s holding that the first amendment protected all speech other than that dealing with "matters only of personal interest." A few Fifth Circuit panels nevertheless continued to think it important to characterize public employees' speech as relating to only "personal" matters, thereby crediting them with only self-serving motivation or intent. See *supra* notes 266-86 and accompanying text.

because it related only to matters of personal interest, or because it did not address matters of public concern was not always clear. When applying the latter standard, the court tended to take a rather narrow view as to the kinds of questions it believed the public would find of interest.

*i. Noyola v. Texas Department of Human Resources*<sup>301</sup>

Mr. Noyola was a state welfare worker who was fired for daring to suggest changes in case-load assignments, including his own, in order to assure improved delivery of services to clients. His evidence before the district court in response to defendants' motion for summary judgment, was as follows:

Plaintiff Noyola made suggestions to Defendant Elizondo regarding efficient and customary procedure for handling a caseload. . . . Every worker in the Lower Valley Unit had one case load. I had two case loads . . . . I suggested to Mrs. Elizondo that to better deliver services on [sic] a more timely and efficient manner to our clients, that perhaps the case load could be distributed on a more equitable basis. Her sarcastic reply was, "What's the matter? I thought you were supposed to be Super Worker?" At this time, she again retaliated and imposed an area which composed [sic] of approximately 250 cases on me. I was now to work the largest case load in a three-county geographic area which involved 13 different communities.<sup>302</sup>

The district court denied defendants' motion for summary judgment. The Fifth Circuit panel reversed on the ground that nothing in Noyola's evidence suggested that his speech was more than an internal grievance with his supervisor.<sup>303</sup> As such, the panel concluded, Noyola's speech raised no first amendment issue.<sup>304</sup> Perhaps the panel meant that a "grievance" was necessarily a matter of only personal interest, but it did not so characterize it.<sup>305</sup> Neither did the panel conclude that Noyola's speech failed to address a matter of public concern.<sup>306</sup> Instead, it was something else, a *tertium quid*.

*Page* is another *tertium quid* case. Here the panel held that Ms. Page's "decision to bypass normal communication channels" was a "personnel" question, not a matter of public concern.<sup>307</sup> But the panel did not explicitly hold that it was a matter of only personal interest either. Likewise, in *Gomez*, the court found that the plaintiff's informing another agency's employee of the prospective change in residential patient stays was not a matter

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301. 846 F.2d 1021 (5th Cir. 1988). See also *infra* notes 337-39 and accompanying text.

302. *Id.* at 1023.

303. *Id.* at 1024.

304. *Id.*

305. Nor did the panel proceed to the next prong of *Davis-Day* analysis and inquire whether the information involved "would be of no relevance to the public's evaluation of governmental agencies." See *supra* note 257 and accompanying text.

306. *Noyola* is in the line of 5th Circuit cases that turn on a peculiar reading of *Connick*. In these cases, the court gives little attention to whether the speech in question dealt with "matters of public concern," but rather focuses on the "role" in which the employee spoke: whether as citizen or employee. See *infra* notes 319-52, 490-95 and accompanying text. The panel found the record to indicate "that Noyola was speaking to his supervisor primarily as an employee rather than in his role as a citizen." *Noyola*, 846 F.2d at 1024.

307. See *supra* notes 288-97 and accompanying text.

of public concern; neither was it exactly a matter of "personal" concern.<sup>308</sup> Rather, it was only a "matter of inter-agency debate."<sup>309</sup>

ii. *Terrell v. University of Texas System Police*<sup>310</sup>

The director of University police called on Chief Price to correct some management problems in the department. The problems included alleged harassment and favoritism practiced by various supervisors, including Captain Terrell, in relation to some lower echelon employees. Price assigned Terrell the job of revising the department policy and procedures manual. Subsequently, someone anonymously sent Price photocopies of pages from a small notebook or diary in Terrell's handwriting, many of which "reflected unfavorably on Price."<sup>311</sup> Price fired Terrell. The trial judge instructed the jury that three matters recorded in the notepad were of public concern. The matters were "Chief Price's policy of mandatory overtime; the need for supervisory training; and the need to conduct exit interviews with employees who resigned."<sup>312</sup> The Fifth Circuit, however, observing that Terrell had not attempted to communicate these matters to the public, held that they "were a wholly intra-governmental concern," not "matters of public concern."<sup>313</sup> But the court did not characterize the notes as a matter of personal interest, either. Again, we see that the court has been reluctant to hold that employee expression concerning the manner in which government is or should be operated is protected under the first amendment.<sup>314</sup>

The results in these cases derive from a peculiarly narrow view of the kinds of matters that may be considered of public concern. In effect, these panels have taken the position that public employee speech relating to the operations, procedures, or actions of their agency or other agency employ-

308. See *supra* notes 282-87 and accompanying text.

309. *Gomez v. Texas Dep't of Mental Health*, 794 F.2d 1018, 1021 (5th Cir. 1986). Elaborating on hyperbolic language in *Connick*, the *Gomez* panel went on to conclude that even if, as Gomez argued, his statement to the county center employee concerned "the proper treatment of the mentally ill in El Paso, Texas," it still would not qualify as a matter of public concern.

Almost anything Gomez might say about the internal office procedures or policies of the State Center could have some bearing on the Center's treatment of the mentally ill. If all such statements were treated as addressing 'matters of public concern,' government employees could with impunity express any job-related criticisms they might choose, in contravention of *Connick's* admonition that the Constitution 'does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.'

*Id.* at 1022. But see *Price v. Brittain*, 874 F.2d 252, 258 (5th Cir. 1989). The panel did not explain why it found it appropriate to apply *Connick's* concern about employee grievances to Gomez's speech which clearly was neither a "job-related criticism" nor a "grievance." The terms "impunity" and "immunity" suggest that the panel subscribed to the theory that job-related criticisms were *per se* contrary to governmental interests (if not quasi-criminal acts) and punishable as such. See *supra* note 80.

310. 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). Also see *infra* notes 322-28 and accompanying text.

311. *Id.* at 1361.

312. *Id.*

313. *Id.* at 1362-63.

314. But see *Mills v. Alabama*, 384 U.S. 214, 218 (1966), quoted *supra* note 183 and accompanying text.

ees, especially superiors, is only a personnel or grievance matter. This speech is not of public interest, even when it concerns effective or efficient delivery of services to the public.<sup>315</sup> The court has generally ignored the Ninth Circuit's test, under which "personnel disputes" and "grievances" are protected speech if the information involved *would* be relevant "to the public's evaluation of the performance" of the governmental agency.<sup>316</sup> Likewise, several panels seem to have disregarded the holding in *Gonzalez* that "an issue of private concern to the employee may also be an issue of public concern."<sup>317</sup> Instead, various Fifth Circuit panels have proceeded to develop additional doctrines and tests that have made it more difficult for public employee speech concerning agency operations to qualify for first amendment protection.

As a result, it no longer appears to be true that the first amendment gives strong protection to a junior public employee's criticism of a more senior official's words or acts.<sup>318</sup> As the cases just noted indicate, a public employee may be fired even if she merely suggests that agency efficiency would be improved by more equitable allocation of case loads; talks with another employee on the telephone about meeting with a higher level supervisor who has announced an "open door" policy; mentions a pending change in institutional policy to an employee of another agency that would be affected by it; or keeps a secret notebook containing comments regarding needed changes and procedures which criticize a superior. These strange results derive from new tests and criteria developed by Fifth Circuit panels since *Connick*.

#### 4. *New Fifth Circuit Criteria for Determining Whether Public Employee Speech Passes "the Threshold Test"*

*Connick*'s holding failed to provide clear guidelines for lower courts as to whether public employee speech deserves protection under the first amendment. In particular, *Connick* failed to say whether speech that was *not* concerned only with matters of personal interest was protected. One way the Fifth Circuit tried to make sense of *Connick* was to focus on the speaker's *role* rather than on the content of his or her speech. Under this test, even speech relating to matters of public concern might fail the threshold test attributed to *Connick*.<sup>319</sup>

##### a. *The "Role" in Which the Employee Spoke*

The "role" theory was first adumbrated in *Davis*, which emphasized the phrases "as a citizen" and "as an employee" in quoting *Connick*'s holding.<sup>320</sup> The panel found that *Davis*'s requests were all "personal" because

315. See also discussion of *Gomez* and *Noyola supra* notes 309, 282-86, 301-06 and accompanying text.

316. See *supra* notes 256-65 and accompanying text.

317. See *supra* notes 225-26 and accompanying text.

318. See *supra* note 1 and accompanying text.

319. See *infra* notes 320-44 and accompanying text.

320. *Davis v. West Community Hosp.*, 755 F.2d 455, 461 (5th Cir. 1985). See *supra* note 79 and accompanying text.

they arose in a context in which his own patient records were subject to investigation.<sup>321</sup> The panel's decision did not turn explicitly on the question whether Davis had spoken "as a citizen" or "as an employee." In some later cases, however, that distinction was critical. These cases held that if the employee spoke "as an employee," she would not be protected by the first amendment, no matter what the speech concerned.

In *Terrell*<sup>322</sup> another panel likewise emphasized the "as a citizen" and "as an employee" language from *Connick*.<sup>323</sup> The court expressly shifted attention from the content of the speech to the role of the speaker. By doing so, it was able to avoid having to determine whether the speech dealt only with a matter of personal interest or referred to matters of public concern.<sup>324</sup> The panel was concerned that the latter category become so broad as to allow *too much protection* for public employee speech:

Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.<sup>325</sup>

Under this test, even if the employee spoke in both "roles," her speech might still be outside the first amendment if spoken "primarily" as an employee. This reading of *Connick* conflicts with other Fifth Circuit holdings that public employee speech about both matters of public concern and other matters, in short, a mixed bag of concerns, would be protected.<sup>326</sup> The *Terrell* panel concluded that, regardless of the content of Terrell's "speech" in the secret diary,<sup>327</sup> he "was not terminated for speaking as a citizen upon matters of public concern" because he was speaking *only as an employee*.<sup>328</sup>

*Jett*,<sup>329</sup> decided almost two months after *Terrell*, made no mention of

321. *Id.* at 459. See *supra* notes 188-90, 253-57, 296-97 and accompanying text.

322. 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). See *supra* notes 310-314 and accompanying text.

323. *Id.* at 1362. *Terrell* did not, however, cite *Davis*.

324. Only a few months earlier, in *Rankin*, another panel (which included two of the same judges who served on the *Terrell* panel) had held that only speech relating to matters of public concern came within the first amendment. See *supra* note 300. *Rankin* and *Terrell* mark the beginning of two divergent Fifth Circuit "threshold" tests, both purportedly deriving from *Connick*.

325. *Terrell*, 792 F.2d at 1362. The court here evidently was building on hyperbolic or overbroad language in *Connick*. See *supra* note 118. Neither *Terrell* nor *Connick* had to do with "anything that occurs within a public office." Both concerned, more narrowly, public employee speech. Whereas in *Connick* the Court tried to classify the content of that speech in terms of "public concern/only personal interest" analysis, the *Terrell* panel focused primarily, if not exclusively, on the "role" in which the employee spoke. The tacit assumption appears to have been that *as employees* citizens have no first amendment speech rights.

326. See *supra* notes 225-26 and accompanying text.

327. See *supra* note 312 and accompanying text.

328. *Terrell*, 792 F.2d at 1363.

329. *Jett v. Dallas Indep. School Dist.*, 798 F.2d 748 (5th Cir. 1986), *aff'd in part*, 491 U.S. 701 (1989). See *supra* notes 220-22 and accompanying text.

either *Terrell* or of *Davis*' distinction between the "citizen" and "employee" roles. Nevertheless, the *Jett* panel considered it relevant that Jett's statements as to the eligibility of school athletes under proposed NCAA standards "were not made as part of Jett's performance of his official duties or as part of [the school district's] business."<sup>330</sup> The panel did not identify the factual basis for its conclusion that Jett's quoted remarks were not made in his official capacity. *Jett* could be seen as another of the "whistleblower" cases where the public employee is protected *so long as* he goes public.<sup>331</sup> The language quoted here implies that had Jett expressed his concern over the academic qualifications of the school's athletes in his role *as an employee*, for instance, in the principal's office or at a faculty meeting, his speech would *not* have been protected. The policy consequence of this "role" theory jurisprudence is to encourage public employees to run to the media with their concerns, rather than risk going through channels.<sup>332</sup>

The *Page* panel quoted *Connick*'s holding without emphasis<sup>333</sup> but then went on to identify cases where the court had (purportedly) held that the "public employees spoke as citizens"<sup>334</sup> and, on the other hand, cases where such employees were held to have spoken "as employees, not citizens."<sup>335</sup> Here, too, the panel paid no attention to the *content* of the employee's speech. Since the court found that Page's "decision to bypass normal communications channels" was a personnel matter,<sup>336</sup> it evidently concluded that she spoke only as an employee. Likewise, the *Noyola* panel, having determined that the employee's speech suggesting that services could be delivered more efficiently if case-loads were more equitably allocated<sup>337</sup> was nothing "other than the airing of an internal grievance," concluded that he had spoken primarily in his role as an employee, not as a citizen.<sup>338</sup> As such, the court found *Noyola*'s speech outside the first amendment. By using a "role" theory, the panel did not reach the question whether *Noyola*'s speech addressed a matter of public concern.<sup>339</sup> *Connick*, it will be recalled, left unprotected only speech on "matters *only* of personal interest."<sup>340</sup> *Rankin*, construing *Connick*, held that only speech relating to matters of public concern would be protected.<sup>341</sup> To these "role" theory panels, however, it did not matter whether the speech related to one kind of concern or

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330. *Id.* at 758.

331. See *supra* notes 162-91 and accompanying text.

332. See *supra* notes 180-91 and accompanying text. This implication also appears to run counter to *Givhan* and *Brown*. See *supra* notes 51-61, 180-183 and accompanying text.

333. *Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir. 1988).

334. *Id.* (citing *Thomas*, 784 F.2d at 653); *Wells v. Hico Indep. School Dist.*, 736 F.2d 243, 253 (5th Cir. 1984), *cert. dismissed*, 473 U.S. 901 (1985).

335. *Page*, 837 F.2d at 238 (citing *Connick v. Myers*, 461 U.S. 138, 148-49 (1983); *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *Day*, 768 F.2d at 100-01; *Davis v. West Community Hosp.*, 755 F.2d 455, 460-61 (5th Cir. 1985)).

336. *Page*, 837 F.2d at 238. See *supra* notes 288-95, 307 and accompanying text.

337. See *supra* notes 301-06 and accompanying text.

338. *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1024 (5th Cir. 1988).

339. *Id.*

340. See *supra* note 79 and accompanying text (emphasis added).

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

the other. For them, it was enough to divine the primary *role* in which the employee spoke. Their underlying presumption seems to have been that *employees* as such should be seen but not heard from.<sup>342</sup>

The tendency toward the "role" theory came to full expression in *Moore v. MVSU*, where the panel reformulated the threshold test entirely in terms of this new theory without even mentioning matters of public concern. The panel even attributed this "role" test directly to the Supreme Court:

The Supreme Court has stated that when a public employee speaks in her role as an employee, and not as a citizen, "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 behaviour."<sup>343</sup>

It may be significant that most of the panels relying on the "role" test held the employee speech unprotected.<sup>344</sup>

Not all panels, however, have used the "role" version of the threshold test. In more recent cases, including *Kinsey*,<sup>345</sup> *Scott*,<sup>346</sup> *Moore*,<sup>347</sup> *Frazier*,<sup>348</sup> *Johnston*,<sup>349</sup> and *Brawner*,<sup>350</sup> the court has specifically inquired whether the speech "addressed a matter of public concern." In each of these cases, the panels found that the employees' speech *did* address matters of public concern, and was therefore protected under the first amendment. The "role" test raises a higher threshold hurdle for public employees seeking to vindicate their first amendment rights than does the test set out by the Supreme Court in *Connick* and *Rankin*. According to *Rankin*, the question simply is whether or not the speech addressed a matter of public concern.<sup>351</sup> Arguably the Fifth Circuit has receded from using "role" analysis. The court specifically criticized the "role" approach in *Moore*:

We have not . . . used the labels "employee" and "citizen" because as an analytical matter, these labels can be misleading. Confusion in analysis can result because such an inquiry may cause us to lose sight of the inherent public-natured content of speech which in the context may appear to relate to an on-going employee matter.<sup>352</sup>

342. See *supra* note 80.

343. *Moore v. MVSU*, 871 F.2d 545, 551 (5th Cir. 1989).

344. Employees' speech was held unprotected in *Davis*, *Terrell*, *Page*, *Noyola*, *Moore v. MVSU*, and *Kirkland*. It was held protected in *Thompson* and *Jett*. See *supra* notes 84, 237-44, 266-73, 288-97, 301-14, 320-43 and accompanying text.

345. *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 276-79 (5th Cir. 1990).

346. *Scott v. Flowers*, 910 F.2d 201, 210-11 (5th Cir. 1990).

347. *Moore v. City of Kilgore*, 877 F.2d 364, 369-72 (5th Cir.) *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989). See *supra* notes 231-36 and accompanying text.

348. *Frazier v. King*, 873 F.2d 820, 825 (5th Cir.), *cert. denied sub nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989). See *supra* note 174 and accompanying text, and *infra* notes 386, 427.

349. *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1577 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 718, 107 L. Ed. 2d 738 (1990).

350. *Brawner v. City of Richardson*, 855 F.2d 187, 191-92 (5th Cir. 1988).

351. *Rankin v. McPherson*, 483 U.S. 378, 384-88 (1987); *Johnston*, 869 F.2d at 1577.

352. *Moore v. City of Kilgore*, 877 F.2d 364, 371 n.3 (5th Cir.), *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989).

b. "Isolated Acts by Specific Individuals"

*Davis* had to do with a surgeon's allegations that another physician's patient care was "ineffective," that this ineffective care was condoned by hospital officials, and that certain hospital board members had engaged in activities involving conflict of interest.<sup>353</sup> The panel had to determine whether these allegations addressed matters of public concern or only personal interests.<sup>354</sup> In finding that these allegations fell entirely into the latter category, the panel thought it significant that they "did not involve any policy or practice of the hospital" and that they were "related only to isolated, unsubstantiated acts by specific individuals."<sup>355</sup> The panel suggested, first, that complaints involving governmental agency policies or practices might qualify as matters of public concern.<sup>356</sup> Panels in some later cases, however, where employees' speech involved agency "policy or practice" did not find it protected on that account.<sup>357</sup> *Davis'* other suggestion, that speech "related only to isolated, unsubstantiated acts by specific individuals" fell outside the scope of matters of public concern, was also dropped in later cases. As to "unsubstantiated" charges, the court elsewhere recognized that the Supreme Court had established that even false speech is protected so long as it is not knowingly or recklessly false.<sup>358</sup> Other panels have found that speech concerning conduct by specific individuals in isolated instances did relate to matters of public concern.<sup>359</sup>

c. "Inhouse Context" vs. "Going Public"

*Davis* also invoked a test or consideration picked up in some later Fifth Circuit cases: namely, that even though statements or queries might *potentially* be matters of public concern, so long as they remain "in their inhouse context," they have "not yet achieved that status."<sup>360</sup> The *Davis* panel cited *Connick's* reference to "context" as a limitation on the Court's holding in *Givhan* that private communications are protected under the first amend-

353. *Davis v. West Community Hosp.*, 755 F.2d 455, 460 (5th Cir. 1985).

354. See *supra* notes 253-57, 296-97 and accompanying text.

355. *Davis*, 755 F.2d at 461. The panel did not explain its conclusion that *Davis's* complaint that hospital administrators condoned ineffective patient care did not involve hospital policy or practice.

356. See *supra* notes 253-57, 296-97 and accompanying text.

357. See *supra* notes 282-95, 301-15 and accompanying text. Where the employees' speech concerning agency policies and practices was made publicly or to the media, however, the court has sometimes found it protected. See *supra* notes 216-49 and accompanying text. *Pickering*, *Mt. Healthy*, and *Givhan* all found public employee speech regarding agency policies and practices protected under the First Amendment. See *supra* notes 6-9, 27-33, 51-54 and accompanying text.

358. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968); *Moore v. City of Kilgore*, 877 F.2d 364, 376 (5th Cir.), *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989); *Jett v. Dallas Indep. School Dist.*, 798 F.2d 748, 758 (5th Cir. 1986), *aff'd in part*, 491 U.S. 701 (1989). *But see supra* note 23 as to *Neubauer v. City of McAllen*, 766 F.2d 1567 (5th Cir. 1985) and *Megill v. Board of Regents*, 541 F.2d 1073 (5th Cir. 1976). In both of those cases the court hinted (but did not expressly find) that the speech in question had been knowingly or recklessly false.

359. See *supra* notes 214, 178-81, 224-36 and accompanying text.

360. *Davis v. West Community Hosp.*, 755 F.2d 455, 462 (5th Cir. 1985).



ment.<sup>361</sup> Following *Davis*, some panels took the position that to qualify as a matter of public concern, the topic either must *already* be under discussion in the community, or, if the topic was only of *potential* interest, the "speaker" must have been trying to "go public."

In *Brinkmeyer v. Thrall Independent School District* the court emphasized that the school board's split into contending factions had been discussed in the community.<sup>362</sup> The *Gomez* panel found that the length of patient stay had been discussed between the state and county mental health agencies, but not publicly debated in the larger community.<sup>363</sup> If a topic *is* demonstrably a matter of public debate or became such, as possibly evidenced by media attention, it would appear *ipso facto* a matter of public concern.<sup>364</sup> The court has been less than clear in defining the circumstances under which issues not yet discussed by the community at large might also qualify as matters of public concern.

We have seen that "whistleblower" speech is more likely to be found protected if the "whistleblower" in fact succeeded in going public.<sup>365</sup> Several panels have held that speech by public employees was unprotected because, among other reasons, the employees had not yet attempted to communicate their complaints to the general public.<sup>366</sup> These panels evidently considered whether the "speaker" had tried to communicate to the public an indicator as to whether the speech addressed a matter of public concern or, in the "role" theory cases, whether the employee was speaking "as employee" or "as citizen."<sup>367</sup> It is unclear, however, how this factor contributes to the threshold analysis. In *Givhan*, the Supreme Court made it clear that private speech may also be protected by the first amendment.<sup>368</sup> The fact that an employee attempted to go through channels to resolve problems relating to agency policies or practices,<sup>369</sup> or communicated privately with personnel of other agencies to advise as to pending policy changes,<sup>370</sup> says nothing about potential public interest in these matters. Likewise, the fact

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361. *Id.* at 460-61.

362. 786 F.2d 1292, 1295 (5th Cir. 1986). See *supra* note 214.

363. *Gomez v. Texas Dep't of Mental Health*, 794 F.2d 1018, 1019, 1021 (5th Cir. 1986).

364. The court so concluded on the basis of other considerations as well, e.g., in *Moore*, where the court viewed media interest as a key feature of the context indicating that the employee's speech involved a matter of public concern. *Moore v. City of Kilgore*, 877 F.2d 364, 371 (5th Cir.), *cert. denied*, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989). See also *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) ("Scott raised his criticisms . . . in a manner calculated to attract the attention of the public . . . . The public indeed was interested in Scott's views, as evidenced by the attention given his letter by the local media").

365. See *supra* notes 170-83 and accompanying text.

366. See *Ayoub v. Texas A&M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991); *Moore v. MVSU*, 871 F.2d 545, 551 (5th Cir. 1989); *McAdams v. Matagorda County Appraisal Dist.*, 798 F.2d 842, 846 (5th Cir. 1986); *Gomez*, 794 F.2d at 1022; *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). The *Noyola* panel implicitly used this factor; it thought it significant that no one (other than Noyola's supervisor) was "even alleged to have heard the speech." *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1024 (5th Cir. 1988).

367. See *supra* notes 320-44 and accompanying text.

368. See *supra* notes 51-62 and accompanying text.

369. See *Noyola*, 846 F.2d at 1021; *Page v. DeLaune*, 837 F.2d 233 (5th Cir. 1988).

370. *Gomez v. Texas Dep't of Mental Health*, 794 F.2d 1018 (5th Cir. 1986).

that a public employee made notes in a private diary<sup>371</sup> but had not yet presented the matters contained in those notes to public view tells nothing as to possible public concern about them.

Not all Fifth Circuit panels have insisted that the first amendment protects public employee speech on agency policies or practices only if the employee attempts to "go public."<sup>372</sup> A more appropriate test is the Ninth Circuit formula seemingly accepted by the *Davis* and *Day* panels.<sup>373</sup> Under this test, it makes no difference whether the employee had tried to contact Woodward and Bernstein<sup>374</sup> or other conduits to the general public. Rather, the dispositive question is whether the employee speech dealt with "information that would be of . . . relevance to the public's evaluation of the governmental agencies."<sup>375</sup> This test is both directly relevant and readily applicable in determining whether an employee's speech related to a matter of public concern. It contrasts favorably in these respects with judicial speculation as to the "role" in which an employee may have spoken,<sup>376</sup> and with the easily applied, but extraneous, inquiry as to whether the employee attempted to "go public."

Public employee plaintiffs who survive the threshold test, and thus are found to have had a first amendment interest in their speech, do not necessarily succeed in vindicating that interest. Under *Pickering/Connick*, governmental interests are to be weighed and then balanced against the employee's and the public's first amendment interest in her speech.<sup>377</sup> The Fifth Circuit has developed some additional tests of its own for weighing and balancing. Some of these tests make it more difficult for public employees to prevail in such cases. Others attach greater weight to the value of protecting free speech.

### B. *Weighing Governmental Interests Against Public Employees' First Amendment Speech Rights*

Under *Connick*, as construed in *Rankin*, once a court has determined that an employee's speech related to a matter of public concern, the court must undertake to weigh and balance the employee's free speech interests against the government's interests in suppressing such speech. *Connick* established a variable scale, depending on the importance of the interests on either side of the balance. The Fifth Circuit added a special "sliding scale" to be used in certain circumstances. In addition, the Fifth Circuit identified certain factors that were to be considered in assessing the importance of the speech

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371. *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987).

372. *See Brinkmeyer v. Thrall Indep. School Dist.*, 786 F.2d 1291 (5th Cir. 1986); *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985).

373. *See supra* notes 256-65 and accompanying text.

374. *See supra* note 183 and accompanying text.

375. *Davis v. West Community Hosp.*, 755 F.2d 455, 461 (5th Cir. 1985) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)); *see Day*, 768 F.2d at 700.

376. *See supra* notes 320-52 and accompanying text.

377. *See supra* notes 6-26, 63-118 and accompanying text. *Rankin* also contributed further considerations to the balancing analysis. *See supra* notes 140-56 and accompanying text.

interests, and a number of criteria applicable in appraising governmental interests. We turn first to the balancing theories.

### 1. *Balancing with Sliding Scales*

According to *Connick*, “[t]he state’s burden in justifying a particular discharge varies depending upon the nature of the employee’s expression.”<sup>378</sup> The Court did not explain what it meant by the “nature” of an employee’s expression. It did, however, add a second sliding scale for those situations where an employer believes that an employee’s speech could potentially disrupt the office and destroy working relationships.<sup>379</sup> There, the employer could take steps before such disruption or destruction actually occurred; however, the Court cautioned, “a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.”<sup>380</sup> *Rankin* added yet another sliding scale, depending on the employee’s responsibilities within the agency<sup>381</sup> by virtue of its statement that “The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails.”<sup>382</sup>

Certain Fifth Circuit panels have introduced minor variations on these balancing formulas. *Gonzalez* repeated the first of the *Connick* formulas, and modified the second only slightly by adding “of disruption” after “showing.”<sup>383</sup> *Matherne* added two more significant variations. In the first, it detached the second *Connick* formula from the context in which it was applied: an employer’s curtailment or punishment of employee speech because of the employer’s belief it was likely to disrupt office operations.<sup>384</sup> The panel then set out the *Connick* formula as applicable in all situations: “[In] *Gonzalez v. Benavides*, we explained that the balancing test is not all-or-nothing but rather a sliding scale in which ‘public concern’ is weighed against disruption: ‘[A] stronger showing of disruption may be necessary if the employee’s speech more substantially involves matters of public concern.’”<sup>385</sup> It is to be noted that “disruption” here is also removed from its context in *Connick*, where it was a question of “disruption of the office.”<sup>386</sup> Under *Matherne*, it would seem, “disruption” might refer to anything.

The *Matherne* panel’s second variation on *Gonzalez*’ sliding scale related to the extent of the state’s burden of proof:

Occasionally, the state’s burden to justify its actions may be as light

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378. *Connick v. Myers*, 461 U.S. 138, 150 (1983).

379. *Id.* at 152.

380. *Id.*

381. *Rankin v. McPherson*, 483 U.S. 378, 390 (1987).

382. *Id.*

383. See *infra* note 385 and accompanying text.

384. Compare *Connick*, 461 U.S. at 151-52; *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985).

385. *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988).

386. Another panel subsequently construed *Matherne* to have held “that the greater the public concern, the greater the disruption must be to give rise to qualified immunity.” *Frazier*, 873 F.2d at 826.

as merely proving that the employer "reasonably believed the employee's speech was likely to disrupt its operations." However, where, as here "the employee's speech more substantially involves matters of public concern," the burden increases to require *objective evidence of disruption*.<sup>387</sup>

*Gonzalez* had not specified that *objective* evidence would be required when an employee's speech "more substantially involves matters of public concern." In effect, the *Matherne* panel called for a heightened level of scrutiny where employee speech addresses more substantial, significant, or important matters of public concern. This second variation on the *Gonzalez* formula appears to have been intended to apply to all balancing, not just to balancing in situations where an agency superior anticipates potential disruption of office operations.

Using one or another of these "sliding scales," Fifth Circuit panels have proceeded to "balance" the employee speech interests against various purported governmental interests. Several new factors or emphases emerged in the course of these decisions. We turn first to those on the side of the speech interests.

## 2. *Weighing the Importance of Public Employee Speech Interests*

*Connick's* balancing formula referred to "the nature" of employee speech and the extent to which such speech substantially addressed matters of public concern. It may be inferred that by "nature," the Court meant to indicate the *importance* of the employee's speech, that is, "whether it affects a matter of great public concern" or one of lesser consequence.<sup>388</sup> Surprisingly, few post-*Connick* Fifth Circuit cases attempt to measure the importance or weight of the free speech interests. Attention to this consideration appears only in recent decisions.

In *McBee*, the en banc court noted that under *Connick* the district court, on remand, should consider the degree to which the deputies' activities involved public concerns and the gravity of these concerns.<sup>389</sup> The court, however, then proceeded to identify only factors that related to possible negative effects of the employees' speech on the sheriff's office's performance of its responsibilities.<sup>390</sup> The *Gonzalez* panel was the first to identify issues presented by public employee speech as matters of "significant" or "substantial" public concern.<sup>391</sup> As such, the panel concluded, they outweighed the relatively slight ways Gonzales' speech might have adversely affected governmental operations.<sup>392</sup> The *Rankin* panel, using slightly different nomenclature, found that McPherson's comment in connection with the assassination attempt on President Reagan "was evoked by and addressed

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387. *Matherne*, 851 F.2d at 761 n.53 (emphasis added) (citations omitted).

388. *Connick v. Myers*, 461 U.S. 138, 150 n.9 (1983).

389. *McBee v. Jim Hogg County*, 730 F.2d 1009, 1013, 1016 (5th Cir. 1984).

390. *Id.* at 1016-17.

391. *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). See *supra* notes 228-29 and accompanying text.

392. *Id.* at 1302-03.

serious matters of public concern," and therefore outweighed its negligible effects on the government's interest in maintaining an efficient office.<sup>393</sup> Presumably the court of appeals would adjudge whether matters of public concern were sufficiently significant, substantial, or serious. But none of the cases indicate the criteria to be applied in making such a judgment.<sup>394</sup> Later, another panel referred to the "weight" of a public employee's speech, but found it outweighed by the affected governmental interests.<sup>395</sup> The court's most thorough inquiry to date as to the nature and importance of speech interests is set out in *Moore*.<sup>396</sup>

The *Moore* panel found that both firefighter Moore and the public or local citizenry had a "strong" or "extremely significant" interest in his speech.<sup>397</sup> The panel identified the nature of Moore's interest as speaker, specifically, the ability to disseminate information on the effectiveness of the fire department throughout the community, without fear of reprisal, in order to awaken the political conscience of the community so as to bring about needed change.<sup>398</sup> Thus, Moore had a significant interest in his speech on that issue.<sup>399</sup> As rationale, the court stated "The First Amendment accords all of us, as participants in a democratic process, room to speak about public issues."<sup>400</sup> Some earlier decisions had also emphasized the *public's* interest in hearing public employee speech in order to make informed judgments as to the performance of governmental functions. *Connick* itself had urged that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"; "'speech concerning public affairs is more than self-expression; it is the essence of self-government.'"<sup>401</sup> The Fifth Circuit has insisted that the first amendment especially protects speech on the manner of government operations.<sup>402</sup> One panel also emphasized the societal interest in protecting the integrity of the judicial system from damage that would result if the government were permitted to retaliate against employees who provided

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393. *Rankin v. McPherson*, 483 U.S. 378, 390 (1987) (emphasis added). See *supra* notes 208-12 and accompanying text.

394. Panels have also said that to merit protection, speech must relate to matters of "legitimate public concern." *Coats v. Pierre*, 890 F.2d 728, 732 (5th Cir. 1989); *Day v. South Park Indep. School Dist.*, 768 F.2d 696, 700 (5th Cir. 1985) (emphasis added). The court has not said how it would distinguish between matters of "legitimate" public concern and other such matters. Compare *Pickering v. Board of Educ.*, 391 U.S. 563, 571 (1968), which refers to "a matter of legitimate public concern," but does not limit first amendment protection to such speech.

395. *Price v. Brittain*, 874 F.2d 252, 258-59 (5th Cir. 1989). See *supra* note 169.

396. *Moore v. City of Kilgore*, 877 F.2d 364 (5th Cir.) cert. denied, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989). See *supra* notes 231-36 and accompanying text.

397. *Id.* at 372-73, 376.

398. *Id.* at 372.

399. *Id.*

400. *Id.* at 371.

401. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted).

402. *Brown v. Texas A&M Univ.*, 804 F.2d 327, 337 (5th Cir. 1986) (citations omitted). See also *Gonzalez v. Benavides*, 774 F.2d 1295, 1299 (5th Cir. 1985). See also the Ninth Circuit test approved, though not utilized, in *Davis*, which refers to information relevant to the public's evaluation of a governmental agency's performance. See *supra* notes 256-59 and accompanying text.

damaging testimony against their employers before official adjudicatory or fact-finding bodies.<sup>403</sup> The *Moore* court urged that the first amendment protects the public's interest as "a willing listener."<sup>404</sup> That court concluded, "[t]he public, naturally, cares deeply about the ability of its Fire Department to respond quickly and effectively to a fire. If staffing shortages potentially threaten the ability of the Fire Department to perform its duties, people in the community want to receive such information."<sup>405</sup> To some extent, the speaker's and the public's interest coalesce. The *Moore* court's recognition of separate interests, however, clarifies the interests at stake, and should provide helpful guidelines for reflection by other panels on the nature and weight of the employee's speech interests. *Moore*'s analysis provides for greater precision than can be achieved if the court thinks only of the employee's first amendment speech "right." This right is a somewhat vague or evasive value when contemplated apart from the employee's practical interest in its free exercise. The community also has an interest in matters related to delivery of services affecting public safety or welfare.

### 3. *Factors Relating to the Nature and Weight of Governmental Interests*

Through its major decisions from *Pickering* to *Rankin*, the Supreme Court set out and refined considerations for appraising the nature and extent of governmental interests to weigh against the public employees' speech.<sup>406</sup> In view of the many and diverse statements as to governmental interests and related criteria enunciated by the Court, it is not surprising that Fifth Circuit case law presents a variegated picture.

#### a. "Close Working Relationships": *McBee* Factors

The court's first discussion of governmental interests following *Connick* was in its en banc opinion in *McBee*.<sup>407</sup> The court summarized *Connick*'s statements as to governmental interests in two different ways. The first was, "the government's legitimate interest in maintaining proper discipline in the public service, to the end that its duties may be discharged with efficiency and integrity."<sup>408</sup> Second, in reviewing the *McBee* facts, the court proposed to focus on the question "whether 'close working relationships are essential to fulfilling [the deputies'] public responsibilities.'"<sup>409</sup>

The en banc court added certain other factors to be considered in assessing the impact of employee speech on these interests. As to appraising the governmental interest in maintaining proper discipline, the court added the

403. *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989), cert. denied, 110 S. Ct. 718, 107 L. Ed. 2d 738 (1990).

404. *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir.), cert. denied, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989).

405. *Id.*

406. See *supra* notes 10-12, 19-26, 61-62, 88-118, 140-56 and accompanying text.

407. *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1985). See *supra* notes 200-03 and accompanying text.

408. *Id.* at 1013. Cf. *Connick v. Myers*, 461 U.S. 138, 150-51 (1983).

409. *McBee*, 730 F.2d at 1016. Cf. *Connick*, 461 U.S. at 151-52 (when such relationships are essential, "a wide degree of deference to the employer's judgment is appropriate.").

factor of the employee's *motive* in engaging in the speech at issue.<sup>410</sup> This factor was not articulated in *Connick*, which had identified manner, time, place, and context as relevant considerations in determining the validity of a supervisor's fear that the employee's speech had the potential for undermining office relationships.<sup>411</sup> Expanding on the second *Connick* inquiry, whether "close working relationships are essential to fulfill [the agency's] public responsibilities," the *McBee* court first added that "the closeness of a working relationship as it affects job performance is not to be gauged merely by the size of the office or the number of employees. Rather, it is a function of the particular 'public responsibility' being carried out."<sup>412</sup> The court then noted several other considerations that might bear on the question whether the employee's speech would significantly disrupt the office's ongoing operation,<sup>413</sup> such as whether the employee's speech was "sufficiently hostile, abusive or insubordinate" as to have that effect.<sup>414</sup> For instance, even where an intimate working relationship is not implicated, "an appointive senior official's public disavowal of the authority of his superiors may constitute such disruption as to outweigh his First Amendment right in that speech."<sup>415</sup> Previous derogatory speech about one's superior also might be outweighed. Following a political campaign, the successful candidate need not have "forced on [his] organization an individual who has blackguarded [his] honesty and ability up and down the county."<sup>416</sup> Later panel decisions picked up some of these new factors and also added some others.

b. "Make or Break" Authority and Manner of Relating to Officials:  
Gonzalez Considerations

The *Gonzalez* panel explicitly identified another new factor limiting the employee's freedom to speak.<sup>417</sup> In order to safeguard the political process, the court said, the rights of "senior government employees to exercise broad discretionary authority [who thereby] may be able to 'make or break' the programs and policies of elected officials" might have to be curtailed.<sup>418</sup> In addition, *Gonzalez* noted some considerations that would be relevant in appraising whether such an employee's speech posed any threat to the elected officials' political program. The panel noted that Gonzalez had not refused to carry out the elected officials' directions that were not inconsistent with the agency's regulations; that he offered to cooperate with the officials in all

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410. *McBee*, 730 F.2d at 1013 (emphasis added). Recently the court has cautioned against focusing on employee motivation to the exclusion of other relevant factors. *Thompson v. City of Starkville*, 901 F.2d 456, 465 n.7, 466 (5th Cir. 1990) (citing *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988)).

411. *Connick*, 461 U.S. at 152-53. See *supra* notes 101-11 and accompanying text. The *Connick* majority had, in conclusory fashion, attributed to Myers only self-serving intent. See *supra* note 118.

412. *McBee*, 730 F.2d at 1016. Cf. *supra* note 382 and accompanying text.

413. *Id.* at 1017.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Gonzalez v. Benavides*, 774 F.2d 1295, 1300 (5th Cir. 1985).

418. *Id.*

other ways; and that he did not attempt to obstruct their investigation. Rather, Gonzales merely objected to the commissioners' violation of agency regulations.<sup>419</sup> In *Givhan*, the Supreme Court had set out manner, time, and place as the criteria to be applied in determining whether institutional efficiency is threatened<sup>420</sup> by a government employee's personal confrontation of his immediate superior.<sup>421</sup> The *Gonzalez* panel pointed out that Gonzalez was polite throughout his various encounters, did not engage in personal attacks on the officials, and had often offered to cooperate in resolving the problems.<sup>422</sup> These considerations all appear to relate to the employee's *manner* of speech. Conversely, in *McAdams*, another panel found that an appointed discretionary employee was probably terminated because he refused to cooperate with elected officials, and because he communicated with the officials in a "rude and hostile manner."<sup>423</sup> This panel found "extensive evidence that McAdams' refusal to cooperate with the Board disrupted the effective functioning of the [agency]."<sup>424</sup>

### c. *Disruption, Discipline, Insubordination, and Efficiency*

Two lines of cases incorporate further developments in the Fifth Circuit. In one, the court has emphasized that "disruption" of governmental efficiency is to be given little weight when the employee's speech serves to expose wrongdoing by government officials.<sup>425</sup> As early as *Porter*, a post-*Pickering*, but pre-*Connick* case, the court held:

The First Amendment balancing test can hardly be *controlled* by a finding that disruption did occur. An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.<sup>426</sup>

Several post-*Connick* Fifth Circuit cases have likewise so held.<sup>427</sup>

Another series of cases focuses on the importance of discipline and the

419. *Id.* at 1302.

420. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415 n.4 (1979). *See supra* note 61 and accompanying text.

421. *Id.*

422. *Gonzalez v. Benavides*, 774 F.2d 1295, 1303 (5th Cir. 1985).

423. *McAdams v. Matagorda County Appraisal Dist.*, 798 F.2d 842, 846, 848 (5th Cir. 1986). The report does not describe the specific conduct the panel characterized as rude and hostile.

424. *Id.* at 847.

425. *See infra* note 427 and accompanying text.

426. *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979) (emphasis in original).

427. *See Frazier v. King*, 873 F.2d 820, 826 (5th Cir.), *cert. denied sub nom. Davoli v. Frazier*, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989) ("Although Frazier's 'whistle blowing' obviously created tension and difficulties at Wade [the facility], when weighed against the exposure of unethical medical practices affecting hundreds of inmates, the disruption is a minimal interest.") *See also Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) ("Even assuming that the department maintained an interest in a confidential investigation, such an interest would be outweighed by the public's interest in the disclosure of misconduct or malfeasance.").



peril of insubordination. *Connick* had used language suggesting that discipline of public employees is, as such, an important governmental interest.<sup>428</sup> In *McBee*, the court stated that it was appropriate to inquire whether an employee's activity had been so "insubordinate" as to cause a significant disruption in the office's continued operation.<sup>429</sup> Here insubordination is not regarded as a bad thing in itself; the critical question is whether it had significantly disrupted the office's operation. In some later cases, as well, the court was careful to point out that insubordination, without more, was not an important governmental concern.<sup>430</sup> The Fifth Circuit has generally held that "loyalty" and "discipline" are not to be taken as abstract governmental interests per se, but rather are to be seen in relation to their effect on a particular agency's operations.<sup>431</sup>

The *Moore* court held that even efficiency is not, itself, an absolute value.

Creating room for free speech in a hierarchical organization necessarily involves inconveniencing the employer to some degree. Speech concerning public affairs usually creates attendant inefficiencies in the running of the public entity. But efficiency is not an end-all and be-all goal of a democracy. Speech among the people helps to maintain the vitality of self-government.<sup>432</sup>

Applying the *Pickering* test for governmental interests, reiterated in *Rankin*,<sup>433</sup> the *Moore* court insisted that the critical question was whether the government's interest in promoting the efficiency of the public services its employees perform "outweighs [the employee's] and the public's interest in his speech that addresses a matter of public concern."<sup>434</sup> The court found that Moore's insubordinate speech had little or no impact on the effectiveness or efficiency of the City's operations or other interests, and that the public's and Moore's interest in his speech was of substantially greater weight.<sup>435</sup> The *Moore* court's careful description of the various affected interests involved, and its close attention to the actual extent of any impact Moore's speech may have had upon them, provide an exemplary model for courts to follow when undertaking to identify, weigh, and balance competing first amendment and governmental interests.

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428. See *supra* notes 91-94 and accompanying text.

429. *McBee v. Jim Hogg County*, 730 F.2d 1009, 1017 (5th Cir. 1984).

430. *Moore v. City of Kilgore*, 877 F.2d 364, 374-76 (5th Cir.), cert. denied, 110 S. Ct. 562, 107 L. Ed. 2d 557 (1989); *Browner*, 855 F.2d at 192.

431. See *Moore*, 877 F.2d at 374; *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985). In some other cases, however, the court's determination that the speech in question did not relate to matters of public concern appears to have been colored by an implicit assumption that speech on matters of personal interest is somehow inherently insubordinate or disruptive. See *supra* note 80 and notes 266-317 and accompanying text.

432. *Moore*, 877 F.2d at 364.

433. See *supra* notes 11, 142 and accompanying text.

434. *Moore*, 877 F.2d at 372.

435. *Id.* For further consideration of the court's analysis in *Moore*, see Hiers, *supra* note 74, at 118-19. Cf. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971) (firemen's political speech held unrelated to performance of their duties and therefore protected).

## IV. CONCLUSIONS

As has been seen, it can no longer confidently be said that “[t]he First Amendment ensures that under most circumstances even the most junior clerk typist can criticize the speech and acts of the top officials, in her office as freely as any citizen can.”<sup>436</sup> Both Supreme Court and Fifth Circuit decisions have contributed to the erosion of first amendment protection for government employee speech.

A. *The Supreme Court Decisions*

The seeds of many later difficulties were already contained in *Pickering*.<sup>437</sup> There the Court hinted, though it did not so specify, that public employee speech might be entitled to first amendment protection only if it related to “matters of public concern.”<sup>438</sup> Later, the Supreme Court would declare that ascertaining whether the employee’s speech addressed a matter of public concern was the sole test for determining whether such speech was within the first amendment at all.<sup>439</sup> *Pickering* gave little guidance as to what kinds of questions might be considered matters of public concern. Moreover, by proposing that an employee’s speech interest should be balanced against the State’s interest in the efficiency of its public services,<sup>440</sup> the Court tacitly assumed that employee speech of any sort is likely to intrude on “the efficiency” of governmental operations. A number of subsequent Supreme Court and the Fifth Circuit decisions likewise appear to reflect this assumption. It probably underlies the Court’s later determination that only public speech relating to matters of public concern should be accorded first amendment protection, as if employee speech on other matters *necessarily* would be adverse to governmental interests in efficiency.<sup>441</sup> The *Pickering* formula seemed to presume that only “the government” had a legitimate interest in promoting the efficiency of an agency’s performance of its public responsibilities, and that employees were incapable of such concern or that their insights and suggestions as to such matters were inherently subversive.

The Supreme Court’s unanimous 1977 decision in *Mt. Healthy*<sup>442</sup> established that in order to prevail in first amendment speech actions, government employee plaintiffs must show that they were punished *because* they had exercised their speech rights. This causation requirement had already been implicit in *Pickering*. What was new was that the Court now went on to provide that even though protected speech played a “substantial part” in the governmental decision to punish an employee, such punishment would not necessarily constitute a constitutional violation worthy of remedial action.<sup>443</sup> After *Mt. Healthy*, the defendant employer or supervisor could escape liabil-

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436. See *supra* note 1 and accompanying text.

437. See *supra* notes 6-26 and accompanying text.

438. See *supra* note 11 and accompanying text.

439. See *supra* note 130 and accompanying text.

440. See *supra* note 11 and accompanying text.

441. See *supra* note 80.

442. See *supra* notes 27-50 and accompanying text.

443. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977).

ity entirely if it could persuade the court that it would have punished the employee anyway.

Did this mean that governmental employees who served "at pleasure" or without tenure, and thus could be dismissed without cause, would be left without any first amendment protection? Or did it mean that if protected speech played a substantial part in the decision to dismiss such employees, the governmental employer or supervisor defendant would have to come forward with reasons to justify its actions, reasons that otherwise would not have been required? And would district courts then scrutinize such reasons to make sure that they were not merely a pretext? In the latter instance, the courts would have the added task of speculating what employers or supervisors would have done had they not violated employees' speech rights.

*Mt. Healthy* implicitly invited governmental employers or supervisors to penalize employees for exercising their first amendment rights, and then invent *post hoc* pretexts to justify their actions.<sup>444</sup> Instead, the Court could have made clear that when governmental employees' first amendment rights had been violated, they could recover, at a minimum, monetary damages *whether or not* their employers or supervisors would have dismissed or otherwise sanctioned them on other grounds.<sup>445</sup>

Two years later, in *Givhan*, the Court strengthened public employees' speech rights. Specifically, the Court held that public employees need not make their expressions public in order to bring them within first amendment protection. Speech in the form of private communication with an employer or supervisor would also be protected, provided the content, manner, time, and place of such speech did not threaten the agency's institutional efficiency. Neither *Mt. Healthy* nor *Givhan* considered whether, or determined that, the respective employees' speeches had addressed a "matter of public concern." *Connick* itself was curiously vague on this point as well.

In *Connick*, a divided Court, using strangely contorted language, held that a public employee's speech on matters of only personal interest would not be protected.<sup>446</sup> The majority did not explain *why* speech on such matters was to be denied first amendment protection. In view of the Court's extreme concern that governmental employers need not tolerate disruptive or insubordinate conduct by employees,<sup>447</sup> it can be inferred that the Court sim-

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444. See *supra* notes 35-49 and accompanying text.

445. See *supra* notes 40-50 and accompanying text. It need not follow that in such circumstances the court must order both damages and reinstatement. In *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273 (5th Cir. 1990), the Fifth Circuit upheld an award of damages; the decision does not indicate that the discharged employee was or would be reinstated. Various types of remedies are described in *Gonzalez v. Benavides*, 774 F.2d 1295, 1298 and n.7 (5th Cir. 1985); *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109, 1113-14 (5th Cir. 1980). Possibly the plaintiff-employee in *Mt. Healthy* failed to request alternative relief.

446. See *supra* notes 63-81 and accompanying text.

447. See *supra* notes 80, 149. "[C]ourts confronting free speech claims of public employees are notably solicitous toward public employers and correspondingly unwilling to treat employees' interests in expression seriously." Ingber, *supra* note 80, at 55. Ingber observes that deference to employer supervisors does not necessarily promote efficiency. "[T]he risk is constant that the efficiency goal relied upon to limit employee free speech is but the prejudices, insecurities, and authoritarian nature of speech regulators." *Id.* at 63. Such deference reflects not only

ply assumed that employee speech on personal matters would impinge on governmental interests.<sup>448</sup> Perhaps the Court also presumed that speech on "personal" matters would have little or no social value.<sup>449</sup> It appears likely that the Court's determination that employee speech on merely personal matters was to be outside the first amendment's protection was based on its subliminal pre-judgment that governmental interests would generally outweigh the value of such speech. The *Connick* Court attempted to categorize all speech on matters of office policy as merely personal, and therefore not of public concern. Evidently it was unwilling to credit either employees or the public with an interest in such matters as office morale and efficiency.<sup>450</sup>

*Connick* did not explicitly hold that only speech relating to matters of public concern would be protected. Nevertheless, it identified three factors to be considered in determining whether an employee's speech addressed a matter of public concern, specifically, "content, form, and context . . . as revealed by the whole record."<sup>451</sup> The Court did not say what kind of speech might be deemed related to matters of public concern. Afterwards, appellate courts, attempting to apply *Connick* experienced considerable difficulty defining what constitutes a matter of public concern.<sup>452</sup>

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judicial commitment to an outmoded theory of management which presumes that efficiency depends upon hierarchical authority. *Supreme Court, 1982, supra* note 74, at 169 n.49. This might be called the keep-on-picking-cotton-and-keep-your-mouth-shut theory of desired employee conduct. It also reflects a naive equation of the government's interest with the interest of agency superiors, as if the latter were somehow exempt from tendencies to protect turf, play power games, and otherwise act on the basis of their own self-serving interests. "[In *Connick*] the Court was deferential to the dictating hand of the public employer and was oblivious of the public benefits that could ensue from such employee complaints." Note, *supra* note 80, at 474-75. See also *supra* note 214.

448. One recent commentator has argued persuasively that the threshold question should be whether the employee's speech clearly interfered with the agency's ability to function, rather than the nature of the speech. Absent a showing of interference, the speech should be protected. Comment, *supra* note 118, at 1136-38. See also Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990). Estlund concludes that the "public concern" test "inevitably leads to the suppression and the deterrence of speech that is important to public debate." *Id.* at 55. She urges that the public concern test no longer be treated as the *threshold* test; instead, inquiry should proceed, as in *Pickering*, by weighing the employee's interest in speaking against the government's interest in effective performance of its functions. *Id.* at 52-53. See also Masarro, *supra* note 46, at 67-68 (proposal of balancing approach).

449. The "personal interest"/"public concern" dichotomy ignores inherent connections between the two.

The *Connick* formula systematically denigrates the importance of the particular grievance in generating public concern over an issue. As such, it deprives each individual self-interested speaker of the very legal protections she may need in order to discover and join with those who may share her concerns. Such a conception of matters of public concern enforces a truncated vision of public debate and cuts off the roots from the branch of public discourse and democratic governance.

Estlund, *supra* note 448, at 38.

450. "The bizarre result of the *Connick* majority's holding is that statements about the operational efficiency of public employers are apparently not deserving of first amendment protection, while statements about teacher dress codes are deserving of such protection." Note, *supra* note 80, at 466-67.

451. See *supra* note 83 and accompanying text.

452. Fifth Circuit panels have remarked upon the problem. *Thompson v. City of*

Moreover, *Connick* was entirely silent as to the constitutional status of employee speech that related neither to "matters of only personal interest" nor to matters of public concern. The Court seemed to assume that these two categories constituted the entire universe of employee speech. That would be true only if the realm of speech concerning matters of public concern included all speech that was *not* related to matters of only personal interest. Subsequently, various Fifth Circuit panels, unwilling to view the realm of "matters of public concern" so broadly, evidently felt constrained by *Connick* to categorize speech on neutral or *tertium quid* matters as "personal" and therefore unprotected.

*Connick* also restricted governmental employee speech rights at another level of analysis. *Pickering* required employers or supervisors to show that protected speech actually had interfered with office operations or impeded the employee's performance of his duties.<sup>453</sup> *Connick* allowed governmental superiors to penalize employee's speech if the superior merely feared that such speech *might* disrupt the office or destroy "working relationships."<sup>454</sup> The *Connick* court, according to the employer's beliefs a large measure of deference, found such fears reasonable.<sup>455</sup> After *Connick* courts not only had to determine whether governmental employees' protected speech had actually impacted adversely on agency operations; they also had to speculate whether supervisors had reasonably feared that lower-ranking employees' speech *might* have such effect. Clearly *Connick* tilted towards limiting protection for governmental employees' speech rights.

In *Rankin*, the Court unambiguously declared that whether a public em-

Starkville, Miss., 901 F.2d at 456, 461 (5th Cir. 1990); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 798 (5th Cir. 1990). See Comment, *supra* note 118, at 1110.

453. *Connick v. Myers*, 461 U.S. 138, 166-67 (1983) (Brennan, J., dissenting).

454. See *supra* notes 100-02 and accompanying text.

455. *Connick*, 461 U.S. at 151-52, 154. Numerous commentators have criticized this feature of *Connick* for its chilling effect on employee speech and attendant adverse policy consequences. Comment, *Constitutional Law—First Amendment—Freedom of Speech—Public Employees—Connick v. Myers*, 30 N.Y.L. SCH. L. REV. 417, 438-42 (1985):

Faced with . . . losing their jobs, government employees are likely to adopt a cautious approach . . . and withhold both public and private opinions critical of their employers. As a consequence, the general public may be deprived of inside information about the manner in which the government discharges its public services. This removal of access to the invaluable repository of information possessed by public employees may severely undermine the role of the citizenry in self-governance.

*Id.* at 442. See Handler, *supra* note 257, at 317-18; Note, *Constitutional Law—Supreme Court Restricts First Amendment Rights of Public Employees—Connick v. Myers*, 58 TUL. L. REV. 831 (1984); Note, *Constitutional Law—First Amendment—Dismissal of State Employee for Distributing Questionnaire Upheld Where Speech Tangentially Affected Public Concern And Questionnaire Had Potential to Disrupt Office, Undermine Supervisory Authority, and Destroy Close Working Relationships: Connick v. Myers*, 13 U. BALT. L. REV. 365 (1984). See also Ingber, *supra* note 80, at 58-59:

[The] worker can be removed when an employer merely *anticipates* that [employee questioning] might get too disruptive. Hence, the employer can prevent a grievance from spreading and capturing the public's interest. . . . The Court's language is reminiscent of that found in the very first free speech cases decided around 1920 and of those during the Communist scare of the 1950s.

*Id.*

ployee's speech related to matters of public policy was the "threshold question" for first amendment analysis.<sup>456</sup> Lower courts would thereafter know where to begin analysis in such cases. Unfortunately, *Rankin* added little guidance as to what kinds of matters might be of public concern for purposes of the first amendment.

The Court made a serious mistake when it erected this threshold test.<sup>457</sup> This test in effect denied that public employees have any constitutionally protected interest or right *of their own* in their speech, whether in the workplace or elsewhere. Instead, their speech is sheltered by the first amendment only if and to the extent that it contributes to public debate or provides the public with needed information.<sup>458</sup> It is conceptually erroneous and confusing to treat *the public's* interest or benefit as a factor, much less as the *sine qua non*, in determining whether *the employee speaker* has a protected interest in his speech. Such treatment ignores the speaker's own interests, which may not be entirely identical with the public's.<sup>459</sup> Before *Rankin*, lower courts could have attempted to limited *Connick's* potential for undermining public employee speech rights by denying first amendment protection only to speech clearly arising out of personal grievances. Since *Rankin's* explicit holding that only speech on matters of public concern will be considered for such protection, harmless expressions on personal and *tertium quid* matters may cost employees their job if the speech somehow happens to displease agency superiors. Absent the Court's revisiting and eliminating this "threshold question," lower federal courts can afford first amendment protection to public employee speech only by finding it within a broader spectrum of matters of public concern. Whether or not a court will do so may depend more on the individual judge's values than on the content and nature of the employee's speech.<sup>460</sup>

As to balancing interests, *Rankin* defined the nature of the relevant governmental interests more narrowly and precisely than *Pickering* and *Connick*. These earlier cases had referred, variously, to the importance of

456. See *supra* notes 130-35 and accompanying text.

457. See *supra* notes 448-49.

458. See *infra* notes 529-35 and accompanying text.

459. On this important distinction, see *Developments, supra* note 80, at 1769-70:

The Court's consistent failure to identify and elaborate public employees' interests in expression has resulted in a body of case law that belittles those interests by ignoring them.

...  
Among such interests are the right of public employees not to share the majoritarian views of their employers [citing, *inter alia.*, *Abbott v. Thetford*, 534 F.2d 1101 (5th Cir. 1976)(en banc) (per curiam), and characterizing it as "a case demonstrating particular insensitivity to this problem"] and the interest of employees in speaking their professional or vocational conscience on work place affairs without fear of reprisal. In particular, public employees have legitimate interests in the efficiency and fairness of their work environments: a harshly managed or poorly run work place can breed disharmony and inefficiency, and thus the efforts of employees to address these concerns may merit strong judicial protection.

*Id.* See also *supra* notes 398-400 and accompanying text.

460. See *supra* notes 80, 118.

maintaining discipline by immediate superiors, "harmony among co-workers,"<sup>461</sup> and preventing adverse effects on workplace morale and office relationships generally.<sup>462</sup> Such considerations or "interests" might or might not actually be related to the efficiency or effectiveness and quality of services delivered to the public. For example, an agency office might be marked by either strict discipline or harmonious office relationships, but nevertheless fail to serve the needs of the public or public clients. To the extent that considerations such as "discipline," "morale," "loyalty," and office harmony or relationships are viewed as ends in themselves, punishing employees' speech perceived as contrary to such ends would not necessarily improve the agency's delivery of public services.<sup>463</sup> *Rankin* refocused attention on the underlying governmental interest in "promoting the efficiency of the public services it provides through its employees."<sup>464</sup> Considerations such as those just noted "make apparent that the state interest element of the test focuses on the effective functioning of the public enterprise."<sup>465</sup> Employee speech was not to be silenced merely because superiors disagreed with its content.<sup>466</sup>

*Rankin* may also have affected the causation phase of analysis. As has been noted, *Mt. Healthy* seemed to free governmental superiors to punish employees for exercising "protected" speech rights so long as the former could persuade the court that they would have punished the employees anyway.<sup>467</sup> When punishment took the form of discharge or firing, and the employee lacked tenure or "served at pleasure," it was unclear whether *Mt. Healthy* required the defendant-superior to come forward with *any* reasons for the dismissal. According to *Rankin*, however, the government bears the burden of justifying the discharge "on legitimate grounds."<sup>468</sup> This language occurs in the Court's discussion of balancing; but it also necessarily applies to causation analysis. Courts do not ordinarily require, much less scrutinize, a government employer's reasons (or lack of reasons) for firing an employee who served at pleasure. But since *Rankin*, if the firing had been even partly in retaliation for the employee's speaking on matters of public concern, the lower courts should scrutinize the government's *other* reasons for discharging the employee in order to determine that such reasons were not merely pretextual.

### B. Patterns and Problems in Fifth Circuit Jurisprudence

In most of its post-*Connick* government employee speech cases, the Fifth Circuit has given the greater part of its attention to determining whether the speech addressed a matter of public concern. Considerable attention also

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461. See *supra* notes 19-20 and accompanying text.

462. *Connick v. Myers*, 461 U.S. 138, 151-52 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 570 (1968). See *supra* notes 94, 98 and accompanying text.

463. See *supra* notes 426-35 and accompanying text.

464. See *supra* notes 142-46 and accompanying text.

465. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

466. See *supra* note 129 and accompanying text.

467. See *supra* notes 442-44 and accompanying text.

468. See *supra* note 140 and accompanying text.

has been devoted to weighing the speech interests and balancing these against purported governmental interests in suppression. Because relatively few cases have been decided on the basis of *Mt. Healthy* causation standards, this article omits a discussion of Fifth Circuit causation analysis.<sup>469</sup> We review first, and most extensively, the court's approach to determining whether employee speech addressed matters of public concern.

### 1. *The Problem of Defining Matters of Public Concern*

Like the other courts of appeal, the Fifth Circuit has found it difficult to establish definite criteria for determining whether an employee's speech related to matters of public concern.<sup>470</sup> The panels have agreed that a good many topics can be so categorized. Speech regarding misconduct by public officials, including fellow police officers, whether or not specifically labelled "whistleblowing," has generally been found within the scope of matters of public concern.<sup>471</sup> Political speech and speech concerning public policy likewise qualify.<sup>472</sup> That the content of such speech may be "loathsome" does not prevent its relating to matters of public concern.<sup>473</sup> Public employee speech concerning matters affecting community safety also generally meets the test,<sup>474</sup> as does speech by school personnel on matters regarding academic programs, policies and practices.<sup>475</sup>

What is uncertain is where the court should draw the line between employee speech on other matters of public concern and speech on matters of "only personal" or "private" interest. Largely because the the Supreme Court seemed to decree that all speech is divided into only these two parts,<sup>476</sup> Fifth Circuit panels have sometimes resolved doubt by categorizing employee speech on mixed or *tertium quid* topics as relating merely to their "personal" concerns.<sup>477</sup> In doing so, various panels have developed a number of tests, doctrines and dicta that unnecessarily restrict government

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469. A few cases were decided *solely* on the basis of the employee's failure to show that his speech was a substantial or motivating causation factor. See, *Robinson v. Boyer*, 825 F.2d 64, 68 (5th Cir. 1987); *Montgomery v. Trinity Indep. Sch. Dist.*, 809 F.2d 1058, 1061 (5th Cir. 1987). Also see *supra* notes 276, 274 and accompanying text. Recently the court has somewhat confined the pro-employer effect of *Mt. Healthy's* second or "but for" causation test. See *supra* notes 36-50 and accompanying text. It did so by limiting this test to situations where the relief an employee seeks would "put him in a better position than he would have occupied but for the . . . protected conduct." *Scott v. Flowers*, 910 F.2d 201, 209-10 n.15 (5th Cir. 1990). Arguably this limitation means that employees who would have been disciplined on other grounds should be entitled to relief for violation of their first amendment speech rights. See *supra* notes 46-50 and accompanying text.

470. See *supra* notes 157-58.

471. See *supra* notes 171-83, 224-30, 237-43 and accompanying text. See generally *Thompson v. City of Starkville*, 901 F.2d 456, 462-63 (5th Cir. 1990).

472. See *supra* notes 200-14 and accompanying text.

473. See *supra* note 212 and accompanying text.

474. See *supra* notes 234-38 and accompanying text. See also *Moore v. MVSU*, 871 F.2d 545, 551 (5th Cir. 1989).

475. See *supra* notes 216-23 and accompanying text. See also *Pickering, Mt. Healthy*, and *Givhan*, discussed *supra* notes 6-62 and accompanying text. See generally *Piver v. Board of Educ.*, 835 F.2d 1076, 1077-80 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

476. See *supra* notes 71-81, 446-50 and accompanying text.

477. See *supra* notes 253-344 and accompanying text.



employee speech and adversely affect public interests. Yet not all panels have agreed to such restrictions, some of which appear contrary to Supreme Court holdings.

*a. Failure to "Go Public"*

When the Supreme Court decided *Givhan*, it had not yet established an inquiry as to personal/public concern as the threshold question in first amendment public employee speech analysis. But it clearly held that such employees would not lose their freedom of speech just because they arranged to communicate privately with their employers rather than spread their views before the public.<sup>478</sup> Notwithstanding *Givhan*, Fifth Circuit panels occasionally have considered the fact that a public employee spoke or wrote privately instead of trying to "go public" as an indicator that the speech in question related to a matter of personal, rather than public concern.<sup>479</sup> Recently, however, the court has backed away from emphasizing this indicator, though retaining it as "simply another factor."<sup>480</sup> In view of *Givhan*, it is unclear why it should be a factor at all. As the court stated in *Brown*, "[t]he fact that the speech was delivered privately to [the employee's] supervisors, rather than to Bob Woodward and Carl Bernstein, does not necessarily render the speech any less protected."<sup>481</sup> The court's recent decision in *Thompson* articulated an important policy consideration that should weigh in favor of demoting if not abandoning the "going public" factor. The Court stated that "[a] holding to the contrary would mean that loyal employees seeking to rectify problems would lose constitutional protection for attempting to correct problems in house."<sup>482</sup> But some panels have, at least implicitly, endorsed a closely related test or factor.

*b. The Speech Did Not Pose the Issue as One for Public Debate*

*Connick* did not say whether speech qualifies as relating to a matter of public concern only if its topic is already one discussed in the community, or whether it might also qualify if the topic was one that would, in the court's view should, be of interest to the community.<sup>483</sup> *Connick* did say that in determining whether the "speech" in question addressed a matter of public concern, courts should consider its "context, form and context."<sup>484</sup> The "context" factor has led some Fifth Circuit panels to regard issues raised pursuant to intra-, or even inter-, agency controversies as matters of only personal interest to the employee even when the speech's *content* clearly related to matters about which a reasonable, prudent public would be

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478. See *supra* note 59 and accompanying text.

479. See *supra* notes 313, 360-71, 364, 366 and accompanying text.

480. *Thompson v. City of Starkville*, 901 F.2d 456, 466-67 (5th Cir. 1990). See also *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 277-78 (5th Cir. 1990).

481. *Brown v. Texas A&M Univ.*, 804 F.2d 327 (5th Cir. 1986). See *supra* note 183 and accompanying text.

482. *Thompson*, 901 F.2d at 467.

483. See *supra* notes 76-77 and accompanying text.

484. See *supra* note 83 and accompanying text.

concerned.<sup>485</sup>

In the case where day care workers complained that another employee had brought a gun to work and otherwise violated the center's rules, the court concluded that these complaints really were motivated by concerns of favoritism, not by a desire to draw attention to matters of public concern that should be stopped. Their speech thus constituted only a personal grievance, even though the court recognized that some of the contents of the complaint might have been of interest to the public.<sup>486</sup> In another case, a panel found that although the subject matter of the employee's speech was "an issue of some discussion between state agencies," it was never "a matter of public debate" in the larger community, and therefore, was only a personal grievance.<sup>487</sup>

In two cases, however, the court implicitly adopted a Ninth Circuit standard that could be instructive in this connection. Under this test, speech dealing with individual personnel disputes and grievances might nevertheless relate to matters of public concern if "the information would be of . . . relevance to the public's evaluation of the performance of [the] governmental agenc[y]." <sup>488</sup> No Fifth Circuit cases mention this standard. Several, however, insist that a public employee's speech can relate *both* to individual or personal grievances *and* to matters of public concern.<sup>489</sup> Two additional restrictive tests are to be considered first.

### c. *The "Role" in Which the Employee Spoke*

In an effort to derive a practical, applicable standard from the Supreme Court's stated holding in *Connick*,<sup>490</sup> a number of Fifth Circuit panels focused on the phrases "as a citizen" and "as an employee." These panels concluded that inquiry should focus upon the "role" in which the employee spoke.<sup>491</sup> Some panels even went so far as to consider the employee's "role" to the exclusion of the *content* of her speech, bypassing entirely the question whether the speech addressed a matter of public concern.<sup>492</sup> These panels neglected the language, albeit obscurely phrased, in *Connick*'s holding that refers to the *content* of employee speech "upon matters of public concern," or "upon matters only of personal interest." One recent decision, however, expressly eschewed the use of role analysis precisely for that reason;<sup>493</sup> another decision made clear that it would not consider the employee's "role" apart from the *content* of his speech.<sup>494</sup> More recent cases appear to have

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485. See *supra* notes 266-73, 301-06, 310-14, 337-44, 353-63 and accompanying text.

486. See *supra* notes 271-273 and accompanying text. The court evidently did not consider the question whether a public agency practiced favoritism a matter of public concern.

487. See *supra* notes 282-87, 363 and accompanying text.

488. See *supra* notes 257-65, 373-76 and accompanying text.

489. See *infra* notes 494-514 and accompanying text.

490. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

491. See *supra* notes 320-44 and accompanying text.

492. See *supra* notes 322-28, 333-44 and accompanying text.

493. See *supra* note 352 and accompanying text.

494. *Thompson v. City of Starkville*, 901 F.2d 456, 465 (5th Cir. 1990). Cf. *Kirkland v.*

receded entirely from the "role" theory.<sup>495</sup>

*d. "Personnel" Therefore "Personal"*

Occasionally, Fifth Circuit panels have taken the position that *any* matter involving an agency's *personnel* procedures is, necessarily, only a matter of "personal" concern to the employee, and so, by definition, *not* a matter of public concern.<sup>496</sup> This tendency possibly arises out of ambiguities in *Connick*,<sup>497</sup> or, perhaps, out of the similarity of the words "personnel" and "personal." Recently, in *Thompson* the court set out a number of points that could guide inquiry more precisely as to what might constitute "matters of only personal interest."<sup>498</sup>

The court noted that Thompson would derive little personal gain from filing his grievance,<sup>499</sup> that, for example, he "did not seek back pay or promotion,"<sup>500</sup> nor was his grievance concerned with working conditions.<sup>501</sup> Instead, he had helped others file similar complaints, complaints that "clearly did not redound to his own benefit." He had also alleged widespread misconduct which, moreover, implicated public safety concerns.<sup>502</sup> In short, Thompson's speech was by no means merely self-serving. Noting that other circuits had developed certain criteria for determining whether internal complaints about working conditions were only matters of personal interest, the court cited the Fourth Circuit case of *Piver v. Board of Education*.<sup>503</sup> *Piver* observed that previous Fourth Circuit cases had focused on the question of whether the speech concerned "'matters bounded by [the employee's] immediate self-interest,'"<sup>504</sup> or, in slightly different terms, whether "the aggrieved employee himself ha[d] spoken out about his own employment situation when that employee's situation holds little or no interest for the public at large."<sup>505</sup>

The Fourth Circuit observed that other circuits had found that speech regarding grievances or internal agency policies sometimes raised issues of public concern. For example, a teacher's grievance against a principal, a policeman's speech concerning compensation of the city's police officers, and a policeman's written criticism of the behaviour of an immediate superior could raise issues of public concern.<sup>506</sup> Summarizing its own "public con-

Northside Indep. School Dist., 890 F.2d 794, 798-800 (5th Cir. 1990), which is less definite as to this point.

495. *Ayoub v. Texas A&M Univ.*, 927 F.2d 834 (5th Cir. 1991); *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273 (5th Cir. 1990); *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990); *Thompson*, 901 F.2d 456.

496. *See supra* notes 271-73, 282-97, 333-44 and accompanying text.

497. *See supra* note 118 and *supra* notes 68-82 and accompanying text.

498. *Thompson*, 901 F.2d at 456.

499. *Id.* at 465.

500. *Id.* at 466.

501. *Id.* at 467.

502. *Id.* at 466, 467.

503. 835 F.2d 1076, 1079 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

504. *Id.*

505. *Id.* at 1080.

506. *Id.* at 1079, citations omitted.

cern" jurisprudence, the Fourth Circuit concluded:

*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.”<sup>507</sup>

In contrast, a number of Fifth Circuit decisions seem to presume that all employee speech on personnel matters, especially all such speech that can be characterized as “grievances,” should be treated as matters of merely personal interest, even if those grievances or personnel matters involved issues about which the public or community might reasonably be concerned.<sup>508</sup> Perhaps this tendency in Fifth Circuit jurisprudence derives from the fact that *Connick* appeared to divide the world of speech into only two parts<sup>509</sup> and failed to contemplate the possibility that a given instance of speech might well involve *both* the speaker’s personal interests *and* matters of public concern.

*e. Personal Interest and Public Concern: Necessarily Mutually Exclusive?*

Several Fifth Circuit decisions appear to assume that if an employee’s speech deals with a matter of personal interest, it could not *also* relate to any issues of public concern.<sup>510</sup> This assumption may derive from *Connick’s* seemingly dichotomizing language. In other decisions, however, the court has stated explicitly that a government employee’s speech may relate *both* to matters of “personal” interest *and* to those of public concern, and that in such cases courts should consider the speech protected and proceed to balancing.<sup>511</sup> Recently, in *Thompson* the court addressed this issue directly and stated: “The existence of an element of personal interest on the part of an employee in his or her speech does not . . . dictate a finding that the employee’s speech does not communicate a matter of public concern.”<sup>512</sup> The court reviewed not only its own previous decisions and those of other cir-

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507. *Id.* at 1079.

508. *See supra* notes 266-74, 282-87, 301-09, 337-44, 353-55 and accompanying text.

509. *See supra* notes 78-82 and accompanying text.

510. *See supra* note 508.

511. *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 279 (5th Cir. 1990); *Brawner v. City of Richardson*, 855 F.2d 187, 191-92 (5th Cir. 1988); *Gonzalez v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985); *Wells v. Hico Indep. School Dist.*, 736 F.2d 243, 249 (5th Cir. 1984), *cert. dismissed*, 473 U.S. 901 (1985).

512. *Thompson v. City of Starkville*, 901 F.2d 456, 463, 466 (5th Cir. 1990). *Thompson* tacitly criticized the *Terrell* court’s emphasis on employee *motivation* as an indicator for speech on matters of personal/public concern. *Id.* at 465 n.7, 466. *See also Kinsey*, 916 F.2d at 278-79 (“motive is not the controlling issue”).

cuits,<sup>513</sup> but also pointed out that the Supreme Court itself, in *Connick*, found that the employee's speech had contained "a mixture of public and personal concerns," and so went on to balance her interest with the government's.<sup>514</sup>

*f. Comments and Recommendations*

*Pickering* and *Connick* left open the possibility that employee speech on all matters other than those of purely personal interest might be protected under the first amendment. But then in *Rankin*, the Court closed the door to all speech unrelated to matters of public concern. Although several Fifth Circuit decisions have tended to view employee grievances or speech on questions of agency policy as *ipso facto* matters of merely personal interest, the court has recently analyzed the personal/private disjunction more closely.<sup>515</sup> Finding that the employee himself "stood to gain little through his grievance," it rejected the characterization of his grievance as merely personal where it also aimed at bringing to light misconduct by others within the agency.<sup>516</sup> Likewise, the Fourth Circuit has found speech concerning matters beyond those "bounded by [one's] immediate self-interest" entitled to protection.<sup>517</sup> This "beyond-matters-bounded-by-the-employee's-self-interest" test is both an applicable standard, and one that is true to *Connick's* holding that protection ordinarily would be denied only to speech on matters of purely personal interest.<sup>518</sup>

Likewise, it is well-established in the Fifth and other circuits that a given instance of employee speech may relate to matters of both personal and public concern. In its own terms, *Connick* denied protection to employee speech that addresses *only* matters of personal interest. If employee speech relates to both such matters *and* to matters of public concern, the court should proceed to the balancing phase of analysis.

The critical question, of course, is whether the employee's speech *does* at least touch on some matter or matters of public concern. A number of Fifth Circuit decisions seem to assume that the public has no interest in such matters as whether employees were required to work overtime, with or without compensation;<sup>519</sup> the treatment of the mentally ill in public facilities;<sup>520</sup> the adequacy of patient care by physicians in public hospitals and possible conflicts of interest on the part of hospital board members;<sup>521</sup> or the efficiency

513. *Thompson*, 901 F.2d at 464. In addition to *Browner* and *Gonzalez*, the court cited *Hall v. Ford*, 856 F.2d 255, 260 (D.C. Cir. 1988), and *Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988).

514. *Thompson*, 901 F.2d at 464.

515. *Id.* at 466-67.

516. *Id.* at 465-66.

517. *Piver v. Board of Educ.*, 835 F.2d 1076, 1079 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

518. *Connick v. Myers*, 461 U.S. 138, 147 (1983) (emphasis added). See *supra* note 490 and accompanying text.

519. See *supra* notes 266-69, 310-13 and accompanying text.

520. See *supra* notes 282-86, 309 and accompanying text; but see *supra* note 169.

521. See *supra* notes 296-97 and accompanying text.

and effectiveness of a government agency's operations in delivering public services.<sup>522</sup> Other circuits, however, have been willing to credit the public with a greater measure of interest in agency operations and performance.

The Ninth Circuit's standard, evidently endorsed in *Davis* and *Day*, would qualify employee speech as "of public concern" even if it deals with individual personnel disputes and grievances provided "the information would be of . . . relevance to the public's evaluation of the performance of [the] governmental agencies."<sup>523</sup> The Fourth Circuit has also factored attention to potential public concern into its threshold question as reflected in its statement that "[t]he focus is . . . upon whether the 'public' or the 'community' is likely to be concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee."<sup>524</sup>

The Fifth Circuit should de-emphasize such indicators as whether the employee attempted to "go public" and whether the employee intended the subject of her speech to become a matter for public debate, and give greater attention to the actual content of the "speech" itself. Though the "role" in which the employee spoke may be a factor in considering the context, it should remain only a factor; attention to it should not preempt consideration of the speech's content. Courts should recognize that a grievance or speech on *personnel* matters is not necessarily concerned only with matters of *personal* interest. Speech on matters of both personal and public concern is entitled to protection. As in *Thompson* and a series of Fourth Circuit cases, the court should limit the category of employee speech on "only personal" matters to speech clearly relating to the employee's own self-interest, such as wages, hours, and working conditions. In recent cases, the court implicitly has done so.<sup>525</sup> Where such speech also relates to concerns beyond the employee's own immediate self-interest the court should be open to the possibility that it may also deal with matters of public concern. In this connection, the court should credit the public with being interested in such matters as agency staff morale, the openness of supervisors to routine communications and suggestions by employees, and even critical statements that reflect concern to improve the effectiveness of the agency's performance. The court need not be overly zealous to protect agency superiors from embarrassment at the threshold question level of analysis. If an employee's speech in fact impinged upon the efficiency of the agency's performance of its assigned public

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522. See *supra* notes 301-06 and accompanying text. The public, of course, is not present as a party in litigation on these matters. Yet by virtue of their role in administering the *Pickering/Connick/Rankin* threshold and balancing tests, the courts have been assigned responsibility for representing the public's interests—a responsibility also grounded more generally in their role as the judicial branch of government.

523. See *supra* notes 257-65 and accompanying text.

524. *Piver v. Board of Educ.*, 835 F.2d 1076, 1079-80 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988) (quoting *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985)).

525. See *Ayoub v. Texas A&M Univ.*, 927 F.2d 834, 836-38 (5th Cir. 1991) (employee's complaint concerned only his own salary); *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 277 (5th Cir. 1990) ("dispute over an employee's job performance" said to involve "purely private speech"); *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) ("Scott's criticisms had nothing to do with his own conditions of employment").

services, the extent of that impingement can be weighed against the importance of the employee's speech in the balancing phase of inquiry. Whenever the court can discern any interest that a reasonable, prudent public would have in the subject matter of employee speech, it should regard that speech as at least worthy of being weighed against any legitimate interests the government might have in suppressing that speech.

## 2. *Balancing in the Fifth Circuit*

Currently, balancing occurs only if the court has determined that an employees' speech addressed a matter of public concern and was, therefore, deserving of first amendment protection. Conceptually, three steps are involved in balancing public employee speech interests with governmental interests. The first is to identify and weigh the importance of the employee's speech interest. The second is to identify and weigh the government's interest in suppressing such speech (or in punishing the speaker). The third step is the actual balancing, determining which interest or set of interests is more important. The court has not always attended carefully to each step.

### a. *Weighing the Employee's Speech Interests*

Fifth Circuit panels have seldom paused to identify and assess employees' interests in their speech. The Supreme Court has also given little guidance on this matter. One might suppose that this is so because the courts have assumed that an employee's right to free speech or self-expression is an inherent or self-evident right, one guaranteed by the first amendment, and thus constitutionally recognized as precious to each individual speaker. The cases, however, do not so indicate. At best, the cases mention the right to self-expression only obliquely.<sup>526</sup> Instead, the courts have tended to assign value to employee free speech only to the extent that such speech serves or is instrumental to some *societal* good.

In *Pickering* the Court referred only to "the interests of the teacher, as a citizen, in commenting upon matters of public concern."<sup>527</sup> The Court did not explain why an employee's interest should be so limited. The Court repeated this same language in *Mt. Healthy* and *Givhan*,<sup>528</sup> but did not attempt to identify or assess the importance of either employee's speech. Likewise, in *Connick* the Court made no effort to weigh the importance of Myers' interest in asking whether other staff members felt pressured to work in certain political campaigns.<sup>529</sup> Instead, the *Connick* Court merely stated that this question was "a matter of interest to the community upon which it is essential that public employees be able to speak without fear of retaliatory discharge."<sup>530</sup> Again, implicitly, the employee's speech right was accorded

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526. See *supra* note 459 and accompanying text.

527. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

528. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977).

529. See *supra* note 118.

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

value only to the degree that it had some possible social utility. Although the *Connick* Court indicated that some employee speech might be especially important, it proposed to assess that importance only in terms of its importance to the public.<sup>531</sup> It did not, however, undertake to weigh the importance of Myers' speech on this standard. In *Rankin* the Court mentioned the employee's interest in her right to freedom of speech twice, though without elaboration.<sup>532</sup> The Court implicitly denied that this interest had constitutional value, declaring that it could be protected only if her speech addressed a matter of public concern. Had it not met that touchstone test, she would have had no such right.<sup>533</sup>

These cases suggest that the Court generally has considered a public employee's speech to have value only in terms of its social utility. Absent such utility, the speaker's own interests in either her right to freedom of expression or in the content of her speech had no value deemed worthy of first amendment protection. Implicitly, the Court seems to have assumed that public employee speech of *any* kind is inherently adverse or detrimental to the operation of governmental agencies.<sup>534</sup> The *only* kind of speech that should be accorded constitutional protection was speech relating to matters of public concern, and only because of its possible social utility. Thus, even before employee speech could be "balanced" with identifiable governmental interests, all speech other than that relating to "matters of public concern" was *presumed* to be outweighed by assumed governmental interests in suppressing such speech.<sup>535</sup> The Court may not have intended this result. It may have simply evolved from the somewhat fragmented series of considerations set out in *Pickering* and *Connick* which culminated in *Rankin's* rather casual declaration that the threshold question was whether employee speech addressed "matters of public concern."

In this context, it is not surprising that very few Fifth Circuit cases credit public employees with any interest in their speech rights or in the content of their speech. Nevertheless, some panel decisions *hint* that the employee's own interests might merit constitutional weight. Several cases specifically describe the value of employees' speech to the public or community which could benefit from hearing it.

#### *i. The Employee's Own Interest*

A number of Fifth Circuit panels construing *Pickering*, *Connick*, and *Rankin* have held that it is proper for agency superiors to punish employees

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531. *Id.* at 147-49. See *supra* note 118.

532. See *supra* note 156.

533. See *supra* notes 121-39 and accompanying text.

534. See *supra* note 80.

535. See *Connick v. Myers*, 461 U.S. 138, 149 (1983): "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." Other expressions of exaggerated anxiety on the part of the *Connick* majority as to putative perils of permitting public employees to speak freely are reviewed *supra* note 118.



for speaking about matters involving the employees' own interests.<sup>536</sup> These cases illustrate the deleterious consequences of the Supreme Court's tacit *presumption* that employee speech on such matters *necessarily* interferes with the efficiency of governmental operations.<sup>537</sup> Yet in a few cases, the court has credited employees with having a valid interest in the content and function of their speech, if not in their right to freedom of expression as such. In *Thompson* the court urged that "loyal employees seeking to rectify problems [should enjoy] constitutional protection for attempting to correct problems in house."<sup>538</sup> Correcting such problems presumably would not only benefit the public, but would also make for better working conditions such as improved morale or safety, for employees, including the speaker. Similarly, in *Moore* the court found that the employee speaker himself had a legitimate interest in his speech, though the court identified that interest mainly in terms of making public information regarding the effectiveness of the agency so as to awaken the community's political concern.<sup>539</sup>

## ii. *The Public's Interest*

The *Moore* court also explicitly identified the public's interest as "a willing listener" in *hearing* agency employees' speech on matters relating to the agency's ability to perform its duties efficiently and effectively.<sup>540</sup> The value of such speech has also been recognized in other cases.<sup>541</sup> In *Gonzalez*, the court found that employee speech regarding an agency policy that had "generated friction and reduced the efficiency of the agency" was important as a matter of public concern.<sup>542</sup> And as early as *Porter*, the court had insisted that the first amendment concerned "the right and need of the society's citizens to receive information helpful to their economic, social, and political activities . . ."<sup>543</sup> Most Fifth Circuit cases, however, failed to specify or weigh the nature and importance of the public's interest in particular employees' speech. Instead, once they determined that such speech related to matters of public concern, the cases typically proceeded directly to considering the weight of purported, countervailing governmental interests without further attention to benefits the community might derive from the employee's speech.<sup>544</sup>

## b. *Weighing Governmental Interests in Suppressing Employee Speech*

More than a decade after *Pickering*, the Fifth Circuit made it clear that it

536. See *supra* notes 267-309 and accompanying text.

537. See *supra* notes 80, 118, 309, 446-50 and accompanying text.

538. See *supra* note 482 and accompanying text.

539. See *supra* notes 248, 396-401 and accompanying text.

540. See *supra* notes 402, 404-05 and accompanying text.

541. See *supra* notes 402-03 and accompanying text. See *Piver v. Pinder Co. Bd. of Ed.*, 835 F.2d 1076, 1078, 1081 (4th Cir. 1987) (considering the interests of the *speaker* as well as those of the community).

542. See *supra* note 230 and accompanying text.

543. *Porter v. Califano*, 592 F.2d 770, 773 (5th Cir. 1979) (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976)).

544. Compare the Ninth Circuit's formula, *supra* notes 257, 488 and accompanying text.

would not be enough for governmental agency superiors to make vague claims that employee speech somehow "hurt agency efficiency."<sup>545</sup> Instead, construing *Pickering*, the court held that

"[i]n order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment."<sup>546</sup>

As noted earlier, *Connick* opened the door for courts to credit agency supervisors' "reasonable" fears or speculations as to possible future harm that might result from employees' speech.<sup>547</sup> *Rankin*, on the other hand, focused attention upon the actual impact of employee speech on the agency's effective delivery of public services, and required a government agency that had discharged an employee for exercising her speech rights to bear the burden of justifying that discharge on legitimate grounds.<sup>548</sup>

Relatively few Fifth Circuit panels have been willing to accord weight to agency officials' speculations as to possible harm that might result from employees' speech.<sup>549</sup> In most cases, the court attempted to identify the actual impact employees' speech had on relevant governmental operations.<sup>550</sup> One panel, drawing on *Rankin*, held that when the employee's speech "more substantially involves matters of public concern," the governmental agency is required to bring forward objective evidence of any purported disruption.<sup>551</sup> More recently, in *Moore*, the court held that *Rankin* requires the government to bear "the burden of producing evidence which shows its interest in disciplining [an employee] for his speech" in all cases that proceed to balancing.<sup>552</sup> The *Moore* court carefully examined the nature and extent to which the employee's speech, on the record evidence, had actually impacted upon those interests, and found such impact rather minimal.<sup>553</sup> It found, for example, that although the employee's alleged "insubordination" may have personally offended one of his superiors, it did not impair the agency's effectiveness in performing its particular public responsibilities. It may be noted in passing that in some cases where the speech in question failed the "threshold" test, the agency superiors merely perceived a threat to their sense of authority or will-to-power, with no demonstrably negative effect on agency

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545. *Porter*, 592 F.2d at 780.

546. *Id.* at 773; see also *Smith v. United States*, 502 F.2d 512, 517 (5th Cir. 1974); *Battle v. Mulholland*, 439 F.2d 321, 323 (5th Cir. 1971).

547. See *supra* notes 101-03 and accompanying text.

548. See *supra* notes 140-46, 151-55, 461-66, 468 and accompanying text.

549. See *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 280 (5th Cir. 1990); *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990). One possible exception is *Price v. Brittain*, 874 F.2d 252, 258-59 (5th Cir. 1989).

550. See, e.g., *Frazier v. King*, 873 F.2d 820, 820-23, 826-27 (5th Cir. 1989); *Matherne v. Wilson*, 851 F.2d 752, 760-61 (5th Cir. 1988); *Gonzalez v. Benavides*, 774 F.2d 1295, 1301-1303 (5th Cir. 1985).

551. *Matherne*, 851 F.2d at 761 n.53.

552. *Moore v. City of Kilgore*, 877 F.2d 362, 372 (5th Cir. 1989) (emphasis added).

553. *Id.* at 373-76. See *supra* notes 430-35 and accompanying text.

effectiveness.<sup>554</sup>

*c. Balancing the Competing Interests*

In a few Fifth Circuit cases, the court appears to have skipped the balancing step. In these cases, the court did not attempt to weigh the importance of the employee's, or the public's interest in her speech, against governmental interests. Instead, the court summarily concluded that the governmental interests were paramount.<sup>555</sup> On the other hand, where the court found that the employee's speech had little or no impact on governmental interests, it has adjudged the employee's speech interest the more important.<sup>556</sup>

The court has undertaken to balance the importance of competing interests in a number of cases. Generally, where the employee's speech was directed toward calling attention to misconduct on the part of other government employees or officials, the court has found the speech's disruptive effects less significant than the public's interest in the disclosure of such misconduct.<sup>557</sup> In that context, the court has found the government's interest in preventing "disruption" a minimal interest.<sup>558</sup> If the employee's allegations of misconduct were true, the court observed, his statements "could not have adversely affected the proper functioning of the department since the statements were made for the very reason that the department was not functioning properly due to corruption."<sup>559</sup> In another case, the court factored in the effects of the government's retaliatory action on the effectiveness of the agency's operations, as reflected in the statement that "appellees have made no claim that [the employee] was not performing her government job adequately. Thus, by suspending [her] instead of neutralizing or balancing her speech with rebuttal management speech, management has deprived the government of 30 days work of one of its otherwise competent and productive employees.<sup>560</sup> The court hinted that the government employer might have found less intrusive means to protect its purported interests. Curiously, this issue has not been raised in subsequent government employee speech cases.<sup>561</sup> Nor has the court determined whether governmental interests must be "compelling" in order to outweigh employee speech interests.<sup>562</sup>

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554. See *supra* notes 282-95, 301-14, 322-28, 333-42 and accompanying text. See also *supra* notes 80, 309.

555. See *Price v. Brittain*, 874 F.2d 252, 258-59 (5th Cir. 1989).

556. See, e.g., *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273, 279-81 (5th Cir. 1990); *Matherne v. Wilson*, 851 F.2d 752, 760-61 (5th Cir. 1988); *Brown v. Texas A&M Univ.*, 804 F.2d 327, 337 (5th Cir. 1986); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 563-64 (5th Cir. 1982).

557. See *Frazier v. King*, 873 F.2d 820, 826 (5th Cir. 1989); *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988); *Porter v. Califano*, 592 F.2d 770, 773-80 (5th Cir. 1979).

558. *Frazier*, 873 F.2d at 826.

559. *Brawner*, 855 F.2d at 192.

560. *Porter*, 592 F.2d at 780.

561. See *supra* note 18 and accompanying text.

562. *Bowen v. Watkins*, 669 F.2d 979, 982 n.2. (5th Cir. 1982). Both issues may have been mooted by *Connick's* extreme deference to purported governmental interests. See *supra* note 118.

Recently, the court has held that the state's interest in suppressing speech is substantially "weaker" when the speaker is an elected official. In that circumstance, the government cannot justify discipline "on the ground that it was necessary to preserve coworker harmony or office discipline," for an elected official is expected to "exercise independent judgment" and "speak out against what he perceived to be serious defects" in the area of public affairs.<sup>563</sup>

Balancing is more difficult where there are substantial interests or values on both sides of the scales, values which may amount to apples on one side and oranges on the other. Because it had already carefully analyzed the governmental interests actually affected by the employee's speech, and had found that speech beneficial to the community's interest in the effective operation of the agency, the *Moore* court concluded that the speech interests clearly outweighed the governmental interests in suppressing it.<sup>564</sup> Possibly the court made its closest call in *Gonzalez*.<sup>565</sup> Here, as later in *Moore*, the court found that the employee's speech *concerned* the effective operation of the agency. For this and other reasons, his speech was deemed important to the community and to have "addressed matters of substantial public concern."<sup>566</sup> On the basis of *Connick*, the court therefore held that the government defendants were required to make a stronger showing of disruption. It found that *Gonzalez's* "speech" posed no immediate threat to the agency's operation, and that although he had protested the commissioners' conduct as violating agency regulations, he was polite and cooperative in his dealings with them, considerations relevant to the "manner, time, and place" factors set out in *Givhan*.<sup>567</sup> The *Gonzalez* court commended this kind of "individualized balancing" rather than "the predictable but inflexible categorical approach."<sup>568</sup> *Gonzalez* is itself an exemplary model for the former approach.

#### d. Comments and Recommendations

Neither the Supreme Court nor the Fifth Circuit has given much attention to the nature and weight of governmental employee speech interests. By requiring that employee speech must address a matter of public concern in order to be protected, the Court unnecessarily stripped government employees of their right to freedom of speech under the first amendment. The "matter-of-public-concern" requirement, fails to make clear that the public has an interest in employee speech regarding the efficiency and effectiveness of agency operations. The public interest is not served when government employees are punished for putting ideas into the suggestion box, sharing

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563. *Scott v. Flowers*, 910 F.2d 201, 211-12 (5th Cir. 1990). The court did not explain why it extended *Pickering/Connick/Rankin* analysis to speech by elected officials. In *Scott*, the government employee, a justice of the peace, was not disciplined by an employer. The issue was whether his speech rights had been violated through reprimand by the state judicial conduct commission.

564. See *supra* notes 396-406, 432-35 and accompanying text.

565. See *supra* notes 224-30, 418-22 and accompanying text.

566. *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985).

567. *Id.* at 1302-03.

568. *Id.* at 1303.

them with their superiors, or passing them on to others in the community. Where the employee's speech raises questions or provides information that would be relevant to the public's evaluation of the governmental agency's performance,<sup>569</sup> such benefit to the public should be considered. Courts should also consider the employee's own legitimate interest in his agency's effectiveness on the "employee's speech interest" side of the scales, as some Fifth Circuit cases have done.<sup>570</sup>

In some cases the court may have summarily accepted an agency's claims as to the damaging effects of alleged "insubordination" or "disruption." Other decisions, however, include careful analysis of the *actual* impact of employee speech on the effectiveness or efficiency of the agency's fulfillment of its particular responsibility for delivering services to the public. *Moore* is an especially fine example of this type of analysis. The central question should be whether the employee's speech significantly diminished her capacity to carry out her duties, or in any significant way interfered with the agency's performance of its services to the public. The public employee's first amendment speech right should *not* turn on whether an agency superior was displeased with her speech's content.

If the court has carefully identified and analyzed the interests on both sides of the scales, balancing, or determining their relative importance may be fairly easy. For instance, balancing would be easy where the employee's speech was primarily a personal grievance as to her own working conditions, while its impact on the agency's delivery of services to the public was clearly detrimental; or where an employee's speech brought to light important information as to misconduct by agency officials without otherwise adversely affecting the agency's delivery of public services. But when important interests are present on both sides of the scales, the court should be especially meticulous in assessing their weight as well as any *actual* negative effects of the employee's speech upon bona fide and significant governmental interests. The public has a proper and substantial interest not only in the efficiency of governmental services, but also in hearing from knowledgeable governmental employees at all levels who have ideas about how their agency can function more productively or otherwise address matters of public concern. The public has an interest in the courts' seeing to it that such speech is not "chilled" so long as it does not demonstrably undermine the agency's effective performance of its responsibilities.

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569. See *supra* note 257 and accompanying text.

570. See *supra* notes 540-43 and accompanying text. The *Connick* Court itself suggested as much, though in typically cryptic language. Observing that "discipline and morale in the work place are related to an agency's efficient performance of its duties," the Court concluded, "the focus of Myers's questionnaire is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors." *Connick v. Myers*, 461 U.S. 138, 148 (1983). Presumably the Court would have considered Myers' questions as to "discipline and morale in the workplace" related to matters of public concern if it had thought that her *purpose* was "to evaluate the performance of the office." See *supra* note 118.