Who Your Friends Are Could Get You Fired--The Connick Public Concern Test Unjustifiably Restricts Public Employees' Associational Rights

Paul Cerkvenik
Note

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There are no countries in which associations are more needed, to prevent the despotism of faction or the arbitrary power of a prince, than those which are democratically constituted.

Alexis de Tocqueville, 1835

The Columbus, Mississippi, Fire Department hired William Boddie in 1987, under terms of employment that included a twelve-month probationary period. Boddie was not an officer or even a member of the local firefighters’ union, but was friends with some local union officials. Just eight hours before the end of his probationary period, the city, through its fire chief, Robert W. Gale, fired Boddie. Alleging that the dismissal violated his First Amendment right to freedom of association, Boddie brought a 42 U.S.C. § 1983 claim against the city and Gale. At

2. Boddie v. City of Columbus, 989 F.2d 745, 747 (5th Cir. 1993).
3. Id. at 751.
4. Id. at 747.
5. Id. at 746-47. 42 U.S.C. § 1983 provides that
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


Courts analyze § 1983 claims under a three-step process. First, the plaintiff must show that the alleged conduct was constitutionally protected. Second, the plaintiff must show that the protected conduct was a substantial factor or a motivating factor in the job discipline or dismissal action. Third, the defendant may show, by a preponderance of the evidence, that it would have made the same decision or taken the same action even in the absence of the protected conduct. Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). This
trial, the defendants asserted that they fired Boddie because of his "poor attitude."6 The jury found the defendant's assertion to be mere pretext and concluded Boddie's discharge violated his First Amendment rights because the city fired him for associating with officers in the local firefighter's union.7

The key issue before the Fifth Circuit on appeal was whether the "public concern" requirement for speech-based claims outlined in Connick v. Myers8 applies to association-based First Amendment claims as well.9 The defendants argued that because Boddie failed to prove that his association with union members was a "matter of public concern," his associational activity fell outside the protection of the First Amendment, under the test set forth in Connick.10 Applying Fifth Circuit precedents,11 the Boddie court held that proof of constitutionally protected associational activity did not require an "independent proof that [the association] touched a matter of public concern" to establish a prima facie case under § 1983.12 In affirming the trial court decision, the Fifth Circuit held that the

Note addresses only the first element of a § 1983 claim—whether the activity in question is protected conduct.


7. Id. The question put to the jury was whether "Mr. Boddie's exercise of his protected First Amendment right of association was a substantial or motivating factors [sic] in the decision by the City and Chief Gale to discharge him." Id. at 751. At trial one city councilperson testified that Chief Gale told him that Boddie "hung out with the wrong crowd," which the councilor believed was a reference to the union. Id. Chief Gale himself testified that any union causes "turmoil," and union members testified that they "advised firemen not to join the union during their probationary period for fear of retaliation." Id.

8. 461 U.S. 138 (1983). Connick was a § 1983 case involving a claim of discharge of a public employee in violation of the employee's First Amendment freedom of speech rights. Id. In Connick, the Supreme Court held that generally a public employee's speech must "touch upon a matter of public concern" to be constitutionally protected. Id. at 147; see also infra notes 52-58 and accompanying text (detailing the Court's holding in Connick).


10. Id. See infra notes 52-58 and accompanying text (detailing the Court's holding in Connick).


In Coughlin, the Fifth Circuit held that "[a] public employee's claim that he has been discharged for his political affiliation in violation of his right to freely associate is not subject to the threshold public concern requirement." Coughlin, 946 F.2d at 1158.

Connick test applied only to speech and not to associational activity.\textsuperscript{13}

The \textit{Boddie} case exemplifies the problem that has created a split in the federal circuit courts: does Connick's threshold "public concern" requirement apply only to speech-based claims, or does it also apply to freedom of association claims?\textsuperscript{14} Not all courts have agreed with the \textit{Boddie} court's reasoning on this issue, and even the \textit{Boddie} court indicated its discomfort with the conclusion it reached.\textsuperscript{15} Courts that face this issue must address a fundamental underlying question: to what extent will courts protect freedom of association for public employees? The issue is significant because public sector employees comprise over seventeen percent of today's civilian workforce,\textsuperscript{16} and because the increasing diversity of American society has led to a vast expansion of new kinds of associations among individuals. A uniform determination of this issue will resolve a split among the federal circuit courts, and more importantly, could shape and clarify the parameters of the right of freedom of association for all citizens.

This Note analyzes the division in the federal circuit courts over whether the \textit{Connick} "public concern" test should apply to public employees' claims of discharge in violation of protected First Amendment associational activity. Part I describes freedom of association jurisprudence under the First and Fourteenth Amendments. Part I also details public employees' associational and speech rights as defined under the original balancing test of \textit{Pickering v. Board of Education},\textsuperscript{17} and under

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} The Fifth, Eighth, Tenth, and Eleventh Circuits hold that the \textit{Connick} public concern test does not apply in associational cases; the Third, Sixth, and Seventh Circuits hold that \textit{Connick} does apply. \textit{See infra} note 59 (summarizing cases on each side of the issue).

\textsuperscript{15} The result the \textit{Boddie} court reached was not as certain as the brevity of the opinion implies. In rejecting the applicability of the \textit{Connick} public concern test to association, the \textit{Boddie} court said of the defendant's argument, "\textit{If}s force aside, the answer to this question is not open for this panel." \textit{Boddie}, 989 F.2d at 747 (emphasis added). The clear implication of the opinion's language is that, despite the court's broad view of the scope of constitutionally protected associational activity, it would apply \textit{Connick} to bar Boddie's claim if it were not bound by Fifth Circuit precedent.

\textsuperscript{16} \textit{BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993}, at 419-21 (113th ed. 1993). In 1992, there were 18,579,000 federal, state, and local government employees in a total civilian workforce of just over 108 million persons. \textit{Id.}

\textsuperscript{17} 391 U.S. 563 (1968); \textit{see infra} notes 44-51 and accompanying text (discussing the Court's reasoning and holding in \textit{Pickering}).
the newer "public concern" test established in Connick v. Myers. Part I concludes by summarizing the current circuit court split and explaining that Supreme Court precedents neither mandate nor prohibit application of the Connick public concern test to associational claims. Part II contends that the fundamental differences in origin and nature between speech rights and associational rights should preclude applying the Connick public concern test in associational rights cases. Part II also argues that the Connick public concern test unjustifiably restricts the associational rights of public employees. Finally, Part III suggests that the proper approach for resolving the controversies raised by the assertion of associational rights in the public employment context ought to involve application of the balancing test set forth in Pickering, after a determination of the degree of constitutional protection the association deserves.

I. FREEDOM OF ASSOCIATION RIGHTS FOR PUBLIC EMPLOYEES

A. THE IMPLIED CONSTITUTIONAL FREEDOM OF ASSOCIATION

The United States Constitution does not expressly protect the freedom to associate. The language and history of the First and Fourteenth Amendments, however, imply the protection of this right. Three general categories constitute the right

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18. 461 U.S. 138 (1983); see infra notes 52-58 and accompanying text (discussing the Court's reasoning and holding in Connick).

19. Freedom of association means "the right of all persons to associate together in groups to further their lawful interests." Professional Ass'n of College Educators v. El Paso County Community College, 730 F.2d. 258, 262 (5th Cir.) (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (recognizing that freedom of association includes the right not to associate)), cert. denied, 469 U.S. 881 (1984); see also Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 5 (1964) ("[I]t cannot be seriously doubted that the First Amendment's guarantees... give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them."); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 466 (1958) (recognizing the right of persons to "pursue their lawful private interests privately and to associate freely with others in so doing").


The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.
to freedom of association: expressive association connected to First Amendment rights of speech, religion, or assembly; association connected with the privacy right derived from the liberty concepts of the Due Process Clauses; and social or economic associations not directly connected to either of those two fundamental constitutional rights.

In the seminal case recognizing constitutional protection for associational freedom, NAACP v. Alabama ex rel. Patterson, the United States Supreme Court erected a broad tent of constitutional protection for associational activities. In holding that Alabama could not compel production of the NAACP’s membership lists, the Court defined the right of freedom of association as “the right of the members [of the NAACP] to pursue their...
lawful private interests privately and to associate freely with others in so doing."

Moreover, the Court held that state action that curtails the freedom to associate merits the closest scrutiny.

Since the 1958 NAACP case, the Supreme Court has addressed freedom of association claims in a wide variety of areas, establishing protections for the following associational activities: loyalty oaths, political activity and patronage, union activities and organizing, membership in social, cultural, and economic organizations, student organizing.

27. Id. at 466. The Court explained that the state must establish an interest sufficient to overcome the protected associational rights of the NAACP members to justify its court order compelling production of the lists. Id. at 463-64. Thus, from the outset of freedom of association jurisprudence the Court has approached the associational right by balancing the substantiality of the state's interest against the nature of the associational right being asserted.

28. Id. at 460-61.

29. In Wieman v. Updegraff, the Court struck down an Oklahoma statute that required each state officer and employee, as a condition of employment, to take a loyalty oath stating that the employee is not, and for the preceding five years has not been, a member of a communist front or subversive organization. 344 U.S. 183, 191 (1952). In Keyishian v. Board of Regents, the Court held that mere membership in an organization, without specific intent to further unlawful aims of an organization, is not a constitutionally adequate basis for exclusion from public employment. 385 U.S. 589, 607 (1967).

30. In Elrod v. Burns, the Court stated that "[t]he threat of dismissal [from public employment] for failure to provide [political support] unquestionably inhibits protected belief and association." 427 U.S. 347, 359 (1976); see also Branti v. Finkel, 445 U.S. 507 (1980) (upholding injunction prohibiting termination of public defenders based solely on their political beliefs).

31. In Smith v. Arkansas Highway Employees, the Court recognized that union activity is within the protection of the constitutional guarantee of freedom of association. 441 U.S. 463, 464 (1979). See also Roberts v. Van Buren Pub. Schs., 773 F.2d 949, 957 (8th Cir. 1985) (recognizing associational freedoms implicated when state required the Jaycees to admit women as full members); Professional Ass'n of College Educators v. El Paso County Community College, 730 F.2d 258, 262 (5th Cir.) (holding that state interference with public employees' union membership violated the employees' first amendment rights), cert. denied, 469 U.S. 881 (1984).

32. In Roberts v. United States Jaycees, 468 U.S 609 (1984), the Court found that the right to freedom of association was "plainly implicated" where the state used the Minnesota Human Rights Act to require the Jaycees to admit women as full members "[i]n view of the various protected activities in which the Jaycees engages." Id. at 622. The Roberts Court held that the state's compelling interest in eradicating discrimination justified the statute's impact on the Jaycees' associational freedoms. Id. at 623; see also New York State Club Ass'n v. City of New York, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring) (noting the strength of an associational right "varies with the nature of the organization").
zations, and family and personal relationships. Some lower courts have extended the scope of protected activity even further by protecting associational activity in the areas of dating and cohabitation outside marriage.

The scope of activities protected under the freedom of association guarantee continues to be a matter of legal and philosophical debate. Some commentators argue that the recent freedom of association cases limit protection to two areas: expressive association (connected to First Amendment speech rights) and intimate association (connected to 14th Amendment liberty and privacy rights). This "instrumental" approach is

33. In Healy v. James, 408 U.S. 169 (1972), the Court recognized that a college's denial of recognition of a student group, without justification, burdened the students' right to association protected by the Constitution. Id. at 181.

34. See Moore v. City of East Cleveland, 431 U.S. 494 (1977) (striking down a city housing regulation and extending constitutional protection to family relationships beyond the nuclear family); Loving v. Virginia, 388 U.S. 1 (1967) (holding a Virginia statute banning interracial marriage "deprive[d] the Lovings of liberty without due process of law .... The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.").

35. In Wilson v. Taylor, 733 F.2d 1539, 1540-41 (5th Cir. 1984), for example, the plaintiff was fired from his job as a police officer for dating the daughter of a convicted felon. The Fifth Circuit held that the freedom of association protected this purely personal association. Id. at 1544. The court stated that "the first amendment freedom of association applies not only to situations where an advancing of common beliefs occurs, but also to purely social and personal associations." Id. In the view of the Fifth Circuit, "[i]t is too late in the day to doubt that this freedom of association extends only to political or conventional associations and not to the social or unorthodox." Id. at 1543. The court further stated that "[t]he concept of freedom of association has grown to include more than associations which are for the purpose of advancing shared beliefs." Id. See also McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 334-36 (2d Cir. 1981) (holding that requirement that tenants in a public housing project register overnight guests violated the tenants' rights to privacy and freedom of association, and could only be justified by a showing that the means adopted were the least restrictive in light of the governmental interests served) (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Shelton v. Tucker, 364 U.S. 479 (1960)); infra note 81 (explaining that it is best to think of associational rights as proceeding on a continuum).


37. The term "instrumental approach" refers to the view that expressive association should be constitutionally protected only where it is an "instrument" employed by individuals to engage in activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and free exercise of religion. In contrast, the "intrinsic approach" refers to the view that association of an intimate nature should receive constitutional protection as a fundamental element of personal liberty that is central to our Consti-
closely linked to the theoretical view that the First Amendment only protects the relationship between political speech and representative democracy, the traditional rights under the First Amendment. Other commentators argue that, based on the liberty concepts of the Fourteenth Amendment and a broader interpretation of the First Amendment, the constitutional guarantee of freedom of association ought to be recognized as an independent right that deserves greater consideration. These commentators favor protecting associations that are distinct from and reach beyond the traditional First Amendment concern for politically-rooted associations. Supreme Court decisions reflect both of these views.

38. Rotunda et al., supra note 21, § 20.7, at 22 (citing Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1943); Alexander Meiklejohn, Political Freedom (1960); Alexander Meiklejohn, What Does the First Amendment Mean?, 20 U. Chi. L. Rev. 461 (1953)).


40. Raggi, supra note 39, at 14 ("Freedom of association as a principle which is implicit in the concept of ordered liberty, basic to our democratic society, with roots deep in our history, should be recognized as an independent right."). Under Raggi's formulation, whatever action a person can pursue as an individual, freedom of association would protect when pursued in concert with others. Id. See Tribe, supra note 20, § 12-2, at 788, § 12-26, at 1010-14 ("[I]t is unclear how far the Court will carry its recently taken move in the opposite direction—toward a system in which concerted effort itself is seen as entitled to independent constitutional protection."). See also Soifer, supra note 39, at 669 ("[A]n independent right of freedom of association makes logical, historical, and normative sense.").

In his famous observations on America, Alexis de Tocqueville said:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

De Tocqueville, supra note 1, at 98. It is instructive that de Tocqueville connected association with "personal" liberty (a 14th Amendment and Due Process Clause notion) and not simply "political" liberty (a First Amendment notion).

41. See, e.g., Roberts, 468 U.S. at 617-18 (stating that "[o]ur decisions have referred to Constitutionally protected 'freedom of association' in two distinct senses," expressive association and intimate association). Nevertheless, in his opinion, Justice Brennan explained that "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Id. at 622.
B. Speech and Association Rights of Public Employees Under Pickering and Connick

The Supreme Court only recently adopted the view that the government may not constitutionally compel persons to relinquish their constitutional rights as a condition of public employment. Typically, the cases involving constitutional rights in the public employment context arise where a public employer restrains, conditions, or retaliates against a public employee's speech or expression.

1. The Pickering Balancing Test

The Supreme Court originally articulated a "balancing test" for claims involving public employees' speech or associational rights in Pickering v. Board of Education. In Pickering, a school teacher affiliated with a teacher's organization wrote a letter to a local newspaper criticizing the school board's budget policies. The Pickering Court held that courts must balance

In her concurrence, Justice O'Connor argued that the proper approach to associational freedom claims is "to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter." Id. at 638 (O'Connor, J., concurring in part and in the judgment).

In 1967, the Supreme Court said that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (striking down a state law compelling university employees to certify past or present status as a Communist). See also Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (rejecting a lower court decision requiring teachers to relinquish first amendment rights); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) ("It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.").

This is a reversal of the view prevailing during the first half of this century, known as the "right-privilege distinction" and famously characterized by Justice Holmes, who said a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). For a good historical summary of this development in the law, see Note, Developments in the Law: Public Employment, 97 Harv. L. Rev. 1611, 1738-49 (1984).

43. See, e.g., Pickering, 391 U.S. at 563 (striking down the discharge of a teacher who wrote a letter to the editor that was critical of local school board); Shelton v. Tucker, 364 U.S. 479, 497 (1960) (invalidating a state law requiring public teachers to file an affidavit listing all the organizations to which they had belonged within the last five years); Wieman, 344 U.S. at 183 (striking down a state law compelling public employees to give a loyalty oath denying any past affiliation with communists or subversive organizations).

44. 391 U.S. 563, 569 (1968).

45. Id. at 565-66. The school discharged him, alleging that the letters included false statements, damaged the reputation of administrators and school
the public employee's interest as a citizen in commenting upon matters of public concern, against the state's interest as an employer concerned with the efficient delivery of public services. The Court anchored this balancing analysis on the notion that as an employer, the state may at times have more significant reasons for regulating the speech of its employees than it has for regulating the speech of citizens in general.

The *Pickering* Court recognized that the myriad of factual possibilities that arise in the public employment context require not a fixed standard by which to judge all speech, but rather general guidelines for analyzing and balancing the competing interests involved. The Court's balancing analysis focused on whether the statements impeded the teacher's performance of his regular teaching duties or interfered with the operations of the school generally. Accordingly, the Court analyzed whether the school's interest in limiting the First Amendment rights of its teachers was significantly greater than its interest in limiting similar rights of any member of the general public. In short, the *Pickering* test provides that a government employer board members, disrupted faculty discipline, and fomented controversy, conflict, and dissension among teachers, administrators, the Board, and the school district residents. *Id.* at 566-67.

46. *Id.* at 568.
47. *Id.*
48. *Id.* at 569. Until Connick v. Myers, 461 U.S. 138, 147-48 (1983), there was no threshold requirement that speech touch on a matter of public concern; rather, the *Pickering* analysis considered, as one element in the balance, the extent to which the speech involved matters of public concern. *Pickering*, 391 U.S. at 568.

Ironically, the general standard specifically avoided by the Court in *Pickering*, *id.* at 569, is precisely what the *Connick* public concern test creates by imposing a threshold that speech must pass before any balancing analysis occurs. See infra notes 52-58 and accompanying text (explaining the threshold requirement of the public concern test). In his *Connick* dissent, Justice Brennan argued that

[i]n the proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions. *Connick*, 461 U.S. at 165 (Brennan, J., dissenting).

50. *Id.* at 573. Specifically, the Court noted that the teacher's criticism was not aimed at persons with whom the plaintiff had daily contact, that the employment relationship was not one requiring personal loyalty and confidence for proper functioning in the job, and that the statements were on issues of legitimate public concern. *Id.* at 569-73. The Court concluded, after balancing the competing interests, that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater
may not take disciplinary action or fire a public employee based on the employee's speech unless an overriding state interest supports the government action.  

2. The Connick Public Concern Requirement

In the 1983 case of Connick v. Myers, the Supreme Court significantly restricted the scope of constitutional protection for the speech rights of public employees. The Court in Connick held that

when a public employee speaks not as a citizen upon 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.

Since Connick, discharge or other disciplinary actions by a government employer arising from speech or expression are not actionable unless the speech or expression touches on a matter of public concern. Whether speech addresses a matter of public concern is determined by weighing the employees' interest in protecting the valuable contribution of speech or expression and the employer's interest in limiting a similar contribution by any member of the general public. Id. at 573.

An example of the application of the Pickering balance to the dismissal of a non-tenured teacher because of her union activities arose in Hickman v. Valley Local Sch. Dist. Bd. of Educ., 619 F.2d 606 (6th Cir. 1980). Although the precise nature of the teacher's constitutional rights was not described, the court held that "school administrators . . . cannot discharge teachers because of their disapproval of the teachers' union activities. This much is clear, though the test in Pickering v. Board of Educ. requires the court at times to weigh various factors in order to determine the scope of First Amendment protections." Id. at 610.

51. Pickering, 391 U.S. at 582 (White, J., concurring in part and dissenting in part); see also Hickman, 619 F.2d at 610 (holding the firing of teacher constitutionally impermissible where based on a personality conflict arising out of the teacher's protected union activities).

52. 461 U.S. 138 (1983). Connick involved a dispute between Harry Connick, District Attorney for the Parish of Orleans, and an Assistant District Attorney on his staff, Sheila Myers. Id. at 140. Myers objected to Connick's decision to transfer her to a different section of the District Attorney's office, so she circulated a questionnaire about working conditions to other employees. Id. at 140-41. Connick considered the distribution of the questionnaire to be an act of insubordination, and fired Myers. Id. at 141. Myers alleged that the discharge violated her First Amendment right of free speech. Id.

53. Connick is viewed as a departure from the trend in Supreme Court decisions from the 1950s to the 1970s of moving toward granting public employees all constitutional rights that are available to citizens in general. Developments in the Law—Public Employment, supra note 42, at 1741, 1770.

54. Connick, 461 U.S. at 147.

55. See, e.g., Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393, 399 (3d Cir. 1992) (holding that teacher's statements in faculty newsletter intended to organize opposition to administration were not of public concern and there-
concern is determined by the content, form, and context of the statement at issue.56

The Connick Court clearly intended to prevent public employees from turning virtually any remark made in the public employment context, no matter what its effect or substance, into a constitutional case when the remark precedes an unfavorable employment decision.57 Connick thus endowed the government with broad authority to act against public employees, while stripping those employees of virtually all constitutional protection when their speech does not touch on a matter of public concern.58

C. THE CIRCUIT COURT SPLIT—IS THE CONNICK PUBLIC CONCERN THRESHOLD AN ESSENTIAL ELEMENT IN ASSOCIATIONAL CLAIMS BY PUBLIC EMPLOYEES?

The federal circuit courts are split over whether the Connick public concern test applies to an employee's claim that a public employer violated the employee's right to freedom of association.59 Because the Supreme Court's recognition of associational

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56. Connick, 461 U.S. at 147-48. Although this is a broad and vague definition, the Connick Court seemed to apply it to mean at least that speech on matters relating to a personnel dispute, such as the transfer of Sheila Myers to another section of the office, were not matters of public concern. Id. at 148. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens in dissent, criticized the meaning of "public concern" outlined by the majority opinion. Id. at 158 (Brennan, J., dissenting) (noting the public concern threshold "impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal").

57. Id. at 149. The Connick Court stated that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," id., and that "government offices could not function if every employment decision became a constitutional matter." Id. at 143.

58. Id. at 146. In the majority opinion Justice White explained that "[w]hen employee expression cannot be fairly considered as relating to [public concern], government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id.

59. The Fifth, Tenth, and Eleventh Circuits hold that the Connick public concern test does not apply to cases in which employees allege only violation of associational rights. See Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 993 (5th Cir.) (en banc) (superintendent's association with school board members'
freedoms is relatively recent, the federal courts have only a developing and incomplete body of jurisprudence to guide their decisions in these cases. As a result, courts' discussion, rea-

opponents), cert. denied, 112 S. Ct. 2275 (1992); Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991) (sheriff deputy's association with sheriff's political opponent); Hatcher v. Board of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1989) (principal's association with parents opposed to school closing). The Eighth Circuit, without directly addressing the issue, has implicitly adopted the same view. Saye v. St. Vrain Valley Sch. Dist. RE-1J, 785 F.2d 862 (10th Cir. 1986) (teacher's activity as a faculty union representative); Roberts v. Van Buren Pub. Schs., 773 F.2d 949, 957-58 (8th Cir. 1985) (activities by a teacher recruiting others to join a union). See also Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537, 1543 (11th Cir. 1987) (college radio station employee fired for associating with another former employee who was also fired); Conger v. Board of Comm'rs, No. 88-1584-C, 1990 WL 112940, at *5 (D. Kan. July 11, 1990) (stating "[t]he Connick query of whether the speech touches upon a matter of public concern seems pointless in freedom of association claims when the plaintiff alleges discrimination based on membership and participation in the association alone and no 'speech' is involved"); Stellmaker v. DePetrillo, 710 F. Supp. 891 (D. Conn. 1989) (retaliation against teacher who invoked union grievance procedures when transferred); Gavrilles v. O'Connor, 579 F. Supp. 301, 304 (D. Mass. 1984) (public concern test not applied to plaintiff's claim that town officials retaliated against her for filing a union grievance; plaintiff stated a valid associational right claim); Parker v. Cronvich, 567 F. Supp. 1073 (E.D. La. 1983) (applying Connick test to First Amendment speech, but not association claims, where deputies were allegedly fired for union membership).

The Third, Sixth, and Seventh Circuits hold that the public concern test does apply to employees' claims involving only violations of associational rights. See Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393, 400 (3d Cir. 1992) (holding that statements in a faculty newsletter intended to organize teachers to oppose administration are not protected associational activity); Griffin v. Thomas, 929 F.2d 1210, 1212-14 (7th Cir. 1991) (holding assistant principal's filing of union grievance not protected from retaliation because the grievance is not a matter of public concern); Boals v. Gray, 775 F.2d 686, 691-93 (6th Cir. 1985) (stating associational right not burdened when correctional officer demanding union representation given additional suspension). See also Marshall v. Allen, 984 F.2d 787, 798 (7th Cir. 1993) (holding associational right implicated because support of other employees alleging sex discrimination touches on a matter of public concern); Monks v. Marlinga, 923 F.2d 423, 425 (6th Cir. 1991) (per curiam) (holding employees alleging dismissal for union activities adequately established that those activities touched on a matter of public concern); Broderick v. Roache, 767 F. Supp. 20, 24-25 (D. Mass. 1991) (noting public concern requirement applies to police union president's union activity); Petrozza v. Village of Freeport, 602 F. Supp. 137, 143 (E.D.N.Y. 1984) (holding firing of city plumber violated associational right because political association at issue was a matter of public concern).

60. Tribe, supra note 20, § 12-1, at 785, § 12-26, at 1010. See also supra notes 19-41 and accompanying text (relating to the development of freedom of association in constitutional jurisprudence).

61. Tribe, supra note 20, § 12-26, at 1014 ("It is unclear how far the Court will carry its recently taken move... toward a system in which concerted effort itself is seen as entitled to independent constitutional protection.").
reasoning, and analysis of the appropriate level of protection for public employees' associational rights has been cursory and limited.62

The courts holding that the Connick threshold test does apply to associational claims63 rely on one or more of the following three rationales for their holdings. First, these courts note that even though Connick and Pickering involved speech claims, an underlying issue in these cases was "whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties or other associations that certain public officials might find subversive."64 Next, these courts contend that no logical reason exists to differentiate between speech and association.65 Finally, they argue that one First Amendment freedom should not be elevated above another,66 and, therefore, associational rights should not be exempt from the Connick test.67

Adopting the view that Connick applies to associational claims, the Court of Appeals for the Seventh Circuit concluded, for example, that the job reassignment of an assistant principal in retaliation for his filing of a union grievance did not violate his right of freedom of association as the filing was a matter of

62. Strauss, supra note 36, at 475 (characterizing the cases as holding or assuming the Connick test does or does not apply "without discussion").

63. See supra note 59 (citing cases).

64. Griffin v. Thomas, 929 F.2d 1210, 1213 (7th Cir. 1991) (holding assistant principal's filing of union grievance not protected from retaliation because the grievance is not a matter of public concern); Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985) (holding freedom of association not infringed when correction officer demanding union representation given additional suspension because union representation not a matter of public concern) (quoting Connick v. Myers, 461 U.S. 138, 144-45 (1983)).

65. Boals, 775 F.2d at 692.

66. McDonald v. Smith, 472 U.S. 479, 485 (1985) ("These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.") (citations omitted). McDonald involved a libel claim by a prospective nominee to the post of U.S. Attorney against a citizen who wrote a letter critical of the plaintiff to the President of the United States. Id. at 480-81. It should be noted that the Court's pronouncement involved putting two express constitutional protections of the First Amendment on equal footing, whereas the associational right is an implicit protection that arises in part out of the liberty guarantee of the Fourteenth Amendment. See supra notes 19-41 and accompanying text (describing the implied right of association). Therefore, association, as an implicit and not express right arising from more than one constitutional provision, arguably could receive different treatment by courts.

67. Griffin, 929 F.2d at 1213.
personal, not public concern.\textsuperscript{68} Similarly, the Sixth Circuit concluded that where a correctional officer received two additional days of suspension after demanding union representation at an impromptu due process hearing for insubordination, the employee's right of freedom of association was not violated.\textsuperscript{69} The court concluded the incident involved a matter of internal discipline and was not a matter of public concern.\textsuperscript{70}

The courts ruling that associational claims are exempt from the \textit{Connick} test\textsuperscript{71} set forth two arguments.\textsuperscript{72} First, they point out that \textit{Connick} involved only speech and did not raise associational claims.\textsuperscript{73} Second, and perhaps more importantly, these courts contend that they must respect the broad definition of protected associational activity established by the Supreme Court in \textit{NAACP v. Alabama ex rel. Patterson}, and that \textit{Connick} should not infringe upon that broad protection.\textsuperscript{74}

Adopting the view that associational claims are exempt from \textit{Connick}'s requirements, the Fifth Circuit concluded that a deputy sheriff's claim that he was discharged for his political affiliation in violation of his right to freedom of association "is not subject to the public concern requirement."\textsuperscript{75} Also adopting this view, the Eleventh Circuit concluded that a principal's right to freedom of association was violated by a job demotion in retaliation for her association with parents who opposed a school closing, and by the Board of Education's refusal to allow her to bring others to a meeting with the superintendent related to her job assignment.\textsuperscript{76} Similarly, the Tenth Circuit did not apply the public concern test when it concluded that nonrenewal of a

\begin{thebibliography}
\bibitem{68} \textit{Id.} at 1215.
\bibitem{69} \textit{Boals}, 775 F.2d at 696.
\bibitem{70} \textit{Id.}
\bibitem{71} \textit{See supra} note 59 (citing cases).
\bibitem{72} For a slightly different analysis, see Strauss, \textit{supra} note 36, at 485-86.
\bibitem{73} Hatcher v. Board of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1987). Vivian Hatcher was a school principal who brought a § 1983 action after the school board demoted her in a school reorganization. \textit{Id.} at 1548, 1557. She alleged the demotion was retaliation for her association with parents protesting school closings at public meetings. \textit{Id.}
\bibitem{74} \textit{Id.} at 1558 (quoting \textit{NAACP v. Alabama ex rel. Patterson}, 357 U.S. 449, 460-61 (1958)). In \textit{NAACP v. Alabama ex rel. Patterson} the Court said that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters. . . . [S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61.
\bibitem{75} Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991).
\bibitem{76} \textit{Hatcher}, 809 F.2d at 1557-58 (remanded for a determination of whether the associational conduct was a substantial factor in the job demotion).
\end{thebibliography}
teacher's contract in retaliation for her activities as a union faculty representative violated her First Amendment rights.77

Most significantly, no court addressing this issue ventures beyond the reasoning described above to thoroughly examine the differences between speech and association in the public employment context. As a result, there exists no persuasive foundation for the settlement of this circuit court split in the cases decided to date.

II. THE CONNICK TEST IS INAPPT IN THE CONTEXT OF ASSOCIATIONAL RIGHTS

When analyzing claims involving associational rights of public employees, courts should directly apply the Pickering balancing test, without first requiring that the plaintiff meet the threshold public concern requirement that Connick established for speech cases. Because the Supreme Court did not address the differences between speech and association in either Connick or Pickering, however, lower courts lack clear guidance as to whether Connick applies to associational claims. Furthermore, lower court decisions in associational rights cases brought by public employees are marked by a conspicuous lack of analysis on this basic issue.78 A more thorough analysis of the differences between speech and association, and the proper degree of protection courts should afford association in the public employment context, reveals that Connick is an inapt rule for cases involving associational rights.

Important distinctions between speech and association emerge when courts apply the Connick public concern test to alleged violations of a public employee's associational rights. Three problems result from such an application. First, the Connick test completely eliminates constitutional protection for the non-public associations of public employees. Second, the definition of "public" association is vastly more difficult to determine and is subject to much "easier" manipulation than is the determination of what is public speech. Third, non-public associational activities might become a basis for disciplining or dismissing public employees even though the government has not shown that the associational activities interfere with its legitimate interests as an employer. As such, the lower courts' failure to thoroughly analyze the differences in both constitu-

78. See supra note 61 and accompanying text.
tional origin and fundamental nature between speech and association has left the law confused, and places the important constitutional rights of public employees at risk in the circuits that apply the Connick threshold to associational rights claims.

A. **Connick's Public-Private Distinction Unjustifiably Eliminates Protection for Non-Public Associational Rights**

Although the Constitution protects both public and private associations, there should not be a bright line classification between the two. A bright line classification obscures the reality that a range of activity exists that involves both public and private aspects of association. Accordingly, the associational right should protect a spectrum of associational activities.

A wide variety of everyday social activities falls in the mixed middle of this spectrum—between the public political activity protected by the First Amendment, and the private intimate activity protected by the Fourteenth Amendment. A common example is labor union activity. Union activity includes private economic matters such as negotiations over wages, benefits, and working conditions, and public matters such as group speeches and activities promoting the political interests of union members. Another common example is social organizations such as the Jaycees, Rotary clubs, or Planned

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79. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 20 (1988) (Scalia, J., concurring in part and concurring in the judgment) (noting that the opinion of the Court assumes, but does not hold, that there exists "a constitutional right of private association for other than expressive or religious purposes"); *supra* notes 31-32, 41. See also Shelton v. Tucker, 364 U.S. 479, 487 (1960) (holding that "interference with personal freedom" of teachers by compelling disclosure of associational ties violates the Constitution).

80. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Justice Brennan stated in *Roberts*, "[i]n particular, when the State interferes with individuals' selection of those with whom they wish to [associate], freedom of association in both of its forms may be implicated." Id.

81. See *Rotunda* et al., *supra* note 21, § 20.41, at 204 ("Perhaps it is best to think of associational rights as proceeding on a continuum from the least protected form of association in commercial activities to the most protected forms of association to engage in political or religious speech or for highly personal reasons, such as family relationships.").

82. See *supra* notes 21-24 and accompanying text.

83. Union organizing and affiliation is a constitutionally protected activity against which the state may not retaliate or discriminate. *Smith v. Arkansas Highway Employees*, 441 U.S. 463 (1979) (per curiam).

84. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (protecting the right not to associate with some of the public activities of a union, but upholding statutory dues requirements for collective bargaining activities).
Parenthood. These organizations engage in various activities involving economic, social, and cultural matters, in addition to purely political matters. A third type of associational activity falling in the middle of this spectrum involves personal relationships outside the context of family and marriage, such as dating and cohabitation. This broad spectrum of associational activity reveals a fundamental difference between speech and association. The range of associational activity inherently invokes both the personal freedoms protected by the privacy and liberty guarantees of the Fourteenth Amendment and the First Amendment freedoms of speech, religion, petition, and assembly. Constitutional protection of these activities does not spring from only one or the other constitutional source of associational freedom. The mixed origin and nature of the freedom to engage in these activities fundamentally distinguishes association from pure speech or pure expression activities, whose protections arise from the First Amendment's historical primary concern for robust, free, and open political dialogue.

85. See, e.g., Roberts, 468 U.S. at 622. See also supra note 32 (describing the Roberts holding). In Roberts, the Court noted that the right to freedom of association was "plainly implicated" by a state statute prohibiting discrimination on the basis of gender in public accommodations. 468 U.S. at 622. Even though the statute's effect of compelling one to associate with another against one's will violated the right of association, the Court upheld the violation because the statute furthered a compelling governmental interest unrelated to the suppression of ideas. Id. at 623.

86. Id. at 626-27.

87. For example, the Court in Roberts provided a high degree of constitutional protection, arising from the liberty and privacy concepts of the Due Process Clause, for "certain intimate human relationships" such as "creation and sustenance of a family[,]... raising and education of children[,]... and cohabitation with one's relatives." Id. at 617-19 (citations omitted).


88. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (describing the First Amendment as a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").
sis for the Connick public concern test in speech-based claims, it is inapt when applied to associational activity.

The Connick threshold does not further its purpose when applied to associational claims, thus creating harsh and unjustified results. The public concern threshold eliminates a public employee's protection for the entire range of mixed public and private associational activities not directly included within the political expression protections of the First Amendment. Generally, the Constitution affords associational activities a degree of protection that varies with the nature of the activity and the government's interest in restricting or regulating the activity. The Constitution therefore, guarantees some degree of protection in associational choices, whether for purely public activity, purely private activity, or some combination thereof. Though these mixed associational activities are constitutionally protected for other citizens, public employees receive no protection under the Connick public concern test. Until the courts justify

89. In Connick v. Myers, the Court explained that the threshold public concern test was appropriate because the constitutional value being protected—participation in "public affairs" in ways that "certain public officials might find 'subversive'"—is the kind of speech that "occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection." 461 U.S. 138, 144-45 (1983) (citations omitted).

90. See Strauss, supra note 36, at 488-89 (arguing that the public concern test should be applied to expressive associations and not applied to intimate associations such as marriage, but acknowledging that the exception only for intimate associations would provide public employees with "scant protection for their associations"). See also Connick, 461 U.S. at 158 (Brennan, J., dissenting) (arguing that the public concern test "impermissibly narrows the class of subjects on which public employees may speak out"). The same impermissible narrowing occurs when Connick is applied to employees' associational activity.

91. New York State Club Ass'n v. City of New York, 487 U.S. 1, 18 (1987) (O'Connor, J., concurring) ("But our cases also recognize an 'association's First Amendment right to control its membership,' acknowledging, of course, that the strength of any such right varies with the nature of the organization.") (quoting Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984)).

92. "[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms [Fourteenth Amendment personal liberty and First Amendment expression] may be implicated." Roberts, 468 U.S. at 618.

93. See, e.g., Griffin v. Thomas, 929 F.2d 1210 (7th Cir. 1991). Griffin was an assistant school principal whose job performance ratings were reduced after she missed more than two months of work due to work-related injuries. Id. at 1211. Through the union grievance procedure, she prevailed in her effort to have her "excellent" rating restored, but 24 hours later was demoted. Id. Her suit alleging retaliation for her union affiliation was dismissed on summary judgment because her association did not touch on a matter of public concern. Id. The Seventh Circuit affirmed the trial court, holding that Connick applies to freedom of association. Id. at 1215. This effectively precluded any analysis of
treating public employee association as the equivalent of speech, such a result is arbitrary, harsh, and indefensible.94

B. THE CONNICK DEFINITION OF PUBLIC CONCERN IS UNWORKABLE IN THE CONTEXT OF ASSOCIATION

A second, more practical problem in applying the Connick rule to associational claims arises when courts attempt to define "public concern." Connick held that an examination of content, form, and context will determine when speech touches on a matter of public concern.95 Although the Connick Court did not completely clarify what distinguishes public from private speech, the Court did state that speech concerning "internal office affairs" or "employee grievances" is not considered public speech, whereas speech on governmental affairs presumably is considered public.96 This threshold serves to prevent two disruptions in the workplace: those created by the speech itself and

the defendant's alleged reason for the demotion, including whether it was in retaliation for union affiliation, whether it was merely a pretext, and if not a pretext, whether the reason for the dismissal was sufficient to justify the invasion of Griffin's associational rights.

94. Connick arguably established a reasonable basis for distinguishing between public speech and non-public speech by resting its distinction on the grounds that speech concerning mere personnel grievances resulting from management decisions is not the kind of speech protected by the First Amendment in the public employment context. 461 U.S. at 148-49. Courts have not engaged in similar reasoning when applying Connick to associational claims. See, e.g., Griffin v. Thomas, 929 F.2d 1210 (7th Cir., 1991) (holding Connick test applicable to association claims as well as speech claims).

95. Connick, 461 U.S. at 147-48. See supra text accompanying note 56. Criticism of the "public concern" threshold has been substantial. Connick, 461 U.S. at 147. In his dissent to Connick, Justice Brennan voiced two concerns: (1) that one factor, the context of the speech, is weighed twice, once in the public concern test and then again in the Pickering balance; and, (2) that the public concern test impermissibly narrows the class of subjects on which public employees may speak without fear of retaliation. Id. at 157-58 (Brennan, J., dissenting).

In addition, a number of authors have criticized Connick. See, e.g., Cynthia K.Y. Lee, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 Cal. L. Rev. 1109, 1117-20 (1988) (arguing the Connick test is overbroad and fails to constitutionally protect speech that does not affect the government's managerial function); Stephen Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 Ind. L.J. 43 (1988) (arguing that Connick unfairly burdens the employee and that courts have been "anything but consistent" in defining public speech); Paul Ferris Solomon, The Public Employee's Right of Free Speech: A Proposal for a Fresh Start, 55 U. Cin. L. Rev. 449 (1986) (criticizing Connick for failing "to provide clear guidance" to lower courts).

96. Connick, 461 U.S. at 147-49.
those perpetuated by judicial review of workplace disputes. The application of this threshold to speech claims in the lower courts, however, has been characterized as "anything but consistent."

Given the definition and purpose of the public concern test, its application to associational claims leads to even greater confusion. Associational activity is by its nature an ongoing course of action. In contrast, speech involves definitive statements made during a controversial situation and often reducible to a single set of facts. Speech cases, therefore, are more easily measured by context, content, and form. The objectionable speech at issue in Connick, for example, was the employee's questionnaire circulated to other staff—a clearly definitive form of speech. By contrast, the objectionable association in Boddie was much less definitive because it involved a "close" friendship with fellow employees who were also union officers, a friendship that apparently extended throughout Boddie's twelve-month probationary period.

Individual associations, like Boddie's, are not static relationships. They evolve over time, often possessing different characteristics of form, context, and content at different points in the relationship. As a result, a court's analysis of associa-

97. See supra notes 57-58 and accompanying text. See also Lee, supra note 95, at 1123 (discussing the two disruptions prevented by imposition of the threshold requirement).
98. Allred, supra note 95, at 75. As a result, public employers and employees are "confused as to the scope of their free speech rights and responsibilities." Id. Thus, even in speech cases, the public concern definition appears to be defeating one of the test's purposes—to prevent disruption from judicial review—because of the inconsistent and confusing application of the test in the lower courts.
99. For an example of the confusion already resulting, compare Griffin v. Thomas, 929 F.2d 1210 (7th Cir. 1991) (applying Connick to preclude an associational claim based on the filing of a union grievance because the grievance did not touch on a matter of public concern), with Boals v. Gray, 775 F.2d 686, 693 (6th Cir. 1985) (applying Connick but finding that "an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid First Amendment claim").
100. See supra note 56 and accompanying text (noting the definition of "public concern" provided by the Connick Court).
101. The Connick Court examined each of the 14 questions on the employee questionnaire circulated by Sheila Myers and found only one touched on a matter of public concern. Connick, 461 U.S. at 149 (the questionnaire itself is attached to the opinion at 155).
102. Boddie v. City of Columbus, 989 F.2d 745, 750-51.
103. For example, the testimony in Boddie showed that the plaintiff was "a close friend" of the union officers, that he "hung out" with the union members, and that he was supportive of union activities. Id. at 751.
tional relationships in terms of their "public" or "private" character is vastly more susceptible to the inconsistency and manipulation already evident in speech-based cases. Such manipulation, whether intentional or unintentional, will occur whenever the court focuses on a private aspect as opposed to a public aspect of the associational activity at issue.

Second, associational activity is one step further removed than speech from conduct that threatens government efficiency. As one commentator has noted, "[b]ecause expressive conduct may be overt, noisy, and directly provocative, it can affect the relationships between the employee and her supervisors, co-workers, and employer to a much greater extent." Association, by contrast, is less threatening because it is often either simply a form of belief or, in other instances, not manifested in workplace or work-related conduct. Association thus provides less disruption of legitimate governmental objectives in the workplace such as efficiency, and therefore deserves greater protection than speech. Connick's public concern test, which arose in speech cases, does not recognize this important distinction between speech and association, and thus insufficiently protects association.

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104. The facts of Boddie's association, for example, could easily be manipulated by a court to achieve a finding either way on the public concern threshold. In assessing whether Boddie's association was public or private, the court could focus on the "friendship," or the fact that he "hung out" with union members, or that he was supportive of union activities. Each might lead to a different result. If the court focused on support for union activities it could emphasize either the public political activities of unionism or the private economic activities. Again, one leads to a different result than the other.

105. Allred, supra note 95, at 65. See also Toni M. Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. CAL. L. REV. 1, 31 (1987) (characterizing the problem as one of broad discretion given the courts under the public concern test).

106. Even commentators who argue for applying Connick to associational claims acknowledge the inconsistent results of Connick in speech cases. Strauss, supra note 36, at 492-93.


108. Id. at 917.

109. Id.

110. The loyalty oath and patronage cases, in which the Court struck down a number of state statutes requiring oaths denying affiliations with subversive associations or pledging loyalty to political parties, exemplify this important distinction. For example, the Court has stated that even a pledge of allegiance to a political party "unquestionably inhibits protected belief and association" even where those beliefs or associations have not been directly expressed.
The distinction between speech and association is critical in the public employment context because the Supreme Court is constantly searching for ways to properly protect individual rights while at the same time allowing the government to function efficiently.\textsuperscript{111} The Court in \textit{Connick} chose to exclude non-public speech from constitutional protection because it may directly threaten the government's efficient operation.\textsuperscript{112} In contrast, non-public association in this context generally does not pose as immediate a threat to the smooth operation of governmental functions.\textsuperscript{113} The \textit{Connick} rule, therefore, should not apply to association.

For example, the fact that Boddie eats and socializes with a union officer on his lunch break\textsuperscript{114} is not nearly as disruptive of office operations as the circulation by Myers of a questionnaire to other employees on her lunch break.\textsuperscript{115} Because speech always involves conduct, speech in the workplace can be disruptive, even if it is of a private character. Association, by contrast, often manifests itself only in the form of belief or non-work-related conduct which, when not acted upon in a way to make the association expressive conduct, is not typically disruptive of governmental operations.\textsuperscript{116} In instances where association is disruptive of the legitimate governmental ends, the \textit{Pickering}

\begin{footnotesize}
\begin{enumerate}
\item See also Singer, supra note 107, at 915-18 (discussing this distinction in light of \textit{Elrod}).
\item See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (rejecting the theory that public employment may be conditioned on a denial of constitutional rights). Even the \textit{Connick} majority recognized that "[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." \textit{Connick} v. Myers, 461 U.S. 138, 147 (1983). \textit{But see supra} text accompanying note 51.
\item See \textit{supra} notes 56-59 and accompanying text, and text accompanying notes 95-96.
\item See \textit{supra} notes 107-09 and accompanying text (recognizing the less intrusive nature of associational activity).
\item See \textit{supra} note 103 (discussing the range of association involved in \textit{Boddie}).
\item See \textit{supra} note 52 (discussing the facts of \textit{Connick}).
\end{enumerate}
\end{footnotesize}
balancing test sufficiently protects the government's interests as an employer.\textsuperscript{117}

C. LAWFUL ASSOCIATIONS DESERVE AT LEAST MINIMAL CONSTITUTIONAL PROTECTION

The third problem with applying the Connick test to associational activity is that the reduced protection of public employees' associational rights arises arbitrarily from the Connick public-private distinction. The courts fail to articulate any analysis and reasoning, as the Connick Court did for speech cases,\textsuperscript{118} to justify applying the public concern test to associational activity in the context of public employment.\textsuperscript{119} Applying the public-private distinction to association extends the Pickering principle that the government has "interests . . . 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" too far.\textsuperscript{120} In association cases, this amounts to a declaration that citizens lose a potentially broad class of associational rights\textsuperscript{121} upon accepting public employment, no matter the legitimacy of the government's interest and without explanation of why private association should be so restrained for public employees.\textsuperscript{122}

\begin{footnotes}
\item 117. See Allred, supra note 95, at 77; see also infra note 133 and accompanying text (discussing Pickering's balancing test).
\item 119. As applied in Connick and other speech cases, the public concern test, which generally eliminates constitutional protection for the private speech of public employees, is grounded in the notion that private speech is categorically not of sufficient constitutional importance to outweigh the government's interest in efficient operations. \textit{Id.} at 146-47. Regardless of the strength of this conclusion, the Supreme Court has failed to engage in similar analytical reasoning with respect to associational activity.
\item 120. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). See also supra text accompanying notes 44-51.
\item 121. See supra notes 26-35, 42-51 and accompanying text. See also Rotunda et al., supra note 21, § 20.41.
\item 122. The Connick public concern threshold in speech cases protects the government's interest in efficient delivery of services by not allowing every word spoken in the public employment context to result in a potential First Amendment claim. Connick, 461 U.S. at 147-49.
\end{footnotes}
Union activity, for example, receives constitutional protec-
tion as an associational activity without a direct basis in public
activity connected to First Amendment free speech.\textsuperscript{123} Implicit
in the Court's view of union activities is the notion that associa-
tional activities receive some constitutional protection, even if
they are not directly connected to a specific right articulated in
the First Amendment or elsewhere in the Constitution, because
the Constitution protects associations of a mixed public-private
character.\textsuperscript{124} To apply the public-private distinction of the
public concern test to associational claims effectively nullifies that
constitutional protection for public employees without justifying
the loss of rights with a compelling, substantial, or even legiti-
mate governmental interest.

Courts can achieve a better result by viewing the activities
that deserve constitutional protection broadly, and by recognizing
that the degree of constitutional protection or scrutiny
should vary with the nature of the associational activity.\textsuperscript{125} Family, religious, and political associations already possess a
high degree of protection because they connect directly to funda-
mental rights expressly guaranteed by the Constitution in the
First and Fourteenth Amendments.\textsuperscript{126} Only a compelling gov-
ernmental interest not achievable by less intrusive means can
justify public employer interference with these rights in the
Pickering balance.\textsuperscript{127} Other associational activities, such as
union affiliations, personal relationships, consumer activities,
commercial associations, or social club memberships, should be

\textsuperscript{123} Smith v. Arkansas Highway Employees, 441 U.S. 463 (1979) (per
curiam).

\textsuperscript{124} See supra notes 24, 31-35 and accompanying text (discussing cases).

\textsuperscript{125} "[T]he nature and degree of constitutional protection afforded freedom
of association may vary depending on the extent to which one or the other as-
pect of the constitutionally protected liberty is at stake in a given case." Rob-

\textsuperscript{126} See supra notes 22-23. See also Strauss, supra note 36, at 482-88, 495
(arguing that only a narrow realm of intimate associations protected by the
Fourteenth Amendment should be excepted from application of the Connick
test).

\textsuperscript{127} See supra notes 44-51 and accompanying text (detailing the Court's
holding in Pickering). This gives associational activity of a public or intimate
nature the highest degree of constitutional protection, consistent with the
Court's general jurisprudence involving the First and Fourteenth Amendments.
Roberts, 468 U.S. at 617-23. It would also be consistent with the language of
Connick that "speech on public issues occupies the 'highest rung of the hierar-
chy of First Amendment values' and is entitled to special protection." 461 U.S.
entitled to a lower degree of protection, because the freedoms protecting these associations only arise indirectly by blending the rights protected by the First and Fourteenth Amendments. As a result, a standard lower than the compelling interest standard provides these activities sufficient protection from governmental interference. The Supreme Court has yet to articulate clearly the degree of protection that this lesser standard should provide.

III. ACHIEVING A BETTER RESULT: DIRECT APPLICATION OF THE PICKERING BALANCING TEST

Rather than apply the Connick threshold public concern test to associational activity of public employees, courts should exclusively focus on the Pickering balancing test. The Pickering framework preserves the Supreme Court's originally broad view of the right of freedom of association while protecting the government's ability as an employer to deliver public services efficiently.

128. Supra notes 76-87, 125 and accompanying text.
129. "[T]he Constitution does not guarantee a right to public employment [but it does not follow that] a city or a State may resort to any scheme for keeping people out of such employment." Garner v. Board of Pub. Works, 341 U.S. 716, 725 (1951) (Frankfurter, J., concurring in part and dissenting in part) (emphasis added).

This conclusion would be consistent with the Court's categorical approach to protection of speech. The Court's doctrine relating to state regulation of speech provides that the "Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) (citation omitted). See also Roberts, 468 U.S. at 638 (O'Connor, J., concurring in part and in the judgment) ("The proper approach to analysis of First Amendment claims of associational freedom is, therefore, to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter.").

130. Rotunda et al. suggest that the Court's standard is that "[s]o long as the [state] is rationally promoting an arguably legitimate government goal by restricting the activities of a business association" the Court will not invalidate the state action. ROTUNDA ET AL., supra note 21, § 20.41.

See infra note 142 for Justice O'Connor's more complete explanation of what the proper degree of protection should be.

131. See supra notes 44-51 and accompanying text.
132. See supra notes 19-35 and accompanying text.
133. The Pickering balancing test would achieve this precisely because it is a balancing test—"it is neutral on its face." Developments in the Law: Public Employment, supra note 42, at 1748. Even though Pickering did expand the protections for public employees, it has been overall pro-employer. Application of the Pickering balancing test
Had the Boddie court applied the Connick threshold test by first asking whether Boddie's associational interest addressed a matter of public concern, as Third, Sixth, and Seventh Circuit precedent require, it most likely would have found that Boddie's relationship with the local union officers was related solely to matters of personal interest. Thus, application of the Connick threshold requirement to Boddie's case would have precluded Boddie's claim under section 1983. Consequently, Boddie would have been denied freedom of association merely because he was a public employee, even though no countervailing governmental interest existed. In effect, Boddie would have the status of a 19th-century public employee—forced to give up constitutional rights to accept or maintain his public employment.

Under the Pickering balancing approach, in contrast, courts would first examine the associational activity—whether political, economic, social, cultural, religious, or intimate—to determine what level of protection it deserves. Courts would then balance the employee's right to pursue those lawful interests in association with others against the government's interests in promoting the efficiency of the public services it has inadequately protected public employees' right to free speech. Although courts have fully articulated and usually deferred to employers' interests in efficiency, they have neglected to explicate employees' interests in expression. This systematic bias has resulted in a body of law that too narrowly conceives public employees' first amendment freedoms.

Id. at 1757.

134. See supra note 59 (citing cases).
135. See Griffin v. Thomas, 929 F.2d 1210, 1214-15 (7th Cir. 1991) (holding assistant principal's filing of union grievance not a matter of public concern).
136. Boddie v. City of Columbus, 989 F.2d 745, 747 (5th Cir. 1993) (acknowledging "the force" of the city's argument that Connick barred Boddie's claim). See also supra note 15 (demonstrating that the Fifth Circuit felt constrained by precedent to not apply Connick).
137. See supra note 42.
138. Supra note 26 and accompanying text.
139. Connick v. Myers, 461 U.S. 138, 150 (1983). The Court in Connick explained that the Pickering balance "unmistakably states" that the State's burden in justifying a particular discharge "varies depending upon the nature of the employee's expression." Id. Therefore, applying the balancing test to associational rights would first entail an assessment of the nature of the employee's association.

This is the same basic approach that Justice O'Connor argued for in her concurrence in Roberts v. United States Jaycees. 468 U.S. 609, 631-38 (1984) (O'Connor, J., concurring). One commentator has characterized her opinion as "the most persuasive opinion in the ... case, perhaps the most cogent of all the recent freedom of association opinions." Soifer, supra note 39, at 655.
140. See supra text accompanying note 27.
provides through its employees. If the Fifth Circuit in Boddie would have taken this approach, for example, the court might have determined that union activity merits an intermediate degree of constitutional protection and required a substantial governmental interest to justify discharges founded upon such associations.

If the Boddie defendants had asserted that the union activity itself was the basis of the dismissal (making the defense no longer pretextual), however, the Pickering balance would not preclude the court from finding that the government’s action furthered a substantial governmental interest sufficient to justify affording public employees less constitutional protection for union activity than citizens in general. The critical difference between the two approaches is that reaching this result under the seemingly simple balancing test forces the court to make the “hard choices inherent in” the Pickering approach. Doing so requires the court to examine the interests of the employer in discouraging union associational activity and weigh those interests against an individual’s constitutionally protected right to associate with a union. Only this balancing process guarantees a fair degree of protection for Boddie’s associational rights.


142. In Vicksburg Firefighters Ass’n v. City of Vicksburg, the Fifth Circuit held that a governmental intrusion on the right to associate in the context of union activity will withstand scrutiny if the regulation serves a legitimate and substantial governmental interest and the means employed are the least drastic restriction of constitutional rights. 761 F.2d 1036, 1039-40 (5th Cir. 1985) (citing Elrod v. Burns, 427 U.S. 347 (1976); Shelton v. Tucker, 364 U.S. 479 (1960)).

This is consistent with Justice O’Connor’s statements in her concurring opinion in Roberts that regulation of commercial associations in the nature of recruiting customers, new members, or employees will be upheld if rationally related to a legitimate governmental end, but that state regulation of an organization’s relations with its members or with the state can pass constitutional muster “only if the regulation is ‘narrowly drawn’ to serve a ‘sufficiently strong, subordinating interest’ without unnecessarily interfering with First Amendment freedoms.” 468 U.S. at 634-35 (O’Connor, J., concurring) (citations omitted).

143. See supra text accompanying note 47.


145. It would be wrong to conclude that the Pickering balancing test, without a Connick threshold, always tips the scales in favor of public employees. In a 1985 case, the Fifth Circuit held, without applying the Connick public concern test, that the city’s interest in prohibiting firefighting supervisors from joining
CONCLUSION

Applying the *Pickering* balancing test to public employee freedom of association claims directly, and without the *Connick* public concern threshold test, achieves an optimum result because it protects a broad range of associational activities without hindering the government's legitimate interests as an employer. Of equal importance, the *Pickering* approach restores the principle underlying the Supreme Court's elimination of the right-privilege distinction with respect to public employees: "[C]onstitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory."\(^{146}\)

In addition, it forces courts to move forward in defining the contours and extent of the constitutional protection guaranteed by the right to freedom of association. A straightforward application of the *Pickering* test would preclude courts from dismissing associational rights cases for failing to meet the *Connick* public concern requirement, and would force courts to confront the more difficult choices that arise when public employees assert associational rights.\(^{147}\)

The public employment context is an advantageous avenue for the courts to begin this next step in defining associational rights. It affords an opportunity for the courts to advance and refine our conception of associational rights and their degree of relative constitutional protection, while also allowing the courts to circumscribe those rights for public employees when the government can assert a sufficient countervailing interest. In doing so, vigilant courts can prevent a mere city fire chief from becoming, in the words of de Tocqueville, "an arbitrary prince."\(^{148}\)

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\(^{147}\) Eiland, 797 F.2d at 957 (noting the "hard choices inherent in the *Pickering* equation").

\(^{148}\) *De Tocqueville, supra* note 1, at 98.