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PROTECTING PUBLIC EMPLOYEES AND DEFAMATION DEFENDANTS: A TWO-TIERED ANALYSIS AS TO WHAT CONSTITUTES “A MATTER OF PUBLIC CONCERN”

[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. When one must guess what conduct or utterances may lose him his position, one necessarily will steer far wider of the unlawful zone. Threat of sanctions may deter almost as potently as the actual application of sanctions.¹

I. INTRODUCTION

The first amendment's freedom of speech clause gives each citizen an *equal* right to self expression and to participation in self-government.² However, in the areas of public employees' first amendment rights and defamation law, certain citizens are not given equal freedom of speech rights.³ Currently, if a public employee's speech is not a “matter of public con-

1. *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) (citing *NAACP v. Button*, 371 U.S. 415 (1963); and *Speiser v. Randall*, 357 U.S. 513 (1958)).

2. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 783 (1985) (Brennan, J., dissenting) (emphasis added). *See also Carey v. Brown*, 447 U.S. 455, 459-63 (1980) (picketing regulation which prohibited some picketing activity but allowed other types of picketing, based on content of such picketing, violated first amendment); *Police Dep't v. Mosley*, 408 U.S. 92, 94 (1972) (same); *Cohen v. California*, 403 U.S. 15, 24 (1971) (Freedom of speech “is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . .”); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (legislation specifically directed at those who use speech to advocate violent and unlawful overthrow of government upheld as constitutional because regulation was narrowly tailored and aimed at serious evil).

3. *See infra* notes 24-32 & 180-95 and accompanying text for a discussion of how public employees' freedom of speech rights are given less protection than other citizens' freedom of speech rights. *See also infra* notes 33-37 & 240-52 and accompanying text for a discussion on how the freedom of speech rights of defamation defendants accused of defaming private individuals are accorded less first amendment protection than other citizens are accorded.

cern,"⁴ he may be subject to a retaliatory discharge based solely upon his speech.⁵ Likewise, in the area of defamation law,⁶ if the defendant's speech is not a matter of public concern, he may be subject to presumed and punitive damages in suits brought under state libel law.⁷

The Supreme Court first confronted the public concern issue in 1983, in *Connick v. Myers*.⁸ The main issue in *Connick* was whether a public employee could be discharged solely on the basis of her speech.⁹ In settling the issue, the Supreme Court determined that the first amendment prohibits the discharge of public employees when their speech addresses a matter of public concern.¹⁰ To determine what statements constitute a matter of public concern, courts must examine the content, form, and context of the statement as revealed by the whole record.¹¹

Two years after the *Connick* decision, the Supreme Court again confronted the public concern issue. This time, the question before the Court concerned the extent to which the first amendment limited the awarding of presumed and punitive damages in defamation actions brought by private individuals.¹² In *Dun & Bradstreet, Inc. v. Greenmoss*

4. For a definition of what constitutes a "matter of public concern," see *infra* note 11 and accompanying text.

5. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

6. In defamation actions, the plaintiff's burden of proof depends upon whether he is a public official, public figure, or private individual. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public official plaintiff must prove "actual malice" in order to prevail); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) ("actual malice" standard applies to public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private plaintiff must only prove fault in order to prevail). For a more detailed discussion, see *infra* notes 212-37 and accompanying text. The main focus of this note is on defamation actions brought by private figure plaintiffs.

7. Punitive damages have been defined as damages given to the plaintiff over and above the full compensation for injuries. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 2, at 9 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The purpose of punitive damages is to punish the defendant, to teach the defendant not to repeat his conduct, and to deter others from following the defendant's behavior. *Id.* *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761 (1985). Prior to *Dun & Bradstreet*, a private figure plaintiff only had to prove fault in order to recover damages. *Gertz*, 418 U.S. at 347-50. However, the plaintiff could not recover presumed and punitive damages unless he showed actual malice as defined by *New York Times*. *Id.* In *Dun & Bradstreet*, the Supreme Court held that when the speech involved does not address a matter of public concern, a private figure plaintiff may recover presumed and punitive damages even absent a showing of actual malice. *Dun & Bradstreet*, 472 U.S. at 761. For a discussion of the various types of damages allowed in defamation actions, see *infra* note 205 and accompanying text.

8. 461 U.S. 138 (1983). For a more detailed discussion of *Connick*, see *infra* notes 164-95 and accompanying text.

9. *Id.* at 140.

10. *Id.* at 147.

11. *Id.* at 147-48.

12. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 751 (1985). For a

Builders,¹³ the Supreme Court held that presumed and punitive damages could be awarded to a private individual upon a lesser showing of fault when the speech involved does *not* address a matter of public concern.¹⁴ Again, the statement's content, form, and context controlled the issue regarding what constitutes a matter of public concern.¹⁵ Thus, in both areas of the law, public employees' first amendment rights and defamation law, the Court focused its inquiry on whether the speech addressed a matter of public concern and it ruled that this depended upon the statement's content, form, and context.

Although the labeling of a particular statement as a matter of public concern or purely private speech¹⁶ is critical to the public employee¹⁷ and the defamation defendant, the Supreme Court failed to devise a clear standard for the lower courts to work with in making these critical determinations.¹⁸ In devising the content, form, and context standard, the Court refused to elaborate on the meaning of the terms: content, form, and context; and intentionally avoided establishing any type of guidelines.¹⁹ Conse-

more detailed discussion of *Dun & Bradstreet*, see *infra* notes 239-62 and accompanying text.

13. 472 U.S. 749 (1985).

14. *Id.* at 761.

15. *Id.*

16. Purely private speech has been defined as "speech solely in the individual interest of the speaker." *Id.* at 762.

17. This note only addresses first amendment rights of *public* employees. For an excellent summary and comparison of public employees' rights to private employees' rights, see Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42 (1987).

18. The current standard states: "[w]hether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Dun & Bradstreet*, 472 U.S. at 761; *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). See Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U.L. REV. 241, 259 (1987) ("[T]he Court [in *Dun & Bradstreet*] failed to set forth any meaningful standard to guide the making of such determinations [of whether speech touched upon a matter of public concern]."); Comment, *Dun & Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz*, 37 HASTINGS L.J. 1171, 1194 (1986) ("Although Justice Powell purported to determine whether the credit report implicated a matter of public concern by evaluating its 'content, form, and context . . . as revealed by the entire record,' his conclusory application of this test did not explain what elements are involved in these criteria and how much weight is to be given to each.").

19. See generally *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In *Pickering*, the Supreme Court explicitly declined to formulate a precise standard. Justice Marshall, writing for the majority, specifically stated:

Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Id. at 569. This statement was reiterated in *Connick*, 461 U.S. at 154.

quently, the standard is inherently vague.

The current standard's inherent vagueness and lack of guidelines²⁰ leads to self censorship and undue caution on behalf of public employees and would-be speakers.²¹ Moreover, the current standard does not give public employees and would-be speakers adequate notice with respect to what topics are appropriate for discussion.²² If the first amendment is to fulfill its historic function,²³ a more explicative standard for determining whether

20. See generally *Connick*, 461 U.S. at 147-49 (for the Court's application of the content, form, and context standard to the facts of the case); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761-63 (1985) (same). In both cases, the Court merely stated the standard and applied it to the facts on hand. In neither case did the Court give any indication as to how the standard was applied or enunciate any specific guidelines as to how the standard was to be applied in future cases. *Connick*, 461 U.S. at 147-49; *Dun & Bradstreet*, 472 U.S. at 761-63.

21. See generally *Dun & Bradstreet*, 472 U.S. at 790 (unrestrained presumed and punitive damages have a chilling potential); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (discussing self-censorship and the tendency to only make statements which "steer far wider of the unlawful zone"); Note, *Connick v. Myers: Narrowing the Scope of Protected Speech for Public Employees*, 5 BRIDGEPORT L.R. 337, 361 (1984) [hereinafter Note, *Narrowing the Scope*] (the standard will induce silence and chill the expression of public employees); Note, *Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339, 340 (1985) [hereinafter Note, *New Restrictions*] (the uncertain standard "will undoubtedly chill a significant amount of constructive criticism of official behavior" by public employees).

22. See generally Note, *Constitutional Law—A New Twist to the Law of Defamation—Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 8 CAMPBELL L. REV. 527, 528-29 (1986) [hereinafter Note, *Constitutional Law*] (the standard will cause difficulty in predicting what statements will subject the speaker to presumed and punitive damages); Note, *New Restrictions*, *supra* note 21, at 339-40 ("The inconsistent decisions that will inevitably result from such a subjective inquiry will fail to provide adequate notice to employees as to what topics are appropriate for discussion within a governmental agency."); Note, *First Amendment—Defamation—Private Individual May Recover Presumed and Punitive Damages Without a Showing of Actual Malice—Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), 16 SETON HALL L. REV. 785, 809 (1986) [hereinafter Note, *First Amendment*] (the standard does not provide any clear guidelines); Note, *A Delicate Balance: Public Employment v. Freedom of Speech*, 17 U. WEST L.A.L. REV. 81, 100 (1985) [hereinafter Note, *Delicate Balance*] (public employees will be unable to predict what conduct is acceptable as a result of the "amorphous standard").

23. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Justice Brandeis expressed the historical significance of the first amendment as follows:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they

speech addresses a matter of public concern must be established.

Public employees are uniquely qualified to provide the public with information concerning the manner in which government is or should be operated.²⁴ Since public employees observe the machinations of government on a daily basis, they can contribute more informed opinions concerning whether public institutions are accomplishing their intended tasks.²⁵ However, because of the inherent vagueness of the content, form, and context standard, public employees must exercise an inordinate amount of caution in discussing matters critical to self-government.²⁶ Thus, despite a national commitment to "uninhibited, robust, and wide-open" debate on public issues,²⁷ those citizens most qualified to contribute to the debate,²⁸ public employees, are often silenced for fear of retaliatory discharge.²⁹

The implications of suppressing the thoughts and ideas of public employees are staggering.³⁰ Additionally, silencing public employees' criticism of the government's internal operations deprives the public of one of its most valuable sources of enlightenment.³¹ Finally, the inherent vagueness of the content, form, and context standard may even discourage qualified indi-

amended the Constitution so that free speech and assembly should be guaranteed. *Id.* See also *infra* notes 126-36 and accompanying text for a general discussion on the history of the first amendment. *But cf.* Borke, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("The Framers seemed to have no coherent theory of free speech and appear not to have been overly concerned with the subject.").

24. See generally Rees, *The First Amendment*, 16 TEX. TECH L. REV. 187, 189 (1985) ("[S]uch persons [public employees] are likely to be unusually well informed on matters in which the public may have an interest in the fullest possible disclosure and debate."); Note, *Narrowing the Scope*, *supra* note 21, at 361 (asserting that "employee criticism of the administration of public services is just as likely to increase its efficiency") (footnote omitted); Note, *New Restrictions*, *supra* note 21, at 339 (discussing public employees' unique qualifications to give informed opinions).

25. See generally Note, *Narrowing the Scope*, *supra* note 21, at 361 (the comments of public employees on the administration of public services are a valuable resource).

26. Note, *New Restrictions*, *supra* note 21, at 339. See also Note, *Narrowing the Scope*, *supra* note 21, at 361 (the standard induces silence).

27. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

28. The manner in which government is operated or should be operated is undoubtedly a public issue. See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

29. *Connick v. Myers*, 461 U.S. 138, 149 (1983). In *Connick*, the Supreme Court held that public employers can fire public employees, without any first amendment implications, if the employee's speech does not address "a matter of public concern." *Id.*

30. In June 1983, the number of persons employed by all levels of government was approximately 15% of the civilian labor force. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 405, 425 (1984). See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 563 (1971) (any restrictions placed on such a significant portion of society should be a matter of grave concern); Note, *Narrowing the Scope*, *supra* note 21, at 360-61 ("The federal, state and local governments of the United States constitute the single largest source of employment in the nation.").

31. Note, *Narrowing the Scope*, *supra* note 21, at 361.

viduals from seeking government employment.³²

Likewise, in the area of defamation law, would-be speakers are unnecessarily deterred from contributing to the public marketplace of ideas because of the inherent vagueness as to what statements constitute a matter of public concern.³³ Under the current standard, if a speaker defames a private individual³⁴ and the court finds that the subject matter of the speech is not a matter of public concern,³⁵ the speaker subjects himself to unlimited liability in the form of presumed and punitive damages.³⁶ Thus, as a result of the lack of clarity concerning what constitutes a matter of public concern, the potential of unrestricted presumed and punitive damage awards in defamation actions may unnecessarily chill the speech of many would-be speakers.³⁷

This note proposes that certain guidelines are necessary to clarify the established content, form, and context standard so the courts and the public can more reasonably determine what constitutes a matter of public concern and thus protected speech.³⁸ An initial exploration of the various lower

32. "[S]uch individuals will fear the loss of the full range of constitutional liberties they enjoy in the private sector." *Id.*

33. See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 774-96 (1985) (Brennan, J., dissenting) (discussing generally the potential chilling effect of unrestrained presumed and punitive damages based on a standard which is not narrowly tailored).

34. See *supra* note 7.

35. *Dun & Bradstreet*, 472 U.S. at 761.

36. "Litigation survey data compiled in 1982 indicated that thirty out of forty-seven recent awards [in libel suits] included awards of 'punitive' damages . . . and seven of those punitive damages awards were for \$1 million or more." R. SMOLLA, *SUING THE PRESS* 74 (1986). "More recent survey data indicate that punitive damages awards have now become even more common and have reached an astronomical average of almost \$3 million per award." *Id.*

37. *Dun & Bradstreet*, 472 U.S. at 789 (Brennan, J., dissenting). See also SMOLLA, *supra* note 36, at 76 ("Why run a controversial story, a story that is a prime candidate for precipitating a libel suit when a safer, duller story will fill space just as well, without the risks attendant to the bolder story?").

38. See generally Langvardt, *supra* note 18, at 259-60.

[A] court's erroneous determination that no public concern existed may lead to disastrous consequences for a negligent defendant, in terms of presumed and punitive damages. Besides judges' inability to make consistent determinations on the public concern question absent some ground rules or standards for making such decisions neither the makers of statements nor such parties' attorneys have any reliable way of predicting the extent of the legal difficulties and financial burdens they may encounter if their statements turn out to be false and a jury finds them negligent. The uncertainty would seem likely to lead to a chilling of first amendment rights.

Id. Comment, *The "Public Interest or Concern" Test—Have We Resurrected a Standard that Should Have Remained in the Defamation Graveyard?*, 70 MARQ. L. REV. 647, 648 (1987) (comparing public concern test to obscenity test). "The Justices seem to suggest that while they may not be able, to *define* a 'public concern,' they'll 'know it when [they] see it.'" *Id.* (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (emphasis in

courts' analysis, or lack thereof,³⁹ of the content, form, and context standard, as well as their interpretations of what statements constitute a matter of public concern⁴⁰ illustrates why guidelines are essential. Next, an exploration of the pertinent history of the first amendment acquaints the reader with the relevant constitutional principles and competing interests behind the Supreme Court's recent public concern holdings.⁴¹ This general historical analysis links the areas of first amendment rights of public employees and defamation law by identifying general first amendment principles common to both areas of the law.⁴² The respective histories of public employees' constitutional rights and defamation law will then be examined, thus providing the reader with a general understanding of how the content, form, and context standard evolved.⁴³ Finally, this note proposes a two-tiered analysis to the content, form, and context standard.⁴⁴ This two-tiered analysis establishes guidelines to alleviate the current standard's inherent vagueness.⁴⁵ Not only do these guidelines give public employees and would-be speakers adequate notice as to what topics are appropriate for discussion, they also offer desirable and helpful guidance for courts in determining what constitutes a matter of public concern.⁴⁶

original) (footnote omitted).

39. See *infra* note 72 and accompanying text for a discussion of those cases in which the lower courts have summarily disposed of the issue of whether the speech in question was a matter of public concern without any type of discussion or analysis of the content, form, and context standard.

40. See *infra* notes 56-125 and accompanying text.

41. See *infra* notes 126-42 and accompanying text.

42. According to one noted author, the first amendment rights of public employees and defamation defendants are linked by virtue of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See generally Rubin, *When The Governed Criticize Their Governors: Parameters of Public Employees' Free-Speech Rights*, 10 EMPLOYEE REL. L.J. 106, 107 (1984) (*New York Times* "established that criticism of public officials and the government was protected under the First Amendment. Thus, public employees began to question whether they, too, had the right to criticize public officials, including their superiors and employers.").

43. For the relevant history in the area of public employees, see *infra* notes 143-66 and accompanying text. For the relevant history in the area of defamation law, see *infra* notes 200-37 and accompanying text.

44. See *infra* section IV.

45. The main criticisms of the content, form, and context standard are that the standard fails to provide adequate guidance and forces courts to make case-by-case determinations on whether a particular statement addresses a matter of public concern. For a general overview of such criticisms, see *supra* notes 18 & 21-22 and *infra* notes 47 & 51-52. The purpose of this note is to address such criticism and propose guidelines to alleviate the current standard's inherent vagueness. See *infra* section IV.

46. See *infra* section IV.

II. VAGUENESS AND THE NEED FOR CLARITY: PROBLEMS WITH THE CURRENT CONTENT, FORM, AND CONTEXT STANDARD

The problem with the current content, form, and context standard does not lie in the Court's reasoning or logic.⁴⁷ Rather, the problem is the Court's final resolution—an inherently vague standard.⁴⁸ The content, form, and context standard is inadequate for three reasons. First, since the establishment of the standard in 1983,⁴⁹ confusion as to how the standard should be applied has arisen in the lower courts.⁵⁰ Second, the current standard gives the lower courts too much discretion in deciding fundamental first amendment issues.⁵¹ Lastly, the current standard does not give potential

47. Many writers have suggested that the distinction between speech on matters of public concern and purely private speech is an erroneous distinction which severely undermines the first amendment's protection in regard to public employees' and defamation defendants. In the context of first amendment rights of government employees, see Milbrath, *The Free Speech Rights of Public Employees: Balancing With the Home Field Advantage*, 20 IDAHO L. REV. 703, 729 (1984) ("The effect of *Connick* is to skew the balancing of the respective [first amendment] interests of the employee and employer in favor of the employer."); Note, *Narrowing the Scope*, *supra* note 21, at 362 ("The majority in *Connick* has defined matters of public concern in significantly more restrictive terms than in previous decisions, thereby narrowing the scope of protected speech for public employees."). Note, *New Restrictions*, *supra* note 21, at 339 ("[A] content prerequisite for first amendment protection of public employee speech is unwarranted as a matter of both precedent and policy."); Note, *Delicate Balance*, *supra* note 22, at 81 ("The decision in *Connick v. Myers*, while purporting to endorse some of the earlier holdings, represents a significant step away from that freedom [freedom of speech] that most United States citizens take for granted."). *But see* Casenote, *Constitutional Law—Civil Rights—A Question of Free Speech for Public Employees*, 30 WAYNE L. REV. 1309, 1322 (1984) ("[*Connick*] represents a reasonable curtailment of the speech rights of public employees."). In the context of defamation law, see Langvardt, *supra* note 18, at 270 (Defamation law would be better served without the public concern approach taken in *Dun & Bradstreet* so long as the standard remains in its present nebulous state.); Comment, *supra* note 18, at 1195-96 ("By restricting the protections of the *Gertz* rule to expressions on matters of public concern, the plurality has 'cut away the protective mantle of *Gertz*.'"); Note, *First Amendment*, *supra* note 22, at 809-10 ("[T]he willingness of the Court to create additional doctrinal distinctions at the expense of clarity indicates that the Court is insensitive to the need to offer clear guidelines and is unwilling to come to rest in the defamation area."); Note, *The Evolution of a Public Issue: New York Times Through Greenmoss*, 57 U. COLO. L. REV. 773, 790-91 (1986) [hereinafter Note, *Evolution*] (Contending that *Dun & Bradstreet* is another step away from *New York Times* with the next logical step being the overturning of *New York Times*. Such a step "would be a constitutional tragedy."); *But see* Note, *Constitutional Law*, *supra* note 22, at 543 (the result in *Dun & Bradstreet* is correct considering the reasoning of preceding cases).

48. See, e.g., Langvardt, *supra* note 18, at 259 (commenting in regard to the content, form, and context standard, "[s]uch a purported test is in reality no test at all").

49. The Supreme Court first formulated the standard in *Connick v. Myers*, 461 U.S. 138 (1983). See *infra* notes 187-89 and accompanying text.

50. See *infra* notes 56-125 and accompanying text.

51. Many commentators have expressed the fear that the current content, form, and context standard will force the courts to make ad hoc determinations on whether a particular statement is a matter of public concern or purely private speech. See *Dun & Bradstreet, Inc.*

litigants any guidance relating to when their speech will be protected and when their speech will subject them to the consequences associated with private speech.⁵²

v. Greenmoss Builders, 472 U.S. 749, 785 n.11 (1985) (Brennan, J., dissenting) ("Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach."); Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 761 (1978) (Powell, J., concurring) (comments that judges should not be in the business of making judgments about which types of speech are more valuable for first amendment purposes); Bull, *Philadelphia Newspaper, Inc. v. Hepps: New Hope for Preserving Freedom of the Press*, 38 MERCER L. REV. 785, 788 (1987) ("As a consequence of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the determination of what is 'of public concern' is to be made by the trial judge, a situation fraught with peril."); Langvardt, *supra* note 18, at 253 ("*Dun & Bradstreet* has embroiled courts in making the very kinds of content discriminations the approach taken in *Gertz* seemed designed to eliminate."); Note, *First Amendment*, *supra* note 22, at 805 ("Unfortunately, judges will once again become the final arbiters of what issues are matters of public concern and are thus worthy of constitutional protection."); Note, *Constitutional Law—Supreme Court Restricts First Amendment Rights of Public Employees—Connick v. Myers*, 58 TUL. L. REV. 831, 847 (1984) [hereinafter Note, *Supreme Court*] ("*Connick* invites lower courts to apply their own subjective standards both in assessing the public employer's interest in office harmony and in determining what subjects are within the public interest."). See generally *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Rosenbloom*, the Supreme Court held that if a defamatory statement concerned "a subject of public or general interest" the plaintiff in a defamation case must meet the *New York Times* actual malice test in order to prevail. *Rosenbloom*, 403 U.S. at 43-44 (Brennan, J., plurality opinion). In a dissenting opinion, Justice Marshall argued that the plurality's approach was unworkable and would lead to ad hoc determinations by the judiciary of whether a particular statement was a subject of public or general interest. *Id.* at 80-81 (Marshall, J., dissenting). Justice Marshall's argument that the courts are ill-equipped to determine whether a statement sufficiently involves the public interest was adopted by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

52. Many writers have expressed concern about the current standard due to its lack of clarity and subjective nature. See Note, *Narrowing the Scope*, *supra* note 21, at 338 ("The Supreme Court has added uncertainty to complexity by its decision in the case of *Connick v. Myers*"); Note, *Constitutional Law*, *supra* note 22, at 528-29 ("[*Dun & Bradstreet*] brings increased difficulty in predicting what libels will be subject to presumed and punitive damages without the proof of 'actual malice' as defined in *New York Times v. Sullivan*"); *Id.* at 529 n.10 ("Much of the difficulty in prediction comes with the subjective nature of deciding what is a public concern and what is a private concern."); Note, *New Restrictions*, *supra* note 21, at 339-40 ("The inconsistent decisions that will inevitably result from such a subjective inquiry will fail to provide adequate notice to employees as to what topics are appropriate for discussion within a governmental agency."); Note, *First Amendment*, *supra* note 22, at 809 ("Perhaps the most unsettling element of the *Dun & Bradstreet* decision, however, is the lack of clear guidelines regarding the level of constitutional protection that will be accorded future defendants in defamation actions."); Note, *Supreme Court*, *supra* note 51, at 848 (the standard set forth by the *Connick* Court is likely to generate even greater uncertainty with respect to the scope of public employees' first amendment rights); Note, *Delicate Balance*, *supra* note 22, at 100 ("The amorphous standard set out in *Connick* is sure to result in the public employee's (and employer's) total inability to predict where the boundaries of acceptable conduct are, resulting in even more cases appearing in the already crowded court system.").

The law in the lower courts since *Connick v. Myers*⁵³ and *Dun & Bradstreet, Inc. v. Greenmoss Builders*,⁵⁴ is a direct product of the vague standard enunciated in these two cases.⁵⁵ The cases that have been decided since these two landmark decisions can be divided into three categories. The first and largest category of decisions involves those cases in which courts, without legal analysis, determine whether the speech at issue is a matter of public concern.⁵⁶ In the second category of decisions, the courts primarily focus on one of the three elements of the standard—content, form, or context—to the exclusion of the other two elements in arriving at a decision.⁵⁷ Finally, the third category of decisions sets forth those cases in which courts place the same type of speech in different categories.⁵⁸

A. *Cursory Application of the Content, Form, and Context Standard*

The lower courts have experienced considerable difficulty applying the content, form, and context standard. The most common problem the courts have encountered is justifying the conclusions they reach regarding whether the speech in question is a matter of public concern. In employing the content, form, and context standard, many courts supply little or no legal analysis to support their holdings on the issue;⁵⁹ instead, they simply state that the speech in question is or is not a matter of public concern.⁶⁰

Lower courts deciding the public concern issue typically recount the facts, cite to either *Connick*⁶¹ or *Dun & Bradstreet*,⁶² and then decide

53. 461 U.S. 138 (1983).

54. 472 U.S. 749 (1985).

55. See *supra* note 11 and accompanying text. See also Comment, *supra* note 38, at 662-64 (comparing the content, form, and context standard enunciated in *Dun & Bradstreet* with the "public interest or concern" standard); Note, *Public Teacher's Right to Free Speech: "A Matter of Public Concern"*, 12 S.U.L. REV. 217, 227 (1986) ("The law since *Connick v. Myers* is a direct product of the tedious and nearly unmanageable test left in place by *Connick*."). For a general discussion of how the content, form, and context standard and the public interest or concern standard are similar, see *infra* notes 238-43 and accompanying text.

56. See *infra* notes 59-78 and accompanying text.

57. See *infra* notes 79-96 and accompanying text.

58. See *infra* notes 97-125 and accompanying text.

59. See generally Langvardt, *supra* note 18, at 261-66 (discussing what the cases that have been decided since *Dun & Bradstreet* reveal about public concerns and the tendency of many lower courts to make public concern-private concern determinations "in a summary fashion, with little or no analysis"); Comment, *supra* note 38, at 662-69 (discussing problems state courts have had in applying a public concern-type analysis and "the virtual absence of analysis within the cases that pass on the issue") (emphasis in original); Note, *supra* note 55, at 228-33 (discussing public employee cases that have been decided since *Connick* and establishing a trend among lower courts to characterize speech as addressing a matter of public concern without any real attempt at applying the content, form, and context standard).

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

61. *Connick v. Myers*, 461 U.S. 138 (1983). If the case involves a public employee's freedom of speech rights, the lower court will cite to *Connick* as the basis for its decision.

whether a public concern exists. *Twist v. Meese*⁶³ is an excellent example of this type of case. In *Twist*, the Antitrust Division of the Department of Justice dismissed an attorney for reporting a suspected criminal conspiracy to obstruct an investigation.⁶⁴ After giving a brief account of the facts,⁶⁵ the *Twist* court made reference to the *Connick* standard.⁶⁶ Then, the court cavalierly stated "[h]ere the involved speech implicated a matter of public concern."⁶⁷ Thus, without offering any support or legal analysis, the court decided the public concern issue in one simple sentence.

To further illustrate the tendency of lower courts to casually classify a particular statement either as a matter of public concern or purely private speech, a second example is helpful. In *Chabal v. Reagan*,⁶⁸ a United States Marshal was dismissed for communicating his belief that he was bound to follow the instructions and orders of the federal judges.⁶⁹ Following a condensed statement of the facts and a cursory reference to *Connick*,⁷⁰ the court simply stated that Chabal's speech was not a matter of public concern.⁷¹ Again, the court failed to explain why or how such a conclusion had been made.

A reading of these two cases, and the numerous other cases⁷² similarly

62. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985). Likewise, if the case is a defamation case brought by a private individual, the lower court will cite to *Dun & Bradstreet* as the basis for its decision.

63. 661 F. Supp. 231 (D.D.C. 1987).

64. *Id.* at 232.

65. *Id.*

66. *Id.* at 233.

67. *Id.*

68. 633 F. Supp. 1061 (M.D. Pa. 1986).

69. *Id.* at 1063.

70. *Id.* at 1066.

71. *Id.* The court characterized Chabal's speech as "matters only of personal interest regarding internal operations of the Marshal's Service and what he perceived should be its proper relationship vis-a-vis the federal judiciary." *Id.* This is the only legal analysis/explanation the court gave to support its determination that Chabal's speech did not address a matter of public concern.

72. *See, e.g., Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987) (speech related to political activity protected; however, court did not specifically hold speech addressed a matter of public concern—court assumed speech was protected and proceeded directly to balancing test); *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986) (court held teacher's complaint that remedial reading materials did not arrive in timely fashion did not address matter of public concern after brief statement of controlling cases); *Jett v. Dallas Indep. School Dist.*, 798 F.2d 748, 758 (5th Cir. 1986) ("This remark, which concerns the academic development of public high school football players and their potential eligibility for playing college football, certainly addresses matters of concern to the community." This statement constitutes the extent of the court's legal analysis on the public concern issue.); *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985) (police officer's entertainment performances in blackface held to be protected form of artistic expression because of community interest); *Alinovi v. Worcester School Comm.*, 777 F.2d 776, 787 (1st Cir. 1985) (court classified teacher's speech as private speech because it

decided, seems to indicate that many judges classify speech based on the principle, "I know it when I see it."⁷³ Such an approach creates several problems. First, judges may not always know the difference between speech regarding matters of public concern and purely private speech.⁷⁴ Second, judges will have different interpretations of the public concern issue.⁷⁵ Third, such an *ad-hoc* approach leads to inconsistent results.⁷⁶ Fourth, such an approach does not provide interested parties adequate notice concerning

was aimed at solving a disciplinary problem; court did not justify its holding with any type of legal analysis); *Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984) (FBI agent disciplined for making comments concerning methods being used for determining layoffs; without any legal analysis, the court simply determined that Murray's speech was "an example of the quintessential employee beef: management has acted incompetently."); *Brown v. Department of Transp., F.A.A.*, 735 F.2d 543, 546 (Fed. Cir. 1984) (air traffic controller supervisor's speech concerning air traffic controllers' strike held to be private speech; court did not provide any legal analysis); *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984) (court simply classified police officer's speech encouraging fellow officer to appeal suspension as private speech concerning personnel dispute); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 645 (8th Cir. 1983) (court based determination that speech addressed matter of public concern on *Pickering* balancing test rather than applying content, form, and context standard); *Post v. Regan*, 677 F. Supp. 203, 208 (S.D.N.Y. 1988) (because of "widespread publicity given by the media to the reported losses and subsequent personnel actions," speech addressed a matter of public concern); *DiFranco v. City of Chicago*, 642 F. Supp. 243, 247 (N.D. Ill. 1986) (court held that city employee's speech concerning misuse of city resources clearly addresses a matter of public concern); *Rodriguez v. Chandler*, 641 F. Supp. 1292, 1299 (S.D.N.Y. 1986) ("[M]inority employment and minority rights issues are no doubt matters of public concern."); *Wagner v. Hawkins*, 634 F. Supp. 751, 754 (W.D. Ark. 1986) ("It would be difficult to imagine a matter of greater public concern than the qualifications of candidates for political office . . ."); *Lehpamer v. Troyer*, 601 F. Supp. 1466, 1468-69 (N.D. Ill. 1986) (Police officer's speech concerning poor evaluations and work assignments "would not enrich the public's store of appropriate knowledge regarding the operation of the police department as it affects the public;" therefore, speech was unprotected.); *Hirsch v. Cooper*, 737 P.2d 1092, 1095 (Ariz. Ct. App. 1986) (After briefly citing to *Dun & Bradstreet*, court held Cooper's statement that he would not send his dog or cat to Hirsch for medical treatment was actionable per se because it was purely private speech.); *Rabren v. Straigis*, 498 So. 2d 1362, 1363 (Fla. Dist. Ct. App. 1986) (Because harbor pilots were commonly a subject of media coverage, statements accusing pilots of incompetence, drunkenness, and involvement in waterfront corruption and racketeering addressed a matter of public concern.); *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 76 (Fla. Dist. Ct. App. 1986) ("We have no trouble determining that the instant case involves alleged defamation arising out of a matter of public interest or concern."); *Great Costal Express, Inc. v. Ellington*, 334 S.E.2d 846, 849, 851-52 (Va. 1985) (court determined employer's statement that an employee had attempted to bribe a shop foreman addressed a private concern; court did not engage in any particular discussion of the issue). No judgment or conclusion as to the correctness of the courts' decisions is offered. These cases simply serve as examples of the numerous lower court cases in which the public concern issue is made without any type of legal analysis.

73. Comment, *supra* note 38, at 648; Langvardt, *supra* note 18, at 259.

74. Langvardt, *supra* note 18, at 259.

75. *Id.*

76. *Id.*

what topics are appropriate for discussion.⁷⁷ Finally, when lower court judges make such *ad-hoc* determinations, without justification or support, the very purpose of the first amendment is undermined.⁷⁸

B. Dispositions Based Primarily on One Element of the Content, Form, and Context Standard

Because of the fact specific nature of the *Connick* and *Dun & Bradstreet* decisions, many courts have had problems applying the content, form, and context standard.⁷⁹ Despite the Supreme Court's mandate that the public concern issue "must be determined by the content, form, and context of a given statement, as revealed by the whole record,"⁸⁰ many courts have misapplied the standard by relying primarily on one specific element of the standard instead of using all three of the elements. Generally, in the area of public employees' freedom of speech rights, courts have tended to overemphasize the "context" factor of the standard.⁸¹ Similarly, in defamation

77. *Id.* at 260.

78. *See infra* notes 126-42 and accompanying text.

79. *Connick v. Myers*, 461 U.S. 138 (1983) and *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) were very factually-oriented decisions. In *Connick*, the Court evaluated each question on Myers' questionnaire, the circumstances behind the distribution of the questionnaire, and the effect of the questionnaire. *Connick*, 461 U.S. at 148-49. Because the Court believed that Myers' questionnaire would not convey any useful information to the public, the Court held that the questions were not of public importance. *Id.* at 148. Also, because the questionnaire was prepared as a result of an employment dispute, the context factor of the public concern test played a major role in the Court's determination. *Id.* at 153. Similarly, in *Dun & Bradstreet*, the Court examined the surrounding circumstances of the credit report. *Dun & Bradstreet*, 472 U.S. at 762. Based on the Court's analysis of the specific facts in *Dun & Bradstreet*, the fact that the credit report was only disseminated to five subscribers played a major role in the Court's decision. *Id.* Consequently, the Court overemphasized the form factor of the content, form, and context standard. *Id.*

80. *Connick*, 461 U.S. at 147-48; *Dun & Bradstreet*, 472 U.S. at 761.

81. *See, e.g., Davis v. West Community Hosp.*, 755 F.2d 455, 459, 461-62 (5th Cir. 1985) (letter written by general surgeon to hospital supervisors concerning dispute with other hospital personnel and alleging ineffective patient treatment held to be purely private speech based on context of speech; context of speech consisted of personal grievances); *Boyd v. Secretary of the Navy*, 709 F.2d 684, 685, 687 (11th Cir. 1983) (comments of naval machinist supervisor regarding propriety of planned training program did not address a matter of public concern because speech arose in context of employee grievance); *Lynn v. Smith*, 628 F. Supp. 283, 285-86, 289 (M.D. Pa. 1985) (public employee who was chief shop steward for his union was punished for filing grievances; because grievances arose in context of employer-employee dispute, speech was not protected). *Compare Hamer v. Brown*, 641 F. Supp. 662, 664, 666 (W.D. Ark. 1986) (college professor's speech to committee investigating expenditure of public funds was not protected since speech concerned personnel actions taken by college administration) with *Hamer v. Brown*, 831 F.2d 1398, 1400, 1402 (8th Cir. 1987) (college professor's speech relating to expenditure of public funds did address a matter of public concern because speech was made in context of committee investigation into usage of such funds). These cases are provided as examples of how many lower courts use the context factor to make their final decisions. No opinion is given regarding whether the final decisions were correct.

cases, courts usually rely on the "form" factor to determine whether the speech addresses a matter of public concern.⁸² Although such reliance is understandable, based on the specific facts of *Connick*⁸³ and *Dun & Bradstreet*⁸⁴ as discussed later in this note, such reliance results in a mechanical application of the standard. To illustrate this point, a recently decided Seventh Circuit opinion is examined.

In 1980, the Court of Appeals for the Seventh Circuit decided a public employment case.⁸⁵ The dispute in this case centered around a public employee's comment concerning the alleged discharge of the director of the state agency where she was employed.⁸⁶ The employee's comment was responsive to an article in the *Chicago Sun Times* entitled, "Report Thompson Axes Aide."⁸⁷ In addressing the issue of whether the first amendment protected the employee's speech, the court of appeals held that the em-

82. See, e.g., *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 637-38, 644-45 (8th Cir. 1986) (letter to congressional committee investigating Cattle-Pak discount program addressed a matter of public concern since investigation was a newsworthy event); *Mutafis v. Erie Ins. Exch.*, 775 F.2d 593, 594-95 (4th Cir. 1985) (defamatory statement in the form of an inter-office memorandum did not address a matter of public concern); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1493-94, 1504 (D.D.C. 1987) (report naming employee as one of several individuals responsible for fraudulent securities practices was a matter of public concern because the entire incident received enormous publicity); *Dexter's Hearthside Restaurant, Inc. v. Whitehall Co.*, 24 Mass. App. Ct. 217, 218, 220-21, 508 N.E.2d 113, 114, 116-17 (1987) (erroneous report stating that Dexter's account was delinquent did not address a matter of public concern since publication of report was limited; form of report more important than state law which required reporting of delinquent accounts). These cases simply serve as examples as to how many lower courts have relied solely on the form element of the content, form, and context standard. No opinion is given concerning the propriety of the courts' final decisions.

83. See *supra* note 79.

84. See *supra* note 79.

85. *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980).

86. *Id.* at 36-37. In *Yoggerst*, Yoggerst worked as an administrative assistant, in charge of property, for the Illinois Governor's Office of Manpower and Human Development (GOMAHD). *Id.* at 36. On April 26, 27, and 28, 1978, unconfirmed reports were circulating that the Director of GOMAHD, L. W. Murray, had been discharged by the Governor. *Id.* In fact, on April 27, 1978, the *Chicago Sun Times* featured an article entitled, "Report Thompson Axes Aide." *Id.* On the morning of April 27, Yoggerst called a fellow employee, Linda Coker, seeking information about a work-related matter. *Id.* at 37. Yoggerst opened the phone conversation by inquiring "Did you hear the good news?" *Id.* Yoggerst's comment was obviously directed to the rumors of Murray's dismissal. *Id.*

Coker reported the incident to one of the supervisors. *Id.* Consequently, Yoggerst was reprimanded and a memorandum was placed in her personnel file. *Id.* Yoggerst then filed a grievance requesting that the memorandum be removed from her file. *Id.* Yoggerst's request was subsequently denied. *Id.*

Later, Yoggerst resigned her position at GOMAHD and filed suit alleging that the memorandum and denial of her grievance violated her first amendment rights. *Id.* The district court held against Yoggerst without addressing Yoggerst's first amendment claim. *Id.* at 38.

87. *Id.* at 36.

ployee's "comment did involve a matter of some public importance and concern."⁸⁸ However, the case did not stop here. Since the district court had previously dismissed the employee's case on a motion for summary judgment, the court of appeals remanded the case for further proceedings.⁸⁹

Following the Seventh Circuit's remand, the Supreme Court decided *Connick v. Myers*.⁹⁰ Based on *Connick*, the court of appeals reversed its earlier holding and found that the speech at issue did not address a matter of public concern.⁹¹ Although the court stated that "the content factor is most important" in deciding whether the speech addressed a matter of public concern,⁹² the court's conclusion seems to indicate otherwise. Despite the court's claim that the "context in which [the employee] spoke does not alter our conclusion as to the proper characterization of her remark,"⁹³ the context of the remark was, arguably, the determinative factor. According to the court, the employee's remark merely reflected her personal feelings toward the director.⁹⁴ In other words, the context in which the employee spoke was personal rather than public. Thus, based on the context of the employee's speech, the court determined that the first amendment did not protect her remark.⁹⁵ Because the Supreme Court specifically devised a three-prong test to determine the public concern issue, the Seventh Circuit arguably misapplied the test by only focusing on the context of the em-

88. *Id.* at 40. In addressing the first amendment issue, the court stated:

Yoggerst's comment did not necessarily involve a matter where "free and open debate is vital to informed decision-making by the electorate." But her casual comment did involve a matter of some public importance and concern (as evidenced by continuing media speculation concerning the Director's tenure), and, we believe, First Amendment protection should be available absent countervailing negative impacts on the employment relationship.

Id. Because *Connick* had not yet been decided, the court relied on *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). According to *Pickering*, courts are required to balance the employee's interest "in commenting upon matters of public concern" against the employer's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. For a more thorough discussion of *Pickering*, see *infra* notes 148-63 and accompanying text.

In *Yoggerst*, no evidence was presented that Yoggerst's comments affected her employment relationship or impeded her ability to efficiently perform her employment duties. *Yoggerst*, 623 F.2d at 40.

89. *Id.* at 41.

90. 461 U.S. 138 (1983).

91. *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984). The court explained that in *Yoggerst I*, "we concluded that Yoggerst's statement involved a matter of public concern without the benefit of the Supreme Court's test in *Connick* for determining the issue." *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* Although the court classified Yoggerst's speech as private speech, the court acknowledged "that the rumors that Murray would be fired—a matter of obvious public interest and concern—were the impetus for Yoggerst's remarks to Coker." *Id.*

ployee's speech.⁹⁶

C. *Conflicting Application of the Content, Form, and Context Standard*

1. Public Employee Cases

The unequal application of the content, form, and context standard is the final and most disturbing problem that has arisen in the lower courts. Because the Supreme Court failed to provide adequate guidelines for the lower courts to work with, many courts have placed the same type of speech in different categories.⁹⁷ In the area of public employees' first amendment rights, the context factor has proven to be the most problematic. Two cases, *Johnson v. Lincoln University of Commonwealth System of Higher Education*⁹⁸ and *Ferrara v. Mills*,⁹⁹ best illustrate this problem.

The *Johnson* case involved the dismissal of a tenured faculty member as a direct result of statements he made concerning the University's faculty-student ratio.¹⁰⁰ In *Ferrara*, a public school teacher was demoted in retaliation for comments he made concerning the assignment of a teacher to a field of study in which the teacher lacked certification.¹⁰¹ In both cases, the statements were an outgrowth of a personal dispute between the teacher and the school administration.¹⁰² Further, the dispute in both cases concerned questions of academic policy and educational standards.¹⁰³ Despite

96. Because the standard requires courts to look to all the circumstances surrounding the speech "as revealed by the whole record," it is arguable that the Court intended each element of the public concern test to have equal weight. See generally *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (setting out exact language of the public concern test); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761 (1985) (same).

97. Compare *Czurlanis v. Albanese*, 721 F.2d 98, 105 (3d Cir. 1983) (government mismanagement and waste deemed a matter of public concern) and *Berry v. Bailey*, 726 F.2d 670 (11th Cir. 1984) (corruption in Sheriff's office not a matter of public concern). Compare also *Saye v. St. Vrain Valley School Dist.*, 785 F.2d 862, 866 (10th Cir. 1986) (A teacher's aide's discussion with mothers of two students in her special education class concerning allocation of aide time did not address a matter of public concern.) with *Southside Pub. Schools v. Hill*, 827 F.2d 270 (8th Cir. 1987) (Teachers' complaints to department of education concerning delay in implementation of programs for handicapped students addressed a matter of public concern.); *Twist v. Meese*, 661 F. Supp. 231, 233 (D.D.C. 1987) (A Department of Justice attorney's speech concerning his suspected belief of criminal conspiracy to obstruct justice addressed a matter of public concern.) with *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868 (4th Cir. 1984) (Police department employee's whistle-blowing activities concerning understaffing and inefficiency of police department's emergency operations center did not address a matter of public concern.).

98. 776 F.2d 443 (3d Cir. 1985).

99. 781 F.2d 1508 (11th Cir. 1986).

100. *Johnson*, 776 F.2d at 447-48.

101. *Ferrara*, 781 F.2d at 1510-11.

102. *Johnson*, 776 F.2d at 447; *Ferrara*, 781 F.2d at 1515.

103. *Johnson v. Lincoln Univ. of Commonwealth Sys. of Higher Educ.*, 776 F.2d 443,

these similarities, the courts reached different conclusions. In *Johnson*, the Third Circuit held that Johnson's dismissal violated the first amendment since his speech addressed a matter of public concern,¹⁰⁴ whereas in *Ferrara* the Eleventh Circuit held that the first amendment did not protect Ferrara's statements.¹⁰⁵

This disparity is a direct consequence of the lack of guidance the current content, form, and context standard provides the lower courts. In this instance, the two courts interpreted the context element of the *Connick* test differently. The *Johnson* court specifically held that the mere fact that Johnson's statements were an outgrowth of a personal dispute¹⁰⁶ did not prevent his statements from touching upon a matter of public concern,¹⁰⁷ whereas the *Ferrara* court held that because of the context¹⁰⁸ of his speech, Ferrara's statements did not address a matter of public concern.¹⁰⁹

Ironically, the *Ferrara* court acknowledged that the educational issue addressed by Ferrara is one of the most frequently debated issues in the public forum.¹¹⁰ Despite this recognition that the content of Ferrara's speech addressed a matter of public concern,¹¹¹ the court seems to have disregarded the content factor of the content, form, and context standard. The only explanation for the Eleventh Circuit's confusion is that the court misapplied the *Connick* standard, possibly believing that any speech arising in the context of a personal dispute was unprotected. The *Ferrara* court's confusion in applying the *Connick* standard lends support to the argument that certain guidelines are necessary to clarify the content, form, and context standard so that courts can more reasonably determine what consti-

452 (3d Cir. 1985); *Ferrara*, 781 F.2d at 1515.

104. *Johnson*, 776 F.2d at 451.

105. *Ferrara v. Mills*, 781 F.2d 1508, 1515 (11th Cir. 1986).

106. In 1977, a wide scale dispute broke out at Lincoln University over a proposed drastic reduction in the number of faculty that would have increased the student-faculty ratio. Before the dispute was over, many dissenting faculty members were dismissed for voicing their opinions. Johnson was one of the faculty members who was dismissed. *Johnson*, 776 F.2d at 448-49.

107. *Id.* at 451.

108. Ferrara's statements were made in a meeting with the principal in which Ferrara and the principal were discussing Ferrara's course assignments for the following term. *Ferrara*, 781 F.2d at 1510-11. Also the out-of-field teacher was assigned to teach a class Ferrara wanted to teach. *Id.*

109. *Id.* at 1515.

110. *Id.* Although the *Ferrara* court used the term "public forum," the court was not using it as a legal term of art. Rather, the court was simply acknowledging the fact that speech concerning educational issues generally addresses a matter of public concern. *Id.* Regulations affecting speech are oftentimes scrutinized on the basis of where the speech occurs. *See generally Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (describing types of fora and level of first amendment protection speech is given based on forum where speech occurs).

111. *Ferrara v. Mills*, 781 F.2d 1508, 1515 (11th Cir. 1986).

tutes a matter of public concern.

2. Defamation Cases

This same controversy is reflected in libel cases brought since *Dun & Bradstreet*.¹¹² Generally, in defamation cases, the form factor of the standard seems to give courts the most difficulty.¹¹³ Two cases, *Jacobson v. Rochester Communications*¹¹⁴ and *Miles v. Perry*,¹¹⁵ are demonstrative of the confusion in this area.

The *Jacobson* case involved a false report by a radio station that Jacobson was serving a sentence in the Stillwater State Prison for arson.¹¹⁶ In *Miles*, several members of the Union Baptist Church's Board of Trustees falsely accused Miles of misappropriating church funds.¹¹⁷ In both cases, the statements were found to be false and defamatory¹¹⁸ and the plaintiffs were found to be private individuals.¹¹⁹ Further, both of the defamatory statements at issue imputed criminal conduct.¹²⁰ Despite these similarities,

112. This is not surprising since the *Dun & Bradstreet* standard is identical to the *Connick* standard. See *supra* notes 11 & 15 and accompanying text.

113. Compare *Sisler v. Gannett Co.*, 104 N.J. 256, 516 A.2d 1083 (1986) (Allegations concerning improper loans made by a bank deemed a matter of public concern because banks are subject to federal and state licensing regulations.) with *Connolly v. Labowitz*, 519 A.2d 138, 141 (Del. Super. 1986) (Dissemination of information concerning qualification and performance of physician deemed not a matter of public concern despite state licensing requirements.). Compare also *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 362 (11th Cir. 1987) (investment advice deemed a matter of public concern) with *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511 (10th Cir. 1987) (credit report not a matter of public concern).

114. 410 N.W.2d 830 (Minn. 1987).

115. 529 A.2d 199 (Conn. App. Ct. 1987).

116. *Jacobson*, 410 N.W.2d at 832. Although Jacobson had been convicted of arson, he did not serve time in prison. Also, following a change of venue, Jacobson was retried and found not guilty of the criminal charges against him. *Id.*

117. *Miles*, 529 A.2d at 202. Miles had been a member of the church for thirty years and she had served on the church's finance committee as the financial secretary for six years. *Id.* In 1981, the board of trustees employed an accountant to review the church's tax exempt status. *Id.* As a result of the review, the board of trustees conducted an investigation of the church's financial affairs. *Id.* In January of 1983, a meeting of the church membership was called to inform the members of the investigatory findings. *Id.* At the meeting, several members of the board implied that Miles had misappropriated church funds. *Id.* At trial, Miles proved that the statements were made of and concerning her, that the statements were false and defamatory, that the defendants were responsible for making the statements, and that she suffered humiliation and anguish as a result of these statements. *Id.*

118. *Jacobson v. Rochester Communications*, 410 N.W.2d 830, 832 (Minn. 1987); *Miles*, 529 A.2d at 202.

119. *Jacobson*, 410 N.W.2d at 836; *Miles v. Perry*, 529 A.2d 199, 204 (Conn. App. Ct. 1987). This finding is important because it triggers the *Dun & Bradstreet* analysis. See *infra* notes 241-42 and accompanying text.

120. *Jacobson*, 410 N.W.2d at 832; *Miles*, 529 A.2d at 202. At common law, statements imputing criminal conduct were per se actionable. See *infra* note 205 and accompanying text.

the final outcome of the two cases differed. In *Jacobson*, the court held that the news report addressed a legitimate matter of public concern,¹²¹ whereas the *Miles* court held that the defamatory statements did not address a matter of public concern.¹²²

In this instance, the two courts interpreted the form element of the *Dun & Bradstreet* test differently. Although the statements were publicly disclosed in both cases, the *Miles* court seemed to emphasize the fact that Miles' speech did not involve a matter of public concern because the statement was only made to members of Miles' church, rather than to the public at large.¹²³ Arguably, the *Miles* court placed too much emphasis on the form of the dissemination.

The *Dun & Bradstreet* Court stated that the content, form, and context of the speech must be reviewed in light of the entire record.¹²⁴ By focusing mainly on the form factor, the *Miles* court misapplied the *Dun & Bradstreet* test. However, since the Supreme Court did not provide any guidelines as to the application of the content, form, and context standard,¹²⁵ the *Miles* court cannot be faulted for misapplying the standard. Instead, the fault lies in the standard itself. Because the standard is too vague, lower courts cannot determine what constitutes a matter of public concern. Thus, guidelines must be established so that courts can more reasonably resolve critical public concern questions.

III. THE EVOLUTION OF THE CONTENT, FORM, AND CONTEXT STANDARD: AN HISTORICAL OVERVIEW OF THE FIRST AMENDMENT

A. Freedom of Speech and Its Historical Significance

According to some authorities, the numerical position of the first amendment is symbolic because freedom of expression enjoys primacy in our scale of rights.¹²⁶ Freedom of speech is the matrix of every other form of freedom; it is an indispensable condition which has been recognized historically, politically, and legally.¹²⁷ In 1964, the Supreme Court declared that cases involving the first amendment must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."¹²⁸ Although

121. *Jacobson*, 410 N.W.2d at 832.

122. *Miles*, 529 A.2d at 207.

123. *Id.*

124. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761 (1985).

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

126. A. COX, FREEDOM OF EXPRESSION 1 (1981).

127. Note, *supra* note 55, at 217 (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

128. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

the political foundations of the first amendment are often emphasized, especially by the Supreme Court,¹²⁹ the first amendment's protection of free speech goes much deeper than just political speech.¹³⁰ The framers of the Constitution believed that a free press should advance truth, science, morality, and the arts in general, as well as responsible government.¹³¹

Despite its primacy, the first amendment's guarantee of freedom of speech is not absolute.¹³² Further, according to the Supreme Court, not all speech is deserving of equal first amendment protection.¹³³ In the hierarchy

129. A. Cox, *supra* note 126, at 3. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964) "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74-75.

130. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the Supreme Court stated:

The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24.

131. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42 (1971) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967)).

132. See generally *Schenck v. United States*, 249 U.S. 47 (1919) "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Id.* at 52.

133. The Supreme Court on occasion has recognized that not all speech is deserving of equal first amendment protection. Obscene speech and "fighting words" have been granted no protection. See, e.g., *Roth v. United States*, 354 U.S. 476, 483 (1957) (The first amendment was not intended to protect every utterance; obscenity is outside the protection of the first amendment.); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (explaining that freedom of speech is not absolute and that certain types of speech, such as lewd, obscene, profane, libelous, and insulting or "fighting" words, have such slight social value that they may be regulated); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92 (1952) (advocating violent overthrow of the government is unprotected speech); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (publication of troop sailing time may be enjoined). Some areas of speech are protected, but do not warrant as much first amendment protection. Commercial speech, speech concerning purely commercial transactions, is a good example of such speech. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976) (Common sense differences between commercial speech and other varieties of speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980) (Because the "First Amendment's concern for commercial speech is based on the informational function of advertising," the government may ban deceitful communications and commercial speech related to illegal activity. However, if speech is not misleading or does not relate to unlawful activity, the state may only regulate such commercial speech if it has a substantial interest and the regulation is narrowly drawn to achieve the state's interest.).

of first amendment values, speech dealing with matters of public concern occupies the highest rung.¹³⁴ Thus, in deciding first amendment cases, courts must first consider them against our profound national commitment to uninhibited and robust debate.¹³⁵ Second, courts must balance the competing interests at stake to devise a workable solution to the problems inherent in all first amendment cases.¹³⁶

As a result of this balancing of competing interests, judicial interpretation of the first amendment is continually changing. In the 1960s, two major changes occurred. In 1964, the area of defamation law was constitutionalized in order to give the first amendment breathing space.¹³⁷ Then in 1967, the Supreme Court incorporated the doctrine of unconstitutional conditions¹³⁸ into the general body of constitutional law thus extending freedom of speech to public employees.¹³⁹ Since 1964, in the area of defamation law, the Supreme Court has struggled to devise a workable standard which properly balances the competing interests of the first amendment against the individual's reputation interests.¹⁴⁰ Likewise, in the area of first amendment rights of public employees, since 1967, the Court has gone through a similar struggle balancing the employee's first amendment interests against the employer's interest in promoting the efficiency of the public service that the office performs through its employees.¹⁴¹ Today, in both areas of the law, litigants' first amendment rights are given greater protection when their speech addresses a matter of public concern.¹⁴²

B. Public Employees: From *McAuliffe* to *Connick*

Since 1892, public employment was considered a privilege,¹⁴³ and public employees had no right to object to conditions placed upon the terms of their employment.¹⁴⁴ In 1952, the right-privilege distinction reached its

134. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982).

135. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

136. *A. Cox*, *supra* note 126, at 4.

137. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). "[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72.

138. *See generally* *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The doctrine of unconstitutional conditions simply states that public employment cannot be conditioned on the relinquishment of constitutional rights. *Id.* at 605-06.

139. *Id.*

140. *See infra* notes 212-37 and accompanying text.

141. *See infra* notes 143-87 and accompanying text.

142. *See supra* notes 5 & 7 and accompanying text.

143. *See, e.g.*, Note, *New Restrictions*, *supra* note 21, at 340 (Until the mid-twentieth century, courts viewed public employment as a privilege that the government could bestow on its own terms.).

144. *See generally* *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). Prior to the Supreme Court's holding in *Keyishian*, public employees' constitutional

high point when the Supreme Court held that while people may assemble, speak, and believe as they choose, they have no right to work for the state on their own terms.¹⁴⁵ However, in 1967, the Supreme Court finally put the right-privilege distinction to rest and vastly expanded the constitutional rights afforded government employees.¹⁴⁶ Although the Court expressly rejected the right-privilege distinction in 1967 and broke new ground in the area of first amendment rights of public employees, it did not set forth a discernible standard.¹⁴⁷ Accordingly, the Supreme Court attempted to fill this void in *Pickering v. Board of Education*.¹⁴⁸

rights were controlled by *McAuliffe*. In *McAuliffe*, Justice Holmes observed that “[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id.* at 220, 29 N.E. at 517.

145. Note, *Narrowing the Scope*, *supra* note 21, at 340 n.15 (citing *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952)). “At issue in *Adler* was the constitutionality of New York’s Feinberg Law, which effectively precluded from state employment any person advocating, or belonging to organizations advocating the violent or forceful overthrow of the government.” *Adler*, 342 U.S. at 487-90. The petitioner, a public school teacher, contested the constitutionality of the law on the grounds that it infringed upon his freedom of speech and freedom of assembly rights, as well as the free speech and assembly rights of all other public employees and those seeking such employment. *Id.* at 491-92. In upholding the law, the Court emphasized that the only limitation placed on an individual was with respect to his freedom to choose between membership in a subversive organization and public employment. *Id.* at 493.

146. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). *Keyishian* was an English instructor at the State University of New York. *Id.* at 591. As a faculty member of an institution of higher education owned and operated by the State of New York, *Keyishian*’s employment was conditioned on compliance with a New York plan formulated to prevent the appointment or retention of subversive persons in state employment. *Id.* at 591-92. As part of the plan, all faculty members were required to sign a certificate stating that they were not Communists, and if they ever had been Communists, that they had reported that fact to the President of the University. *Id.* at 592. When *Keyishian* refused to sign the certificate, his contract was not renewed. *Id.* In upholding the lower court’s decision, the Supreme Court expressly overruled *Adler* and held that the Court of Appeals for the Second Circuit had correctly stated the law when it held that “the theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected.” *Id.* at 605-06 (quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1966)). See also Note, *New Restrictions*, *supra* note 21, at 341 n.18 and accompanying text (*Keyishian* vastly expanded the rights of government workers by laying the right-privilege distinction to rest; note 18 discusses the variety of rights extended to government employees as a result of *Keyishian*).

147. Note, *Narrowing the Scope*, *supra* note 21, at 341.

148. 391 U.S. 563 (1968). *Pickering*, a school teacher at a public high school, wrote a letter to the editor of the local newspaper criticizing the way in which the board of education and the superintendent of the school had handled past proposals to raise new revenue for the school. *Id.* at 564. After the letter was published, *Pickering* was fired. *Id.* The board of education justified *Pickering*’s firing on the grounds that the letter’s publication was detrimental to the efficient operation and administration of the schools. *Id.* Although *Pickering*’s letter contained some factual errors, the Supreme Court held that the dismissal violated *Pickering*’s constitutional right of free speech. *Id.* at 574. In so holding, the Court stated, “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employ-

Most writers consider *Pickering* a landmark decision in the area of first amendment rights of public employees for two reasons.¹⁴⁹ First, the *Pickering* Court reiterated its rejection of the notion that public employees must relinquish their first amendment rights as a condition precedent to public employment.¹⁵⁰ Second, the *Pickering* Court laid the ground work for future retaliatory discharge cases.¹⁵¹ Although the Supreme Court expressly recognized the public employee's right to enjoy constitutional privileges, the Court did not grant blanket protection to all employee speech.¹⁵² Instead, the *Pickering* Court recognized that the public employer also had a strong interest in promoting and maintaining the efficiency of the public service that the office performs through its public employees.¹⁵³ In order to reconcile these competing interests, the *Pickering* Court adopted a balancing test in which the employee's interests as a citizen were weighed against the employer's need to maintain professional relationships and the proper working atmosphere.¹⁵⁴

While the *Pickering* Court refused to enunciate any specific guidelines to judge all such employee speech,¹⁵⁵ the Court did list a number of elements to be considered in balancing the competing interests.¹⁵⁶ These fac-

ment." *Id.*

149. See, e.g., Note, *Supreme Court*, *supra* note 51, at 833. (*Pickering* was a landmark decision because the "Supreme Court held that an employee's right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.") (quoting *Pickering v. Board of Educ.*, 391 U.S. at 574). *But see* Note, *supra* note 55, at 220 (*Pickering* was the first indication of the erosion of the first amendment rights of public employees.).

150. *Pickering*, 391 U.S. at 574-75. See also Note, *New Restrictions*, *supra* note 21, at 342 (*Pickering* is the leading case on the free speech rights of public employees because it reiterated the Supreme Court's rejection of the idea that public employees had to relinquish their first amendment rights as a condition of their employment.).

151. See *infra* notes 172 & 180-85 and accompanying text.

152. *Pickering*, 391 U.S. at 568. See also Note, *New Restrictions*, *supra* note 21, at 342 (no blanket protection).

153. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). See also Note, *supra* note 55, at 220 (quoting balancing of interests language from the *Pickering* decision); Note, *Narrowing the Scope*, *supra* note 21, at 342 (discussing strength of state's interest in providing quality public services); Casenote, *supra* note 47, at 1316 (second part of the test, once speech has been determined to be a matter of public concern, is to balance the employee's interest against the government's interest in maintaining office efficiency).

154. *Pickering*, 391 U.S. at 568. See also Milbrath, *supra* note 47, at 707 (The problem in every public employee case in which the employee claims he was fired in retaliation for exercising his first amendment rights is to arrive at the proper balance between the employee's rights and the government's rights.); Note, *Delicate Balance*, *supra* note 22, at 86 (same).

155. See *supra* note 19 and accompanying text.

156. These elements include: 1) whether the statements are directed towards any person with whom the employee would normally be in contact in the course of his daily work; 2) whether the employee's immediate supervisor must maintain employee discipline or harmony among co-workers; 3) the extent to which the employee's personal loyalty to and confidence in his superiors are necessary to the proper functioning of the relationship between them; 4) the extent to which the statements, if false, would be difficult to counter because of the employee's

tors mainly focus upon the effect that the employee's speech has on the efficient operation of the workplace.¹⁵⁷ In *Pickering*, the balance was struck in favor of Pickering's right to comment on matters of public concern, since there was no evidence presented that his letter in any way harmed the efficient operation of the school system.¹⁵⁸

The content of Pickering's letter proved to be a critical factor in the *Pickering* decision since the content addressed a matter of legitimate public concern.¹⁵⁹ Another critical factor was the context of Pickering's speech.¹⁶⁰ Since Pickering's letter was published in a public forum, the context of the letter strengthened Pickering's right to speak.¹⁶¹ Despite the importance of

presumed greater access to the real facts; 5) whether the object of the statement could easily rebut the statements if they are erroneous; 6) whether the statements impede the employee's proper performance of his daily duties; 7) whether the statements interfere with the regular operation of the involved institution; 8) whether the nature of the employee's job calls for confidentiality; and 9) whether the matters commented upon are of legitimate public concern. *Pickering*, 391 U.S. at 569-73.

157. Note, *Supreme Court*, *supra* note 51, at 833-34. See also Note, *Narrowing the Scope*, *supra* note 21, at 342-43 ("These elements focus in large part upon the employee's relationship with his co-workers, employer, and the hiring institution."); Note, *New Restrictions*, *supra* note 21, at 342-43 (The factors include the state's interest in maintaining discipline by immediate supervisors and harmony among co-workers, in preserving loyalty and confidence in the particular employment relationship, and in discharging incompetent employees.); Note, *Constitutional Law—First Amendment—Dismissal of State Employee for Distributing Questionnaire Upheld Where Speech Tangentially Affected Public Concern and Questionnaire had Potential to Disrupt Office, Undermine Supervisory Authority, and Destroy Close Working Relationships: Connick v. Myers*, 103 S. Ct. 1684 (1983), 13 BALTIMORE L. REV. 365, 367 (1984) [hereinafter Note, *Dismissal*] (introducing factors used to determine the strength of the competing interests).

158. *Pickering v. Board of Educ.*, 391 U.S. 563, 567-73 (1968). The Court could find no evidence that Pickering's letter affected his ability to efficiently perform his teaching duties. *Id.* at 570. On the contrary, the Court found that Pickering's relationship with the board of education and the superintendent was not the type of close working relationship where personal loyalty and confidence are necessary to the proper functioning of their respective duties. *Id.* Further, no evidence was presented that the harmony between Pickering and his co-workers had been effected, nor was evidence presented as to the effect of the letter on the community as a whole or the administration of the school system in particular. *Id.* at 567.

159. *Id.* at 571. The issue debated in *Pickering* concerned the financing of the local school system. *Id.* In balancing the interests in favor of Pickering, the Court stated that "the question whether a school system requires additional funds is a matter of legitimate public concern." *Id.* "In a society that leaves such questions to popular vote, free and open debate is vital to informed decision making by the electorate." *Id.* at 571-72. The Court then went on to say that since teachers, as a class, are most likely to have the means to form informed and definite opinions on how school funds should be allocated, "it is essential that they be able to speak out freely without fear of retaliatory dismissal." *Id.* at 572.

160. Note, *supra* note 55, at 223.

161. *Id.* Note, *Narrowing the Scope*, *supra* note 21, at 343-44 (Although the Court emphasized the public context of Pickering's speech, this factor was not outcome-determinative.); See also Note, *New Restrictions*, *supra* note 21, at 343 (public context in which employee's speech was made strengthened employee's right to speak).

these factors in the final outcome of the *Pickering* decision, the Court did not attempt to define what constituted a matter of public concern,¹⁶² nor did the Court explicitly state that the context of the speech was a factor to be weighed in balancing the competing interests.¹⁶³ However, in 1983, in *Connick v. Myers*,¹⁶⁴ the Supreme Court attempted to define what constituted a matter of public concern¹⁶⁵ and explicitly acknowledged that context was a factor to be considered in determining whether the speech addresses a matter of public concern.¹⁶⁶

The dispute in *Connick* centered upon a questionnaire concerning the internal operating procedures of a district attorney's office. Shortly after being informed that she was being transferred to another department, Myers, one of the assistant district attorneys, prepared a questionnaire "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees ever felt pressured to work in political campaigns."¹⁶⁷ Myers then distributed the questionnaire to the other assistant district attorneys. Shortly thereafter, Myers was fired for refusing to accept the proposed transfer.¹⁶⁸ Myers then brought an action against Connick alleging that she was wrongfully discharged for exercising her constitutionally protected right of free speech.¹⁶⁹ Although the district court and the court of appeals agreed with Myers and ordered her reinstated,¹⁷⁰ the Supreme Court reversed on the grounds that

162. Note, *supra* note 55, at 221.

163. *Id.* at 223; Note, *Narrowing the Scope*, *supra* note 21, at 343-44.

164. 461 U.S. 138 (1983).

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

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

167. *Connick*, 461 U.S. at 140-41. The main reason Myers prepared the questionnaire was because when she expressed concern over her proposed transfer, Dennis Waldron, one of the first district attorneys, suggested that Myers' concerns were not shared by others in the office. *Id.* at 141. Myers informed Waldron that she would do some research on the matter and subsequently, she prepared and distributed the questionnaire. *Id.* See generally Note, *Connick v. Myers: A Matter for Public Concern*, 29 LOY. L. REV. 1174 (1983) (for a general overview of *Connick* and the Supreme Court cases leading up to *Connick*).

168. *Connick*, 461 U.S. at 141. Myers did not specifically refuse to accept the proffered transfer. *Id.* When she was first informed about the possible transfer, Myers expressed her concern that if she were transferred to the juvenile division, a possible conflict of interest could arise. *Id.* at 140 n.1. Myers had previously participated in a counseling program for convicted juvenile defendants. *Id.* If she was transferred, Myers could be faced with prosecuting juveniles she had previously counseled. *Id.* Myers expressed this concern to her immediate supervisor, Waldron, and to the District Attorney himself, Connick. *Id.* at 140-41. After Connick urged Myers to accept the transfer, Myers replied that she would "consider" it. *Id.* at 141. Although Connick told Myers that she was being fired for not accepting the transfer, the real reason for her firing was the questionnaire. *Id.* In reference to the questionnaire, Waldron told Connick that Myers was creating a "mini-insurrection" within the office. *Id.*

169. *Id.* at 141.

170. *Connick v. Myers*, 507 F. Supp. 752 (E.D. La.), *aff'd*, 654 F.2d 719 (1981). For an excellent summary and analysis of both the district court's and the court of appeals' holdings

Myers' speech did not address a matter of public concern; thus, the first amendment did not protect her speech.¹⁷¹

In making its decision, the *Connick* Court relied heavily on the language of *Pickering*¹⁷² and determined that federal courts should not get involved in public employment disputes unless the employee's speech addresses a matter of public concern.¹⁷³ According to the *Connick* Court, the only reason courts get involved in public employee discharge cases is to ensure that citizens are not deprived of fundamental constitutional rights by virtue of their public employment.¹⁷⁴ Thus, the threshold requirement for courts to get involved in public employment cases is that the public employee's speech must address a matter of public concern.¹⁷⁵

After reviewing Myers' questionnaire, the Court held that none of the questions were of public import,¹⁷⁶ except for question number eleven,¹⁷⁷ which addressed the issue of official pressure upon employees to work for political candidates.¹⁷⁸ Because of this question, the *Connick* Court engaged in the *Pickering* balancing test to determine whether the first amendment protected Myers' speech.¹⁷⁹

and reasoning, see Note, *Delicate Balance*, *supra* note 22, at 83-85.

171. *Connick v. Myers*, 461 U.S. 138, 154 (1983).

172. Note, *supra* note 55, at 224. See also *Connick*, 461 U.S. at 143 ("[T]he repeated emphasis in *Pickering* on the right of a public employee as a citizen, in commenting upon matters of public concern, was not accidental. This language reflects both the historical evolution of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.").

173. *Connick*, 461 U.S. at 146.

[W]hen 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.

Id. at 147.

174. *Id.*

175. *Id.* at 146.

176. *Connick v. Myers*, 461 U.S. 138, 148 (1983).

177. *Id.* at 149. Question number eleven stated: "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id.*

178. *Id.* The Supreme Court has held that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. *Id.* (citing *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976)). The Supreme Court has also held that government service should depend upon meritorious performance rather than political service. *Connick*, 461 U.S. at 149 (citing *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Pub. Workers v. Mitchell*, 330 U.S. 75 (1947)).

179. *Connick*, 461 U.S. at 150. Although the threshold requirement for courts to get involved in public employment disputes is that the employee's speech addresses a matter of public concern, the first amendment does protect public employee's private speech. *Id.* at 147. However, the employee's speech does not receive as much first amendment protection when it

In *Pickering*, the Court noted that the inherent problem in all such public employee cases was to arrive at a proper balance between the competing interests of the public employee and the public employer.¹⁸⁰ Analyzing the *Pickering* elements,¹⁸¹ there was no demonstration in *Connick* that Myers' questionnaire impeded her ability to perform her responsibilities,¹⁸² but there was evidence that close working relationships were important to the efficient operation of the district attorney's office.¹⁸³ Although no evidence existed that Myers' questionnaire disrupted the office or destroyed working relationships,¹⁸⁴ the Supreme Court held that *Connick* should be given a wide degree of deference in managing his office.¹⁸⁵ Despite these facts, the Supreme Court did not feel bound to strictly follow the *Pickering* Court's analysis.¹⁸⁶ Instead, the *Connick* Court extracted the two most critical elements from *Pickering*, the right to comment on matters of public concern and the context of the speech,¹⁸⁷ and incorporated them into a new standard.

According to the new standard, the threshold requirement is that the public employee's speech addresses a matter of public concern.¹⁸⁸ In determining whether speech addresses a matter of public concern, courts must look at the content, form, and context of the statement as revealed by the whole record.¹⁸⁹ Although the *Connick* Court made no attempt to define "content, form, and context," the content factor relates to the subject matter of the speech, the form factor examines who the speech was conveyed

addresses a matter of private concern. *Id.* According to the *Connick* Court:

We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.

For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.

Id. (citations omitted).

180. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). *See supra* notes 152-54 and accompanying text (discussing how the Court balanced the competing interests).

181. *See supra* note 156 and accompanying text.

182. *Connick v. Myers*, 461 U.S. 138, 151 (1983). *See also* element number seven, *supra* note 156.

183. *Connick*, 461 U.S. at 151. *See also* element number three, *supra* note 156.

184. *Connick*, 461 U.S. at 151-52. *See also* element number two, *supra* note 156.

185. *Connick*, 461 U.S. at 151-52. *Connick* testified that he believed Myers was trying to disrupt the routine of the office with her questionnaire. *Id.* at 151 n.11.

186. Note, *Supreme Court*, *supra* note 51, at 836-37. *See also Connick*, 461 U.S. at 148 n.7, 150 n.10 (Since the inquiry into the protected status of speech is a question of law and the Supreme Court is the final authority in determining the meaning of the Constitution, the Court is compelled to examine for itself the statements in issue and the circumstances under which they were made.)

187. *See supra* notes 159-66 and accompanying text.

188. Note, *Supreme Court*, *supra* note 51, at 836.

189. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

to, and the context factor encompasses where and why the employee spoke.¹⁹⁰ In applying the standard, the *Connick* Court emphasized the fact that Myers' questionnaire did not seek to gather any information about the functioning of the district attorney's office that would be of use to the general public in evaluating the performance of the district attorney's office.¹⁹¹ In other words, the content of Myers' questionnaire did not focus on any matters open to public debate.

Another factor that weighed heavily in the Court's decision was the fact that Myers did not intend to publicly disclose any of the information from the questionnaire.¹⁹² Rather, the questionnaire was circulated to a limited number of people and was intended to gather information for Myers' personal use only. Finally, the Court considered the context in which the questionnaire arose.¹⁹³ While the questionnaire was responsive to the current situation within the district attorney's office, the questionnaire was not responsive to any issue open to public debate or any issue currently a subject of public attention. Taken as a whole, Myers' questionnaire was merely a continuation of her personal dispute with Connick, an expression on a private matter which affected her and her alone.¹⁹⁴ Therefore, the *Connick* Court held that the first amendment did not protect Myers' speech.¹⁹⁵

In view of the historical purpose of the first amendment¹⁹⁶ in general as well as the history of constitutional rights of public employees in particular,¹⁹⁷ *Connick* was correctly decided. The first amendment was primarily concerned and "fashioned to assure unfettered interchange of ideas for the bringing about of political and social change."¹⁹⁸ Myers' speech was merely self-expression of a personal grievance which was not intended to bring about any type of political or social change. Although one must look behind the facts and holdings in *Connick* in order to find justification for the Su-

190. Note, *Dismissal*, *supra* note 157, at 370. See also *Connick*, 461 U.S. at 152-53 (The Court generally discusses nature of Myers' speech stating that subject matter, manner, time, and place are all important factors the Court weighs to determine whether the speech addresses a matter of public concern.). But see *Connick*, 461 U.S. at 160 (Brennan, J., dissenting) ("Whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why.").

191. *Connick*, 461 U.S. at 148. See also Note, *New Restrictions*, *supra* note 14, at 349 (only information questionnaire would convey to public was that an employee was upset with the status quo); Note, *Dismissal*, *supra* note 157, at 370 (purpose of questionnaire was to continue employment dispute rather than to inform public of government wrongdoing).

192. *Connick*, 461 U.S. at 148.

193. *Id.* at 153-54.

194. *Connick v. Myers*, 461 U.S. 138, 154 (1983).

195. *Id.* at 154.

196. See *supra* notes 126-36 and accompanying text.

197. See *supra* notes 143-63 and accompanying text.

198. *Roth v. United States*, 354 U.S. 476, 484 (1957).

preme Court's holding that Myers' speech did not address a matter of public concern,¹⁹⁹ it is plausible that the Supreme Court correctly classified Myers' speech as private speech.

C. Defamation: From *New York Times* to *Dun & Bradstreet*

In 1964, the Supreme Court revolutionized the field of defamation law by giving defamatory statements constitutional protection in the landmark case of *New York Times Co. v. Sullivan*.²⁰⁰ Prior to 1964, defamatory statements were generally considered to be one of the narrowly defined classes of speech unprotected by the first amendment.²⁰¹ Before defamatory statements attained constitutional status, they were governed by common law principles.²⁰²

At common law, in order to establish a prima facie case in an action for libel or slander²⁰³ the plaintiff had to prove: 1) that the words complained of were published of and concerning him; 2) that the words were defamatory; and 3) that the defendant was responsible for publishing the words.²⁰⁴ Once a plaintiff established a prima facie case in a libel action, he did not have to prove that the publication caused damage, since damages were presumed.²⁰⁵ In other words, the common law imposed strict liability

199. See *supra* notes 190-95 and accompanying text.

200. 376 U.S. 254 (1964). In *New York Times*, the Court held that erroneous statement is inevitable in free debate and if the freedoms of expression are to have the breathing space they need to survive, these statements must be protected. *Id.* at 271-72. The Court then went on to hold that, "[t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for defamatory falsehoods relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. Most commentators consider *New York Times* a landmark decision of tremendous constitutional significance. See, e.g., Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 193-94 (*New York Times* may prove to be the most important first amendment decision the Supreme Court has ever produced.).

201. Note, *Evolution*, *supra* note 47, at 774 (citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

202. Note, *First Amendment*, *supra* note 22, at 785.

203. A cause of action for defamation can take one of two forms: an action for libel or an action for slander. See PROSSER & KEETON, *supra* note 7, § 111, at 771; Note, *Survival of Libel Actions—There is Life After Death in New Jersey*, 15 SETON HALL L. REV. 639, 639 n.2 (1985). The distinction between the two different types of actions lies in the method of publication, which can be either oral or written. See PROSSER & KEETON, *supra* note 7, § 112, at 785. If a defamatory statement is communicated orally, a cause of action for slander exists, while a written defamatory statement will give rise to an action for libel. *Id.*

204. C. DUNCAN & B. NEILL, *DEFAMATION* 22 (1978).

205. *Id.* Libel is per se actionable if the statement at issue is defamatory on its face. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1354 (1975). Slander is per se actionable only if

on persons accused of defaming the plaintiff. This imposition of strict liability can best be understood in light of the high value the common law placed on an individual's reputation.²⁰⁶

While strict liability was the norm, the common law did allow the defamation defendant some defenses.²⁰⁷ For first amendment purposes, the most notable defense at common law was the qualified privilege of "fair comment."²⁰⁸ Fair comment is the most notable defense because the background of *New York Times* lies in the general recognition, at common law, of the fair comment privilege.²⁰⁹

The common law fair comment privilege, being a qualified privilege, depends on the truth of the facts upon which the comment is based and does not protect honest misstatements of facts.²¹⁰ Unless the defendant

the statement falls into one of four narrowly drawn categories: the commission of a crime, the contraction of a loathsome disease, a matter that would adversely affect the plaintiff's business, or an accusation of unchastity if the plaintiff is a woman. *Id.* Libel per quod (libel not defamatory on its face) requires extrinsic proof of the statement's defamatory meaning unless the written statement falls into one of the four categories of slander per se. *Id.* at 1354-55. Furthermore, a per se action presumes damages to the plaintiff's reputation, while a per quod action requires proof of special damages. *See id.* at 1355-56. *See generally* PROSSER & KEETON, *supra* note 7, § 112, at 785-97 (detailing and explaining the various types of libel and slander).

206. *See, e.g.,* Rosenblatt v. Baer, 383 U.S. 75 (1963). "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.* at 92-93 (opinion by Stewart, J.).

207. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* (4th ed. 1971). At common law, there were absolute privileges, which allowed the defendant to completely avoid all liability when established, and qualified privileges. Qualified privileges had to be exercised in a reasonable manner and for the proper purpose, or else the defendant's immunity was forfeited. Some examples of absolute privileges include: judicial proceedings—judges, witnesses and counsel were given absolute immunity in the carrying out of their respective functions in connection with any judicial proceedings; legislative proceedings—members of legislative bodies were given absolute immunity for acts done and statements made in the performance of their duties; executive communications—certain executive officers were also given absolute immunity for acts done and statements made in the discharge of their duties. Truth was also an absolute defense. *Id.* § 114, at 776-85; *see also* RESTATEMENT (SECOND) OF TORTS §§ 585-92A. The most notable qualified privilege was the privilege to make fair comments on matters of public concern. Since this privilege was qualified rather than absolute, the comment had to be based on true facts. W. PROSSER, *supra* § 115, at 785; *see also* RESTATEMENT, *supra* §§ 594-98A. *See generally* Comment, *supra* note 18, at 1172-73 (for a brief history of American defamation law).

208. W. PROSSER, *supra* note 207, § 118, at 819. The fair comment privilege applied when publications to the general public addressed matters of public concern. *Id.*

209. *Id.* *See also* Note, *Constitutional Law*, *supra* note 22, at 531 ("For first amendment purposes the most important of these common law privileges was that of 'fair comment' on matters of public concern.").

210. *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964); *see also* Note, *Constitutional Law*, *supra* note 22, at 531 (fair comment privilege protected statements of opinion)

could discharge the burden of truth, he became subject to general damages without a showing of harm by the plaintiff.²¹¹ In *New York Times*, the Supreme Court attempted to strike a balance between the common law of defamation and the first amendment guarantee of free speech.²¹² In striking the balance, the Court abolished the common law rule of strict liability finding that it violated the first amendment.²¹³ In abolishing the rule of strict liability, the Court expressly recognized that honest misstatements of fact fall within the ambit of the first amendment's protection.²¹⁴

Although *New York Times* was originally a narrow decision, applying only to public officials in the performance of their official duties, the Supreme Court eventually extended the *New York Times* rule to public figures in 1967.²¹⁵ In extending the scope of the *New York Times* rule to

but not honest misstatements of fact).

211. *New York Times*, 376 U.S. at 267.

212. Note, *First Amendment*, *supra* note 51, at 790. See also *New York Times*, 376 U.S. at 270-73 (generally discussing historical importance of first amendment, nature of attacks on government and public officials, and fact that "erroneous statement is inevitable in free debate").

213. *New York Times*, 376 U.S. at 268-69. In *New York Times*, an Alabama police commissioner brought a defamation action against the *New York Times* for publishing an advertisement alleging civil rights violations by the police department. *Id.* at 256. Although the advertisement was substantially correct, the jury found liability on the basis of some relatively minor inaccuracies. *Id.* at 256-58. Since Alabama's fair comment privilege only protected true statements, the jury's determination was proper. *Id.* at 263. However, as a result of the jury's determination, the commissioner was awarded \$500,000 in damages. *Id.* at 256. The question before the Court in *New York Times* was whether the common law rule of strict liability, as applied to a defamation action brought by a public official against a critic of his official conduct, abridged the first amendment. *Id.* at 264-65. In holding that the rule violated the first amendment, the Court stated that erroneous statements are inevitable in free debate, and if the freedoms of expression are to have the breathing space they need to survive, erroneous statements must be given constitutional protection. *Id.* at 271-72.

214. *Id.* at 273.

215. The Supreme Court extended the actual malice standard to public figures in the consolidated opinion of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In extending the actual malice standard to public figures, the Court observed that "public figures, like public officials, often play an influential role in ordering 'society' and that many who do not hold public office . . . are nevertheless intimately involved in the resolution of important public questions." *Id.* at 164-65 (Warren, C.J., concurring). In separate opinions, Justice Black, joined by Justice Douglas, and Justice Brennan, joined by Justice White, concurred in Chief Justice Warren's rationale for applying the *New York Times* standard to public figures. *Id.* at 170, 172. The Court defined a public figure as an individual who thrusts himself into a public controversy or who receives continuing public scrutiny and possesses the ability to rebut the defamatory statement. *Id.* at 154-55 (Harlan, J., plurality opinion). The Supreme Court later refined this test and recognized three types of public figures. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 12-13, at 643-44 (summarizing three categories of public figures). A person is "a public figure for all purposes" if he has achieved "general fame or notoriety in the community." *Gertz*, 418 U.S. at 352. An individual may also be deemed a public figure if he "voluntarily inject[s] himself into a public controversy in order to influence the resolution of the issues involved." L. TRIBE,

include public figures, the Court's primary focus was on the plaintiff's status.²¹⁶ However, in 1971, in *Rosenbloom v. Metromedia, Inc.*,²¹⁷ the Supreme Court abruptly shifted its focus from the plaintiff's status to the nature of the speech.²¹⁸ In a highly criticized opinion,²¹⁹ the Court suggested that the actual malice test should extend to all defamation cases in which the speech involved addressed a "subject of public or general interest."²²⁰

Until *Rosenbloom*, the Supreme Court had engaged in a balancing test in determining how much protection defamatory statements should be given.²²¹ The two competing interests that the Court weighed were the freedom of speech on the one side, and the individual's interest in protecting his reputation and good name on the other.²²² At common law, the scales were arranged so that the individual's interest in protecting his reputation and good name invariably outweighed virtually all statements tending to harm that interest.²²³ By placing defamatory statements within the realm of the first amendment's protection, the Supreme Court attempted to strike a balance between the common law of defamation and the first amendment.²²⁴

supra §§ 12-13, at 644 (misquoting *Gertz*, 418 U.S. at 345) (the proper language is as follows: "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345). Finally, a person may become a public figure involuntarily. *Gertz*, 418 U.S. at 345.

216. Comment, *supra* note 18, at 1174.

217. 403 U.S. 29 (1971).

218. Note, *First Amendment*, *supra* note 22, at 793.

219. See *Gertz*, 418 U.S. at 346 (1976). See also Note, *Constitutional Law*, *supra* note 22, at 532 (*Rosenbloom* was a highly criticized opinion).

220. *Rosenbloom*, 403 U.S. at 43. In *Rosenbloom*, the plurality determined:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety . . .

Whether the person involved is a famous large-scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

Id. at 43-44 (Brennan, J., plurality opinion).

221. See *supra* notes 212-14 and accompanying text and *infra* notes 222-25.

222. Note, *Constitutional Law*, *supra* note 22, at 527; Comment, *supra* note 18, at 1171.

223. See *supra* notes 205-06 and accompanying text.

224. See *supra* text accompanying note 7. The *New York Times* standard was designed to prevent the self-censorship the common law rule of strict liability promoted. The standard was also designed to give the first amendment "breathing space." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). Although the common law allowed "fair comment" on matters of public concern, if any of the factual assertions contained in the comment were false, the speaker became liable for uttering defamatory falsehoods. C. DUNCAN, *supra* note 204, at

However, in striking the balance in *Rosenbloom*, the Supreme Court overcompensated and extended the *New York Times* rule "to absurdity."²²⁵

While tolerating some degree of abusive discourse is necessary to protect freedom of speech,²²⁶ the plurality's extension of the actual malice standard to all "subjects of public or general interest" in *Rosenbloom* invited too much abuse.²²⁷ After *Rosenbloom*, the scales became disproportionately tipped in favor of freedom of speech.²²⁸ The competing interest of the individual's right to protect his reputation and good name was virtually nonexistent.²²⁹ It had been overshadowed by the all-encompassing first amendment.²³⁰

In 1974, three years after *Rosenbloom*, the Supreme Court decided to resurrect the individual's right to protect his reputation. In *Gertz v. Robert Welch, Inc.*,²³¹ the Court explicitly overruled the *Rosenbloom* "subjects of

62-64. In devising the actual malice standard, the Supreme Court recognized that "erroneous statement[s] are inevitable in free debate." *New York Times*, 376 U.S. at 271-72. This recognition enabled the Court to modify the common law fair comment privilege in order to promulgate the concept that honest misstatements of fact fall within the ambit of the first amendment's protections. *Id.*

225. Note, *Evolution*, *supra* note 47, at 780.

226. *New York Times*, 376 U.S. at 271. As James Madison said, "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." *Id.* (citing 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

227. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974).

228. *Id.* at 346. "Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error." *Id.*

229. Note, *Evolution*, *supra* note 47, at 780 (the effect of *Rosenbloom* was to implement a virtually absolute immunity to publishers of defamatory information since any matter of sufficient general interest to prompt media coverage might be said to be a public concern).

230. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting). As Justice Harlan so succinctly stated, "the principal failing of the plurality opinion is its inadequate appreciation of the limitations imposed by the legal process in accommodating the tension between state libel laws and the federal constitutional protection given to freedom of speech and press." *Id.* See also Note, *Constitutional Law*, *supra* note 22, at 532-33 (*Rosenbloom* extended the actual malice standard to all libels involving "matters of public or general concern." In *Gertz*, the Court noted that such an extension infringed "to an unacceptable degree the state interest in compensating private individuals for injury to their reputation.").

231. 418 U.S. 323 (1974). In *Gertz*, Elmer Gertz, a reputable lawyer, sued the publishers of the *American Opinion*, Robert Welch, Inc., for publishing defamatory falsehoods about him. *Id.* at 327. In 1968, a Chicago policeman named Nuccio shot and killed a boy named Nelson. *Id.* at 325. Nelson's family retained Gertz to represent them in a civil suit against Nuccio. *Id.* The editorial staff of the *American Opinion* decided to write an article about the criminal trial of Officer Nuccio. *Id.* In March of 1969, an article was published entitled "FRAME-UP: Richard Nuccio And The War On Police." *Id.* at 325-26. Although the article's main focus was the criminal trial against Nuccio (in which Gertz had no role), the article characterized Gertz as an official of the "Marxist League for Industrial Democracy," a group which has advocated the violent seizure of the U.S. Government. *Id.* at 326. The article also

public or general interest" approach²³² and revived the distinction between public and private individuals.²³³ As a consequence of rejecting the *Rosenbloom* approach, the *Gertz* Court had to devise a new standard for private plaintiffs.²³⁴ Instead of formulating a uniform standard, applicable to all private plaintiffs, the Court decided to leave the question to the states.²³⁵ However, the Court did hold that the states may not impose liability without fault.²³⁶ Further, if presumed and punitive damages were sought, the plaintiff must prove actual malice.²³⁷

Although *Gertz* explicitly overruled the "subjects of public or general

labeled *Gertz* as a "Leninist" and a "Communist-fronter." *Id.* Most of the statements concerning *Gertz* were false. *Id.* Although the jury returned a verdict for *Gertz*, the trial court entered a judgment n.o.v. for the defendant. *Id.* at 329. The trial court held that the *New York Times* actual malice standard applied to the case through the Court's decision in *Rosenbloom*. *Id.* at 329-30. Dissatisfied with the result in *Gertz*, the Supreme Court granted certiorari. *Id.* at 325 ("We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."). In reversing the trial court, the Supreme Court held that the extension of the *New York Times* test proposed by the *Rosenbloom* plurality abridged the states' legitimate interest in compensating private individuals for injury to their reputations. *Id.* at 345-46. The Court also explicitly overruled the *Rosenbloom* "subjects of public or general interest" test. *Id.*

232. *Id.* Although the *Gertz* Court enunciated several reasons for rejecting the *Rosenbloom* public interest test in favor of focusing on the plaintiff's status, one of the main reasons was the Court's dissatisfaction with the ad hoc nature of the test. *Id.* at 346. *See also* Comment, *supra* note 18, at 1178 (*Gertz* "rejected the *Rosenbloom* approach by reviving the distinction between public and private individuals."); Note, *First Amendment*, *supra* note 22, at 794-95 (level of protection depends upon plaintiff's status because the state has strong interest in protecting individual's reputation which outweighs defendant's first amendment rights); Note, *Constitutional Law*, *supra* note 22, at 533 (Court shifted focus back to individual's status); Note, *Evolution*, *supra* note 47, at 781-82 (*Rosenbloom*, public or general interest test, did not adequately balance competing values at stake; status of plaintiff is the proper focus).

233. Comment, *supra* note 18, at 1178. In drawing the distinction between public and private individuals, the *Gertz* Court reasoned that since private individuals have less access to the channels of effective communication, private individuals are more vulnerable to injury. *Gertz*, 418 U.S. at 344. The *Gertz* Court also recognized that generally public officials and public figures have assumed influential roles in ordering society. *Id.* at 345. As a result, public individuals run the risk of closer scrutiny. *Id.* A private individual, on the other hand, does not usually assume an influential role in ordering society. *Id.* Therefore, the private individual has not relinquished his interest in the protection of his reputation and good name. *Id.* at 344-45.

234. *Id.* at 345-46. Under the *Rosenbloom* approach, private plaintiffs had to prove actual malice, if the defamatory statements involved a subject of public or general interest, in order to prevail. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971). By rejecting the *Rosenbloom* approach, the *Gertz* Court created a void in the area of defamation actions brought by private plaintiffs. *Gertz*, 418 U.S. at 346-47.

235. *Id.* at 347. In leaving the question to the states, the *Gertz* Court explicitly recognized the strength of the state interest in compensating private individuals for wrongful injury to their reputation. *Id.* at 348.

236. *Id.* at 347.

237. *Id.* at 349.

interest" test,²³⁸ traces of the test reappeared in 1985, when the Supreme Court decided *Dun & Bradstreet, Inc. v. Greenmoss Builders*.²³⁹ In yet another attempt to ease the inherent tension between the individual's interest in protecting his reputation and the first amendment's interest in unfettered debate,²⁴⁰ the *Dun & Bradstreet* Court held that the first amendment permits recovery of presumed and punitive damages absent a showing of actual malice if the defamatory statement does not address a "matter of public concern."²⁴¹ Like *Gertz*, *Dun & Bradstreet* involved a private plaintiff. Despite this apparent similarity, the *Dun & Bradstreet* Court found *Gertz* to be inapplicable²⁴² and made a distinction between speech on matters of public concern and purely private speech.²⁴³

The speech at issue in *Dun & Bradstreet* was a credit report *Dun & Bradstreet* issued to five of its subscribers.²⁴⁴ The report falsely stated that

238. See *supra* notes 231-33 and accompanying text.

239. 472 U.S. 749 (1985).

240. See generally Note, *Dun & Bradstreet, Inc. v. Greenmoss Builders: "Matters of Private Concern Give Libel Defendant's Lowered First Amendment Protection"*, 35 CATH. U.L. REV. 883 (1986) (discussing generally the Court's struggle to balance individual's reputational interests against first amendment's interest in free flow of ideas; how plaintiff's burden of proof effects the level of first amendment protection a particular statement receives; and how the *Dun & Bradstreet* Court's focus on the type of speech at issue, rather than the plaintiff's status, upsets the balance and lowers the defendant's first amendment protection).

241. *Dun & Bradstreet*, 472 U.S. at 751. See generally Note, *The Supreme Court Creates New Hurdle For Libel Defendants: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 60 ST. JOHN'S L. REV. 144 (1985) (comparing *Gertz* to *Dun & Bradstreet*).

242. *Dun & Bradstreet*, 472 U.S. at 761. Justice Powell, writing for the plurality, stated that the question presented in *Dun & Bradstreet* was whether the rule established in *Gertz* (that presumed and punitive damages may not be awarded unless the plaintiff shows actual malice) applied when the false and defamatory statements do not address a matter of public concern. *Id.* at 751.

243. *Id.* at 756-60. The Court justified the distinction between public and private speech by stating "[n]othing in our opinion [in *Gertz*] . . . indicated that this same balance would be struck regardless of the type of speech involved." *Id.* at 756-57. The Court also indicated that it had not considered the question of whether the *Gertz* balance obtains when the defamatory statements involve purely private speech. *Id.* at 757. Further, in making the distinction between public and private speech, the *Dun & Bradstreet* Court noted that the nature of the speech was important in determining the amount of first amendment protection defamatory statements will be given. *Id.* at 755-56. Thus, like the *Rosenbloom* Court, the *Dun & Bradstreet* Court believed that the nature of the speech was an important factor to be reckoned with in balancing the competing interests. *Id.* See also *supra* notes 217-25 and accompanying text. However, unlike the *Rosenbloom* Court, the *Dun & Bradstreet* Court held that the nature of the speech was only one of several factors to be considered in defamation cases. *Dun & Bradstreet*, 472 U.S. at 758-62. Thus, even though traces of the *Rosenbloom* approach reappeared in *Dun & Bradstreet*, the Court did not completely abandon the status-oriented approach of *Gertz*. *Id.* at 756-58. For a definition of private speech see *supra* note 16.

244. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 751 (1985). *Dun & Bradstreet, Inc.* is a credit reporting agency that provides subscribers with financial and related information. *Id.* All the information is confidential; under the terms of the subscription agreement, the subscribers may not reveal the information to anyone else. *Id.*

Greenmoss Builders had filed for bankruptcy.²⁴⁵ Greenmoss immediately contacted Dun & Bradstreet and asked for a correction after being informed of the defamatory report.²⁴⁶ Greenmoss also requested the names of the firms that had received the false reports.²⁴⁷ Although Dun & Bradstreet promptly sent notices of the error to the five subscribers, Dun & Bradstreet refused to divulge the subscribers' names to Greenmoss.²⁴⁸ As a consequence of not divulging the names, Greenmoss brought a defamation action against Dun & Bradstreet.²⁴⁹

After making the distinction between public and private speech, the Court determined that the credit report did not address a matter of public concern.²⁵⁰ In making this determination, the Court borrowed the standard enunciated in *Connick v. Myers*²⁵¹ and stated that whether the speech addressed a matter of public concern must be determined by the statement's content, form, and context.²⁵² As in *Connick*, the Court did not attempt to define content, form, and context,²⁵³ consequently, the Court perpetuated the uncertainty created in *Connick*.²⁵⁴

Like the *Connick* Court, the *Dun & Bradstreet* Court emphasized several factors which weighed heavily in its determination.²⁵⁵ One such factor was the report's content.²⁵⁶ Since the report was speech solely in the interest of Dun & Bradstreet, Inc. and its specific business audience, the report did not address a matter open to public debate.²⁵⁷ Also, the report's limited

245. *Id.* The error in the credit report had been caused when one of Dun & Bradstreet's employees, a seventeen year old high school student who was paid to review Vermont bankruptcy proceedings, inadvertently attributed to Greenmoss a bankruptcy petition filed by one of Greenmoss' former employees. *Id.* at 752.

246. *Id.* at 751. Greenmoss learned of the report from his banker. *Id.*

247. *Id.* at 751-52.

248. *Id.* The notice stated that one of Greenmoss' former employees, not Greenmoss Builders, had filed for bankruptcy. The notice also stated that Greenmoss "continued in business as usual." *Id.* at 752.

249. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 752 (1985).

250. *Id.* at 762-63.

251. 461 U.S. 138 (1983). For a discussion of *Connick*, see *supra* notes 164-95 and accompanying text.

252. *Dun & Bradstreet*, 472 U.S. at 761 (quoting *Connick*, 461 U.S. at 147-48).

253. *Dun & Bradstreet*, 472 U.S. at 784-85 (Brennan, J., dissenting). "Without explaining what is a 'matter of public concern,' the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not [of public concern]." *Id.* at 785. See also Note, *Punitive Damages in Private Speech Defamation: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 1986 B.Y.U.L. REV. 233, 243 (quoting Justice Brennan's language).

254. See *supra* note 11 and accompanying text. See also *supra* text accompanying notes 50-52.

255. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761-62 (1985).

256. *Id.* at 761.

257. *Id.* at 762. "There is simply no credible argument that this type of credit report requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust

distribution indicated that the report's form was private²⁵⁸—the report was not designed to disclose useful information to the general public. Finally, the Court noted that the report was prepared and disseminated because of Dun & Bradstreet's desire for profit.²⁵⁹ In other words, the report's context was not responsive to any issue currently being debated in the marketplace of ideas. Thus, since the content, form, and context of the report did not address a matter of public concern, the report was not entitled to first amendment protection.²⁶⁰

The four dissenters in *Dun & Bradstreet* believed that the "matter of public concern" test was too reminiscent of the "subjects of public or general interest" test which *Gertz* overruled.²⁶¹ While the dissent's point is well taken, the follies of the current content, form, and context standard can be remedied by clearly defining the terms content, form, and context.²⁶²

IV. CONTENT, FORM, AND CONTEXT DEFINED: A PROPOSAL

Relying on the Supreme Court's past first amendment decisions, certain guidelines can be established so the courts and the public can more reasonably determine what constitutes a matter of public concern. However, before these guidelines are set forth with any specificity, some preliminary definitions must be given. A public concern can be defined as a matter of interest or importance that relates to or affects the people as a whole.²⁶³ Content relates to the subject matter of the speech and embraces all that is contained in or dealt with in a particular expression.²⁶⁴ Form examines how the speech is conveyed,²⁶⁵ and context encompasses where and why a particular statement was made.²⁶⁶ In light of these general definitions, this note proposes a two-tiered analysis to the content, form, and context standard.

and wide-open.'" *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

258. *Dun & Bradstreet*, 472 U.S. at 762. "[I]t cannot be said that the report involves any 'strong interest in the free flow of commercial information.'" *Id.* at 762 (citing *Virginia Citizens Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976)).

259. *Dun & Bradstreet*, 472 U.S. at 762 (profit is a force less likely to be deterred than others).

260. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985).

261. *Id.* at 778-80 (Brennan, J., dissenting). Most commentators also disagree with the majority's logic for the same reason. *See supra* notes 51-52 and accompanying text.

262. The very purpose of this note is to define the terms content, form, and context. *See supra* notes 37-46 and accompanying text.

263. Public has been defined as "of, belonging to, or concerning the people as a whole; of or by the community at large." WEBSTER'S NEW WORLD DICTIONARY 1148 (2d ed. 1982). Concern has been defined as "a matter of interest or importance to one; that which relates to or affects one; affair; matter; business." *Id.* at 293.

264. *Id.* at 307.

265. *Id.* at 548.

266. *Id.* at 307.

The first tier of the analysis focuses on the content of the speech. According to the Supreme Court, speech dealing with matters of *public concern* occupies "the highest rung of the hierarchy of First Amendment values."²⁶⁷ Furthermore, since the Supreme Court's main concern in protecting freedom of speech has centered around the idea "that debate on *public issues* should be uninhibited, wide-open and robust,"²⁶⁸ it is logical to first examine all that is contained in or dealt with in a particular expression in deciding the public concern issue. Finally, according to Justice Brennan, "whether a particular statement . . . is addressed to a subject of public concern does not depend on where it was said or why."²⁶⁹ Thus, in applying the content, form, and context standard, courts should first look to the statement's content to determine whether the speech addresses a matter of public concern.

In defining the term content, it must be remembered that freedom of speech has never been limited to matters bearing broadly on issues of responsible government.²⁷⁰ The framers of the Constitution believed that freedom of speech should advance truth, science, morality, and the arts in general, as well as responsible government.²⁷¹ Further, if freedom of speech is to fulfill its historic function, it must embrace all issues about which information is needed to enable members of society to cope with the exigencies of their period.²⁷²

In light of these principles, the content of a particular statement involves a matter of public concern when the essential meaning or substance of the speech addresses some issue currently being debated in the marketplace of ideas, be it political, social, cultural or scientific. However, in determining whether a particular statement addresses an issue currently being debated in the marketplace of ideas, courts must avoid the temptation of equating public controversy with all controversies of interest to the public.

267. NAACP v. Clairborne Hardware Co., 458 U.S. 886, 913 (1982) (emphasis added).

268. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (emphasis added).

269. Connick v. Myers, 461 U.S. 138, 160 (1985) (Brennan, J., dissenting). Justice Brennan went on to state, "[t]he First Amendment affords special protection to speech that may inform public debate about how society is to be governed—regardless of whether it actually becomes the subject of public controversy." *Id.* (footnote omitted). See also *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 786-91 (1985) (Brennan, J., dissenting) (where Justice Brennan reiterates his belief that the content of the statement is the most important element of the content, form, and context standard); Casenote, *The De-Constitutionalization of Defamation Law—Is It Really That Far Off?*, 9 *HAMLIN L. REV.* 279, 334-36 (discussing Justice Brennan's content-based first amendment hierarchy and advocating for its adoption in combination with a declaratory judgment action); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984) ("[W]e believe that the content factor is most important in making this determination.").

270. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42 (1971).

271. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

272. See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

For example, debate over the financing of a local school system can be characterized as addressing a matter currently being debated in the marketplace of ideas because the resolution of the issue will have a general impact on all members of the community.²⁷³ But, debate over an issue such as the reasons why a famous couple got a divorce would not be the sort of public controversy characterized as addressing an issue currently being debated in the marketplace of ideas.²⁷⁴ Although such speech may be of interest to some members of society, the resolution of the issue is of no consequence to the members of the general public. Thus, the key factor courts must focus on in determining whether the content of a particular statement addresses a matter of public concern is the potential impact the statement has on the general public.

If the public concern issue can be resolved based on the content of a particular statement, the court's analysis should end. However, if the statement's content is not dispositive of the issue, courts should then proceed to the second tier of the analysis. The second tier focuses on the remaining two factors of the public concern standard: form and context. These two factors should be examined together and given equal weight.

In analyzing the form of the speech, courts should look at how the speech has been communicated. If the speech has been publicly disseminated, either orally or in writing, the speech should receive more protection than speech that has not been publicly disseminated.²⁷⁵ The second factor courts should examine concerning the statement's form is the extent of the statement's dissemination. Arguably, the greater the dissemination, the greater the protection. Thus, speech designed to gather or distribute information in an attempt to resolve an issue currently being debated in the public forum should be granted more protection than speech seeking infor-

273. See generally *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

274. See generally *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (Divorce proceedings of famous couple "is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.").

275. For example, if a particular statement is made to a group of people or published in some type of publication, the statement's form is presumably public. However, if the same statement is made during a private conversation or written in a personal letter, the statement's form is presumably private.

It is important to remember that according to the two-tiered analysis, the form of the speech is only considered when the statement's content is *not* dispositive of the public concern issue. See generally *Rankin v. McPherson*, 107 S. Ct. 2891 (1987). In *Rankin*, a deputy constable was fired for saying "if they go for him again, I hope they get him," in regards to the attempted assassination of President Ronald Reagan. *Id.* at 2895. Although the statement was made during a private conversation, the Court held that the statement addressed a matter of public concern. *Id.* The Court based its holding on the fact that the content of the statement addressed a matter of public concern. *Id.* at 2898. "The statement was made in the course of a conversation addressing the policies of the President's administration." *Id.* at 2897.

mation for the speaker's personal benefit.²⁷⁶

Finally, in analyzing the context of the speech, courts should look at the speaker's motivation for making the statements. Statements made in the speaker's personal best interest should generally be given less protection than speech made on behalf of resolving an issue currently in the marketplace of ideas.²⁷⁷ Courts should also examine the speech's responsiveness to issues currently in the public marketplace of ideas. For example, speech concerning a recent budget proposal should be given more protection than speech addressing an issue that has already been resolved. In other words, speech that could potentially have an impact on the general public should receive greater protection than speech that is more academic in nature.

In following these general guidelines, courts can more accurately determine whether a particular statement addresses a matter of public concern. These guidelines also give potential litigants a clearer understanding of when their speech will be protected and when their speech will subject them to the consequences associated with purely private speech. Finally, these guidelines clarify the current standard and eliminate some of the problems the current standard's inherent vagueness has caused.²⁷⁸

V. CONCLUSION

In an area so closely touching one of our most precious freedoms, the freedom of speech, precision of regulation must be the touchstone. The issue of whether or not a particular statement addresses a matter of public concern is critical to the public employee and the defamation defendant. Currently, the issue of whether a statement addresses a matter of public concern is judged by the statement's content, form, and context. As this note demonstrates, this standard is inherently vague. As a result of this vagueness, public employees and would-be speakers cannot reasonably determine when the first amendment will protect their speech. Consequently, public employees' speech may be unnecessarily chilled by the possibility of retaliatory discharges. Likewise, in the area of defamation law, many

276. See *Connick v. Myers*, 461 U.S. 138, 148 (1983) (speech did not attempt to resolve public controversy; speech made for speaker's personal benefit).

277. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (Credit report "was speech solely in the individual interest of the speaker and its specific business audience.").

278. See generally *Knapp v. Whitaker*, 757 F.2d 827, 840-42 (7th Cir. 1985) (Content of public employee's speech would generally be considered as private speech. However, in light of the speech's context and form, the court determined that the speech addressed a matter of public concern.).

The court's reasoning in *Knapp* lends support to the two-tiered analysis this note proposes. Because the court could not dispose of the public concern issue based on the content of the statement at issue, the court turned to the context and form of the statement. *Id.*

would-be speakers may be silenced for fear of unrestrained presumed and punitive damages.

To clarify the issue of what type of speech addresses a matter of public concern, certain guidelines must be adopted. The guidelines outlined in this note have been formulated in light of the first amendment's historical purpose and in an attempt to properly balance the inherent problems associated with all first amendment cases. Finally, these guidelines will enable the courts and the public to more accurately determine what constitutes a matter of public concern and thus protected speech.

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