THE SPEECH OF PUBLIC EMPLOYEES OUTSIDE THE WORKPLACE: TOWARDS A NEW FRAMEWORK

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I. INTRODUCTION

The First Amendment restrains the government from abridging the freedom of speech.[1] When the government functions as an employer, it has interests "that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[2] The Supreme Court recognizes that when the government acts as an employer, it must be given some leeway to limit speech for it to operate efficiently and effectively.[3] On the other hand, governmental employ does not allow the government's interest as an employer to commandeer the First Amendment analysis, for "[u]nconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government."[4] The courts have struggled with this tension, but a relatively clear set of rules has emerged in the doctrine.

Speech that is a matter of public concern, occurs outside of work, and does not interfere with the government's ability to function is generally entitled to protection.[5] Likewise, speech that relates to a matter of public concern, occurs at work, and does not impair the government's ability to function is also generally entitled to protection.[6] Speech that is purely personal to the employee in question and

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[1] U.S. CONST. amend. I.

[2] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[3] *See id.*

[4] Connick v. Myers, 461 U.S. 138, 161 (1983) (Brennan, J., dissenting).

[5] *See Pickering*, 391 U.S. at 572–73, 574.

[6] *See* Rankin v. McPherson, 483 U.S. 378, 384–85, 388 (1987).

that occurs at work is generally not entitled to protection.[7] This Comment primarily addresses a fourth category of speech: speech that occurs outside the workplace, is wholly unrelated to work, and is not a matter of "public concern," as the courts have defined the term.

A handful of cases have addressed this issue.[8] In evaluating whether speech is entitled to protection under the First Amendment, courts have generally applied the traditional framework set forth by the Supreme Court in *Pickering v. Board of Education*[9] and *Connick v. Myers*.[10] The Supreme Court's analysis in *Pickering* requires courts to balance the interests of public employees, as citizens, "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."[11] *Connick*, which latched onto *Pickering*'s public concern language, erected a threshold requirement that an employee must meet to even reach balancing under *Pickering*: the employee's speech must touch upon a matter of public concern.[12]

A problem with applying *Connick*'s holding to speech outside the workplace is that while the threshold requirement effectively disposes of cases involving speech that should not receive protection, it also prevents people from obtaining First Amendment protection for speech deserving of such protection. That *Connick*'s threshold requirement is not elastic enough is demonstrated in "at the workplace" cases where courts have stretched the meaning of public concern far beyond *Connick*'s conception of the term.[13] The problem with *Connick* is not necessarily its result; rather, the problem is that its doctrinal design ignores a large universe of cases.[14] Some courts have recognized the illogic of applying the *Connick* analysis in the context of employee speech that occurs outside of work, while other courts

[7] *See Connick*, 461 U.S. at 154.

[8] *See* Roe v. City of San Diego, 356 F.3d 1108 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004); Melzer v. Bd. of Educ., 336 F.3d 185 (2d Cir. 2003); Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002); Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994); Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989); Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985).

[9] 391 U.S. 563 (1968).

[10] 461 U.S. 138 (1983).

[11] *Pickering*, 391 U.S. at 568.

[12] *Connick*, 461 U.S. at 146–48.

[13] *See, e.g.*, Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1050–52 (6th Cir. 2001) (holding that a schoolteacher's speech regarding the beneficial environmental effects of industrial hemp constituted a matter of public concern).

[14] *See infra* Part III.

have simply avoided the *Connick* analysis entirely.[15] Courts that have attempted to apply *Connick* to speech that occurred outside the workplace have simply contorted *Connick* to the point where it has been rendered meaningless.

This Comment explains why current Supreme Court jurisprudence has proven inadequate in dealing with employee speech that occurs outside the workplace. Part II explains the law that governs public employee speech under the First Amendment. Part III addresses how the lower courts have dealt with speech that does not relate to work and occurs away from the workplace. Part III also recounts the Supreme Court's most recent pronouncement on the subject. Part IV analyzes the state of the law and explains why the Court's treatment of the issue begs for a fresh doctrinal approach. Part V advocates the formulation of a new test for speech that occurs outside the workplace. Specifically, Part V proposes the abandonment of *Connick*'s public concern requirement for all cases in which the speech occurs outside the workplace. For matters that are work-related, the employer should have to justify adverse employment decisions against employees under *Pickering*. For matters wholly unrelated to work, the speech should be presumptively protected unless the government employer shows actual harm or the specter of imminent harm to the workplace.

[15] Roe v. City of San Diego, 356 F.3d 1108, 1120–21 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004) (holding that public concern is automatically satisfied when the speech is not about work, occurs outside of work, and is directed towards the general public); Melzer v. Bd. of Educ., 336 F.3d 185, 186 (2d Cir. 2003) (avoiding the public concern question by assuming without deciding that the threshold was fulfilled after recognizing that many courts have questioned whether the "test is appropriate in cases like the present one"); Pappas v. Giuliani, 290 F.3d 143, 146 (2d Cir. 2002) (assuming without deciding that the public concern test was met); Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994) (noting that the public concern test is designed to distinguish personal employee grievances rather than fix the outer limits of what the First Amendment protects); Flanagan v. Munger, 890 F.2d 1557, 1564 (10th Cir. 1989) ("[T]he public concern test does not apply when public employee nonverbal protected expression does not occur at work and is not about work."); Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985) (observing that the public concern test should be confined to cases that involve employee speech that is purely personal to the employee, such as grievances). The Author would like to note that shortly before publication, the Second Circuit issued its decision in *Locurto v. Giuliani*. Nos. 04-6480-cv(L), 04-6498-cv(CON), 04-6499-cv(CON), 2006 WL 1130906 (2d Cir. Apr. 27, 2006). As relevant to this Comment, *Locurto* held that "the public concern test does not apply neatly as a *threshold* test for expression unrelated to Government employment." *Id.* at *12. Only insofar as *Locurto* so held, the Author agrees. *See infra* Parts IV and V.

II. BACKGROUND

Public employees enjoy at least some First Amendment protection. The Supreme Court first recognized this principle in *Keyishian v. Board of Regents*,[16] which repudiated a long line of cases[17] that clung hard and fast to Justice Holmes's famous admonition that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[18] In *Keyishian*, the Court held unconstitutional New York statutes that barred public employment to members of subversive organizations.[19] The Court's decision in *Keyishian* was the culmination of cases in the 1950's and 60's that attacked state practices of forcing public employees to swear oaths of loyalty and to reveal their political associations. In *Wiemann v. Updegraff*,[20] the Supreme Court struck down an Oklahoma state law that required all state officers and employees to swear loyalty oaths and to reveal their associational activities.[21] Similarly, in *Shelton v. Tucker*,[22] the Court held it impermissible to condition schoolteachers' employment on the requirement that they file affidavits listing the names and addresses of any group or organization they had belonged to in the previous five years.[23] Finally, in *Keyishian*, the Court quoted approvingly the language of *Sherbert v. Verner*:[24] "'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'"[25] In 1968, the Court decided *Pickering*, which articulated the current standard for evaluating whether or not employee speech is protected by the First Amendment.

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[16] 385 U.S. 589 (1967).

[17] *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 491–95 (1952) (holding constitutional a New York law that punished school teachers who spoke seditious words or engaged in seditious acts); Garner v. Bd. of Pub. Works, 341 U.S. 716, 720–24 (1951) (holding constitutional a California law requiring, *inter alia*, public employees to swear they neither had not been and were not members of the communist party); United Pub. Workers v. Mitchell, 330 U.S. 75, 94–104 (1947) (holding constitutional the Hatch Act, a federal law regulating the political activities of federal employees); United States v. Wurzbach, 280 U.S. 396, 398–99 (1930) (upholding against constitutional challenge the Federal Corrupt Practices Act).

[18] McAullife v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

[19] *Keyishian*, 385 U.S. 589, 597–610.

[20] 344 U.S. 183 (1952).

[21] *Id.* at 185.

[22] Shelton v. Tucker, 364 U.S. 479 (1960).

[23] *Id.* at 487–90.

[24] 374 U.S. 398 (1963).

[25] Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) (quoting *Sherbert*, 374 U.S. at 404).

In February of 1961, the Board of Education of Township High School District 205 in Will County, Illinois, sought approval by the voters of a bond referendum of $4,875,000, seeking to build two new schools.[26] The voters rejected the proposal.[27] In December of the same year, the Board offered another proposal, this time seeking to raise $5,500,000 for the construction of two new schools.[28] The second proposal passed.[29] Almost three years later, in 1964, the Board proposed a tax increase that the citizens voted down.[30] Later that year, the tax increase was again submitted to the voters who, once again, defeated it.[31] Via the local newspaper, the local teachers organization had urged voters to approve the tax hike, arguing that defeating it would decrease the quality of education provided by the schools.[32] Two days before the second vote, the paper published a letter from the superintendent of schools urging the voters to approve the increase.[33]

In response to the campaign for the tax increase, Marvin Pickering, a schoolteacher in the district, wrote a letter expressing disagreement with the way the Board handled the 1961 bond issue.[34] Pickering also took issue with the Board's allocation of financial resources as between its educational and athletic programs.[35] Finally, Pickering charged the superintendent "with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue."[36]

Pickering was fired for writing the letter.[37] At the Board hearing, the Board alleged that Pickering's letter contained numerous falsities and that the letter's publication unjustifiably harmed the integrity of the Board and the administration.[38] Pickering's letter, the Board argued, "would tend to foment controversy, conflict, and dissension among teachers, administrators, the Board of Education, and the

[26] Pickering v. Bd. of Educ., 391 U.S. 563, 565 (1968).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 565–66.
[30] *Id.* at 566.
[31] *Id.*
[32] *Pickering*, 391 U.S. at 566.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Pickering*, 391 U.S. at 566–67.

residents of the district."[39] Pickering brought a lawsuit in the state circuit court, which upheld his dismissal.[40] Over the dissent of two justices, the Illinois Supreme Court affirmed.[41]

In an opinion by Justice Marshall, the United States Supreme Court reversed.[42] The Court began its opinion by identifying the competing interests in these cases: "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."[43] The Court, first evaluating the truthful aspects of Pickering's letter, observed that this was not a case in which Pickering's letter would have an adverse effect on his employment relationships with either the Board or the superintendent.[44] The Court thus rejected the Board's position that truthful statements can warrant dismissal due to their inherently critical nature.[45] Turning to Pickering's false statements,[46] the Court held that there was simply no evidence showing that the letter impeded Pickering's performance of his duties or interfered with the operation of the schools.[47] The Court concluded, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[48]

Fifteen years later, the Court revisited the employee speech issue in *Connick v. Myers*. *Connick* erected a threshold requirement that public employees must meet to even reach the *Pickering* balancing test. Sheila Myers was an Assistant District Attorney in New Orleans.[49] Harry Connick was the District Attorney of New Orleans.[50] In October of 1980, Connick told Myers that she would be transferred to another division of criminal court.[51] Although Myers strongly objected to the transfer,[52] Connick urged her to accept the reassignment.[53]

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[39] *Id.* at 567 (internal quotation marks omitted).
[40] *Id.* at 565.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 568.
[44] *Pickering*, 391 U.S. at 570.
[45] *Id.*
[46] *Id.* at 570–73.
[47] *Id.* at 572–73.
[48] *Id.* at 573.
[49] Connick v. Myers, 461 U.S. 138, 140 (1983).
[50] *Id.*
[51] *Id.*
[52] *Id.*

Myers prepared a questionnaire designed to elicit the views of her fellow workers on matters regarding, among other things, office transfer policy and morale.[54] Myers distributed the questionnaire to fifteen assistant district attorneys.[55] One of her supervisors learned that she was distributing the survey and informed Connick that "Myers was creating a 'mini-insurrection' within the office."[56] Connick then terminated Myers for failing to accept the transfer.[57] He also told Myers that he considered the distribution of the questionnaire an act of insubordination.[58]

Myers filed suit pursuant to 42 U.S.C. § 1983, alleging she was wrongfully terminated because the First Amendment protected the speech in which she had engaged.[59] She prevailed in the district court, which ordered her reinstatement and awarded her damages.[60] Connick appealed and the Fifth Circuit affirmed.[61] In an opinion by Justice White, the Supreme Court reversed the judgment of the court of appeals.[62]

The Court concluded that *Pickering* and its progeny stood for the proposition that courts should not examine the government's reasons for discharging an employee when the employee's speech does not touch upon a matter of public concern.[63] Indeed, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," the government should essentially wield its power to do all that is necessary to efficiently run its offices without judicial oversight.[64] Courts are not appropriate forums to address personnel decisions made by public agencies when they involve matters of personal interest.[65] To determine whether an employee's speech touches upon a matter of public concern, courts must look to the "content, form, and context of a given statement, as revealed by the whole record."[66] The Court found

[53] *Id.* at 141.
[54] *Id.*
[55] *Connick*, 461 U.S. at 141.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 141–42.
[61] *Connick*, 461 U.S. at 142.
[62] *Id.* at 142–54.
[63] *Id.* at 146.
[64] *Id.*
[65] *Id.* at 147.
[66] *Id.* at 147–48.

that Myers's questionnaire, save one exception,[67] did not touch upon matters of public concern.[68] Indeed, Myers's questions were "mere extensions of [her] dispute over her transfer to another section of the criminal court."[69] They were not matters of public concern because they did not seek to inform the public about the District Attorney's Office.[70] The Court did not engage in *Pickering* balancing because Myers's statements did not meet the public concern threshold.[71]

Justice Brennan filed a dissent. First, Justice Brennan argued that the manner and context of the employee's statement is not relevant to the public concern analysis.[72] The manner and context is relevant in the second part of *Pickering*'s analysis—whether or not the speech harms the employer's interests—but whether an employee chooses to express his grievance in private or in public should be irrelevant in the public concern calculus.[73] Next, Justice Brennan strenuously argued that the First Amendment vigilantly protects "the dissemination of information on the basis of which members of our society may make reasoned decisions about the government."[74] As such, it is crucial that statements critical of public officials fall within the ambit of the First Amendment's protection.[75] Justice Brennan chided the majority for adopting a narrow conception of public concern, arguing the majority's fear that every remark by a public employee would "'plant the seed of a constitutional case'" was unfounded.[76] By adopting such a narrow conception, the majority wrested from the people the determination of whether employee speech had utility and gave the choice to judges.[77] Justice Brennan argued that it was more consistent with the First Amendment to evaluate employee speech by asking whether or not the speech inter-

[67] *Connick*, 461 U.S. at 149. The Court found that Myers's question whether any of the assistant district attorneys "ever [felt] pressured to work in political campaigns on behalf of office supported candidates" involved a matter of public concern. *Id.* The Court concluded nonetheless, under the rationale of *Pickering*, that Connick was justified in discharging Myers. *See id.* at 154.

[68] *Id.* at 148.

[69] *Id.*

[70] *Id.*

[71] *See Connick*, 461 U.S. at 154

[72] *Id.* at 159 (Brennan, J., dissenting).

[73] *Id.*

[74] *Id.* at 161 (citing Mills v. Alabama, 384 U.S. 214, 218–19 (1966)).

[75] *Id.* at 162.

[76] *Id.* at 164 (quoting the majority opinion at 149).

[77] *Connick*, 461 U.S. at 165 (Brennan J., dissenting).

fered with the "performance of governmental functions and in preserving employee discipline and harmony."[78]

A few years later, in *Rankin v. McPherson*,[79] the Court had an opportunity to address employee speech that took place *at* work, but was completely unrelated to work. Ardith McPherson was a deputy constable in the office of the Constable of Harris County, Texas.[80] On March 30, 1981, McPherson and some of her fellow co-workers heard on the radio that there had been an assassination attempt on President Reagan's life.[81] McPherson subsequently engaged in a conversation with Lawrence Jackson, her boyfriend, where she said, in pertinent part: "[I]f they go for him again, I hope they get him."[82] A coworker overheard McPherson's remark and reported it to Constable Walter Rankin.[83] McPherson confessed to making the statement, but said that she "didn't mean anything by it."[84] Rankin subsequently fired McPherson.[85]

McPherson filed a lawsuit pursuant to 42 U.S.C. § 1983, alleging that Rankin, in terminating McPherson's employment, had violated her constitutional rights.[86] The district court granted summary judgment to Rankin, holding that McPherson's speech was unprotected.[87] The Fifth Circuit vacated and remanded for trial.[88] On remand, the district court ruled that the statements were unprotected, and the court of appeals again reversed, holding that McPherson's statement touched upon a matter of public concern.[89] The appellate court then engaged in balancing under *Pickering*, concluding that because McPherson's duties were ministerial in nature and "'her potential for undermining the office's mission so trivial,'" the government's interest in maintaining an efficient workplace did not outweigh McPherson's interest in her speech.[90]

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[78] *Id.*
[79] 483 U.S. 378 (1987).
[80] *Id.* at 380.
[81] *Id.* at 381.
[82] *Id.* (internal quotation marks omitted).
[83] *Id.*
[84] *Id.* at 382 (internal quotation marks omitted).
[85] *Rankin*, 483 U.S. at 382.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 382.
[89] *Id.* at 383.
[90] *Id.* (quoting McPherson v. Rankin, 786 F.2d 1233, 1239 (5th Cir. 1986)).

In an opinion by Justice Marshall, the Supreme Court affirmed.[91] The Court turned to the threshold test set forth in *Connick*: whether McPherson's speech touched upon a matter of public concern.[92] The Court held that McPherson's statement "plainly dealt with a matter of public concern."[93] The Court considered the context in which McPherson made the statement, during the course of a conversation discussing the President's policies.[94] The Court concluded that McPherson's statement was not a threat to kill the President,[95] and that the inappropriateness of McPherson's statement was irrelevant to the public concern analysis.[96] The Court quoted *New York Times v. Sullivan*,[97] observing that public debate sometimes includes sharp, caustic attacks on public officials.[98] Turning to balancing under *Pickering*, the Court held that Rankin had failed to show that the employer's interest in maintaining an efficient workplace outweighed McPherson's right to free speech.[99] The Court concluded that Rankin did not inquire as to whether McPherson's statement disrupted the work of the office.[100] Furthermore, because she made her statement in private, no evidence existed that McPherson disparaged the office of the constable.[101] McPherson's statement was neither related to the functioning of the office nor to her ability to perform her work.[102]

Justice Marshall concluded by noting the importance of considering the duties and responsibilities of the employee when the State argues that it is necessary to discharge an employee because the employee's speech undermines the functioning of a government office.[103] Justice Marshall determined that where the employee is not a

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[91] *Rankin*, 483 U.S. at 383.

[92] *Id.* at 384.

[93] *Id.* at 386.

[94] *Id.* at 386. Indeed, McPherson testified that before she uttered "I hope they get him," Jackson was speaking about the President's policies on welfare, Medicaid, and food stamps. *Id.* at 381.

[95] Under federal statutes, a threat to kill the President is unprotected speech. *See* 18 U.S.C. §§ 871(a), 2385 (2000).

[96] *Rankin*, 483 U.S. at 387.

[97] 376 U.S. 254 (1964)

[98] *Rankin*, 483 U.S. at 387 ("'Debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'") (ellipses in original) (quoting *Sullivan*, 376 U.S. at 270).

[99] *Rankin*, 483 U.S. at 389.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 390–92.

policy maker or does not serve in a public capacity, "the danger to the agency's successful functioning from that employee's private speech is minimal."[104] Accordingly, Justice Marshall found that McPherson's duties were purely clerical and, thus, she was not involved with any law enforcement function of the constable's office.[105] Consequently, the office's interest in maintaining an efficient workplace did not outweigh McPherson's First Amendment rights.[106]

Justice Powell filed a concurring opinion.[107] In Justice Powell's view, it was unnecessary for the Court to engage in the analysis required by *Connick* and *Pickering* because it will only be the "unusual case" where the employer will have such an overriding interest in maintaining an efficient workplace that it will be justified in punishing an employee for making "a single, offhand comment directed to only one other worker . . . ."[108] Notwithstanding, Justice Powell agreed with the Court's *Connick* and *Pickering* analysis of McPherson's speech.[109]

Justice Scalia dissented,[110] arguing that McPherson's statement clearly did not touch upon a matter of public concern.[111] Justice Scalia rejected the majority's attempt to contextualize McPherson's statement and argued that McPherson's criticisms of President Reagan's policies merely fashioned her motives for uttering her remark, rather than actually forming the basis of its content.[112] Justice Scalia concluded that McPherson's statement was very near the category of speech that was unprotected. For support, Justice Scalia cited cases that dealt with fighting words[113] and advocacy of force or violence,[114] arguing that such speech could not possibly fall within the ambit of the First Amendment's protection.[115] Justice Scalia also took issue with the majority's contention that the government's interest in maintaining a successfully functioning workplace is diminished when

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[104] *Id.* at 390–91.

[105] *Rankin*, 483 U.S. at 392.

[106] *Id.*

[107] *Id.* at 392–94 (Powell, J., concurring).

[108] *Id.* at 393.

[109] *Id.*

[110] *Rankin*, 483 U.S. at 394–401 (Scalia, J., dissenting).

[111] *Id.* at 396.

[112] *Id.* at 396–97.

[113] Chaplinksy v. New Hampshire, 315 U.S. 568 (1942) (holding that fighting words are unprotected by the First Amendment).

[114] Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (holding that incitement of violence is unprotected by the First Amendment).

[115] *Rankin*, 483 U.S. at 397–98 (Scalia, J., dissenting).

the speech of a low-level, non-policymaking employee is at issue.[116] Employees such as McPherson, Justice Scalia argued, "can hurt working relationships and undermine public confidence in an organization every bit as much as policymaking employees."[117] Justice Scalia gave a number of examples of the type of conduct that would be protected under the majority's ruling, such as non-policymaking employees of the EEOC being permitted to make remarks approving of racial discrimination on the job, or employees of the Selective Service System urging refusal to comply with the draft laws.[118]

The Court expounded upon *Connick*'s definition of public concern in *United States v. National Treasury Employees Union* (*National Treasury*).[119] The case involved a challenge to a 1989 federal law that prohibited federal employees from accepting compensation for delivering speeches or writing articles, even if those speeches or articles were unrelated to the employee's employment.[120] Both the district court and the court of appeals invalidated the law insofar as it applied to Executive Branch employees.[121] The Supreme Court affirmed in part and reversed in part.[122] The Court's decision in *National Treasury* is relevant to this Comment in two key respects: its discussion of *Connick* and Justice O'Connor's concurrence.

The Court applied *Connick* because the case involved a burden on employee speech and the Court held that the speech at issue touched upon matters of public concern.[123] The speech did not involve "employee comment on matters related to personal status in the workplace."[124] The Court held that the speech was addressed to a public audience, was made outside the workplace, and was largely unrelated to the plaintiffs' government employment.[125] Accordingly, the Court applied *Pickering*.

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[116] *Id.* at 400–01.

[117] *Id.* at 400.

[118] *Id.* at 400–01.

[119] 513 U.S. 454 (1995).

[120] *Id.* at 457.

[121] *Id.* at 462–63.

[122] *Id.* at 480. Specifically, the Court upheld the enjoinment of the statute insofar as it applied to the specific plaintiffs who brought the suit, but the Court reversed the judgment insofar as it granted relief to parties who were not before the court. *Id.*

[123] *Id.* at 466. The speech that the plaintiffs engaged in comprised of, *inter alia*, a Postal Service employee giving speeches on the Quaker religion, a tax examiner writing articles about the environment, and a scientist at the FDA who wrote articles reviewing dance performances. *Nat'l Treasury*, 513 U.S. at 461–62.

[124] *Id.* at 466.

[125] *Id.*

Justice O'Connor concurred in part and dissented in part.[126] While Justice O'Connor focused primarily on the government's interests in adopting the honoraria ban[127] and the remedy adopted by the Court,[128] the opinion also briefly analyzed why the speech in the case did not implicate *Connick*'s public concern threshold question.[129] Justice O'Connor wrote that the plaintiffs challenged the law as it applied to speech that occurred outside the workplace and was unrelated to the plaintiffs' government employment—"speech that by definition does not relate to internal office affairs or the employee's status as an employee."[130]

III. THE CIRCUIT COURTS WRESTLE WITH *CONNICK*

The lower courts have had difficulty applying *Connick* to fact patterns involving employee conduct that occurred outside the workplace and was unrelated to work. In *Berger v. Battaglia*,[131] the Fourth Circuit explained that *Connick* should be read narrowly and apply only to fact patterns like the one involved in *Connick* itself. The court in *Flanagan v. Munger*[132] held that *Connick* does not apply at all in cases that involve employee speech that occurs outside the workplace and is unrelated to the employee's government employment. Finally, in *Roe v. City of San Diego*,[133] recently overturned by the Supreme Court,[134] the Ninth Circuit conducted a full blown analysis from *Connick* to *National Treasury*, synthesizing the case law to conclude that the employee speech at issue touched upon a matter of public concern.[135]

A. Connick *Should Be Read Narrowly*

Berger v. Battaglia, decided soon after *Connick*, involved Robert M. Berger, a police officer with the Baltimore Police Department.[136] During his off-duty hours, Berger performed a musical and singing act, not affiliated with his position as a police officer or the department, a part of which contained an impersonation of the singer Al

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[126] *Id.* at 480 (O'Connor, J., concurring in part and dissenting in part).

[127] *Id.* at 480–85.

[128] *Id.* at 485–89.

[129] *Nat'l Treasury*, 513 U.S. at 480 (O'Connor, J., concurring in part and dissenting in part).

[130] *Id.* (internal quotation marks and citation omitted).

[131] 779 F.2d 992 (4th Cir. 1985).

[132] 890 F.2d 1557 (10th Cir. 1989).

[133] 356 F.3d 1108 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004).

[134] 543 U.S. 77 (2004).

[135] *Roe*, 356 F.3d at 1115–22.

[136] *Berger*, 779 F.2d at 993.

Jolson.[137] To impersonate Jolson, Berger wore blackface makeup and a black wig.[138] Berger sought to entertain people; at no point did he make derogatory or inflammatory remarks or seek confrontation.[139] Eventually, Berger became well known for his act and entered into an agreement with the Baltimore Hilton Hotel to perform.[140] The Hilton advertised Berger's performance in the local newspaper with a picture of Berger in blackface.[141] The advertisement offended the National Association for the Advancement of Colored People ("NAACP"), which eventually succeeded in getting a show cancelled due to rumors that its members would storm the stage if Berger performed his act in blackface.[142]

After the cancellation of the show, the police department received complaints from black citizens and from the NAACP.[143] The department then ordered Berger, who was then on light-duty status, to cease all public performances of his act.[144] When Berger returned to full duty status, his commanding officer ordered him not to wear blackface in public.[145] But Berger continued to perform in blackface, even after he was ordered not to, without incident or complaint.[146] He sought permission from the department to receive pay for his performances and his request was denied.[147]

Berger subsequently brought suit in federal district court, alleging that the department had violated his right to free speech.[148] The district court entered judgment in favor of the department despite finding that Berger's speech touched upon a matter of public concern.[149] The court struck the balance under *Pickering* in favor of the department because the department had an overpowering interest in maintaining good relations with Baltimore's black community and

[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 994.
[141] *Id.*
[142] *Berger*, 779 F.2d at 994–95.
[143] *Id.* at 995.
[144] *Id.*
[145] *Id.* at 996.
[146] *Id.*
[147] *Id.*
[148] *Berger*, 779 F.2d at 996.
[149] *Id.*

averting future disruptions.[150] Berger appealed, and the Court of Appeals for the Fourth Circuit reversed.[151]

The Fourth Circuit held that the public concern test is more properly suited to address a category of speech that is *not* protected than to fix the First Amendment's outer limits of protection.[152] Accordingly, the speech that is not entitled to protection is speech that is of personal concern to the employee, such as a personnel grievance.[153] The appropriate inquiry, the court held, is whether the public would be concerned with the expression or whether the employee speech is merely "a private matter between employer and employee."[154] Applying this test, the court held that Berger's performances were of concern to the community and they were obviously of public interest because the public willingly paid to see him perform.[155] Moreover, the court held that the balance under *Pickering* should be struck in favor of Berger and remanded the case to the district court for further proceedings.[156]

B. Connick *Does Not Apply at All*

Flanagan v. Munger concerned three police officers in the Colorado Springs Police Department, along with an investor named Richard Paul, who together formed a corporation to open and operate a video rental store.[157] Paul procured 2500 used video tapes for the company, 100 of which were adult films.[158] The films were available only to persons twenty-one and older, and only the film titles were visible from the shelf.[159] James Munger, the chief of police, received an anonymous letter alleging that certain police officers "were coowners of a Porno Video business."[160] Munger conducted an investigation and concluded that the officers were violating or had violated the department's regulation concerning off-duty employment.[161] Munger subsequently asked the officers to remove the adult films

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[150] *Id.*
[151] *Id.* at 993, 1003.
[152] *Id.* at 998.
[153] *Id.*
[154] *Berger*, 779 F.2d at 999 (internal quotations marks omitted).
[155] *Id.*
[156] *Id.* at 999–1003.
[157] Flanagan v. Munger, 890 F.2d 1557, 1560 (10th Cir. 1989).
[158] *Id.*
[159] *Id.*
[160] *Id.* (internal quotations omitted).
[161] *Id.*

from their inventory.[162] He also told the officers that they would receive a reprimand for violating departmental regulations.[163] The officers removed the adult films from the store's shelves.[164]

Thereafter, a local reporter contacted one of the officers, asking him to verify information that the officers ran a video store that rented adult films and that the officers were reprimanded for their activities.[165] After the conversation, the officers arranged a meeting with Chief Munger.[166] Munger then spoke to the local media and announced the imposition of written reprimands against the officers.[167] The officers filed suit in federal district court, alleging that, *inter alia*, their First Amendment rights had been violated.[168] The district court granted the defendants' motion for summary judgment on all causes of action.[169] The Court of Appeals for the Tenth Circuit affirmed in part and reversed in part.[170]

Analyzing the officers' First Amendment claim, the court first noted that the fact pattern was conceptually different from the archetypal *Pickering/Connick* fact patterns because the conduct at issue—the officers' stocking their video store with adult films—occurred off the job and was unrelated to the officers' government employment.[171] The court held that *Connick* did not apply to the case because it involved nonverbal protected expression that neither occurred at work nor was about work.[172] The court first wrestled with the notion that placing sexually explicit videos for rent in a video store could somehow qualify as a matter of public concern; indeed, the court noted, it is difficult to see how it possibly could.[173] Next, the court noted that when a statement is made at or about work, the public concern test makes sense because the distinction to be made is whether the statement takes on some significance outside the workplace or whether the statement is purely personal to the employee's employment.[174] Where the facts involve speech that is non-work related and occurred

[162] *Id.*
[163] *Flanagan*, 890 F.2d at 1561.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Flanagan*, 890 F.2d at 1561.
[170] *Id.* at 1572.
[171] *Id.* at 1562.
[172] *Id.*
[173] *Id.* at 1563.
[174] *Id.* at 1564.

outside the workplace, the court distinguished, "the purpose behind using the public concern test is simply irrelevant."[175] The court observed that the purpose of *Connick*, as *Connick* itself observed, was to weed out lawsuits concerning employee speech where the employee was speaking on matters of purely personal interest.[176]

Accordingly, the court held that the public concern test did not apply.[177] Instead, the court developed an alternative test that it said could fulfill the same function as the public concern test.[178] The test is simply whether the speech itself involves protected expression.[179] If it does, then courts should balance, pursuant to *Pickering*, the employee's right against the employer's right to run its operation efficiently.[180]

C. A Full Blown Analysis Under Connick *and* National Treasury

John Roe, the plaintiff in *Roe v. City of San Diego*, sold sexually explicit videos of himself on eBay while serving as a police officer in San Diego.[181] Roe wore a generic police uniform in the videos.[182] Roe's supervisor became aware of Roe's activities and discovered certain items offered for sale by Roe, including a uniform formerly used by the San Diego Police Department.[183] The department began an investigation into Roe's activities, purchasing items from him.[184] At no time did Roe identify himself by name or as a San Diego Police officer.[185] Eventually, one of Roe's supervisors interviewed Roe about his sale of videos and other items on eBay and Roe admitted to the conduct.[186] The department concluded that Roe had violated three department policies and ordered Roe to stop selling or distributing sexually explicit materials over the Internet.[187]

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[175] *Flanagan*, 890 F.2d at 1564.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.* at 1565.

[181] Roe v. City of San Diego, 356 F.3d 1108, 1109–10 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004).

[182] *Id.* at 1110.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 1110–11.

[186] *Id.* at 1111.

[187] *Roe*, 356 F.3d at 1111.

Roe subsequently removed the items he had listed for sale, but he did not change his seller's profile on eBay.[188] His profile described two sexually explicit videos he had produced, the prices of the two videos, and the price he charged to make custom videos.[189] Roe was then charged with violating a fourth departmental policy and disciplinary action was recommended.[190] The department terminated Roe's employment.[191] Roe filed suit in federal district court, alleging that he was terminated in violation of his First Amendment right to freedom of speech.[192] The district court dismissed Roe's complaint for failure to state a claim.[193] The Ninth Circuit reversed.[194]

The court first noted the purpose of the public concern test is "to avoid the constitutionalization of common workplace grievances between public employers and employees."[195] The court understood *Connick* not to give a precise definition of public concern.[196] Nonetheless, the Ninth Circuit acknowledged the Supreme Court's holding in *Connick* that the issue in the *Connick* plaintiff's questionnaire—whether employees were pressured to work on political campaigns—touched upon a matter of public concern.[197] The court proceeded to observe that the typical public concern case involves employee criticism of an employer's policy, specific actions, or supervisory personnel.[198] Additionally, the panel noted its circuit's penchant for reading public concern broadly when internal disputes or power struggles were not at issue.[199] The panel, however, distinguished the case before the court because the employee conduct occurred outside the workplace.[200]

Next, the court looked to the Supreme Court's decision in *National Treasury*.[201] The court relied heavily on *National Treasury*'s brief observations that none of the speech in that case was related to the employee's employment and the speech occurred outside the work-

[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Roe*, 356 F.3d at 1111.
[194] *Id.* at 1110.
[195] *Id.* at 1115 (citing Connick v. Myers, 461 U.S. 138, 149 (1983)).
[196] *Id.*
[197] *Id.* (citing *Connick*, 461 U.S. at 148).
[198] *Id.* at 1116 (quoting Berger v. Battaglia, 779 F.2d 992, 997 (4th Cir. 1985)).
[199] *Roe*, 356 F.3d at 1117 (citations omitted).
[200] *Id.*
[201] *Id.*

place.[202] Furthermore, the court then quoted approvingly the Fourth Circuit's holding in *Berger* for the proposition that speech that is not purely personal to the employee is at least entitled to qualified protection.[203] Citing *Berger* and a Ninth Circuit case that adopted *Berger*[204] for support, the court explained that public concern as set forth in *Connick* served a narrow purpose: "to preempt a narrow category of claims involving speech related to a public employee's status in the workplace."[205] Accordingly, the court held that when speech is not about the employer or employment, is directed to the general public, and occurs away from the workplace, the speech touches upon a matter of public concern.[206]

D. Roe *Is Overruled*

Deciding the case solely on the briefs, the Supreme Court reversed the Ninth Circuit's decision in *Roe*.[207] The Court termed the Ninth Circuit's reliance on *National Treasury* as "seriously misplaced."[208] The Court noted that Roe took steps to link his videos and the other items he sold on eBay to the department in a way that harmed the department.[209] The Court observed that San Diego had conceded throughout the litigation that Roe's activities were unrelated to his employment.[210] The Court, however, wrote that San Diego had consistently maintained that Roe's speech was "detrimental" to the police department and "harmful to the proper functioning of the police force."[211] Accordingly, the Court held that *Roe* was controlled by *Connick* and *Pickering*, rather than by *National Treasury*.

The Court next applied *Connick*.[212] The Court held that "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest *and* of value *and* concern to the public at the time of publication."[213] Applying this test of public concern,

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[202] *Id.* (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995)).

[203] *Id.* at 1119 (quoting *Berger*, 779 F.2d at 998).

[204] *Id.* (citing *Berger*, 779 F.2d at 998; Roe v. City & County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997)).

[205] *Roe*, 356 F.3d at 1119.

[206] *Id.* at 1119–20.

[207] City of San Diego v. Roe, 543 U.S. 77, 78 (2004) (per curiam).

[208] *Id.* at 81.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* at 83–84.

[213] *Roe*, 543 U.S. at 83–84 (emphasis added).

the Court concluded that Roe's speech did not qualify.[214] The Court pointed to the dissent in *Connick* to explain why Roe's speech failed to make this even "a close case."[215] The dissenters in *Connick* concluded that the activities of Myers, the plaintiff in *Connick*, touched upon a matter of public concern because they informed the public about how a certain elected official was discharging his duties; but Roe's activities "did nothing to inform the public about any aspect of the [police department's] functioning or operation."[216] Nor was Roe's expression akin to that uttered in *Rankin*, where the speech was related to political news.[217]

IV. ANALYSIS

A. Speech In, Speech Out

The ultimate question to be answered in public employee speech cases is whether the speech is entitled to the full panoply of First Amendment protections. Because the *Pickering* balancing test is fact sensitive,[218] however, there is no general principle applicable to the speech in every case. The issue is whether the speech is at least entitled to *qualified* protection. Qualified protection means that the employer would have to show, in order to permissibly limit the speech, that the employee's speech interfered with the efficiency of the operations, as discussed in *Pickering*.[219] The Court in *Connick* made clear that it did not want to constitutionalize workplace personnel disputes and grievances.[220] But what about non-workplace disputes that are non-work-related? The question arises, do we want to offer qualified protection to such speech, and if so, why?

Autonomy is one of the primary justifications underlying freedom of speech[221] and the literature on the autonomy justification for free speech is quite extensive.[222] The Kantian view of autonomy pos-

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[214] *Id.* at 84.

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *See supra* note 43 and accompanying text.

[219] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[220] Connick v. Myers, 461 U.S. 138, 149 (1983).

[221] Daniel J. Solove, *The Virtues of Knowing Less*: *Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 989 (2003).

[222] *See, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Geoffrey R. Stone, *Autonomy and Distrust*,

ited that individuals are to be treated as ends unto themselves, "with a right to the greatest liberty compatible with the like liberties of all others."[223] A person's action is limited insofar as it impinges on others.[224] Charles Fried argued that people are free to arrange their lives within their own sphere of liberty.[225] Allowing the speech in the foregoing cases allows people to be autonomous and have a certain degree of control in running their lives.

Such autonomy should not be merely circumscribed to speech that is a matter of public concern. Under the Kantian view of autonomy, speech is valuable in and of itself because individuals are ends unto themselves, and protecting one person's political speech while not protecting another's sexually explicit speech would run counter to this assumption.[226] In curbing the free speech rights of employees away from the workplace, the employee is converted into essentially an arm of the State and, in a way, ceases to be her own person. People are not entirely measured by what they do; they are also measured by who they are. Public concern, in many cases, ceases to allow public employees to be who they are, and in so doing, undermines their autonomy as individuals. The speech in *Roe*, *Berger*, and *Flanagan* is valuable not because of any tangible benefit it adds to society, but because it allows the individual to function freely. Of course, the speech may ultimately be unprotected when *Pickering* is applied,[227] but the autonomy rationale at least supports providing speech qualified protection against government censorship.

B. Roe*'s Red Herring;* Connick*'s Havoc*

The Supreme Court's decision in *Roe* did not overrule the foregoing lower court cases (except *Roe* itself) that have interpreted *Connick* as applying, if at all, very narrowly in out-of-the-workplace cases related to employment.[228] Accordingly, it will be necessary to take

64 U. COLO. L. REV. 1171 (1993); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

[223] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (citing IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Bobbs-Merrill Co., 1959) (1785); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., Bobbs-Merrill Co., 1965) (1797)).

[224] Fried, *supra note* 223, at 233.

[225] *Id.*

[226] *Id.*

[227] *See supra* note 43 and accompanying text.

[228] *See supra* note 15 and accompanying text.

Connick on its own terms, and reconcile those cases with *Connick* to see whether or not those cases read it correctly.

i. *Roe* Did Not So Much Address Public Concern as Engage in a *Pickering* Analysis

In *Roe*, the Ninth Circuit relied heavily on *National Treasury* in its decision.[229] In *National Treasury*, the Supreme Court held that public concern was satisfied because the speech at issue occurred outside the workplace and was unrelated to the employees' employment.[230] The Court in *National Treasury* essentially ascribed the same meaning to *Connick* as did the Fourth Circuit in *Berger*, and to a lesser extent, the Tenth Circuit in *Flanagan*.[231] Coupled with Justice O'Connor's concurrence, *National Treasury* stands for the proposition that *Connick* excised from constitutional protection a very narrow category of speech.[232]

The Supreme Court in *Roe*, however, rejected the comparison to *National Treasury* by holding that the San Diego Police Department ("SDPD") had been injured by Roe's activities.[233] This analysis, however, does not address public concern so much as it addresses the other side of the constitutional equation: the balancing inquiry under *Pickering*. The Court wrote of the "detriment[]" to the SDPD and the "harm[]" to the police force.[234] This statement mirrors the language that typically guides the *Pickering* analysis, which requires the employer to show that the employee's speech would harm the efficiency of its operations.[235] Instead, the *National Treasury* Court was conducting a public concern analysis.[236] When the Court in *Roe* wrote that the case "falls outside the protection afforded in [*National Treasury*],"[237] it confused the role of *National Treasury* in the Court's employee free speech jurisprudence. *National Treasury* does not offer "protection" as much as it merely applies *Connick*—and it does so fairly narrowly at

[229] Roe v. City of San Diego, 356 F.3d 1108, 1117 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004).

[230] United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995).

[231] *See id.* at 466; *see* Flanagan v. Munger, 890 F.2d 1557, 1563 (10th Cir. 1989) ("[T]he public concern test was not intended to apply to situations of this type."); Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985) (holding that speech outside the workplace and unrelated to work is subject to qualified protection under *Connick*).

[232] *Nat'l Treasury*, 513 U.S. at 466.

[233] City of San Diego v. Roe, 543 U.S. 77, 80–82 (2004) (per curiam).

[234] *Id.* at 81.

[235] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[236] *Nat'l Treasury*, 513 U.S. at 466.

[237] *Roe*, 543 U.S. at 82.

that.[238] Accordingly, the Court chose to apply *Connick* instead of *National Treasury*.[239] This is, of course, an improper choice because the two cases are not mutually exclusive.[240] Indeed, the *National Treasury* court applied *Connick* straightforwardly for the proposition that certain speech falls within *Connick's* definition of public concern when it occurs outside the workplace and is unrelated to work.[241]

The principle that emerges from the Court's discussion of *National Treasury* is that *National Treasury* will be disregarded where there is harm to the employer.[242] The logical endpoint of this principle is that courts can simply bypass the public concern analysis where there has been a showing of discrete harm to the employer and move right to *Pickering*. It is possible that, in *Roe*, the Supreme Court found the Ninth Circuit's reliance on *National Treasury* "seriously misplaced"[243] because such reliance compelled the conclusion that Roe's activities were, in fact, matters of public concern under *National Treasury*.

Thus, the correct reading of *Roe* is that the Court ascribed such low value to Roe's speech—his engaging in sexually explicit conduct on film—that the Court simply chose not to protect it. The case is an outlier in the public concern cases and it should not be read as a vehicle by which to explicate *Connick*. To be sure, *Roe* certainly elaborates on the definitional aspect of *Connick* insofar as it defines the contours of public concern.[244] But by implicitly applying *Pickering*, and by merely rejecting *National Treasury*'s application in the instant case, *Roe* does not answer the question of how *Connick* should generally be applied to cases that involve speech made outside the workplace, unrelated to employment. Instead, *Roe* left *National Treasury*'s discussion of public concern standing, and in doing so, left open the possibility that speech directed at a public audience, made outside the workplace, and unrelated to the employee's government employment, fulfills *Connick*'s conception of public concern.

ii. *Connick*: Why Public Concern in Outside-the-Workplace Cases is a Doctrinal Failure

Connick is a doctrinal failure. *Connick*'s public concern doctrine exempts so much speech from protection that it fails to protect even

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[238] *See Nat'l Treasury*, 513 U.S. at 466.
[239] *Roe*, 543 U.S. at 83–84.
[240] *See Nat'l Treasury*, 513 U.S. at 466.
[241] *Id.*
[242] *Roe*, 543 U.S. at 83–84.
[243] *Id.* at 81.
[244] *Id.* at 83–84.

the most innocuous employee speech that occurs off campus and is unrelated to work.

It is clear that *Connick* did not contemplate cases where the employee's speech was non-work related and occurred outside the workplace.[245] As Professor Lee points out, *Connick* made clear that grievances over personnel matters did not constitute matters of public concern.[246] However, Professor Lee also points out that the Court in *Rankin* fit, within the *Connick* framework, speech that most assuredly was not a matter of public concern.[247] *Connick* purports to tell us that speech that is a matter of public concern will be protected by showing us what speech is *not* a matter of public concern.[248] This is the doctrinal conundrum borne by *Connick*, and it is hardly confined to cases that involve speech that occurs outside the workplace.[249] *Connick* could have confined its holding to personnel or intra-office disputes or power struggles. Instead, it painted with a broad brush, requiring that the speech touch upon a matter of public concern to even reach balancing under the *Pickering* test.[250] The question arises, though, whether it is legitimate to read *Connick* as suggesting that *all* speech *other* than internal personnel disputes or employee grievances constitute matters of public concern. Put another way, should *Connick* be read as the lower court cases suggest,[251] that it simply excises from the First Amendment's protection a narrow class of cases, rather than fixing the limits of constitutional protection?

Before undertaking that analysis, it is worthwhile to consider what "public concern" really means. *Connick* does not really define it, except only to hold one part of Myers's questionnaire as touching upon it.[252] One commentator notes that public concern or public in-

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[245] *See* Connick v. Myers, 461 U.S. 138, 140 (1983).

[246] Cynthia K. Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1126 (1988).

[247] *Id.*

[248] *Connick*, 461 U.S. at 147–49.

[249] *See, e.g.*, Lewis v. Harrison Sch. Dist., 805 F.2d 310, 313–17 (8th Cir. 1986) (holding that a high school principal's criticism of a superintendent's speech was protected even though the matter involved a personnel dispute, where the matter drew a large turnout at a board meeting, the attention of a local newspaper, and spawned a petition signed by several teachers).

[250] *Connick*, 461 U.S. at 146.

[251] *See* Roe v. City of San Diego, 356 F.3d 1108, 1117 (9th Cir. 2004) (citations omitted), *rev'd*, 543 U.S. 77 (2004); Flanagan v. Munger, 890 F.2d 1557, 1562 (10th Cir. 1989); Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985).

[252] *Connick,* 461 U.S. at 149.

terest may be viewed in either an objective or a subjective sense.[253] When viewed subjectively, the inquiry is whether or not the public is, in actuality, concerned with the speech.[254] As an objective matter, however, something may be a matter of public interest even if no one is subjectively interested in it.[255] R. George Wright argued that the Supreme Court's jurisprudence aims to protect speech that concerns the "legitimacy of the political process," speech that is popularly accepted, or speech that captures the attention of the media.[256]

Viewed through this lens, it is quite difficult to argue that the speech in *Berger* and *Flanagan* rose to matters of public concern under *Connick*. This Comment has explained why *Connick*'s public concern language was generally unnecessary to decide the case before it.[257] Nonetheless, the Supreme Court specifically went out of its way to erect a threshold requirement to move on to the *Pickering* balancing test.[258] The court in *Berger* held only that Berger's imitation of Al Jolson in blackface constituted a matter of public concern because it was *not* a workplace grievance.[259] The *Berger* court's logic is forceful insofar as it suggests that *Connick* should not be read to compel results that are not in harmony with the reasons underlying its decision. Nonetheless, the *Berger* court's decision also has the effect of writing the public concern test out of existence; if anything that is not a workplace personnel dispute or complaint *is* a matter of public concern, then public concern has been effectively drained of all meaning.[260]

The *National Treasury* Court arrived at its holding in virtually the same way as the *Berger* court reached its decision.[261] The Court in *National Treasury* made no effort to describe how the plaintiffs' activities rose to matters of public concern, instead focusing on how the plaintiffs' activities were unlike those activities the Court chose not to protect in *Connick*.[262] Once again, such a reading of *Connick* is unfaithful

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[253] *See* R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 34–35 (1987).

[254] *Id.*

[255] *Id.* at 35.

[256] *Id.* at 35–36 (quoting Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986)).

[257] *See supra* Part IV.B.ii.

[258] Connick v. Myers, 461 U.S. 138, 146–49 (1983).

[259] Berger v. Battaglia, 779 F.2d 992, 998–99 (4th Cir. 1985).

[260] *See* D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 262–63 (1990) ("[T]he Fourth Circuit [in *Berger*] turned *Connick* on its head.").

[261] *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995).

[262] *Id.*

to *Connick*'s conception of public concern because it treats *Connick* as having not mentioned the concept at all. Public concern is the linchpin of *Connick*.

After *Roe* refined *Connick*'s conception of public concern, the consequences of these two decisions are far reaching. It is unclear how courts will apply *Roe* and *National Treasury*, but because *Roe* is the Court's latest pronouncement on the subject, *National Treasury*'s discussion of public concern may fall by the wayside. If *National Treasury* did not apply in *Roe*, when would it ever apply? In *National Treasury*, the Court should have conducted a public concern analysis before reaching *Pickering*. The *Connick/Roe* public concern doctrine conflated the *Connick/Pickering* analyses by considering the harm to the employer.[263]

Implicit in the *Roe* Court's treatment of *National Treasury*, then, is that *Pickering* considerations also inform the analysis in *Connick*.[264] This is a doctrinal quagmire. The public concern analysis is supposed to function as a *threshold* requirement to even reach *Pickering*. Perhaps the lesson to be gleaned from *Roe* is that speech that is so far beyond the conception of "newsworthiness" is entitled to no protection at all. One wonders whether the *Roe* Court overruled *sub silentio* the public concern holding of *National Treasury* and merely replaced it with its "newsworthiness" standard. The overarching point is that the Supreme Court did *not* explicitly cast aside *National Treasury*, which reaches a far different conception of public concern than does *Roe*.[265] Due to the Supreme Court's confounding treatment of the issue in *Roe*, courts will likely struggle with the question of when *National Treasury* applies.

If the Supreme Court in *Roe* chose not to protect Roe's speech because of its low First Amendment value, and *Connick*'s public concern requirement is most properly read as having teeth, then we are left with a First Amendment that offers little protection to the free speech rights of public employees when they speak outside the workplace on matters unrelated to their employment. Courts applying the *Connick* analysis to speech that occurs outside the workplace that is unrelated to work are writing the *Pickering* analysis out of existence.

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[263] *See* City of San Diego v. Roe, 543 U.S. 77, 81 (2004) (per curiam).

[264] *Id.* at 82–85.

[265] *Compare Nat'l Treasury*, 513 U.S. at 466 (speech addressed a public audience, made outside the workplace, and largely not involving government employ entitled to presumptive protection under *Connick*), *with Roe*, 543 U.S. at 84 (speech addressed a public audience, made outside the workplace, and largely not involving government employ not entitled to protection under *Connick*).

The very essence of *Connick* is that the government should not have to justify an adverse employment decision when speech is not about a matter of public concern.[266] In formulating the public concern doctrine, however, the court launched a missile to kill a mouse.[267] Since the speech at issue does not occur at work, it is likely that the speech is not about work. Because the speech is not *about* work, the *Connick* Court's concern of personnel disputes planting the seeds of constitutional cases diminishes greatly.

What remains is speech that would otherwise be entitled to full protection in the absence of the employee's government employment. What justifies the employee's loss of her free speech rights, then, is the notion that the speech may somehow harm the employer. When viewed this way, *Connick* is simply a superfluous hurdle for plaintiffs to jump. One may argue that by virtue of the governmental employ, the employee *should* have to overcome certain hurdles and the employer should enjoy wide latitude in curbing the speech of its employees. But when the speech occurs outside of work, the public concern test is like trying to put a square peg in a round hole because the central concern of *Connick* is that internal personnel matters are not protected by the First Amendment.[268] *Connick*'s concern is rendered irrelevant when the speech is unrelated to employment. There is a doctrinal and policy-based solution to *Connick* which is more speech protective and more doctrinally coherent than *Connick*.

V. A DOCTRINAL AND POLICY BASED SOLUTION: *FLANAGAN* AND PROTECTED EXPRESSION

Connick, while having teeth, is also an albatross, and the court in *Flanagan* treated it as such.[269] Where *Berger* strained to apply it, *Flanagan* chose to ignore it.[270] The *Flanagan* approach is less fundamentally at odds with *Connick* than it first appears to be. *Flanagan* held simply that *Connick* does not apply to speech that occurs outside the workplace and is unrelated to the employee's employment.[271] In light of *Roe*, do courts even have to apply *Connick* in these situations? One commentator has argued that because the court in *Rankin* extended *Connick* to a comment unrelated to the employee's employ-

[266] Connick v. Myers, 461 U.S. 138, 146–49 (1983).

[267] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

[268] *Connick*, 461 U.S. at 147.

[269] Flanagan v. Munger, 890 F.2d 1557, 1562–65 (10th Cir. 1989).

[270] *Id.*

[271] *Id.* at 1564–65.

ment, *Connick* still applies.[272] *Connick* and *Rankin*, however, do not purport to address situations where the conduct does not occur *at* work.[273] One might argue instead that *Roe* overruled *Flanagan* because *Roe* applied *Connick* to this type of fact pattern.[274] *Roe* did not formulate a new principle of law, however, as much as it overturned the Ninth Circuit's decision because the conduct was not, in the Supreme Court's view, a matter of public concern. *Roe* left open the possibility that *Connick* does not apply away from the workplace because *Roe* only addressed the parties' specific situation rather than the broad doctrinal issue of whether *Connick* applies in these types of cases.[275]

The counterargument is, of course, that *Roe* implicitly held as such by applying *Connick*. However, *Roe* did not set forth any new principle of law. *Roe* merely redefined public concern and held that Roe's activities did not meet the threshold.[276] Explicitly left open was the possibility that *Connick* did not apply in cases like *Roe* because the Supreme Court did not make such a holding.[277] The *Roe* decision is more properly viewed as correcting what the Court saw as a clearly erroneous decision from the Ninth Circuit.[278]

This Comment proposes the abandonment of *Connick* where employee speech occurs away from work and is unrelated to employment.[279] Instead of *Connick*, a refined type of *Flanagan* test should apply. The inquiry should be whether the employee's speech is protected by the First Amendment, and if it is, whether the speech invokes the specter of imminent harm such that the employer should not have to justify its action under *Pickering*.

Under *Flanagan*, an employer would first ask whether the employee engaged in protected expression.[280] If the answer is yes, then the employer would necessarily have to weigh its interests in curbing the speech at issue against punishing the employee who spoke.[281] This is, of course, no different than the decisions that government employers currently make. The only difference is that, in the absence

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[272] *See* Smith, *supra* note 260, at 264.

[273] *See* Rankin v. McPherson, 483 U.S 378, 384 (1987); *Connick*, 461 U.S. at 154.

[274] City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam).

[275] *Id.* at 84–85.

[276] *Id.* at 84.

[277] *Id.* at 82–85.

[278] *Id.* at 84.

[279] This Comment is not the first place that someone has proposed a partial abandonment of *Connick*. *See* Smith, *supra* note 260, at 262.

[280] Flanagan v. Munger, 890 F.2d 1557, 1564–65 (10th Cir. 1989).

[281] *Id.* at 1565–67.

of actual harm, the employer will have to evaluate whether the harm to its operation is imminent. Otherwise, the employer will have to presume that the speech is protected unless the speech interferes with the employer's operation such that the employer would win under *Pickering*.[282] The result is that employers would not be able to inhibit employees' speech outside of work unless their speech was imminently harmful, or unless the employer could *actually* show that the speech hampered its operations. With the public concern test abandoned, all speech otherwise deserving of First Amendment protection would be presumptively protected.

Employers would still have an "out" if they could show that harm was imminent. To show how this would work as a matter of practice, it is clear that in cases like *Roe*, *Berger*, and *Flanagan* an employer would not be able to make the requisite showing. In *Roe*, the harm alleged to befall the police department was grossly exaggerated by the Supreme Court. If someone other than a member of the department had actually identified Roe in one of his videos as an officer in the department, it is possible that the reputation of the department could have been harmed. However, it is entirely unclear why this harm in the abstract should outweigh Roe's right to engage in activity that is otherwise protected, unless the department could show *actual* harm under *Pickering*. The harm in *Roe*, nebulous at best, is far from immediate.[283] In *Berger*, the harm to the department was not immediate either. Indeed, Berger was only fired after the department had suffered *actual* harm,[284] and thus *Pickering* was the appropriate standard for the *Berger* court to apply to Berger's speech.[285] Finally, in *Flanagan*, it is unclear whether the plaintiffs' sales of adult videotapes harmed the department at all,[286] much less presented the specter of imminent harm when the department found out about their activities.

A case where the imminent harm test would likely be satisfied is one with facts like *Melzer v. Board of Education*.[287] In *Melzer*, plaintiff Paul Melzer was terminated from his position as a school teacher because of his membership in the North American Man/Boy Love As-

[282] *See* Smith, *supra* note 260, at 269.

[283] *See Roe*, 543 U.S. at 78–79.

[284] *See* Berger v. Battaglia, 779 F.2d 992, 995 (4th Cir. 1985).

[285] Notwithstanding the *Berger* court's misconstruction of *Connick*, *see supra* notes 259–60 and accompanying text, the court's application of the *Pickering* standard was proper.

[286] *See Flanagan*, 890 F.2d at 1560–61.

[287] 336 F.3d 185 (2d Cir. 2003).

sociation.[288] Melzer's membership in the organization was eventually discovered by the school and was widely reported in the media.[289] Melzer alleged that his termination violated his First Amendment rights to free speech and association.[290] The school district argued that the public airing of Melzer's activities made it impossible for him to effectively continue as a teacher.[291] The court assumed that the public concern test was satisfied and struck the balance under *Pickering* in favor of the school district, upholding his dismissal.[292]

The school district could have made a showing that Melzer's continued employment at the school would result in imminent harm. It is more likely than not that the school district would suffer harm from the revelation of a public school teacher's membership in a group that openly advocates the abolition of age of consent and child pornography laws.[293] This is not to suggest that Melzer would necessarily have harmed anybody.[294] It is, instead, only to point out that the *possible* harms that could have befallen the school were many, and the disruption eventually caused by the revelation of Melzer's membership was entirely predictable.[295] In this unique circumstance, the school district should not have had to show that its interests outweighed Melzer's interests.

This is, indeed, the tradeoff in abandoning the public concern test. Abandoning the test assures that other speech, while perhaps not of the highest First Amendment value, will be presumptively protected, but gives government employers an out if they are inevitably going to be harmed by the employee's speech or by the continued employment of the employee. Such a tradeoff will have the effect of allowing more speech in, but also gives employers a tool to address speech that will, unlike in *Roe*, *actually* harm them. The ultimate goal of the test is to permit employees to do as they wish when they are not at work, as long as the government remains unharmed.

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[288] *Id.* at 189–90.

[289] *Id.* at 190–91.

[290] *Id.* at 192.

[291] *Id.*

[292] *Id.* at 196–200.

[293] *Melzer*, 336 F.3d at 189.

[294] Indeed, there was no evidence that Melzer had broken any laws. *Id.* at 189.

[295] The counterargument, mentioned in *Melzer*, is that such disruption effectively amounts to a heckler's veto on Melzer's speech. *Id.* at 199. The very substance of this area of law, however, assumes that the public employees' speech is, in some instances, at the whim of the body politic. Otherwise courts would not engage in any balancing at all.

VI. CONCLUSION

In *Roe*, the Supreme Court missed an opportunity to clarify its free speech jurisprudence as it relates to speech by public employees that occurs outside of work and is unrelated to work. Instead, the Court issued a confounding decision that will likely confuse the lower courts. Courts will continue to struggle to apply the case law to this category of speech until the Supreme Court addresses it directly. The solution proposed in this Comment would leave courts in the position of applying the *Pickering* analysis to employee speech that occurs outside the workplace without the added struggle of defining when the speech is of public concern—a relatively useless inquiry for this category of speech unless one envisions a world where the government employee is an ever-functioning arm of the State. Because a person should not lose his autonomy by virtue of working for the government, the Court should reject this vision, and offer this category of speech qualified First Amendment protection.