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PUBLIC AND PRIVATE SPEECH: TOWARD A PRACTICE OF PLURALISTIC CONVERGENCE IN FREE-SPEECH VALUES

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The article takes the distinction between public and private speech in the areas of public employment and defamation, where the leading cases are Connick v. Myers *and* Dun & Bradstreet v. Greenmoss Builders, Inc., *respectively, and shows the difficulty which the Supreme Court and the lower federal courts have had in defining public and private speech in First Amendment cases. The thrust of the article is to formulate a clearer definition suitable for use by jurists and lawyers in First Amendment free-speech cases by resorting to three writers of philosophical bent who have addressed the question of what consitutes the "public": John Dewey, in* The Public and Its Problems; *Hannah Arendt, in the chapter "The Public and the Private Realm" in her book* The Human Condition; *and Walter Lippmann in* The Public Philosophy. *The article further relates the views of Dewey, Arendt, and Lippmann to conventional judicial and scholarly rationales for freedom of speech like the instrumental rationale of political governance and the intrinsic rationale of self-expression, especially as developed in the early formative period of free-speech values by Justices Holmes and Brandeis. In the course of the argument, the metaphilosophical ideas and methods of Richard P. McKeon are used, in connection with the writers' views of what constitutes the "public," to develop a model of convergence. This model of convergence is then used to achieve the major goal of the article, philosophical clarification of the standards for identifying public and private speech in constitutional litigation. To this end the model of convergence, employing a plurality of meanings for the "public," is applied to the mass of confusing case law in the lower federal courts, offering practical solutions to problems of conflict and ambiguity in particular concrete cases.*

INTRODUCTION

Inherently vague, indefinite, and sometimes contradictory meanings ascribed to "public" and to "private" speech make these concepts and the distinction between them among the most troublesome in First Amendment jurisprudence. The Supreme Court developed these two concepts in the 1980's in the areas of public employees' speech[1] and defamation.[2] In a process brought to fruition in the 1970's, the Court had begun to distinguish high-value speech protected under the First Amendment from low-value speech, by treating them as broad classes of speech and by subjecting them to *categorical* balancing to define the kinds of circumstances in which the distinction must be used — not *case-by-case* balancing turning on the individual facts and interests

1. Connick v. Myers, 461 U.S. 138 (1983).

2. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (Powell, J., plurality) (White, J., concurring).

in each case.[3] In its attempts to differentiate high-value *public* speech from low-value *private speech*, the Court appears to have retained elements of its general categorical balancing approach, but has also mixed into its analysis individualized balancing of specific facts and interests. It has also failed on occasion to make the distinction between public and private speech where the logic of its own case law seems to require the distinction. Against this background of broad-stroke attempts by the Supreme Court to define public and private speech, the lower federal courts have struggled with the minutiae of constant litigation — especially in the area of public employment — to maintain a semblance of consistency in applying these concepts.[4] Thus the confusion in this area of the constitutional law of free speech alone illustrates that "the Supreme Court has failed in its attempts to devise a coherent theory of free expression."[5]

My inquiry is an attempt to resolve the problem of distinguishing the "public" from the "private" in the context of First Amendment protection of speech. In the course of this resolution I attempt to construct "a coherent theory of free expression," at least in this niche of First Amendment jurisprudence, by establishing an analytical framework for making the distinction between public and private speech; but it is not a unitary theory organized around a single controlling doctrine or theory. Rather, I utilize a theory of ethical and philosophical *pluralism* to construct "the broadest range of purposes or values that can *coherently* be thought to underlie the Free Speech Clause"[6] as directed to public and private speech. I adapt to this end the thought of the late Richard P. McKeon[7] and especially his concepts of philosophic semantics and inquiry.[8] Because, as McKeon says, "it is easy to refute other philosophers within the framework of one's own [unitary] philosophy," pluralism can provide a means to avoid facile and often futile one-sided distortions of others' principles — distortions inherent in unified or monolithic methodologies — by "afford[ing] an alternative to the impossible task of discovering and expounding an overarching doctrine to include whatever is good in all doctrines while

3. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194-95 (1983).

4. *See, e.g.*, Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988).

5. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982).

6. R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 149 (emphasis added) (The author analyzed the writings of J.S. Mill. For reasons stated I analyze a plurality of thinkers).

7. Late Professor on the Committee on Ideas and Methods, The University of Chicago.

8. *See* RICHARD MCKEON, *Philosophic Semantics and Philosophic Inquiry* (first distributed in mimeograph, 1966), *in* FREEDOM AND HISTORY AND OTHER ESSAYS 242 (Zahava K. McKeon ed., 1990).

avoiding what is false, or incomplete, or meaningless, or unessential."[9] The essence of forging compromise and coherence is found in the realization that agreement on action, not on rigid doctrinal theory, is required. Thus the "philosophic problem of [freedom of speech] consists, not in the discovery of a single true philosophy in which all . . . must agree, but rather in the discovery of [a] common course[ ] of action and common solutions of problems on which men might agree for different reasons."[10]

The thread of my argument throughout is that philosophy can come to the aid of the law in resolving certain legal issues, and that the highly conflicted First Amendment law concerning the meaning of public and private speech particularly lends itself to such a resolution facilitated through philosophical thought. The general justifications given by the Supreme Court for freedom of speech frequently approach or even attain a philosophical level and thus are compatible with germane ideas generated by nonlegal but practical thinkers of philosophical bent. Moreover, because the Court has not fashioned a coherent doctrine specifically for distinguishing public and private speech, resort is in order to other sources for specific and well reasoned analysis on this issue, and such nonlegal thinkers are an obvious source. The writers whom I have selected have the additional advantage of having specifically addressed the nature of the public and the private in the twentieth century American context, and one — Walter Lippmann — was even a preeminent journalist who involved himself in numerous public controversies. Finally, the philosophical approach which I take here is compatible with legal reasoning because its ultimate aim is to resolve issues and to justify decisions in concrete situations. Ideas about and rationales for freedom of speech take on a practical coloration in a context of action. As I shall argue throughout, philosophical pluralism adapted to the needs of the law in a democratic society promotes judicial decision-making by focusing on possibilities for compromise and the adjustment of interests, not on the construction of grand theories which obscure the traditional concern of legal reasoning, as a species of practical reason, with the particulars of each case.

My inquiry into the concepts of public and private speech accordingly, and as indicated, proceeds, strongly influenced by this pluralistic approach, into an analysis of the three major underlying values commonly held by the Supreme Court to support constitutional speech: the marketplace theory of truth, self-governance, and self-realization

9. RICHARD MCKEON, FREEDOM AND HISTORY: THE SEMANTICS OF PHILOSOPHICAL CONTROVERSIES AND IDEOLOGICAL CONFLICTS 23-24 (1952), *reprinted in* FREEDOM AND HISTORY AND OTHER ESSAYS 174-75 (Zahava K. McKeon ed., 1990) [all citations hereinafter to the 1990 reprinted edition].

10. Richard McKeon, *A Philosophy for UNESCO*, 8 PHIL. & PHENOMENOLOGY RES. 573, 577 (1948).

(or self-expression).[11] To determine whether all or any of these judicially acknowledged major values is linked to more specific notions of public speech usable by the Court, I turn to and analyze the philosophical but compatible thought of three significant American thinkers, each of whom has written cogently and coherently on the nature of the public and each of whom has done so from the perspective of one of the more general, judicially recognized First Amendment values. Thus John Dewey has written from the need for pragmatic self-governance;[12] Hannah Arendt, from the perspective of self-expression;[13] and Walter Lippmann, from the perspective of a timeless truth (but not precisely a "marketplace of ideas" as usually understood in First Amendment jurisprudence).[14] The general methodology and approach to issues of social valuation of two of these figures — Dewey and Arendt — correspond to the methods and approaches of two First Amendment giants — Oliver Wendell Holmes and Louis Brandeis, respectively. Lippmann's place in the inquiry is more difficult to assess, but his version of truth, though different in source from Holmes', is nonetheless directed toward the pragmatic aim of action. The organizing principles of each of these figures concerning the value and nature of the public are then applied to the tangled case law. My conclusion is that the three major values supporting the protections of the First Amendment, as expounded by the three figures analyzed in depth, support a congruent and convergent — rather than a conflicted — basis for resolving the public/private speech controversy in favor of an expanded and more readily defined scope of public speech, with a clearer space for private speech as well.

I open the article in Part I with an analysis of the justifications for free speech as distilled from the path-breaking and majestic opinions of Justices Holmes and Brandeis and relate these views, which have judicial "certificates of title," so to speak, to the nonlegal, and thus "uncertified" but compatible and more subject-specific views of my three writers on the nature of the "public." In Part II, I temporarily interrupt this endeavor to connect judicial thought to kindred philosophical nonlegal ideas by interjecting a review of the relevant case law developed in the Supreme Court. I focus on the vague standards of "content, form, and context" for distinguishing public from private speech developed in the seminal public employment case of *Connick v. Myers*,[15] as well as the impasse which the Court has reached on this issue in its line of defamation cases beginning with *New York Times Co. v. Sullivan*.[16] I resume, in Part III, my attempt to connect legal

11. *See, e.g.*, Stone, *supra* note 3, at 228.
12. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927).
13. HANNAH ARENDT, THE HUMAN CONDITION (1958).
14. WALTER LIPPMANN, THE PUBLIC PHILOSOPHY (Transaction Publishers 1989) (1955).
15. 461 U.S. 138 (1983).
16. 376 U.S. 254 (1964).

thought to pertinent nonlegal thought, first, by explaining how philosophical pluralism promotes and influences this connection, and second, by explaining the major precepts of Dewey, Arendt, and Lippmann that bear on their respective conceptions of the "public" and the "private." These explanations are a propaedeutic for the culmination of the article in Part IV, where I bring the strands of Supreme Court doctrine, philosophical views, and outstanding case law issues together. Thus in Part IV, I define what I mean by "convergence" and then apply the technique of convergence so defined to resolve a number of issues generated in the lower courts' decisions because of conflicting or otherwise unsatisfactory interpretations of underdeveloped Supreme Court precedent. These issues include the problem of the speaker's motivation considered under the rubric of "context" in the public employment cases, and the question of whether a public figure can have a private life (and thus be the subject of private speech) in the defamation cases. With this introduction complete, I now proceed to the arguments in chief.

I. THE THREE MAJOR VALUES SUPPORTING FIRST AMENDMENT FREEDOM OF SPEECH: THEIR JUDICIAL ORIGINS AND THEIR CONNECTIONS TO PHILOSOPHICAL CONCEPTIONS OF PUBLIC SPEECH

The volume of judicial and scholarly discussion about the values underlying the constitutional protection of free speech has been enormous, and it is not my purpose here to canvass that vast literature. Rather, as indicated in the introduction, I will be concerned primarily with three major values or purposes generally agreed to be associated with freedom of speech: democratic participation in political decision-making, self-expression or self-realization, and advancement of knowledge and the search for truth.[17] It is simply my present aim to trace these fundamental values to deeply rooted judicial sources in First Amendment jurisprudence and then to show the linkages between these sources and the conceptions of the "public" held by Dewey, Arendt, and Lippmann.

Ronald Dworkin, in a book review of Anthony Lewis's *Make No Law: The Sullivan Case and the First Amendment*,[18] distinguishes between "two main groups" of "justifications for the free speech and press clauses":

> The first [justification] treats free speech as important *instrumentally*, that is, not because people have any intrinsic moral right to say

17. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) (Here I exclude a fourth value given by Emerson, achievement of a more stable community, because it seems to be included with the political value of self-government as I treat it.); Stone, *supra* note 3, at 228.

18. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

> what they wish, but because allowing them to do so will produce good effects for the rest of us. . . .
>
> The second kind of justification of free speech supposes that freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and *constitutive* feature of a just political society that government treat all its adult members . . . as responsible moral agents.[19]

Dworkin associates the first, or instrumental justification of free speech with Justice Oliver Wendell Holmes' "great dissent" in *Abrams v. United States*.[20] According to Dworkin, "Holmes declared in his *Abrams* dissent [that] politics is more likely to discover truth and eliminate error, or to produce good rather than bad policies, if political discussion is free and uninhibited."[21] Thus "the instrumental [justification] . . . concentrates mainly on the protection of political speech."[22] This emphasis on the political value of free speech found in Holmes also includes the "instrumental argument Holmes . . . made in his *Abrams* dissent, in which he said that truth emerges in a free market of ideas."[23]

In contrast, Dworkin associates the second, or constitutive justification of free speech with Justice Louis Brandeis' "remarkably insightful and comprehensive dissent in *Whitney* [*v. California*[24]]."[25] The kind of justification found there, Dworkin declares, goes beyond the scope of promoting democratic self-governance to a "more active, aspect as well: a responsibility . . . to form convictions of one's own . . . [and] *to express* these [*convictions*] *to others*."[26] Thus "the constitutive justification extends, in principle, to all aspects of speech or reflection in which moral responsibility demands independence."[27] Indeed, Brandeis' genius lay in his view that " 'free speech is valuable both as an end and as a means,' "[28] a view, as Dworkin explains, that *both* instrumental promotion of the political good *and* constitutive support of self-expression "are needed in order fully to explain First Amendment law."[29]

When Holmes' and Brandeis' judicial views were delivered in the early part of this century, they were distinctly minority, dissenting

19. Ronald Dworkin, *The Coming Battles over Free Speech*, THE N.Y. REV. BOOKS, 55, 56 (June 11, 1992) (book review) (second emphasis added).
20. 250 U.S. 616, 624-631 (1919) (Holmes, J., dissenting).
21. Dworkin, *supra* note 19, at 56.
22. *Id.* at 57.
23. *Id.* at 57-58.
24. 274 U.S. 357, 372-80 (1927) (Brandeis, J., [formally or technically] concurring).
25. Dworkin, *supra* note 19, at 57.
26. *Id.* (emphasis added).
27. *Id.*
28. *Id.* (quoting from Brandeis' concurring opinion in *Whitney*, 274 U.S. at 375).
29. *Id.*

opinions.[30] Dworkin states the currently accepted view that "[b]y the 1960s, the great Holmes and Brandeis dissents had become orthodoxy."[31] This is the position that I begin with now: that Holmes' and Brandeis' dissenting opinions in *Abrams* and *Whitney*, respectively, illustrate the concepts of political self-governance, moral self-expression, and the search for truth and knowledge — all First Amendment values that form the current bedrock of judicial thought and that can be linked to conceptions of the "public" and thus to one or more conceptions and valuations of public speech.

A. The Instrumental Value of Political Self-Governance

1. Holmes' Position and Its Relation to Dewey's

The classical and most comprehensive expression of Justice Holmes' valuation of free speech is found, of course, in his dissenting opinion in *Abrams v. United States*.[32]

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired* is better reached by *free trade in ideas* — that *the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution. *It is an experiment, as all life is an experiment.*[33]

This passage reveals some critical views of Justice Holmes: a skepticism of the purportedly self-evident truth of any idea or opinion and a commitment to toleration of different ideas and thus to value plural-

30. Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting) (Brandeis, J., concurring). *See also* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., [formally or technically] concurring).

31. Dworkin, *supra* note 19, at 55. *See also, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (overruling the majority opinion in *Whitney*, against which Brandeis, joined by Holmes, had dissented); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 125 & n.29 (1991) ("Although modern Justices endlessly recall ringing judicial pronunciamentos on behalf of free speech from early history, these famous declarations were not usually found in majority opinions." (citing Holmes' dissent in *Abrams* and Brandeis' dissent [concurrence] in *Whitney*)).

32. 250 U.S. at 624-31.

33. *Id.* at 630 (emphasis added).

ism;[34] a pragmatic, empirical, "experiment[al]" approach to the development of governmental institutions and law;[35] and finally — and most importantly for my inquiry here — the instrumental value of "free trade in ideas" to "the ultimate good desired" — the very legitimacy of constitutional self-governance. "Holmes' principle that the best test of truth is the power of the thought to get itself accepted in competition with other ideas and that truth is the only ground for long-term successful action . . . is the principle of liberal democracy."[36]

In all these viewpoints connected with free speech — toleration of competing social and political values, commitment to the process of discussing ideas as a principal means of molding and preserving the functions of public institutions, and especially reliance on empirical, pragmatic grounds for testing the validity of public values — Justice Holmes' thought bears a strong resemblance to the pragmatic philosophy of John Dewey, particularly as expressed in the latter's *The Public and Its Problems.*[37] The principal difference between Holmes and Dewey — a difference in the substantive content of their thought which stands in contrast to their virtual agreement on the role of speech in democratic *process* — lies in the divergent uses they would make of speech in reforming or reconstituting political society. While Dewey would use speech instrumentally to effect a comprehensive reformation of political society, possibly requiring a break with existing political forms,[38] Holmes would confine the use of freedom of speech to a more circumscribed and minimalist role — that of allowing the competition among ideas to be carried out in a peaceful manner, thereby serving as a kind of "safety valve" for dissent and thus assuring in some sense the simple survival of the existing institutions of government from the threat of violent overthrow.[39] Yet

34. *Cf.* Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) ("[A] constitution is . . . made for people of fundamentally differing views . . . .").

35. *Cf.* Truax v. Corrigan, 257 U.S. 312 (1915).

> There is nothing that I more deprecate than the use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of *social experiments* that an important part of the community desires . . . even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

Id. at 344 (Holmes, J., dissenting) (emphasis added).

See also Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 326-27, 383 (Holmes eschewed natural-law or abstract principles of law in favor of legal positivism and the *a posteriori* derivation of legal principles from the process of legal reasoning itself).

36. RICHARD MCKEON, DEMOCRACY IN A WORLD OF TENSIONS 194, 210 (McKeon ed., 1951).

37. DEWEY, *supra* note 12. *See also infra* note 163 and accompanying text. For a comparison of the similarities and differences between Holmes and Dewey as pragmatic thinkers, *see generally* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

38. *See* DEWEY, *supra* note 12 and accompanying text at 15, 31, 67.

39. *Cf.* Novick, *supra* note 35, at 348-49, and accompanying text (stating that Holmes tended to take a minimalist view of the instrumental value of free speech to

Holmes would abandon this minimalism and bow to the ultimate power of words as expressed in "free trade in ideas," if indeed the thought contained in those words had the power to sweep away existing governmental forms. Holmes expressed this view (rather fatalistically) in the extreme context of the times created by the distrust and fear of revolutionary Bolshevism: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[40]

Thus Holmes and Dewey share a powerful commitment to the role of speech in determining the outcomes of the democratic political process. Their shared view on the generally pragmatic role and value of speech to the maintenance or transformation of political society becomes significant, I shall argue, in the specific context of identifying and justifying *public* speech. It becomes significant because Dewey, consistently with the instrumental political value of free speech as exemplified in Holmes' judicial thought, elaborates a coherent theory of the "public" which enables us to illumine the meaning of "public speech" for this instrumental, political value.

2. The Paramountcy of the Political in Established First Amendment Values

The Supreme Court "has [in a number of its important cases] recognized that *expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'* [Thus] *'[s]peech concerning public affairs* is *more than self-expression;* it is *the essence of self-government.'* "[41] Two aspects of the Supreme Court's treatment in this grouping of cases are noteworthy: the political relation of free speech to "the essence of self-government" establishes the paramount value of such speech, and speech concerned with "public issues" and "public affairs" is — at least in a general way — defined and justified primarily by its instrumental relation to self-government, and only to a lesser degree by its value as "self-expression." To be sure, the concept of "political" has been given a broad meaning and scope by the Court: it concerns "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"[42] — a formulation which both reveals the instrumental relation of free speech (and the information it gener-

self-governance, finding that peaceful discourse is essential to the very survival of government).

40. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

41. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (emphasis added) (citation omitted) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980) and Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

42. Thornhill v. Alabama, 310 U.S. 88, 102 (1940). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978) (citing *Thornhill*'s formulation of the public's need for information as lying "at the heart of the First Amendment's protection").

ates) to the needs of the "public" and which is remarkably similar to Dewey's view of the instrumental role of the process of discussion to resolution of "the public's" problems. The Court, however, has not blotted out other free-speech values by its holdings in this genre of cases:

> It is no doubt true that a central purpose of the First Amendment " 'was to protect the free discussion of governmental affairs.' " But our cases have never suggested that *expression* about philosophical[,] social, artistic, economic, literary, or ethical matters — to take a nonexhaustive list of labels — is not entitled to full First Amendment protection.[43]

Indeed, the late Harry Kalven, Jr. — one of the most praised of First Amendment scholars — has stated:

> The Amendment has a 'central meaning' — a core of protection without which democracy cannot function. . . . This is not [, however,] the whole meaning of the Amendment. There are other freedoms protected by it. But at the [political] center there is no doubt what speech is being protected and no doubt why it is being protected.[44]

The upshot is that, even at the high-water mark of its reliance on political self-governance to justify instrumentally the value of free speech, as explained from the cases above, the Supreme Court has left a place for justification of a different type — especially, as I hope to confirm — the constitutive value of free speech as self-expression. But it is worth noting that one branch of First Amendment scholarship would — in contrast to the Supreme Court — confine the political value of free speech very narrowly.

3. The Exclusivity of the Political — A Minority View

Two First Amendment scholars have argued that the sole justification for free speech is the instrumental one of political self-governance, very narrowly defined. They are Robert H. Bork and Lillian R. BeVier. Bork has argued that "[w]here constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must [therefore] stick close to the text and the history [of the constitutional provision in question], . . . and not construct new rights."[45] It follows

43. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (emphasis added) (citations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) and Mills v. Alabama, 384 U.S. 214, 218 (1966). *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971) (plurality opinion) (" 'The guarantees for speech and press are not the preserve of political expression or comment upon public affairs.' " (quoting Time, Inc. v. Hill, 385 U.S. 374, 388 (1967))).

44. Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208.

45. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

ineluctably from this premise, according to Bork, that "[t]he category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed . . . ."[46] BeVier similarly argues that "[t]he constitutional establishment of a representative democracy implies certain conclusions about the type of speech the amendment must protect from abridgment. The amendment's irreducible minimum coverage is 'speech concerned with governmental behavior, policy or personnel.' "[47]

Bork and BeVier prefer legal reasoning that proceeds, to the greatest extent possible, on the basis of literal or univocal terms, rather than on the basis of analogy, which — though utterly essential to some irreducible degree to all legal reasoning — is nonetheless, in their view, prone to excesses. As Bork states it: "[P]rogression by analogy from one case to the next, [is] an indispensable but perilous method of legal reasoning . . . . If the . . . progression is not to become an *analogical stampede*, the protection of the first amendment . . . must be cut off when it reaches the outer limits of political speech."[48] Likewise BeVier criticizes Alexander Meiklejohn's analogizing of art and other expressive values to political speech with the comment that "[a] wholesale analogy of art and literature to political speech seems desperately attenuated."[49] By the same token they tend to be empiricists or positivists because of their reliance on textual and historical indicia of constitutional norms. They also tend, from McKeon's viewpoint, to be reductionist because they see in history and in its "basic laws . . . a science of human action which is the same for all men, at all times, and in all places."[50] Change itself is explained by these constant underlying "laws" of human nature,[51] or as Bork himself has stated from the bench: "The world changes in which unchanging values find their application."[52]

The quasi-scientific, positivist approach taken by Bork and BeVier, especially as it reflects their distaste for analogical reasoning and their preference for literal terms, can be understood in connection with

46. *Id.* at 27-28.

47. Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 309 (1978) (quoting from Bork, *supra* note 45, at 27-28).

48. Bork, *supra* note 45, at 27 (emphasis added). Despite his later recantation of insistence on rejection of analogical legal reasoning, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 333 (1990), Bork still views the use of analogy with skepticism. "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." *Id.* at 169.

49. BeVier, *supra* note 47, at 356-57.

50. MCKEON, *supra* note 9, at 209-10.

51. *Id.*

52. Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (*en banc*) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

Professor McKeon's "logistic" mode of thought.[53] I mention this point here only as a prelude to a later portion of my inquiry, where I will use other McKeonite modes of thought to set into perspective the free-speech values of broad political instrumentalism (as represented by Dewey), constitutive political self-expression (as represented by Arendt), and the search for truth in the context of action (as represented by Lippmann). This narrow political valuation of free speech, which I will hereafter attribute simply to Bork, has — so far as I know — no corresponding writer of philosophical bent (such as Dewey, Arendt, or Lippmann) who more fully develops the presuppositions behind this line of thought and then uses them to articulate a conception of the "public." Moreover, the Borkian position has never been favored by either the political or judicial branches of the government.[54] For these reasons the Borkian position of a narrow, exclusively political justification for freedom of speech receives a truncated treatment in my inquiry, limited either to the role of a dialectical foil for the explication of my own ideas, or as a bare complement to the other First Amendment values more adequately represented for the purpose of this inquiry — more adequately represented because they are more conducive, given the nature of my argument, to understanding various conceptions of public (and private) speech.

I now turn to the other great type of First Amendment justification, constitutive expression (as described by Dworkin), which complements and extends political instrumentalism.

B. The Constitutive Value of Self-Realization or Self-Expression

1. Brandeis' Position and Its Relation to Arendt's Conception of Self-Realization Through Politics

The greatest authority for self-expression found in First Amendment jurisprudence is Justice Brandeis' famous dissent in *Whitney v. California*:[55]

> Those who won our independence believed that the final end of the state was to make men free to *develop their faculties*; and that in its government the deliberative forces should prevail over the arbitrary. *They valued liberty both as an end and as a means.* They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that *freedom to think as you will and to speak as you think* are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordina-

53. MCKEON, *supra* note 9, at 167-68 (" 'Logistic' methods are employed to construct systems of proof on the model of the mathematical deductions of geometry by giving simple terms literal and univocal definitions, by establishing simple relations among them, and by proceeding . . . [according to] deductive reasoning . . . .").

54. *See infra* notes 212-13 and accompanying text.

55. 274 U.S. 357, 372-80 (1927) (Brandeis, J., [formally or technically] concurring).

> rily adequate protection against the dissemination of noxious doctrine; *that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.*[56]

Brandeis thus finds political democracy and personal fulfillment to be essentially related. Speech is the interconnecting link — "both as an end and as a means" — by which each is realized; and there is no ultimate distinction between the speech that addresses politics and the speech that provides self-realization. By this measure, then, speech is more than a mere means to democratic self-rule and personal expression: it is the constitutive or intrinsic manifestation of the human spirit itself, the spontaneous existential expression of "the freedom to think as you will and to speak as you think." The merger of the political and the personal contexts into a single milieu in which speech fulfills its constitutive role — or, stated differently, the idea that speech is the end or *telos* through which the political and the person emerge together in tandem — is a notion that originated in Greek antiquity. There is, in fact, scholarly evidence that Brandeis held the Greeks of ancient Athens in high esteem, and that his *Whitney* dissent is directly traceable in large part to Pericles' Funeral Oration — extolling the civic virtues of Athenian democracy — as reported by Thucydides.[57] "In short, to discover how the model political human being would function in the model political society, Brandeis turned to the [ancient] Athenians."[58]

In asserting the inseparability of personal and political self-realization, a vision with roots in the history of citizen participation in the public life of ancient Greek democracy, Brandeis presents a view and a constitutive justification for free speech that is remarkably similar to Hannah Arendt's in *The Human Condition*, both in its substance and in its philosophical mode of expression. Arendt, like Brandeis (but writing a generation later), views politics as the place where words (as well as deeds) provide human fulfillment as an end in itself;[59] and, like Brandeis, she models her vision of human fulfillment after the ancient Greeks.[60] Both give self-expression a predominantly political coloration, rather than associating it with expression in the arts or in literature (as some Supreme Court decisions have done[61]); but certainly neither denies the authenticity of these other avenues of expression.

Both Brandeis' and Arendt's notions are consistent with "civic humanism . . . the view that man is a social, even a political, animal

56. *Id.* at 375 (emphases added).

57. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 680-82 (1988).

58. *Id.* at 682 (quoting P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 237-38 (1984)).

59. *See infra* notes 179-94 and accompanying text.

60. *See infra* note 186 and accompanying text.

61. *See infra* note 63 and accompanying text.

whose essential nature is most fully realized in a democratic society in which there is widespread and vigorous participation in political life."[62] Certainly some such view must have been what Brandeis had in mind by his *Whitney* remark that "public discussion is a political duty." Because Arendt extends and elaborates this view of existential and political self-realization through speech, her consequent treatment of the concept of the "public" and the role of speech in that more specific context is — like Dewey's extension of Holmes' more general thought to a specific conception of the "public" — a most plausible resource from which to explicate the term "public speech" when viewed according to a major free-speech value: here, self-expression.[63]

2. Self-Expression as an Englobing Principle — An Example of Rejected Pluralism

In their scholarly work two current legal thinkers, Martin H. Redish and Michael J. Perry, treat self-expression as an englobing principle which assimilates all other free-speech values. Thus Redish asserts that "free speech ultimately serves only one true value . . . 'individual self-realization.' "[64] He further contends that other free-speech values like the "political process" [or the] "marketplace-of-ideas . . . though perfectly legitimate, are in reality subvalues of self-realization."[65] Perry argues that freedom of expression "as an *instrument* for the maintenance of the democratic process" merges with "the value of 'self-realization' " into "*one* category."[66]

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62. JOHN RAWLS, POLITICAL LIBERALISM 206 & n.38 (1993).

63. Unlike the value of instrumental promotion of self-governance, which has been supported by judicial opinion and scholarly writing that carry forward Holmes' initial formulation of the paramountcy of the political, *see supra* notes 32-40 and accompanying text, the concept of self-expression has not received such widespread case law support (except, of course, for the great pinnacle of support for it by Brandeis in *Whitney*), and that which it has received is generally supportive of *non*political expression. *Cf., e.g.,* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."); Miller v. California, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which . . . have serious literary, artistic, political, or scientific value . . . ."). Of course, as previously indicated, the prevailing view of the value of political instrumentalism leaves plenty of space for self-expressive values, *see supra* notes 43-44 and accompanying text, and Brandeis' (and Arendt's) emphasis on *political* self-expression makes them natural allies of this prevailing view. Robert Bork, in contrast and true to his claim for the exclusivity of political instrumentalism (narrowly construed) as the First Amendment's sole support, takes up and rejects all parts of the Brandeis *Whitney* concurrence that he finds to exceed the narrow value of "[t]he discovery and spread of political truth." Bork, *supra* note 45, at 23-26.

64. Redish, *supra* note 5, at 593.

65. *Id.* at 594.

66. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 Nw. U. L. REV. 1137, 1142-43 (1983) (first emphasis added).

The use of such an assimilative approach that folds different or even apparently contrary concepts into one broad principle in support of freedom of speech conflicts, like Bork's approach, with the pluralistic aim of my inquiry — but in a different way. Whereas Bork places all his argumentative weight on one free-speech value and then intensifies his implicit denial of pluralism by making that one value very narrow, Perry and Redish also place all their weight on one value but then further deny in effect the basis for pluralism by using their value — broadly construed — to absorb all other possibilities. To the extent that Redish's and Perry's assimilative monistic approaches deny the existence of other *kinds* of First Amendment values as spelled out in this inquiry, it must be dismissed as destructive of pluralism, even though the effect of their approaches may be to grant far greater constitutional protection to speech than would Bork's. In adhering to a pluralistic viewpoint, I attempt to steer between the Scylla of Bork's narrow doctrinalism and the Charybdis of any broad englobing theory.

C. *The Meaning of the Search for Truth in Connection with the "Marketplace of Ideas"*

It is a commonplace notion that the search for truth is a principal purpose of the First Amendment's protection of speech.[67] The classic expression of this normative fact remains Justice Holmes' dissent, previously quoted, in *Abrams v. United States*: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market* . . . ."[68] Holmes' approach to truth, however (and as already suggested[69]), does not invoke a disinterested, passionless search for truth; rather, it is instrumentally and pragmatically related to action. Holmes' viewpoint has often been compared to the utilitarian thought of J. S. Mill, who also treated truth (in ethical and political matters) as a practical concern rather than as a purely abstract matter.[70] Indeed, McKeon has found a very great similarity between Holmes' and Mill's purposes and methodologies for discovering truth:

> John Stuart Mill['s] practical use of the free interplay of opposed arguments [in *On Liberty*] . . . [also] underlies Justice Oliver Wendell Holmes' vision of the free competition of ideas. . . . Dialogue is

67. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
68. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).
69. *See, e.g.*, *supra* notes 34-36 and accompanying text.
70. *See* JOHN S. MILL, ON LIBERTY 28 (1859; Pelican ed. 1974) ("Truth, in the great *practical concerns of life*, is . . . made by the rough process of a struggle between combatants . . . .") (emphasis added).

> statement and counterstatement, based on ordinary ways of life and ordinary uses of language, with no possible appeal to a reality beyond opposed opinions except through opinions about reality. Truth is perceived in perspective, . . . but there is no overarching inclusive perspective. *Meanings are defined in action and measurement, and there is no theory apart from practice.* Method is the art of seizing and interpreting the opinions of others and of constructing and defending one's own. Virtue is method translated into intelligent self-interest and respect for others.[71]

The upshot is that the truth of Holmes (like the truth of Mill in *On Liberty*) is closely associated with action, and thus is practical — not theoretic — truth. The problem addressed "is not a dialectical or metaphysical problem of determining what right choice or wisdom is . . . ; [rather,] it is a political and a casuistic problem . . . ."[72] The Supreme Court itself has, years after *Abrams*, agreed with this interpretation of Holmesian truth. The protection afforded by the First Amendment to speech, according to the Court, "extends to more than abstract discussion, unrelated to action. The first amendment is a charter for government, not for an institution of learning. '*Free trade in ideas*' means . . . the opportunity to persuade to action, not merely to describe facts."[73]

The writer whom I have chosen to represent and explicate the free-speech value of the search for truth (and to develop from his explication a more specific conception of the "public") — Walter Lippmann — has a viewpoint that fits somewhat uneasily into the practical, instrumental rubric established for truth and knowledge set forth by Holmes. Lippmann's version of truth arises from the notion of tran-

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71. McKeon, *supra* note 9, at 113-14 (emphasis added).

72. *Id.* at 77.

73. Thomas v. Collins, 323 U.S. 516, 537 (1945) (referring expressly to Holmes in internally quoted segment) (emphasis added). Academic freedom might be an exception to the rule that the Court associates the search for truth with the paramountcy of the political. The leading case in support of academic freedom understood as the disinterested search for truth appears to be Sweezy v. New Hampshire, 354 U.S. 234 (1957) (Warren, C.J., plurality opinion and Frankfurter, J., concurring opinion). But even here the search for truth is associated to some extent with political ends, *e.g.*: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate *the vital role in a democracy that is played by those who guide and train our youth." Id.* at 250 (Warren, C.J., plurality opinion).

> *For society's good* — if understanding be an essential need of society — inquiries into the[ ] problems [of the natural and social sciences], speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, *pursued in the interest of wise government and the people's well-being* . . . .

Id. at 262 (Frankfurter, J., concurring opinion) (all emphasis added).

Indeed, Professor Schauer maintains that "virtually all of the Supreme Court's references to academic freedom have been little more than excess verbiage." Frederick Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 Sup. Ct. Rev. 217, 244.

scendent ideas or a nonempirical world behind the world.[74] Thus Lippmann's *source* of truth is metaphysical in the classical sense of that term, not the conflicting and self-interested opinions of men about worldly affairs relied upon by Holmes.[75] Yet there is not a hiatus between Holmes and Lippmann on the *use* of truth, for in *The Public Philosophy* Lippmann is plainly concerned with bringing truth down from the heavens to provide the most practical kind of direction in the affairs of men.[76] Just how well Lippmann's thought will enable me to develop a specific conception of public speech from the First Amendment value of the search for truth remains, because of Lippmann's genuinely metaphysical conception of the source of truth, something of an open question.

II. The Nature of the Distinction Between Public and Private Speech in the Case Law

I have now illustrated the general configurations of First Amendment free-speech values. It remains to be shown how the related but specific distinction between public and private speech has developed in the particulars of the case law before I place these values in the context of my proposed schema of convergence to clarify the distinction. This distinction originated in two areas, as I have already noted: public employment and defamation.

A. Public Employment

In *Pickering v. Board of Education*,[77] the Supreme Court established the distinction underlying the difference between public and private speech when it ruled that "[t]he problem . . . is to arrive at a *balance* between the interests of the [public employee], as a *citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its *employees*."[78] The emphasis is on the dual role of the public employee: as a citizen among other free and equal citizens, he must not be barred from his equal share of, or claim to, the right of free speech; but as an employee, he must be subjected to the discipline of the workplace whose efficient functioning, after all, also promotes the public good and is no less recognizable on this account than is free speech. The result is the balancing of two interests: first, the employee's interest in speaking associated with his role as a citizen entitled to address public affairs, as distinct from and against, second,

74. *See infra* note 199 and accompanying text.
75. *See supra* note 71 and accompanying text (including quotation).
76. *See infra* notes 206-07 and accompanying text.
77. 391 U.S. 563 (1968).
78. *Id.* at 568 (emphasis added).

the government's interest in avoiding disruptive impact on workplace efficiency caused by speech of its employees.

> A broad definition of disruption [as implicitly adopted in *Pickering*] enables the government employer to restrict employee speech that directly impairs government efficiency (by, for example, interrupting the normal office routine or distracting [other] workers) as well as [to restrict] speech that reveals the employee's own incompetence, creates 'disharmony' among other workers, or demonstrates disloyalty.[79]

Such a definition also protects the government's " 'need to set out a uniform official position.' "[80]

In two successive cases the Court first seemed to increase the burden on the public employee by requiring him to prove that opposition to his speech was a substantial motivating factor in causing his discharge or other unfavorable treatment by the public employer,[81] yet seemed to lessen the same burden by not requiring the employee to make her statement to a public, open, or general audience, at least when it concerns subject matter of special public importance.[82] The latter ruling, in *Givhan v. Western Line Consolidated School District*,[83] appears to have been that speech can be both private (in its restricted extent of dissemination) and public (in subject matter) at the same time, with subject matter controlling for assignment of constitutional protection. Then came *Connick v. Myers*,[84] which remains the centerpiece of the Court's effort to structure the proper constitutional analysis of public speech in the public employment cases.

In *Connick v. Myers*,[85] the Supreme Court attempted to systematize its prior doctrine on public and private speech in public employment. The first and most important point to note is that the Court grounded the distinction in the necessity of public employees to have the *political* right to "participate in public affairs,"[86] and particularly in its interpretation of the rationale of the *Pickering* line of cases as having

79. D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 252 (1990) (footnotes omitted).

80. *Id.* at 252 (quoting Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 919 (1986)).

81. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

82. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (permitting statement to be made to an audience of one when the "audience" was speaker's superior and statement was about racial discrimination). *See generally*, Frederick Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 244.

83. 439 U.S. 410 (1979).

84. 461 U.S. 138 (1983).

85. *Id.*

86. *Id.* at 144-45 (citing political or self-government cases such as New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)). *See supra* notes 1, 4, 39 and accompanying text.

arisen in the same "understanding of the First Amendment" — the need to "safeguard[ ] speech on *matters of public concern.*"[87] The Court accordingly relied directly on the instrumental value of speech to the political process in its identification and valuation of public speech,[88] and not on any constitutive value of self-expression. Secondly, and also very important for this inquiry, the Court broke in two (1) the analysis of whether a public employee's speech constitutes "a matter of public speech" or merely private speech, and (2) the *Pickering*-style balancing of the effect of the speech on employer efficiency. If the speech were on a matter of public concern (as determined in (1) or "prong one," above), a court should proceed to balance (in (2) or "prong two," above) the various interests of the parties in the individual case. If on a private matter, the dispute would be resolved in favor of the employer without balancing.[89]

The two prongs of the *Connick* inquiry correspond to two well accepted methods of analysis under current First Amendment jurisprudence. Prong one (concerned with the distinction between public and private speech) corresponds to analysis of content-based restrictions requiring broad classification of speech — by a method frequently referred to as "categorical balancing" — into separate subject matters. These broad subject matters or categories of speech are then denominated as "high-value," "low-value," or perhaps are assigned utterly no value under the First Amendment. On the other hand, prong two of *Connick* corresponds to scrutiny of content-neutral restrictions requiring case-by-case balancing of particular factors in individual cases.[90] *Connick* is accordingly a hybrid case, combining the First Amendment valuation techniques of categorization *and* interest balancing. *My in-*

87. *Connick*, 461 U.S. at 145 (emphasis added).

88. *See supra* note 86 and accompanying text.

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

90. *See* Stone, *supra* note 3, at 194-95. Professor Tribe refers to the two types of First Amendment analysis as "track one" (where the restriction is aimed at the communicative impact of the speech) and as "tract two" (where the restriction is aimed at the noncommunicative impact of the speech). LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789 (2d ed. 1988).

This approach also dovetails with Professor Ely's thesis that, in part because "categorization" and "balancing" should not be regarded as mutually exclusive theories, categorization should on occasion be "employed in tandem" with particularized balancing in a content-protective sense, as "[a]n adjustment" for supposed content-*neutral* restrictions that in fact "singl[e] certain messages out for prohibition and . . . certain messages . . . for protection." John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500-01 (1975). The supplementation of categorization with occasional *protective* balancing is required because "the [government] obviously can move, and often does, 'simply' to control the time, place or manner out of a concern for the likely effect of the communication on its audience." *Id.* at 1498. Because Ely views balancing here as *aiding* in protecting speech content, he would *a fortiori* be loathe to mingle counter-protective factors (like disruption of workplace efficiency) with *Connick*'s prong-one assessment of speech value in a way that could *weaken* protection for such speech.

quiry here proceeds only into the first branch or the threshold of Connick *analysis, namely, whether the speech in question is of public concern or is only private, and does not attempt to assay the balancing of competing interests in the individual public employment cases.*

The Court saw its immediate purpose in *Connick* to prevent "every criticism directed at a public official [from] plant[ing] the seed of a constitutional case."[91] The dispute in *Connick* arose when an assistant district attorney passed out a questionnaire, directly critical of her superiors, to her co-workers. The Court interpreted all but one of the queries on the questionnaire to be an outgrowth of an intraoffice dispute between the assistant and her superiors. Even the one excepted question — dealing with pressure on the assistant district attorneys to work in political campaigns and for this reason deemed by the Court to be "of public concern" — was not enough to prevent the assistant from being sacked for insubordination when *Pickering* balancing was applied. All the other questions were found to be private — directly linked to the office dispute — and thus entitled to no effective protection at all.[92]

"Whether an employee's speech addresses a matter of public concern," the Court held, "must be determined by the *content, form, and context* of a given statement, as revealed by the whole record."[93] In reaching its conclusion in this case, the Court appears to have emphasized the *content* of the speech by characterizing it as concerned mostly with "only [mundane] internal office matters"[94] and thus to have held the speech to possess only low-value constitutional status.[95] The Court, however, provided only an amorphous standard for finding counterpart high-value public speech — "whether it relate[s] to any matter of political, social or other concern to the community."[96] The *context* of the questionnaire was not specifically identified but seemed to reflect either the circumstances in which the questionnaire was circulated, the speaker's motive, or both.[97] The *form*, as we shall see, was somehow associated with the extent of the group to whom the questionnaire was distributed.[98]

In *Rankin v. McPherson*,[99] the Court shifted its analysis to the circumstantial and/or motivational *context* of the speech. It validated as public speech the remark of a low-level public employee when she heard on the radio of the attempted assassination of President Rea-

91. Connick v. Myers, 461 U.S. 138, 149 (1983).
92. *Id.* at 147-49.
93. *Id.* at 147-48.
94. *Id.* at 143.
95. *Id.* at 147.
96. *Id.* at 146. *See infra* note 112 and accompanying text for somewhat more specific examples of public speech.
97. *Connick*, 461 U.S. at 148, 153-54.
98. *See infra* notes 318-20 and accompanying text.
99. 483 U.S. 378 (1987).

gan: "[I]f they go for him again, I hope they get him."[100] As the Court explained, "The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President."[101]

Here the Court chose to place its entire emphasis on the context of the remark[102] rather than on its meaning and suitability for general discourse. To the extent that *Rankin* can be read to hold that a public employee's remark may be given the protected status of public speech simply because it is related in any way to a public official and his policies, it stands for nothing but a tautology, because nearly every statement of any public employee of any significance to this inquiry would be about a public official or public office, usually the very one connected with his employment.[103] At any rate the link between the President's official policies and the motivation behind a blurted wish for the ultimate success of his would-be assassin seems too attenuated to give First Amendment protection to such expression. It avoids any but the most superficial analysis of the speech, a type of analysis that is in the long run not very protective of speech because it proves too much — *viz.*, that virtually any statement about a public figure or policy is protected.

I now spell out some of the principal reasons that determine whether public employees' speech is constitutionally protected under the *Connick* rubric. I revisit most of these in my later criticisms and in my proposal for pluralistic value convergence.

1. Present Approaches Under the *Connick* Line of Cases for Determining Public and Private Speech in the Public Sector

The Court in *Connick*, in defining public speech, relied heavily and directly on the instrumental value of free speech to further citizens' participation in democratic self-government.[104] Some of the problems and issues associated with the Court's *Connick* approach are described below.

As already noted, the distinction between speaker *qua* citizen and speaker *qua* public employee is crucial to the judiciary's understand-

100. *Id.* at 381.

101. *Id.* at 386.

102. *Cf. id.* at 397 (Scalia, J., dissenting) (emphasizing that, "[t]he majority's magical transformation of the *motive* for McPherson's statement into its *content* is . . . misguided . . . .") (emphasis in original).

103. *But cf.* Smith, *supra* note 79, at 255 (*Rankin* extended the public speech doctrine beyond a statement about the speaker's own employer).

104. *See supra* notes 86-88 and accompanying text.

ing of public speech.[105] Yet, this analytical citizen/employee distinction is sometimes distorted. For example, a governmental employer may make the error of treating the remarks of its employee as low-value private speech simply because that person is in fact a public employee, even when the remarks and the circumstances in which the words are spoken evince the speaker's role *qua* citizen and not *qua* employee.[106] By the same token, there can be a correlative but opposite tendency, as illustrated in *Rankin v. McPherson*, to scale back the speaker's status as an employee dramatically and to cast her in the role of citizen whenever any tincture of public purpose colors her speech. This frequent tendency by courts to label speech as public or private, depending on judicial findings of such minute but seemingly talismanic aspects related to the speech or speaker, can be associated with the "fallacy of composition":[107] here, treating the distinction between the two types of speech as capable of being unambiguously applied whenever a minor or incidental aspect of "publicness" (or "public employment" as the case may be) is present.

A closely related problem — one often identical in substance — is the propensity of courts (and scholars) to place an overemphasis on the formal organs of government. For example, if Robert Bork's First Amendment values[108] were applied to identify public speech, the extent of protection would no doubt shrivel because Bork confines the value of free speech to "governmental behavior, policy, or personnel"[109] and insists that speech bear a close, literal relation to this value to be protected. In contrast, as just noted, the Supreme Court in *Rankin* extended protection to speech uttered in the remotest context of governmental policy or structure.[110] Though Bork's theory and the *Rankin* holding yield strikingly dissimilar results, each is premised on a similar notion that a relation to formal governmental structure may or should control the level of First Amendment protection for a particular instance of speech.

The Court in *Connick*, as already noted, held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement, as revealed from the whole record."[111] The Court has not, however, pro-

105. *See, e.g., supra,* note 45 and accompanying text. *Cf.* Thomas W. Rynard, *The Public Employee and Free Speech in the Supreme Court: Self-Expression, Public Access to Information, and the Efficient Provision of Governmental Services*, 21 URB. LAW. 447, 464 (1989) (noting the two types of relationships).

106. *See* City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976) ("Whatever its duties as an employer, when the board sits in public meetings to conduct public business . . . it may not be required to discriminate between speakers on the basis of their employment . . . .").

107. *See. e.g.*, IRVING M. COPI, INTRODUCTION TO LOGIC 96-97 (4th ed. 1972).

108. *See supra* notes 45-52 and accompanying text.

109. *See supra* note 46 and accompanying text.

110. See discussion of *Rankin, supra* notes 99-103 and accompanying text.

111. Connick v. Myers, 461 U.S. 138, 147-48 (1983) (emphasis added).

vided much guidance by which to apply these cryptic standards, except to state that they could apply to the failure of a public agency to "discharge[ ] its governmental responsibilities" or to the employee's attempt "to bring to light actual or potential wrongdoing or breach of public trust"[112] by or in the agency. One commentator has defined these elements as follows: "the content factor relates to the subject matter of the speech, the form factor examines who the speech was conveyed to [as well as the manner in which it was conveyed], and the context factor encompasses where and *why* the employee spoke."[113] These definitions may now be adopted *ex hypothesi,* but are subject to further refinement.

"Context" most often refers to the involvement of the speech in an employee's personal grievance with the employer. If such involvement is found to exist in the most minute degree, its presence may result in a ruling that the employee's remark is low-value private speech. This issue is also frequently related to the courts' making the distinction between speaker as citizen and as public employee too rigid.[114] Frequently the lower courts identify "context" with the *motivation* of the speaker.[115]

"Form" can involve the seeming paradox, found in *Givhan v. Western Line Consolidated School District,*[116] that a statement may be given the protection of public speech even though made to a non-general audience, even one person.

"Content" or subject matter has the greatest influence over the classification of the speech but is particularly compelling when the speech concerns a strong public policy, such as that against racial discrimination.[117]

2. Non-*Connick* Approaches to Protection of Public Employees' Speech

The major First Amendment value of self-expression is rarely used to classify speech by public employees,[118] and the search for truth or knowledge (in a theoretic sense unalloyed with political debate) is evidently never so used.

112. *Id.* at 148.

113. Nadine Renee Dahm, Note, *Protecting Public Employees and Defamation Defendants: A Two-Tiered Analysis as to What Constitutes "A Matter of Public Concern,"* 23 VAL. U. L. REV. 587, 613-14 (1989) (emphasis added).

114. *See supra* note 107 and accompanying text.

115. *See infra* note 231-312 and accompanying text.

116. *See supra* note 82 and accompanying text. *See also* Connick v. Myers, 461 U.S. 138, 148 n.8 (1983).

117. Connick v. Meyers, 461 U.S. 138, 148 n.8 (1983).

118. *See infra* notes 377-81 and accompanying text.

3. The Lack of Clarity

The upshot of *Connick,* its sibling *McPherson,* and their lower-court progeny is that there exist only vague and unwieldy standards for public speech in the public sector.[119] One commentator, Allred, has attempted to construct an empirical *a posteriori* typology of the qualities of public speech found by the lower courts[120] but concludes that there are no consistent standards.[121] Dahm finds "an inherently vague standard."[122] The *Connick* Court itself holds that " 'it [is n]either appropriate [n]or feasible to attempt to lay down a general standard against which all such statements may be judged.' "[123] Indeed, one respected circuit judge has stated that the public employment cases resist the application of any uniform rules of decision: "Determinations of public concern [under *Connick*'s prong-one], and the [prong-two] balancing itself, require ad hoc case-by-case application. The cases are, therefore, not good sources for rules of general application."[124]

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119. *See supra* note 4 and accompanying text.

120. *See* Allred, *supra* note 4, at 50-75 ("Speech on Matters of Current Community Debate", "Speech Alleging Malfeasance or Abuse of Office", "Speech on Public Safety and Welfare", "Speech on the Quality of Public Education", "Speech Concerning Discrimination", and "Matters of Purely Personal Interest").

121. Allred, *supra* note 4, at 75.

122. Dahm, *supra* note 113, at 594 (following 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)).

123. Connick v. Meyers, 461 U.S. 138, 154 (1983) (quoting Pickering v. Board of Education, 391 U.S. 563, 569 (1968)).

124. Goffer v. Marbury, 956 F.2d 1045, 1050 (11th Cir. 1992) (Godbold, J.).

The opinion in one lower federal court case, handed down too late to be incorporated into the general analysis of this article, has a sophisticated analysis of the elements involved in the application of *Connick*'s prong-one threshhold test of whether a public employee's speech is of public concern. In O'Connor v. Steeves, 994 F.2d 905, 913-15 (1st Cir. 1993), the court of appeals — in surveying various lower court applications of the *Connick* standard — developed a tripartitite framework to understanding the problem:

> [1] Some courts have adopted a content-based analysis, focusing exclusively on 'which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government' . . . in effect providing *per se* protection to public-employee speech on certain topics of 'inherent' public interest, such as official malfeasance or abuse of office.
>
> [2] Other courts have adopted an analysis which turns either entirely or in part on the employee's subjective intent, *i.e.*, on whether the employee's speech '*was calculated* to disclose misconduct' or to inspire public debate on some issue of significant interest.
>
> [3] On the other hand, public-employee speech on a topic which would not necessary qualify, *on the basis of its content alone*, as a matter of inherent public concern (*e.g.*, internal working conditions, affecting only the worker and co-workers), may require a more complete *Connick* analysis into the form and context of the public-employee expression . . . [including, *inter alia*, an inquiry into] whether the "form" [or "context"] of the employee's expression suggests a subjective intent to contribute to any such public discourse.

Id. at 913-14 (citations ommitted).

B. Defamation

At common law defamation was a tort of strict liability, at least insofar as the words spoken or written injured the plaintiff in his reputation.[125] "Commentators generally agreed . . . that the historic protection afforded individual reputation by the common-law actions for libel and slander did not effect an abridgement of the freedom of [speech or] of the press."[126] Thus the common law of defamation did not know the distinction between public and private speech; strict liability was the rule whether injured reputation concerned a public or private matter. Then came a series of cases in the Supreme Court which placed a constitutional gloss on the common law and opened the grounds up for the distinction.

1. From Public Official (or Figure) to Public Speech to Public Figure and Back Again to Public (or Private) Speech

In *New York Times Co. v. Sullivan*[127] the Supreme Court — despite its famous assertion that there is "a profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open"[128] — actually held that "a federal [constitutional] rule . . . prohibits a *public official* from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with [subjective] knowledge that it was false or with reckless disregard of whether it was false or not."[129] The reference to "a profound national commitment" to wide-open debate on public issues shows that the Court bottomed its decision on the instrumental value of free speech to democracy.[130] In other words, as in *Pickering* and *Connick* and their line of cases, the prevailing First Amendment value has been the instrumental political value, not constitutive self-expression or a disinterested search for truth. The emphasis in *New York Times*,

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The court's approach to the interpretation of lower courts' applications of *Connick* parallels in many respects the analysis that I offer in this article.

125. *See, e.g.*, E. Hulton & Co. v. Jones, 79 L.J.K.B. 198 (1910) ("A man may publish a libel in good faith believing it to be true, . . . and reasonably believing it to be true, but in fact the statement was false. Under these circumstances he has no defence to the action, however excellent his intention.").

126. Willard H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 586 (1964). Pedrick points out two common-law exceptions for speech about public figures: the "fair-comment" rule, which allowed adverse comments if the facts themselves were accurately reported, and the rule crafted in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), which created a privilege for false statements about public figures if the statements were made in good faith. *Id.* at 583-84.

127. 376 U.S. 254 (1964).

128. *Id.* at 270 (emphasis added).

129. *Id.* at 279-80 (emphasis added) (citing Coleman v. MacLennan, 98 P. 281 (Kan. 1908)).

130. *See also* Dworkin, *supra* note 19, at 58.

though (as already indicated), was upon the status of the person about whom the statement was made and upon the state of mind of the speaker — not upon the nature of the statement itself on the "issues" (though the subject matter of the lawsuit *was* clearly of public concern, the civil rights movement in the South). Shortly thereafter the Court extended this protection to public *figures*, as well as public officials.[131]

In *Rosenbloom v. Metromedia, Inc.*,[132] the plurality, faced with a situation in which the person allegedly defamed was not "a 'public official' or a 'public figure' but . . . a private individual,"[133] acknowledged the nature of the speech itself as a constitutional standard and found that speech as such is protected by the *New York Times* standard when its "publication concerns a matter of public or general interest."[134] Justice Marshall warned in dissent, though, against turning from the status of the figure to the nature of the speech as an organizing principle. He indicated that such a reorientation would threaten the ability of persons to protect their interests in reputation, "since all human events are arguably within the area of 'public or general concern' "[135] and that injury to all reputations would become judged by the supposedly more lenient, speech-oriented protective standard.

The Court adopted the Marshall approach in *Gertz v. Robert Welch, Inc.*,[136] and once again placed the emphasis for determining constitutional protection for the defendant in a defamation suit squarely on the public or private status of the defamed figure. The Court held that a private figure as plaintiff — whose interest in reputation would carry greater weight than a public figure's similar interest when balanced against the value of protecting the speech — would have to prove only "fault" (usually negligence) by the defendant, not *New York Times* malice, to recover. In so ruling the Court noted "the . . . difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not. . . . We doubt the wisdom of committing this task to . . . judges."[137] Yet the *Gertz* Court did not altogether discard a role for the nature of the speech itself in assessing its degree of constitutional protection: it held that one measure of whether a figure is public or private is whether he has "thrust [himself] to the forefront of [a] par-

131. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

132. 403 U.S. 29 (1971) (Brennan, J., plurality opinion).

133. *Id.* at 31.

134. *Id.* at 44.

135. *Id.* at 79 (Marshall, J. , dissenting). Justice Marshall appears to have, some sixteen years after his *Rosenbloom* dissent, fulfilled his own prophecy by holding that the respondent's remark in Rankin v. McPherson, though only minimally related to the President and his policies, was about a matter of public concern. *See supra* notes 99-103 and accompanying text.

136. 418 U.S. 323 (1974).

137. *Id.* at 346.

ticular *public controvers[y]*"[138] — surely an implicit indication that defamatory speech about a figure involved in and defined by such controversy would also be speech of a public nature. Nine years later, the *Connick* Court, addressing the issue in the public employment sector, shifted its focus again and explicitly forced judges to undertake the task of directly evaluating whether *speech* is public or private. Finally, the Court added back the same express requirement in *defamation* cases as well, coming full circle back to the position which it claimed to be avoiding in *Gertz*.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[139] the Supreme Court — faced with a private-figure plaintiff not plainly involved with a public issue — reverted to the *Rosenbloom* public/private speech distinction to resolve the case. In ruling that errant commercially compiled bankruptcy reports of limited distribution were private speech, the plurality relied heavily on *Connick*. "We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection."[140]

> As we stated in *Connick* . . . this 'special concern' [for speech on public issues] . . . is no mystery . . . The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' In contrast, speech on matters of purely private concern is of less First Amendment concern.[141]

The plurality in *Greenmoss Builders*, following the *Connick* Court's lead, thus defined public speech by the instrumental value of self-governance, while assigning to private speech a role defined by the nonpolitical "individual interest of the speaker and its specific business audience."[142]

Although the plurality did not expressly affirm this point in its ruling, the case may also be interpreted as a return to common-law strict liability when both the plaintiff and the speech are private in nature.[143] Thus "it must be that the *Gertz* requirement of some kind of fault . . . is . . . inapplicable in cases such as this."[144] The Court, in

138. *Id.* at 345 (emphasis added).

139. 472 U.S. 749 (1985) (plurality opinion).

140. *Id.* at 758-59 (citations omitted).

141. *Id.* at 759 (brackets in original) (citations ommitted) (quoting Connick v. Meyers, 461 U.S. 138, 145 (1983), and Roth v. United States, 354 U.S. 476, 484 (1957)).

142. *Id.* at 762.

143. *See, e.g.*, Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 471 (1988) ("Under the logic of *Dun & Bradstreet [v. Greenmoss Builders, Inc.]*, the first amendment value of this species of speech is so low that the unvarnished rules of the common law are sufficient to protect it, and no independent first amendment rules will apply.") (footnotes omitted) (citations omitted).

144. *Dun & Bradstreet, supra* note 2, 472 U.S. at 774 (White, J., concurring in the judgment).

rebuffing *Gertz*'s emphasis on the status of the plaintiff as a sole criterion for protecting otherwise actionable defamatory speech, has now implanted the teaching of *Connick* in another area of law. Aside from creating vagueness in the criterion of constitutional protection for defamatory speech itself, this step has also introduced a logical gap in the law of defamation.

2. The Unfinished Logic of the *Hepps* Schema

In *Philadelphia Newspapers, Inc., v. Hepps*,[145] the Supreme Court made the following observation about the impact of *Greenmoss Builders* on defamation and the *New York Times* line of cases:

> One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a . . . defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are . . . less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.[146]

In so describing the moments of the intersection of these "two forces" — (1) the public or private status of the figure or plaintiff and (2) the public or private nature of the speech — Justice O'Connor, writing for the Court in *Hepps*, provided a systematic way for readily determining a defamation plaintiff's required proof of the defendant's state of mind. The schema or matrix provided in Figure 1 is my own interpretation of Justice O'Connor's framework.

The schema reveals that the *Hepps* observation cannot (or does not) account for private speech about a public figure. In the logical progression described by Justice O'Connor, there must be a moment where a public figure (the plaintiff) and private speech about that figure coincide; but the state-of-mind requirement, unlike the similar requirements for the other three moments, is not revealed. I shall later use the pluralistic theory of First Amendment value convergence to fill in this logical (and perhaps doctrinal) gap, as well to make the concepts of public speech clearer both cognitively and normatively, by

145. 475 U.S. 767 (1986).
146. *Id.* at 775.

		SPEECH CATAGORY	
		PUBLIC	PRIVATE
FIGURE CATAGORY	PUBLIC	*New York Times* Standard: "Malice"	?
	PRIVATE	*Gertz* Standard: "Fault" (Usually Negligence)	*Greenmoss Builders* Standard: Common-Law Strict Liability

Figure 1

examining just such a case where this elliptical moment has actually appeared.

III. Three Thinkers Whose Ideas of the "Public" Correspond to the Main First Amendment Values

A. The Stages of Inquiry and Their Relation to McKeon's Pluralistic Schema

In the previous two parts of this inquiry I have considered the issues concerned with distinguishing public and private speech under the First Amendment from the standpoint of two widely separated, even extreme perspectives. In Part I, I outlined the major First Amendment values or justifications of democratic self-governance, self-expression or self-realization, and the search for truth; showed their origins in the ground-breaking work of Justices Brandeis and Holmes in the first years of this century; and prepared the basis for linking these three main values to the thought of three figures of philosophical orientation — whose thought I shall soon present in this, Part III — in order to focus more directly on comprehensive treatments expressly dealing with conceptions of the "public." In Part II, I shifted my viewpoint to sketch the distinction between public and private speech and the problems posed in making this distinction in the concrete jurisprudence of First Amendment case law. Now, in Part III, I move to narrow this gap between broad First Amendment values and issues in the definite case law by drawing out the thought of these three figures on their conceptions of the "public" in a way that can be used in completing the inquiry. In Part IV, I shall attempt to close the gap between broad formulations of First Amendment values and corresponding conceptions of the "public," on the one hand, and existing

problems in the concrete jurisprudence, on the other, by showing how the materials of the former can be used to resolve issues in the latter.

My selection of the thought of John Dewey, Hannah Arendt, and Walter Lippmann to represent differing viewpoints of the "public" is partly governed by the substantive relevance of their thought and partly governed in a purely analytical sense by the comparatively tidy way in which they combine to form a practice of pluralistic convergence under the metaphilosophical schema of Professor McKeon.[147] I have already shown at some length how their respective viewpoints correspond to well-recognized First Amendment values. From the standpoint of convergence or congruence, the thought of the three fit into "types" or "modes of thought" laid out in McKeon's metaphilosophical schema — a form of analysis that claims to account for all possible "types" of thought in an exhaustive, systematic fashion.

> Even in non-technical considerations of thinking, four modes of thought may be distinguished: it is a process by which parts are put together, or englobing truths are approximated, or problems are solved, or arbitrary formulations are interpreted. The four are *formally* exhaustive of possibilities: [*the logistic mode* —] the assumption of least parts, but no whole except by composition; [*the dialectical mode* —] the assumption of an ontological unifying principle, but no absolute least parts; [*the problematic mode* —] the rejection of least parts and separated wholes, and the assumption of problems and natures encountered in the middle region; and [*the operational mode* —] the assumption that all distinctions are initially arbitrary. *The four modes of thought are mutually exclusive and exhaustive of all possible modes.*[148]

My fundamental claim at this point is that, because the respective positions of the three figures can be related and understood vis-à-vis three of McKeon's modes of thought, the use of their thought involves a nearly comprehensive survey of all possible ways of thinking about

147. The schema and its modes of thought is metaphilsosphical in the sense, *inter alia*, that McKeon claims value neutrality for it, *i.e.*, that it presents a heuristic device for relating and understanding substantively different philosophies without distorting the true meaning of any of them. The use of such a schema represents a genuine advantage in the problem of relating different world views, "since [otherwise] it is easy to refute other philosophers within the framework of one's own philosophy [, and since] it is . . . easy [otherwise] to take . . . the step from the refutation of other doctrines to the conviction that the definitions and meanings employed in those doctrines are quite without conceivable foundation . . . ." MCKEON, *supra* note 9 at 174-75. My use of such McKeonite terminology as "schema" and "mode(s) of thought" involves a considerable degree of oversimplification. Readers who desire full amplification should consult, *e.g.*, the essays of McKeon collected and reprinted in RICHARD MCKEON, FREEDOM AND HISTORY AND OTHER ESSAYS: AN INTRODUCTION TO THE THOUGHT OF RICHARD MCKEON (Zahava K. McKeon ed., 1990). On the problems of interpreting McKeon generally, *See, e.g.*, GEORGE PLOCHMAN, RICHARD MCKEON: A STUDY (1990).

148. MCKEON, *supra* note 8, at 245 (all emphases added).

the concept of the "public." The claim, however, cannot be formally fulfilled or completed, because I have no figure whose thought I choose to consider in connection with a fourth or logistic mode, although I have suggested that in some respects Robert Bork might be such a figure.[149] Nonetheless, the use of these three figures should be precise enough for my purpose, "because the end aimed at is not *knowledge* but *action*."[150] This Aristotelian distinction between knowledge and action — or stated in other terms, between theory and practice — is indeed quite fundamental to my inquiry.

The fact that I locate my inquiry on the practical side of the distinction means, as I just suggested, that it should be sufficient for me to sketch my pluralistic resolution of the problem of defining public speech "roughly and in outline,"[151] rather than with exact precision. Moreover, my inquiry is practical because, although I do set out broad norms of First Amendment jurisprudence, I ultimately (in Part IV) attempt to relate and apply these norms to the "particulars, i.e. . . . the circumstances of the action [here, the adjudication of relevant First Amendment cases] and with the objects [*e.g.*, the specific facts of these cases] with which [the action] is concerned."[152] Thus I "recognize the particulars . . . and practice is concerned with particulars."[153] As McKeon himself has said, in the context of his own efforts to invent a pluralistic schema of values to ameliorate international conflict:

> The problem of establishing a program of *common action* based on the different philosophic views, religious beliefs, and political systems represented . . . was a *practical exercise* in exploring the consequences of different conceptions of human rights, democracy, freedom, law, and justice on the co-operation and antagonism of nations.[154]

On a much smaller scale I seek to use McKeon's approach to resolve tensions in First Amendment jurisprudence by formulating common solutions from differing prescriptive viewpoints on the "public." These common solutions might then become at least beginning points to resolve those tensions (including but not limited to those identified in detail in this article) in constitutional litigation.

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149. *See supra*, notes 53-54 and accompanying text; *see also infra*, notes 216-17 and accompanying text for a discussion that attempts to show further why Bork's position should not be acceptable as a fourth viewpoint in my pluralistic approach to distinguishing public and private speech.

150. Aristotle, *Ethics*, *reprinted in* RICHARD MCKEON, THE BASIC WORKS OF ARISTOTLE 937 (1968).

151. *Id.* at 936.

152. *Id.* at 966.

153. *Id.* at 1028. *See also* Aristotle, *Politics*, *reprinted in* RICHARD MCKEON, THE BASIC WORKS OF ARISTOTLE 1164 (1968) ("[E]nactments [of laws] must be universal, but actions are concerned with particulars.").

154. RICHARD MCKEON, DEMOCRACY IN A WORLD OF TENSIONS: A SYMPOSIUM PREPARED BY UNESCO v (1951) (emphases added).

One word of caution, however, is needed at this point: In using McKeon's schema with its modes of thought, one must beware of the fallacy of entitization (sometimes known as reification) or the fallacy of "misplaced concreteness."[155] The modes of thought are purely formal (in the modern sense[156]) and represent only explanatory categories that can be used (as McKeon claims) to relate different philosophical views to one another neutrally without producing the distortion that occurs when one philosophy is viewed through the lens of another. As such, each mode of thought represents a "type," into which various philosophies of *differing substantive content* can be fitted for understanding them, neutrally and without distortion, vis-a-vis other philosophies assigned to other modes of thought. The moment, though, that one mistakes a mode of thought, as a heuristic "type," for a philosophy with substantive content, one has fallaciously entitized or reified that mode of thought. Accordingly, as I explore the substance of Dewey's, Arendt's, and Lippmann's thought on the "public," it is important to remember that (1) all references to McKeon's schema of modes of thought are essentially heuristic in nature, and (2) that — in principle — other philosophers or figures of substantive views differing from the views of these three on the "public" might well have been selected and understood through these same heuristic categories. Thus my selection of Dewey, Arendt, and Lippmann to represent views of the "public" does not, by any means, foreclose the utilization of other figures for this purpose. On the other hand, because of their cogent and systematic accounts of establishing and valuing the "public," and their ready adaptation to McKeon's schema, they seem ideally suited for the treatment that follows.

B. John Dewey and The Public and Its Problems

Dewey's conception of the "public" falls under McKeon's problematic mode of thought.

> "Problematic". . . methods of inquiry define terms relative to the problems under consideration and to the circumstances by which the problems are determined. They avoid alike the dialectical assumption that science is concerned with an organically interrelated universe in which the effect of each part on all others must be taken into account in each inquiry and the logistic assumption that science is concerned with a model or a construct in which effects are explained by the operations and interrelations of least parts.[157]

Accordingly, Dewey's conception of the public "has a political and social . . . context" and is "limited to human *action* in [such] a context [with] . . . circumstances which afford protection to the *action* of the

155. *See* ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 7, 18 (D. Griffin & D. Sherbourne, eds. 1978).

156. *See infra* note 315 and accompanying text.

157. MCKEON, *supra* note 9, at 168.

individual."[158] The problem of the public is to differentiate it "from the numerous other groups of men in association."[159] "The question 'of what transactions should be left as far as possible to voluntary initiative and agreement and what should come under the regulation of the public is a question of . . . concrete conditions that can be known only by careful observation,' "[160] not by general principles derived from abstract reasoning. Founded on these premises, the following elements pertinent to my inquiry are found in Dewey's thought.

Dewey is a pragmatist concerned with self-governance. Ideas are united with action and are derived *a posteriori* from the "facts of human activity,"[161] not from pure or disinterested truth. In this respect Dewey is like J. S. Mill, whose truth is tempered by social utility,[162] and — as I argued in Part I — like Justice Holmes, whose "marketplace of ideas" is a pragmatic test of truth based on its political acceptance.[163]

> [The consequences of human acts upon others] are of two kinds, those which affect the persons directly engaged in a transaction, and *those which affect others beyond those immediately concerned.* In this distinction we find the germ of the distinction between the private and the public. *When indirect consequences are recognized and there is an effort to regulate them, something [i.e., a public] having the traits of a state comes into existence.* When the consequences of an action are confined . . . mainly to the persons directly engaged in it, the transaction is a private one.[164]

Thus Dewey's distinction corresponds to the Court's own contrast between public speech as speech that "embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,"[165] and private speech as speech about "intimate human relationships."[166]

The public, however, is not to be identified with the state itself. Rather, the state and its officials are the public's agents. Indeed, an inchoate public may have to break existing political structures to form itself.[167]

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158. *Id.*, at 221 (emphasis added to distinguish *action* from *knowledge*).
159. *Id.* at 233.
160. *Id.* (quoting DEWEY, *supra* note 12, at 193).
161. DEWEY, *supra* note 12, at 9.
162. *See supra* note 70 and accompanying text.
163. *See supra* notes 35-36, 70-73 and accompanying text.
164. DEWEY, *supra* note 12, at 12-13 (emphasis added). *Cf.* Wright, *supra* note 6, at 156 (Under Mills, speech is "social" and "must carry implications beyond the speaker's individual and immediate consequences.").
165. Thornhill v. Alabama, 310 U.S. 88, 102 (1940).
166. Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984).
167. DEWEY, *supra* note 12, at 15, 31, 67.

Speech of concern to the public is objective in nature and does not strictly depend on the subjective motive of the speaker.[168] The rule of law canalizes actions and makes them predictable to all members of the public; it does not simply issue commands.[169] Liberty becomes rule by officials of the public — rule that "enables individual members to count with reasonable certainty upon what others will do . . . facilitat[ing] helpful cooperation."[170] This view of law and liberty coincides with McKeon's observation that, within the "problematic" mode of thought, the "public" is formed by the deliberate choice of *men* "according to prudence, or right reason, or the rule of law."[171]

The problem of the public is to transform "its inchoate and amorphous [condition by] . . . organiz[ing it for] effective political action relevant to present social needs and opportunities."[172] Various diversions and amusements distract the public from finding the shared experiences[173] needed to form itself effectively.[174] Thus so-called "news" may be of only trivial and *sensational* quality, having no coherence or explanatory power to bring to the relevant problems of the public.[175] The Supreme Court, from its judicial perspective, has implicitly agreed with this view on occasion.[176]

Creative expression through the use of symbols[177] and other forms of artistic expression is essential to the formation of the public. "The function of art has always been to break through the crust of conventionalized and routine consciousness."[178]

C. *Hannah Arendt and* The Human Condition *(Especially the Chapter Entitled "The Public and the Private Realm")*

Arendt's conception of the "public" falls under McKeon's operational mode of thought. Knowledge as embodied in the force of words serves as the power through which a public is realized;[179] but

168. *Cf. id.* at 12 ("We take then our point of departure from the *objective fact* that human acts have consequences upon others.") (emphasis added).
169. *Id.* at 54.
170. *Id.* at 71-72; *see also id.* at 150 ("Liberty is that secure release and fulfillment of personal potentialities which take place only in . . . manifold association with others.").
171. MCKEON, *supra* note 8, at 249.
172. DEWEY, *supra* note 12, at 125.
173. *Id.* at 142.
174. *Id.* at 138-39.
175. *Id.* at 179-80.
176. *Cf.* Time, Inc. v. Firestone, Inc., 424 U.S. 448 (1976) (distinguishing "public controversy" from all controversies of concern to the public, in ruling that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of [sensational] interest to some portion of the reading public").
177. DEWEY, *supra* note 12, at 142.
178. *Id.* at 183.
179. *Cf.* MCKEON, *supra* note 8, at 248.

the power is achieved not through domination of the weaker by the stronger members of the community, but as concerted action through words and deeds to achieve the authentically human. The operational method follows the maxim of Protagoras that "man is the measure of all things"[180] — or in Kantian terms, the perspective of a Copernican revolution in which "objects must conform to our knowledge,"[181] and not our knowledge, to objects. The speaker appeals through speech to the reality constructed in the mental faculties of the audience,[182] not through proof of eternal ideas, external things, or objective natures. "[T]ruth is discovered only in the free clash of opinions, and . . . plausible arguments can be found to support the contradictory of any proposition or doctrine . . . ."[183] The operational method is the method of debate, and thus *the* method of lawyers, like Justice Louis Brandeis, with whom I have closely compared Arendt.

Arendt is an existentialist, a student of Martin Heidegger and Karl Jaspers, and is concerned with self-expression — especially as it occurs within politics as she constitutively understands it. For her, "reality depends utterly upon appearance and therefore upon the existence of a *public* realm into which things can appear out of the darkness of sheltered [*private*] existence."[184] Appearance, whether of speech or action, is of the new, the spontaneous, of that which constitutes a "beginning."[185] The source of much of her thought is the ancient Athenians' concepts of public life, the very same as Justice Brandeis' source in his dissenting opinion in *Whitney v. California*.[186] Accordingly, as I argued in Part I, there is a significant correspondence between the thought of Arendt the philosopher and Brandeis the jurist.

"Although the distinction between *private* and *public* coincides with the opposition of necessity and freedom . . . [t]he most elementary meaning of the two realms indicates that there are things that need to be *hidden* and others that need to be *displayed* publicly if they are to exist at all."[187] The hidden realm of the private concerns biological necessities — chiefly the drive to procreate (and other needs satisfied

180. Plato, *Cratylus*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 421, 424 (Edith Hamilton et al. eds. & Benjamin Jowett trans., 1961).

181. IMMANUEL KANT, CRITIQUE OF PURE REASON 22 (Norman K. Smith trans., 1929).

182. *Cf.* MCKEON, *supra* note 8, at 250 ("[I]n the operational method the knower *makes* knowledge.") (emphasis added).

183. Richard McKeon, *Dialogue and Controversy in Philosophy*, 17 PHIL. & PHENOMENOLOGICAL RES. 143 (1956), *reprinted in* RICHARD MCKEON, FREEDOM AND HISTORY AND OTHER ESSAYS: AN INTRODUCTION TO THE THOUGHT OF RICHARD MCKEON 104 (Zahava K. McKeon, ed., 1990).

184. ARENDT, *supra* note 13, at 51 (emphasis added). *See also id.* at 57 ("*[P]rivacy* . . . can never replace the reality rising out of the sum total of aspects presented by one object to a multitude of spectators.") (emphasis added).

185. *Cf. id.* at 177-78.

186. *See supra* notes 57-61 and accompanying text.

187. ARENDT, *supra* note 13, at 73 (emphasis added).

within the intimate relations of the family) and the innate urge to survive by constantly appropriating the raw materials of nature.[188] Because these necessities are essential to life itself, the private realm which nutures their satisfaction cannot be dispensed with. "A life spent entirely in public, in the presence of others, becomes . . . shallow. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense."[189]

The term "public" points to both a symbolic and a literal "space" in which the most authentic human experience — the sharing of words and deeds — is expressed and developed within "the world common to us all."[190] The function of speech within this common world of appearance is to illumine "the fact of [human] distinct[ive]ness" and thus to "actualiz[e] . . . the human condition of plurality"[191] and individual uniqueness, not to state objective facts or natures except the fact that genuine equals must have the power to speak in a common, public world.

Thus "operational" speech of concern to the public, like "problematic" speech (but in a different way because its meaning reflects *subjective* rather than *objective* reality), does not turn on whether the speaker's meaning or motive is subjective. A subjective or personal motive for the speech and its fitness for display to the public are simply two aspects of the same phenomenon: its authenticity as an expression of individual human uniqueness. In a literal but nonetheless very true sense all public speech *is* subjective (though not all subjective speech is public), because there is simply no other way for public speech to exist consistently with the existential belief in freedom as authentic self-expression. This view corresponds to the McKeonite assertion that under the operational mode of thought "freedom is spontaneous or undetermined activity . . . ; *animate beings* are free. Human freedom is an instance of the freedom to originate: it is freedom of self-initiation or *self-expression* as opposed to conformity to the customary in action, opinion, or taste."[192]

The problem of the public is in many respects to rid its space of the display of the *banal* — not so much of the commonplace, but rather of the mindlessness and "sheer thoughtlessness" which "becloud the reality" of words and deeds which appear in the public realm.[193]

188. *Cf. id.* at 96-101.
189. *Id.* at 71.
190. *Id.* at 198.
191. *Id.* at 178.
192. MCKEON, *supra* note 8, at 247-48 (last emphasis added).
193. *Cf.* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 287-88 (revised Penguin ed. 1984). Thus Arendt's concept of the banal appears to differ from Heidegger's concept of the "everyday" and its culmination in "publicness," which — through its "averageness and levelling down — obscures" authentic existence. M. HEIDEGGER, BEING AND TIME 164-65 (Macquarrie & Robinson

The works of the poet, writer, artist, and monument builder are all needed to supply permanent points of reference in a world in which human action and speech are the most fragile of all human products.[194] Thus, while Arendt's emphasis is on *political* self-expression, she does value other forms of expression.

D. Walter Lippmann and The Public Philosophy

Lippmann's conception of the "public" falls under the dialectical mode of thought. Systems of thought of this "type" collapse phenomenal or empirical distinctions between seemingly contradictory beliefs to reach overarching, transcendent principles of truth.[195] Human reason operating in this transcendent capacity thus supplies the principles for constituting the public, and dialectic overcomes even the supposed gap between heavenly truth and worldly justice — and between theory and practice — by fusing them, at least approximately, into an identity.[196] In rejecting an empirical or phenomenal ground for public affairs in favor of the transcendent, Lippmann with his emphasis on the search for theoretic truth — albeit a theoretic truth with practical repercussions — has not been part of the mainstream of American thought or First Amendment jurisprudence.[197] Yet despite this divergence from the mainstream of American thought, Lippmann has been immensely influential with a sophisticated audience, including some high government officials in several presidential administrations.[198]

Lippmann, though by vocation a journalist, is (for my purposes here) an ontologist interested in transcendent truth. Genuine knowledge lies in a "world behind the world" that is inaccessible to the broad and unsophisticated populace. "The concepts and the principles of the [legitimate] public philosophy have their being in the realm of immaterial entities."[199] Yet "most men — not all men, to be sure, but most active and influential men — are in practice positivists who hold that the only world which has reality is the physical world."[200]

Matters of public concern, including public speech, are those which *should* be guided by reason capable of apprehending the transcendent norms, but matters of the public are all too often guided by passion.[201]

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trans., 1962). Yet the difference may be superficial: Heidegger's concept of "publicness" resembles Arendt's concept of "society," "where private interests [primarily economic ones] assume [unmerited] public significance." ARENDT, *supra* note 13, at 35.

194. ARENDT, *supra* note 13, at 173.

195. *Cf.* MCKEON, *supra* note 9, at 192-93.

196. *Cf. id.* at 203-04.

197. *See supra* notes 14, 74-76 and accompanying text.

198. *See, e.g.*, R. STEEL, WALTER LIPPMANN AND THE AMERICAN CENTURY, ch. 15 (1980).

199. LIPPMANN, *supra* note 14, at 162.

200. *Id.* at 163.

201. *Cf. id.* at 42.

Modern governance has stood this essential order of things on its head: it has become "the rule that ideas and principles are private. . . . All that has to do with what man is and should be . . . [has become] private and subjective and . . . unaccountable."[202]

The problem of the public is to set rational inquiry into genuine values "above the infinite number of contradictory and competing private [interests guided only by passion]."[203] Therefore only *intelligent or wise men*[204] should be entrusted with the guidance of public affairs, and public discussion should be conducted rationally to avoid "silliness, baseness, deception," and "frivolity" which "incite the passions . . . of the people."[205]

In true dialectical fashion Lippmann sees no ultimate distinction between his reliance on transcendent truth and his quest for immanent action. "[T]he discovery of truth, the construction of arguments, and the clarification of minds [are inseparable and] proceed pace by pace."[206] From this perspective Lippmann has declared:

> The hallmark of responsible comment is not to sit in judgment on events as an idle spectator but to enter imaginatively into the role of a participant in the action. Responsibility consists in sharing the burden of men directing what is to be done, or the burden of offering some other course of action in the mood of one who has realized what it would mean to undertake it.[207]

In thus straddling the boundary between the heaven of ideas and the world of action, Lippmann presents a vision of the search for truth that is both like and unlike Holmes' "free trade in ideas": like the Holmesian view because of its orientation to political action; unlike Holmes' notion of truth because it turns to a source for that truth lying beyond the conflicting and self-interested opinions of men in the world.

* * * * *

My figures — Dewey, Lippmann, and Arendt — thus speak with different voices. Their views of the "public" are, of course, deeply prescriptive and not merely descriptive; the view of each is aimed at transforming the materials of society as they exist into a more nearly formed, adequately functioning "public."[208] The jurisprudence of the

202. *Id.* at 99.
203. *Id.* at 180.
204. MCKEON, *supra* note 8, at 248 (emphasis added).
205. LIPPMANN, *supra* note 14, at 126.
206. MCKEON, *supra* note 9, at 104.
207. STEEL, *supra* note 198, at xvii (citations omitted).
208. *Cf.* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 669-74 (1990). Professor Post argues that much of the confusion about the judicial treatment of public speech lies in the courts' failure, through their ambiguous analysis of that concept, to distinguish between normative (or prescriptive) and descriptive (or empirical) definitions of public speech in their opinions. Yet, he reasons,

First Amendment presents a definite field of potential action whereby these differing views — according to the rule of law — could be practically implemented and accordingly "be of use." The means by which these thinkers' views and First Amendment jurisprudence might converge toward some common ground for understanding and clarifying the use of speech in a public sense is essentially the subject of the fourth and final part of this inquiry.

IV. Application of the Concept of Pluralistic Convergence to the Case Law

A. *The Meaning of "Convergence" Among a Plurality of Values*

Before proceeding further I must refine the meaning of "convergence" when that concept incorporates a plurality of values and then is applied to the specific case law.

1. Openness to Pluralistic Convergence

At a very minimum the bare concept of *pluralistic* convergence must involve the coexistence or coincidence of values that are not incompatible with one another. I have tried to show at critical points in this inquiry that the main justifications for protection of speech under the First Amendment are consistent with one another, even though they do not merge into an identity. They are consistent with one another both philosophically and from the standpoint of their mutual acceptance under judicial authority. For example, while the Supreme

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resolution of the ambiguity by distinguishing between prescriptive norms for identifying discourse worthy of public discussion, and empirical facts describing such discourse by what excites the people's attention, brings its own analytical and doctrinal problems. On the one hand, "[t]he normative conception of public concern, insofar as it is used to exclude speech from public discourse, is . . . incompatible with the very democratic self-governance it seeks to facilitate," *id.* at 670, because it cuts off from open discussion ideas that may properly belong to public consideration and thus smacks of judicial censorship. On the other hand, a descriptive approach that measures public speech simply by whatever stimuli excite the people's interest founders because of its "lack of any principled method of determining what kinds of issues ought to be excluded from the domain of public discourse." *Id.* at 673.

I believe that my inquiry offers a way past each of these two impasses associated with prescription and description, respectively. It offers a way around the prescriptive problem of strait-jacketing democratic discussion into one court-approved brand of public speech by providing a *plurality* of normative definitions — definitions that are themselves only *examples* of "types" of views of the public, incorporated into a mutually exhaustive and inclusive schema. It also offers a way around Post's descriptive impasse by recognizing that behind the empirical "facts" selected to determine the scope of a matter of public concern lie normative presuppositions responsible for the selection of those particular facts and excluding others. Thus all conceptions of public speech are normative and *must* exclude some facts. My pluralistic approach expressly recognizes that the various conceptions of public speech are *all* normative, but attempts to provide a means — through McKeon's schema — by which each conception can be understood on its own terms without the distortion imposed by other viewpoints.

Court has frequently stated that the instrumental value of self-governance enjoys paramountcy as the most significant justification for the constitutional protection of speech, the Court has not ruled out the coexistence of other official justifications with this one.[209] In the most pragmatic sense Justice Holmes' and Justice Brandeis' views on the instrumental value of speech to self-governance and its constitutive value to self-expression through the exercise of civic virtue in politics, respectively, are obviously not incompatible, because the two justices joined each other's path-breaking dissents including the dissent in *Whitney v. California*.[210] The search for truth through "free trade in ideas" has also been shown to be concerned with the value of self-governance.[211] The consequence is that the Supreme Court would not be barred by its own precedents and traditions from adopting a concept of pluralism based on these essential free-speech values. In fact it implicitly already has.

The conceptions of the "public" corresponding to these essential free-speech values, as developed by the three thinkers Dewey, Arendt, and Lippmann, are also all compatible — now in a philosophical rather than a strictly judicial denotation. This assertion is truly the underlying presupposition of this entire inquiry, and so its acceptance must probably rest ultimately on intuitive grounds. I should note, however, that my descriptions of these figures' views on the "public" and how they may be related to one another vis-a-vis McKeon's schema are offered throughout as indirect support for this presupposition.

The plain upshot is that *pluralistic* convergence remains an open possibility on both judicial and philosophical grounds, taken as accepted my analysis so far. The argument that follows strives to convert that possibility into a convincing reality.

2. Rejection of Bork's Exclusivity of the Political

One matter is evident: any First Amendment spokesman who zealously insists that his position on values is totally exclusive from and against all other positions, must be denied recognition in a pluralistic scheme. Denial is appropriate whether the exclusivity has either a purported judicial basis in constitutional doctrine and interpretation, or a more theoretical ground in the impossibility of accepting and tolerating other constitutional views.

Robert Bork's position, for example — of the total exclusivity of the narrowly political — has never been adopted by the Supreme Court. Indeed, it has been decisively rejected both politically[212] and

209. *See supra* notes 43-44 and accompanying text.
210. 274 U.S. 357 (1927).
211. *See supra* notes 32-36 and accompanying text.
212. *See generally The Biden Report and Report of the Public Citizen Litigation Group*, reprinted in 9 CARDOZO L. REV. 219 (1987); *see also generally Nomination of*

judicially.[213] Despite his later apparent recantation, on pragmatic grounds, of exclusive reliance on the political value for free-speech protection,[214] Bork also continues to belie his reliance on a rigid, doctrinal approach by his insistence on the impossibility of compromise on First Amendment values. He argues that "moral philosophy has never succeeded in providing *an overarching system* that commands general assent."[215] From this rejection of any *single* moral or legal concept broad enough to support an array of free-speech values, Bork arrives at his limited scope for deriving such values from the literalness of univocal terms traceable to the history of constitution making. My approach to valuing speech, however, undercuts Bork's basic premise by seeking support for broad free-speech protection *not* in a single "overarching system that commands general assent" but rather in a pluralistic view of values that seeks a "common understanding [by which] doctrinal differences are [seen as] merely different modes of stating mutually consistent positions."[216] My viewpoint indeed excludes any position — not just Bork's — that has as its premise that any single value supports freedom of speech to the total or substantial exclusion of others.[217] For example, to the extent that Redish or Perry stake out an englobing value for self expression, my pluralistic viewpoint also undercuts their positions.

3. Disclosure of Convergence in the Particular Cases

Convergence, as I have already argued, takes on a practical, rather than a theoretical coloration in the context of *agreement on action — i.e.*, in adjudication in *particular concrete cases*[218] *— and not on abstract doctrine.*[219] Support found within those First Amendment val-

Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (1987).

213. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam), overruling the Court's opinion by Sanford, J., in Whitney v. California, 274 U.S. 357 (1927) — the position of minimal protection of speech adopted by Bork, *supra* note 45, at 23.

214. Bork, *supra* note 45, at 333. Nonetheless, Bork defends his 1971 "Neutral Principles" article as "one of the most discussed and cited law review articles in our history. . . . I remain glad that I wrote it. Most of it still seems to me to be entirely correct." *Id.* at 347.

215. *Id.* at 253 (emphasis added). *See also* Cass Sunstein, *Low Value Speech Revisited*, 83 Nw. U. L. REV. 555, 560 (1989) (considering the necessity to develop a "more concise and *unitary* test" of high First Amendment value) (emphasis added).

216. MCKEON, *supra* note 8, at 166-67. *See also supra* notes 9-10.

217. Removal of Bork's position from consideration also addresses the problem of my failure to complete the McKeonite schema with a figure's thought illustrative of the logistic mode of thought. *See supra* notes 53-54 and accompanying text. While my rejection of Bork to fill this heuristic role does not, of course, eliminate the possibility that some figure's thought might satisfactorily come within the logistic mode of thought, his treatment here does have the very pragmatic effect of removing *his* kind of First Amendment thinking from having any further impact on my argument for pluralistic convergence.

218. *See supra* notes 152-53 and accompanying text.

219. *See supra* notes 9-10 and accompanying text.

ues that allow judicial recognition of a variety of such values, *and* which correspond to my figures' equivalent thought, should be enough to identify a particular instance of speech as public and to validate it as worthy of heightened First Amendment protection. Indeed, given the critical role played by McKeon's schema and its concomitant presupposition of value pluralism, support found for a particular instance of speech in *any* of the main First Amendment values and its corresponding conception of the "public" will mean that this instance of speech may be expected to enjoy the accompanying support of other justifications and corresponding meanings of the "public" as well.

Contradictions and ambiguities in the case law can then be reformulated to reflect mutually consistent meanings of free-speech values commonly reflected in single instances of speech or action in the concrete world. McKeon's emphasis on *practical* rather than *doctrinal* convergence means that the search is for agreement among divergent positions on a *particular* treatment of public and private speech. So long as the methods available from his framework as embodied in our three figures can — consistently with one another — account for that particular treatment, there is no need to merge the value positions represented by these methods into a single, exclusively controlling rationale for identifying and protecting public speech. A need for exclusive one-to-one correspondence between some overarching doctrine and each particular instance of public speech is discarded. *Convergence among the various rationales for public speech is found in the* particular *cases, not in the justifications or rationales themselves, which still remain distinct and formally exhaustive in their general and abstract analytical formulation.*

Once again, I refer for edification to McKeon's attempt to apply his pluralistic schema to the field of international conflict resolution. My purpose is to approximate that approach and to apply it by analogy to the field of inquiry here.

> All practical problems which depend for their resolution on the agreement of groups of men who differ in . . . conviction are involved in "ideological conflicts." Terms must be clarified and significances explored in agreement on and in execution of a common course of action. . . . A common course of action may be undertaken and justified for different reasons based on different basic principles. . . . The basic problem in [an] ideological conflict concerning [the meaning of a critical term or conception] is the problem of the nature of the conflict: [1] whether it can be resolved only by agreement on a single definition and by abandonment of other meanings which are currently attached to the term or [2] whether it can be resolved by removal of ambiguities in most or all definitions of [the term in question] and by discovery of the manner in which they are compatible with each other in the practical sense of permitting co-

> operative action without violence to [the term in its] different acceptations.[220]

Now I shall apply this general concept of *convergence in practice* — approximating the second branch of McKeon's exposition above (and the branch that he himself proposes to break impasses in ideological conflicts) — to some of the issues in particular cases.

B. Public Employment

1. Overemphasis on Formal Organs of Government

There is a tendency to overemphasize the link between the formal organs of government and the public employee's speech, no matter how attenuated that link is. As I have already noted, the Supreme Court, in *Rankin v. McPherson*,[221] did expand the concept of public speech — rooted in a mere reference to a government official or body — beyond a statement about the speaker's own public employer.[222] Our three figures agree that this type of expansion, even where the reference is to a public official or entity not the speaker's own employer, constitutes a strained notion of the public relevance of speech. According to Dewey an inchoate public might need to form itself for appropriate political action in ways not consistent with the governmental status quo.[223] So according to his thought many statements could be genuinely public yet not about formal governmental structure at all. Moreover, the comment in *Rankin* lacked any essential relation to governmental affairs;[224] and the use of such an incidental and attenuated relation to governmental affairs would, in Dewey's eyes, contribute to a misperception of the true nature of the public, to whom such stray remarks of little rational content have no relevance. Simple association of such remarks with governmental organs would also violate Arendt's norm that authentic human existence concerns the creation by individuals of spontaneous new beginnings.[225] Blurted statements like that of Ms. McPherson, however, reflect a reactive necessity more than genuine freedom of expression, as well as a tendency toward "mindlessness" in bureaucracy — hardly part of Arendt's concept of the public.[226] Lippmann would simply object that

220. McKeon, *supra* note 36, at 194.

221. 483 U.S. 378. *See supra* note 99 and accompanying text.

222. Smith, *supra* note 79, at 255. *See generally supra* note 103 and accompanying text.

223. *See supra* notes 167 & 172 and accompanying text. *Cf.* Pedrick, *supra* note 126, at 593 ("[T]hose matters which are of public concern also go beyond the immediate province of government. [For example], [a] threatened labor strike affecting a critical industry may not provide any immediately discernible role for [uninformed] public opinion but who would doubt the legitimacy of the public concern and the strategic significance of the [informed] public attitude.").

224. *See, e.g., supra* note 110 and accompanying text.

225. *See supra* notes 185, 192 and accompanying text.

226. *See supra* note 193 and accompanying text.

Ms. McPherson's expression was the result of passion or emotion and reflects no attempt to enter into rational discussion.[227] All of this is not to say that public speech might not be associated with formal governmental functions and offices, but rather that mere linkage *simpliciter* should be approached with skepticism.[228]

2. *Connick's* Political Focus on Content, Form, and Context

As I have previously noted, the Court in *Connick* took an instrumental, political approach to the valuation of public speech[229] and, using this approach, focused on the factors of content, form, and context in the speech at issue.[230] I begin with context.

a. "Context" and the Problem of Private Motivation

The Supreme Court in *Connick* was worried that every personal grievance between public employees and the public officials employing them could produce speech worthy of constitutional protection.[231] "Context," as a reflection of a disgruntled employee's personal dispute with management, thus has become — in the lower courts — a primary filter denying protection to speech involved with intraoffice disputes.[232]

(1) The "Tainted" Approach

I have already discussed the problem of the courts' too directly and rigidly linking the nature of speech with the mere fact that the speaker is an employee, without taking account of the fact that he may also speak as a citizen.[233] A very closely related problem is the lower courts' use of the "taint" — my term throughout — of personal motive, when it is "found" (in whatever degree) in the speech of a public employee, to withdraw the heightened constitutional protection associated with public speech and thus subject the speaker to discharge or other discipline. The speech, however, may have content worthy of public attention as understood by our figures, notwithstanding the motivation of the speaker.[234]

The cryptic nature and lack of clarity in the Court's own standards and examples of public speech,[235] and even apparent *disclaimer*[236] of

227. *Cf. supra* note 201 and accompanying text.
228. *See supra* notes 106, 107, 110 and accompanying text.
229. *See supra* notes 86-88 and accompanying text.
230. *See supra* note 111 and accompanying text.
231. *See supra* notes 91-92 and accompanying text.
232. *See supra* notes 114-15 and accompanying text.
233. *See supra* notes 106-07, 110 and accompanying text.
234. *Cf.* Biggs v. Village of Dupo, 892 F.2d 1298, 1301 (7th Cir. 1990) (importance of issues to the public may outweigh employee's personal interest in making them).
235. The Court does not provide much guidance by which to apply its cryptic standard of "context," except to state that it generally could apply to disclosure by a public employee of the failure of a public agency to "discharg[e] its governmental

any controlling definition, gives context (construed as the speaker's motivation) an extremely broad and potentially self-contradictory field within which the lower federal courts may reach their holdings in the cases. Consider, for example, two cases from the Seventh Circuit, in which the same judge wrote for the court, whose contents were acknowledged by the court to be of public concern, but whose outcomes differed because of conflicting treatments of motivation.

In *Callaway v. Hafeman*[237] the plaintiff, a female school administrator, had "privately," *i.e.*, confidentially, made complaints to the school superintendent about the sexually harassing deportment of her immediate (male) supervisor; afterwards she was shunted to a lesser post under a school reorganization plan, which was implemented by the same male supervisor against whom she had complained. Although she had been "openly and publicly critical of the reorganization plan,"[238] her only charge in the ensuing litigation was that the reorganization plan had been used to "retaliate[ ] against [her] for making *private* complaints of sexual harassment."[239] The court found that the employee's complaints of harassment — because she made them in a "private" context and thus, the court found, in her own private interest — poisoned her constitutional right to criticize the reorganization plan:

> Hence, while it is undoubtedly true that incidences of sexual harassment in a public school . . . are inherently matters of public concern, the *Connick* test requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? . . . Or was the point to further some purely private interest?[240]

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responsibilities" or to the employee's attempt "to [bring to] light actual or potential wrongdoing or breach of public trust" by or in the agency. Connick v. Myers, 461 U.S. 138, 148 (1983).

236. *See supra* note 123 and accompanying text.

237. 832 F.2d 414 (7th Cir. 1987) (Bauer, C.J.).

238. *Id.* at 415.

239. *Id.* at 416 (emphasis added). Although citing Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979) in its opinion, the court did not come to grips with the fact that *Givhan* justifies "private" disclosure of public concerns when a content of special public importance is involved. The issue in *Callaway*, sexual harassment, like the issue in *Givhan,* racial discrimination, has similar high public importance (and as in *Givhan*, the employee in *Callaway* made her remarks to a superior responsible for school administration). *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (workplace sexual harassment claims are brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*).

240. *Callaway,* 832 F.2d at 417 (emphasis in original) (quoting from Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985)). *Accord,* Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1257 (7th Cir. 1985) (treating *some* statements, under the initial *Connick* prong, as "go[ing] well beyond [the employee's] interest, as a citizen, in commenting on matters of public concern," despite the similarity of those statements to *other* statements found to be *of* public concern). *See also* Colburn v. Trustees of Indiana Univ., 973 F.2d 581, 586-87 (7th Cir. 1992) (following *Callaway* by stating that "context" involves the motivation or "point" of the speech in question,

The court's use of the word "point" indicates that the employee's subjective motive was the controlling issue.[241]

Yet in *Berg v. Hunter*[242] the court found that another public school reorganization plan was the setting for speech that it found this time to be public,[243] although the employee's "speech [did] not implicate broader issues of public school administration unrelated to his personal disputes[,] [and] the timing and content of these charges [against the plan] [were] tied inexorably to matters of only personal interest to [him]."[244] Motivation of the employees in each of these cases was regarded as private (in the sense that the speech pertained to the personal interest of each), although each spoke about a public subject identified as such in the *Connick* opinion. But no principle in the cases can account for the different results. Neither can my figures account for the different outcomes, but their thought can be used to fashion a common solution to avoid such inconsistency.

For Dewey the subjective motivation of speech is immaterial for its classification as public or private.[245] "[T]he line between private and public is to be drawn on the basis of the extent and scope of the [objective] consequences of acts which are so important as to need control [—] indirect consequences of transactions [with] such an extent that it is deemed necessary to have those consequences *systematically cared* for."[246] Private speech, in contrast, concerns actions whose effects are limited mainly to the persons directly engaged in them.[247] Under this standard the public employee's criticisms of the reorgani-

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but also stating that motivation, while relevant, is "not dispositive of . . . First Amendment claims").

241. The term "point" has been used to indicate subjective purpose in *both* cases finding an employee's speech to be public, and in cases finding it to be private. *Compare, e.g.*, Roth v. Veteran's Admin., 856 F.2d 1401, 1403-06 (9th Cir. 1988) ("point" of the employee's speech, his "express purpose", was to expose "the misuse of public funds," — "inherently of interest to the public") *with* Zaky v. United States Veterans Admin., 793 F.2d 832, 836, 838 (7th Cir.), *cert. denied,* 479 U.S. 937 (1986) ("point" of employee's speech "appear[ed] in the context of [his] protecting his job, a matter of personal interest"). *Cf.* Bausworth v. Hazelwood School Dist., 986 F.2d 1197, 1198 (8th Cir. 1993). "In making our examination [of whether the speech in question is of public concern] we focus on the *employee's role* in conveying the speech rather than the public's interest in the speech's topic." *Id.* (emphasis added).

242. 854 F.2d 238 (7th Cir. 1988) (Bauer, C.J.), *cert. denied*, 489 U.S. 1053 (1989).

243. The speech alleged wrongdoing by a high official in the school — a ground for public concern expressly identified in *Connick*. *Id.* at 239, 243. *See supra* note 112 and accompanying text.

244. *Berg,* 854 F.2d at 242. The court used *Connick* to justify its sifting of the public elements of the speech from its "inexorably" private contents by noting that the Court in *Connick* itself had sifted one public speech element from among numerous private elements. *See supra* note 92 and accompanying text.

245. *See supra* notes 168-71 and accompanying text.

246. DEWEY, *supra* note 12, at 15-16 (emphasis added). *See supra* note 164 and accompanying text.

247. DEWEY, *supra* note 12, at 12. *See supra* note 164 and accompanying text.

zation plan in *Callaway*[248] were plainly public in nature (provided at a minimum that her allegations of retaliation under the school reorganization plan and her complaints of sexual harassment were causally linked[249]), because the societal origins of sexual discrimination defy private control and require the "systematic care" and control of the public,[250] completely apart from the motivation of the speaker who brings an instance of this discrimination to the public's attention. The putative corruption of a public official,[251] identified by the speaker in *Berg*,[252] is public under both Dewey's method and the Seventh Circuit's interpretation of *Connick*,[253] despite the speaker's own narrow motivation for speaking about the corruption.[254] Only Dewey, however, has a consistent explanation for treating the speech in both *Callaway* and *Berg* as protected public speech.

The subjective motivation *simpliciter* of the speaker is also not controlling under Arendt, but for a different reason. Genuine public speech *is* subjective in nature, because spontaneous self-expression,[255] among the most authentic of human experiences, can fully appear only in a public world.[256] Private matters, to be sure, cannot provide a completely spontaneous basis for authentic self-expression because they are, properly understood, firmly rooted in the hidden world of necessity.[257] The attack on sexual discrimination in *Callaway*, accordingly, does not lose its public importance simply because it was expressed in an individual, subjective manner and thus grew out of the speaker's personal interest. Indeed, as indicated, this personal or existential origin — if anything — enhances the public character of the speech. The stereotypical destruction of human uniqueness, found in this sort of discrimination, is an attack on the vital human condition of plurality and its concomitant condition — equality.[258] The individual's complaint of debasement is appropriate to the common, public

248. Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987).

249. *Id.* at 415. Besides, the "public[ ] . . . critic[ism]," *Callaway* itself may well have had other content of public concern; the court's opinion is unclear on this point. *Id. See also* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

250. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

251. *See supra* note 243.

252. Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

253. *Id.* at 239, 243.

254. The extent to which the "taint" of private motivation may reach is revealed in Knowlton v. Greenwood Indep. Sch. Dist., 957 F.2d 1172, 1175 (5th Cir. 1992). There the court of appeals held that the public employees' First Amendment claims were barred because private concerns had motivated their speech about pay and working conditions, despite the fact that the court *upheld* the public employer's liability for Fair Labor Standards Act wage-and-hourly violations *and* its violation of the Texas Whistle Blower Act, which protects public employees from retaliation for reporting violations of law by their employer.

255. *See supra* note 192 and accompanying text.

256. *See supra* notes 184, 188 and accompanying text.

257. *See supra* notes 187, 188 and accompanying text.

258. *See supra* notes 190, 191 and accompanying text.

world of spontaneous self-expression. From Arendt's existentialist perspective, such a protest is fully genuine only as the speaker's unique response to her situation. Corruption by public officials, as in *Berg*, also threatens the conditions of a common world of spontaneous actors and speakers by subjecting them to manipulation through private — usually economic — necessity. Repudiation of such corruption thus does not lose its public nature because of its relation to the speaker's rational self-interest.

Taken together in their alternative objective and subjective viewpoints, Dewey and Arendt explain the irrelevance of gauging the speaker's subjective motivation, so long as the speaker's remarks meet their respective standards of public speech. Here they converge in two concrete cases, *Callaway* and *Berg,* in the sense that their respective philosophies — while maintaining doctrinal distinctness — can each explain adequately why the speech in both of these cases should be considered public. Accordingly, taken together, Dewey and Arendt extend the concept of public speech to *Callaway*, while validating and verifying the grounds for recognition of public speech in both cases. Nor is Lippmann's approach, transcendent or *nonempirical* in nature,[259] in conflict with these empirical approaches of disregarding the motivation of speech in classifying it as public. The issue of feminine equality implicated in *Callaway* is, for example, addressed in a transcendent ideal,[260] and therefore is a part of the public world of universal ideas so long as it is not ultimately clouded or concealed by the passion of its particular expression.[261]

(2) The "Balancing" Approach

Similar confusion about the role of subjective purpose appears in the cases of the Third Circuit. In *Rode v. Dellarciprete*[262] the Third Circuit (purporting to follow *Connick*) stated that "*[c]omplete* reliance on [the employee's] *motivation* for speaking is inappropriate."[263] There the employee "did not merely claim that she was being mistreated [subjective private purpose][;] she claimed that she was a victim of retaliation arising out of racial animus [—] a matter of grave public concern."[264] In *Czurlanis v. Albanese*[265] the same court had held that "the motivations underlying" a particular employee's speech would not control the case, especially in view of the fact that its content did not concern "his pay, his hours, or the conditions of his em-

259. *See supra* note 199 and accompanying text.
260. *See e.g.*, Plato, *Republic, reprinted in* THE COLLECTED DIALOGUES OF PLATO 696, 705 (Edith Hamilton et al. eds. & Benjamin Jowett trans., 1961) (addressing equal treatment of women in the ideal state).
261. *See, e.g., supra* note 203 and accompanying text.
262. 845 F.2d 1195 (3d Cir. 1988).
263. *Id.* at 1201 (emphasis added).
264. *Id.* at 1201.
265. 721 F.2d 98 (3d Cir. 1983).

ployment" but instead inefficient government operations, a public subject.[266] The intimation was, however, that the employee's motivation for speaking might have controlled the case, had the speech concerned his "pay . . . hours, or . . . conditions of . . . employment" *more* than it concerned government inefficiency. Finally, the court in *Zamboni v. Stamler*[267] (relying on *Rode*) rejected an argument that the speech was private simply because the employee had a "singular purpose — to invalidate a promotional plan that was adverse to him."[268] Despite its finding "that the [employee] had a personal stake in the speech at issue," the court held that the employee's speech was public because "the comments [that] precipitated the retaliatory actions were made not only in a private meeting . . . but also to the appropriate officials who were in a position to redress [those] actions."[269]

In these cases the Third Circuit has gone beyond the approach of the Seventh Circuit in *Callaway*. Instead of merely using *any* admixture of private motivation to condemn the employee's speech to private status, the Third Circuit implicitly *balances* the subjective purpose of the speech with other factors (chiefly the content of the speech as reflected in its importance to the public at large) to arrive at the determination of the speech's public or private nature under *prong one* or the threshold of the *Connick* test.[270] Under *Connick,* however, only the second prong or stage of analysis (as modeled on *Pickering*) entails the balancing approach.[271] At this second point in the *Connick* analysis, the employee's civic interest in the speech, if *already* recognized under prong one, is *then* balanced against the employer's interests in efficiency and workplace discipline to decide whether the speech will be given effective protection. The Third Circuit is not the only court of appeals to expand this balancing approach to decide the issue formulated in *Connick*'s first prong.[272]

In *Gonzalez v. Benavides*[273] the Fifth Circuit held that "[w]e do not read *Connick* . . . to exclude the possibility that an issue of private

266. *Id.* at 104. The court in *Rode* relied on this part of *Czurlanis*, distinguishing it from the Seventh Circuit's treatment of motivation in *Callaway*. *See Rode*, 845 F.2d at 1201.

267. 847 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988).

268. *Id.* at 77.

269. *Id.* at 78.

270. *But cf.* Versarge v. Township of Clinton, New Jersey, 984 F.2d 1359, 1366 (3d Cir. 1993) (only *after* the threshold prong-one question of public speech is decided does the general public's interest in the speech come into play as additional weight in prong-two balancing, for the employee's interest and against the public employer's interest).

271. *See supra* note 89 and accompanying text.

272. *But cf.* Johnson v. Lincoln Univ., 776 F.2d 443, 451 (3d Cir. 1985) ("If, in fact, the employee's speech is largely composed of matters of only personal concern, that becomes relevant when the [*Pickering*-style] balancing is done, not in the [prong-one] determination whether the speech touches upon matters of public concern.").

273. 774 F.2d 1295 (5th Cir. 1985) (Wisdom, J.), *cert. denied*, 475 U.S. 1140 (1986).

concern to the employee may also be an issue of public concern."[274] The court, in a footnote, revealed its methodology for deciding such " 'mixed' issues of both public and private concern":[275] "*Case-by-case* adjudication requires consideration of 'the whole record', including the 'context' of the speech, to determine whether the speaker addressed an issue of . . . public concern."[276] It added, finally, that "because public employees speak in a great variety of circumstances, individual balancing [on prong one of *Connick*] seems preferable to a predictable but inflexible categorical approach."[277] In ruling for individual case-by-case balancing to determine the constitutional validity of restrictions on speech *content*, the court departed from the Supreme Court's approach of broad classification and categorical balancing to resolve this issue.[278] The Fifth Circuit's opinion thus raises the question *sub silentio* of whether *Connick*'s prong-one requirement, as applied in lower-court cases like *Gonzalez*, departs from the usual Court-sanctioned method of categorical balancing to determine the constitutionality of proscriptions on the communicative content of speech. The *Gonzalez* court would have us reduce *Connick* to ad hoc balancing on both of its prongs without recognition that public speech can be recognized by its content alone under the usual categorical approach. Before, however, this question of departure from *categorical* balancing can be resolved — principally by bringing the clarifying powers of pluralistic convergence to bear directly on *Connick*'s own ambiguities — I must analyze a few other lower courts' handling of contextual subjective purpose to see whether their treatments fit the pattern already established.

(3) Confusion and Conflict in the Lower Courts

I do not analyze the quite extensive lower-court case law exhaustively or in detail, but only enough to show that the patterns already described of treating motivation are both recurrent and in confusing conflict. The Seventh Circuit's approach of finding otherwise public speech to be "tainted" — again, my choice of words — by the presence of any personal motivation[279] has also appeared in a decision of the Eleventh Circuit,[280] where that court held that a public school teacher's personal concerns about enforcing classroom discipline "tainted" his statements about school administration; statements which — when otherwise expressed by the faculty as a whole — en-

274. *Id.* at 1300-01.
275. *Id.* at 1301.
276. *Id.* at 1301 n.10 (emphasis added).
277. *Id.* at 1303.
278. *See supra* note 90 and accompanying text.
279. *See supra* notes 237-40 and accompanying text.
280. Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

joyed the high value of public speech.[281] Other circuits, like the Third, Fifth, and Sixth, have — on occasion — used the "balancing" approach. For example, the Sixth Circuit in *Brown v. City of Trenton*[282] determined the nature of the speech by balancing the speaker's "interest *qua* employee" against "any interest he might have as a member of the general public," and finding the former to be the weightier of the two, disclaimed "any need for *further* [*Connick prong-two or Pickering*-style] 'balancing.' "[283] The "balancing" technique is also followed in the Tenth Circuit.[284] Some circuits are even in conflict with themselves: *e.g.*, the Seventh[285] and the Third.[286] A few courts *have* used the categorical method to determine the prong-one nature of the speech in question: *e.g.*, the Third Circuit[287] and a district court within the Fifth Circuit.[288] It is this last technique — broad classification and categorization — that is supported by *Connick,* when that case is properly interpreted in the light of Court precedents and "context" is given a meaning consistent with these precedents. The framework of convergence, in the way it handles "context" understood as personal motivation, is consistent with the Court's accepted methodology.

281. *Id.* at 1510, 1516 (by implication). *Accord*, Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75, 77-79 (4th Cir. 1988) (employee's personal motivation arguably "tainted" his testimony in a fair employment hearing, indicating that testimony before such hearings is usually of strong public concern). *See infra* notes 355-61 and accompanying text.

282. 867 F.2d 318 (6th Cir. 1989).

283. *Id.* at 321-22 (emphasis added).

284. *See, e.g.*, Conaway v. Smith, 853 F.2d 789, 795-96 (10th Cir. 1988) (speaker's public and private purposes for his criticisms of the public employer are balanced). *Cf.* Starrett v. Wadley, 876 F.2d 808, 817 (10th Cir. 1989) (purporting to follow *Conaway*, where "[p]laintiff testified that her *motive* in speaking out . . . was not purely personal, but stemmed from her concerns as a member of the community" (emphasis added)).

285. Compare the "tainted" approach in Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987), with the arguably "balancing" position in Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989), and with Biggs v. Village of Dupo, 892 F.2d 1298, 1302 (7th Cir. 1990) (arguably either "balancing" or categorical in methodology, but not *Callaway*-style "taint").

286. Compare the "balancing" approach of Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983), Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988), and Zamboni v. Stamler, 847 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988), with the categorical approach of Johnson v. Lincoln Univ., 776 F.2d 443 (3d Cir. 1985).

287. *See Johnson*, 776 F.2d 443, 451 (3rd Cir. 1985).

288. Schweitzer v. University of Texas Health Center at Tyler, 688 F. Supp. 278, 282 (E.D. Tex. 1988) (Justice, J.) ("[The employee's] personal interest in the concern that she expressed does not derogate her claim to First Amendment protection [before the application of *Pickering*-style balancing] . . . . When the topic of the speech is plainly a matter of public interest, it is of little import that the speaker also has a personal interest in it."). *Cf.* Wilson v. UT Health Center, 973 F.2d 1263, 1269 (5th Cir. 1992) (reading *Connick* not to exclude protection for a public employee's speech when it involves a *mixture* of issues of both public and private concern), *cert. denied*, 113 S. Ct. 1644 (1993).

(4) Resolution of the Role of Context in *Connick*

I have already examined how pluralistic convergence can resolve a conflict about "context" in a lower federal court.[289] Now I trace the grounds of that conflict into *Connick* itself and attempt to resolve the ambiguous role of "context" at its very source.

Critical portions of the *Connick* opinion are arguably consistent with treating "context" as subjective motivation and as incorporating it directly into the evaluation of whether the speech in question is public or private. Consider, e.g.:

> Indeed, the questionnaire . . . convey[s] no information at all other than the fact that *a single employee is upset with the status quo*. . . . reflect[ing] *one employee's dissatisfaction* with a transfer . . . .[290]

The passage directly implies that the employee's personal, subjective purpose is relevant to or even controlling in the prong-one inquiry; yet the Court enters a seemingly identical association of "context" with personal motivation on the prong-two balancing side of its analysis.[291] Indeed, Justice Brennan, in dissent, protested that the Court had invalidly "weighed [context] *twice* — first in determining whether an employee's speech addresse[d] a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer."[292]

The upshot is that "context" construed as subjective motive does not belong on the prong-one side of *Connick*. The Court's traditional methodology of categorical balancing to protect classes of speech eschews this factor,[293] and our figures employed in pluralistic convergence theory have also ruled out any material role for motivation at this stage of the analysis.[294] The Court itself, in the milieu of assessing tort liability for remarks about public figures, has expressly ruled out any reliance on a speaker's subjective purpose — considered as "ill-will or *selfish political motives*"[295] — for withdrawing constitutional protection from his speech.[296] Yet, as I have shown, the lower courts

289. *See supra* notes 237-61 and accompanying text.

290. Connick v. Myers, 461 U.S. 138, 148 (1983) (emphasis added).

291. Compare *supra* note 290 and accompanying text, with another treatment of "context" addressed to the prong-two balancing aspect of the case: "This is not a case where an employee, *out of purely academic interest*, circulated a questionnaire. . . . [Rather] the questionnaire emerged after a persistent dispute between Myers and Connick . . . over office . . . policy." *Connick*, 461 U.S. at 153-54 (emphasis added).

292. *Id.* at 157-58 (Brennan, J. dissenting).

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

294. *See supra* notes 245-61 and accompanying text.

295. Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (distinguishing this type of subjective intent from *New York Times* "knowledge . . . or . . . reckless disregard [for truth]") (emphasis added).

296. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988). The Court stated that:

> [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held

have frequently picked up on *Connick*'s equivocal and excessively weighted, duplicative treatment of context as motivation and applied it to the wrong part of their analyses,[297] instead of confining it to the part where balancing is accepted practice.

Other passages of *Connick*, moreover, support an interpretation *consistent* with our figures' visions of the public and with the categorical approach to content restrictions usually followed by the Court. For example, in finding that the aspect of Meyers' questionnaire concerning office-imposed political campaign work was a public issue, the Court stated:

> [T]here is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. . . . Given this history, we believe . . . that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community . . . .[298]

This judicial reasoning about the societal implications of such "political work" is entirely consistent with Dewey's essential understanding of the public as comprised of those persons who are indirectly affected by transactions requiring social control.[299] By the same token, the *Connick* Court's relegation of speech about intraoffice disputes, involving personal employee grievances, to private status is consistent with Dewey's understanding of a private transaction as one whose effects concern only those directly involved.[300]

> that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment: "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did . . . utterances honestly believed contribute to the free interchange of ideas . . . ." *Id.*, at 73, 85 S.Ct., at 215. Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate . . . .

Id.

But cf. Board of Educ. v. Pico, 457 U.S. 853 (1982) (Brennan, J., plurality opinion) (motivation by governmental officials can be a controlling factor in determining level of speech protectedness when content is irresolvably equivocal on this point).

297. *See* Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987), Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), and *supra* text accompanying notes 237-41 and 273-77, respectively.

The resolution of this equivocal use of "context" may lie partly in restricting its meaning of "subjective purpose" to the balancing aspect only, shading its meaning in the earlier *Connick* prong-one analysis more toward the passive one of "surroundings," "circumstances," or "location." *Cf.* City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n, 429 U.S. 167, 176 (1976) (circumstances in which a public employer hears complaints determines the public or private nature of those complaints), and *supra* text accompanying note 106.

298. Connick v. Myers, 461 U.S. 138, 149 (1983) (citations omitted).

299. *See supra* note 164 and accompanying text.

300. *See supra* note 164 and accompanying text.

In addition, to the extent that *Connick* finds speech concerned merely with one's own personal employment status to be private,[301] the Court's ruling is also consistent with Arendt's assignment of underlying biological and economic processes and operations to the private realm.[302] Elevating such concerns to the public realm would, for Arendt, extend undeserved public status to a "society of jobholders," thereby confusing the possibility of free and unique human experiences with the "sheer automatic functioning" of private economic necessity.[303]

Lippmann's relation to the usage of "context" in *Connick* is harder to gauge, given his concern with the transcendent and the Court's usual reliance on positivist jurisprudence; but certainly Lippmann's disdain for particular issues formed only from the clash of individuals' passions[304] is neither inconsistent with the Court's treatment of run-of-the-mine workplace disputes, nor with the corresponding views of our other figures on this matter.

In this manner pluralistic convergence resolves the equivocation in the term "context" in *Connick* by (1) excluding its troublesome sense of personal motivation in the prong-one threshold stage of analysis, and by (2) identifying a meaning (or group of meanings) for the term that is otherwise consistent with the Court's usage in that case (and others) bearing on the issue of public speech. Insofar as "context" refers to the subjective motivation of the speaker, its use to identify speech as public or private should be eliminated altogether from prong-one analysis. Thus any subjective contextual purpose of the speaker ascribed to the passage "Indeed, the questionnaire . . . convey[s] no information at all other than the fact that a single employee is upset with the status quo . . . reflecting one employee's dissatisfaction with a transfer . . .", and to other passages like it in the *Connick* opinion (alluding to the employee's personal dissatisfaction), should

301. At least one court of appeals has so interpreted *Connick*. *See* Wilson v. UT Health Center, 973 F.2d 1263, 1269 (5th Cir. 1992) (holding that "the [Supreme] Court removed from First Amendment protection only that speech that is made *only* as an employee, and left intact protection for speech that is made both as an employee and as a citizen"), *cert. denied*, 113 S. Ct. 1644 (1993). The Fifth Circuit, at least in this case, thus rejects the "taint" theory. But to the extent that the Fifth Circuit in *Wilson* has adopted a categorical approach to prong-one analyis, it is squarely in conflict with its own opinion in Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) in which the panel endorsed a balancing approach. *See supra* notes, 273-78 and accompanying text.

302. *See supra* notes 187-89 and accompanying text.

303. ARENDT, *supra* note 13, at 322. Arendt would also discard from the public realm trivial employment concerns. *Cf. supra* note 193 and accompanying text. *Cf.* Davis v. West Community Hosp., 755 F.2d 455, 461 (5th Cir. 1985) (employee's demands for apologies from fellow workers, and complaints about his parking space, were not matters of public concern).

304. *See supra* note 203 and accompanying text.

be eliminated from analysis in prong one.[305] Ambiguity about whether passages of this sort refer to the speaker's motivation or the substantive quality or content of the speech is removed by eliminating the former and selecting the latter as the perspective from which to interpret each such passage. Both the passage quoted immediately above and the one of a different tenor previously quoted (beginning "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service") can then be given a common usage that focuses on the quality or content of the speech and not simply on the motivation of the speaker. This is a common usage that is consistent with both Dewey's and Arendt's understandings of the distinction between the public and the private — understandings in which the presence of subjective motivation is not decisive. Thus once one turns from the issue of context to the issue of form or content — especially the latter — quotations from *Connick* such as those given above shed most of their ambiguity or equivocation because they can be readily related to substantive views of Dewey and Arendt that offer a very sharp distinction between public and private without reference to the speaker's motivation.[306]

There is also a closely related confusion in the *Connick* opinion which can be cleared up primarily from the perspective of Arendt. The Court equates the concept of the "private" with the notion of "personal interest" in its very holding:

> We hold . . . that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of *personal interest* . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency . . . .[307]

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305. To the extent that the quotation retains any sense of private personal motivation at all, its relevance should be confined to *Connick*'s prong-two balancing stage. *See also supra* note 297 and accompanying text (suggesting that the meaning of "context" in prong one could be shifted to "surroundings," "circumstances," or "location").

306. Thus from a substantive, subject-matter, or "content"-based approach, both Dewey and Arendt would rather clearly tend to see a passage such as that quoted in the text at *supra* note 290, as relating to a private matter, because for Dewey it relates to a closed, intraoffice situation involving those immediately concerned, *see supra* note 164 and accompanying text, and for Arendt it relates to economic affairs and mere job-holding. *See e.g., supra* note 188 and accompanying text. The second quotation, *see supra* note 298 and accompanying text, entailing partisian political demands on public employees, relates, on the other hand, to Dewey's notion that the "public" concerns the indirect consequences of events upon those beyond those immediately involved, *see supra* note 164 and accompanying text, and to a number of Arendt's substantive views, including the effect that such partisan demands could have on the common public world of appearance and freedom. *See, e.g., supra* notes 190-91 and accompanying text.

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

Although the Court's equation of the "personal" with the "private" does not appear to have contributed to any error in the specific outcome of *Connick*, the Court's apparently unreflective association of the two terms displays a confusion that has been picked up by the lower courts, where it may very well have caused error.[308] The point is that, according to Arendt, *all public statements must be personal* in the sense that their very authenticity proceeds from the subjectivity of the speaker.[309] Spontaneity of expression associated with one's *personal* encounter with social reality is part and parcel of Arendt's existentialist viewpoint. While the "personal" might be associated with Arendt's conception of the "private" as well (though in a very diminished sense because the "private" constitutes a realm in which human freedom is greatly diminished), this possibility only points up the additional futility of using a conception of the "personal" to identify the "private" and to distinguish it from the "public."[310]

This pluralistic resolution of ambiguity and confusion in *Connick* reinforces, and is in turn reinforced by, the Court's traditional reliance on a broad-based categorical methodology to distinguish high-value from low-value speech.[311] *Connick* is thus rid of the vexing problem generated by including the speaker's subjective purpose, under the name of "context," in its prong-one analysis; and the lower courts are given a clarified precedent that is conceptually and coherently extended to a plurality of values.[312]

b. The Unusual Role of "Form"

The ancients thought that form is the medium through which reality or substance becomes intelligible to human reason[313] and that form is

308. *See, e.g.*, Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) ("We agree with the district court that [i]n this case, the context and form of the speech leads to the inescapable conclusion that . . . [Callaway's] concern was *personal*, not public.") (emphasis added).

309. *See supra* note 192 and accompanying text.

310. *Cf. supra* notes 248-49 and accompanying text (discussing the Seventh Circuit's error in Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987), of treating the speech in question as "private" simply because it reflects the subjective motivation and situation of the speaker).

311. *See, e.g., supra* note 90 and accompanying text. Professor Ely also finds the categorical approach far more protective of speech content than an approach that directly assesses speech value by balancing it against a non-speech governmental interest. Ely, *supra* note 90, at 1484. Placing the balancing function outside *Connick*'s prong one, and employing it only at the secondary stage of prong two after the speech value has been well defined, assures that the government will not engage in "gratuitous inhibition" of — from the standpoint of Ely's general approach — employee speech, but rather, that its invocation of the efficiency factor will "trigger[ ] a serious balancing of interests" in which the employee's speech interest will require a truly strong governmental interest to outweigh it. *Id.* at 1486.

312. *See also infra* section IV.B.2.c. pluralistically broadening "content."

313. *See, e.g.*, Plato, *Timaeus*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 1178 (Edith Hamilton et al. eds. & Benjamin Jowett trans., 1961)

closely identified with the essence or substance of a thing.[314] Moderns, however, have severed form from substance,[315] and the Supreme Court in *Connick* has followed this practice by identifying "form" with "the manner, time, and place" of the speech[316] — an identification involving content-neutral restrictions, those restrictions unconcerned, in principle, with the substance of the expression.[317]

The Court in *Connick* cited *Givhan v. Western Line Consolidated School District*[318] in order to amplify one instance of what it meant by "form" — size of the audience and thus the generality of dissemination.[319] The choice of *Givhan* seems unusual because Mrs. Givhan had spoken "privately" to an audience of one (her superior).[320] The *Connick* Court, though, reaffirmed its ruling in *Givhan* that this particular *form* of expression is irrelevant to extension of constitutional protection because "statements concerning . . . racially discriminatory policies involve[ ] a matter of public concern."[321] The Court did not explain, either in *Connick* or in *Givhan* itself, how treating as public expression the remarks of a person to a very limited audience can be reconciled with the notion that the term "public" is usually thought to entail expression *generally* accessible to a wide audience.[322] Because of the focus on *Givhan* in explaining what "form" means in relation to the concepts of public and private speech, the analysis of form in *Connick* tends to be swayed by the unusual, even paradoxical implications of this particular usage.

Professor Schauer, who has made a valiant attempt to explain this paradox,[323] identifies at least two plausible solutions: private (i.e., limited) expression may be identified with "the First Amendment right to petition the government [even one official] for a redress of grievances;"[324] or, "[i]n protecting the critic, the gadfly, the Court partially

314. Aristotle, *Metaphysics*, *reprinted in* RICHARD MCKEON, THE BASIC WORKS OF ARISTOTLE 789 (1968).

315. *See, e.g.*, J. Locke, *Essay Concerning Understanding*, *reprinted in* LOCKE SELECTIONS 176-78 (S. Lamprecht ed., 1956) ("pure substance" is unknowable except from its "qualities called accidents").

316. Connick v. Myers, 461 U.S. 138, 152 (1983).

317. *See, e.g.*, Stone, *supra* note 3, at 190-93; TRIBE, *supra* note 90, § 12-3, at 794.

318. 439 U.S. 410 (1979).

319. *Connick*, 461 U.S. at 146. As it did with "context," *see supra* note 292 and accompanying text, the Court also counted "form" twice — once in each prong of its analysis. *Id.* at 146 (prong one), and at 152-53 (prong two).

320. *See* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 412 (1979).

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

322. *Cf.* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206 (1972) ("Typically, the acts of expression with which a theory of 'free speech' is concerned are addressed to a large (if not the widest possible) audience, and express propositions or attitudes thought to have a certain generality of interest.").

323. Frederick Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District., 1979 SUP. CT. REV. 217.

324. *Id.* at 238.

commit[ted] itself to a philosophy of workplace democracy."[325] These explanations for reconciling a very limited or "private" audience to the expression of a public concern, when the subject matter is itself of a public nature, are congruent with the accepted First Amendment value of self-governance and with Dewey's pragmatic approach to identifying and empowering a public through communication of matters of broad concern to the public's agents. They are not, however, readily made consistent with Arendt's concept of the public, which requires expression to be made *generally* to *others* in a *public space*.[326]

In order to make the idea of a private audience somewhat more consistent with Arendt's thought, as well as to bring Lippmann into the picture, I shall recast Schauer's *Givhan* analysis to show that limited dissemination of expression can nonetheless be considered as public (1) where it is spoken or published to an agent of the public in a representative democracy (similarly to Schauer's idea of petitioning the government, though expanded to non-governmental listeners), *or* (2) when it is privately transmitted to a person (usually a representative of the news media) with responsibility for fashioning an interconnected, coherent account of matters of concern to the general public.

(1) "Private Publication" to Agents or Representatives of the Public

The seeming paradox embodied in the term "private publication" can be rendered consistent with ordinary thought through Dewey's idea that agents of the public (whether officials of the state or not) must use information — even if privately generated[327] — to identify and care for the needs of the public.[328]

For Arendt, however, "political freedom [with its essential component of self-expression in a public space], generally speaking, means the right 'to be a [direct] participator in government,' or it means nothing."[329] Since "the Constitution itself provide[s] a public space

325. *Id.* at 262.

326. Unlike Arendt, Schauer thinks that there is such a thing as private self-expression:

> Although self-expression in general is not a First Amendment value, self-expression by communication has been so regarded in numerous opinions of the Supreme Court. . . . When we focus on the interests of the speaker, it is difficult to say that these interests are necessarily diminished by the smallness or *seclusion* of the audience.

Id. at 237-38 (footnotes omitted; emphasis added). *But cf.* ARENDT, *supra* note 13, at 38 ("privacy" entails the "deprivation" of appearance to others in a public space).

327. "The organized community is still hesitant with reference to new ideas of a non-technical . . . nature. . . . A new idea *is* an unsettling of received beliefs; otherwise, it would not be a new idea. This is only to say that *the production of new ideas is peculiarly a private performance.*" DEWEY, *supra* note 12, at 59 (second emphasis added).

328. *Id.* at 15, 67.

329. HANNAH ARENDT, ON REVOLUTION 218 (Penguin ed. 1979).

only for the representatives of the people and not for the people themselves,"[330] only "the representatives of the people . . . [have] an opportunity to engage in those activities of 'expressing, discussing, and deciding' which in a positive sense are the activities of freedom."[331] So-called "private" citizens find that their opportunity to speak publicly on significant issues may be reduced from direct participation to the indirect, quasi-public power of privately addressing and persuading the genuine public actors — those whose words and deeds *do* have a public space in which to appear. This "second best" concept of speaking publicly does support the constitutional protection by the Court in *Givhan* of the teacher's "private encounters" with the school's principal on the indisputably public subject of racial discrimination in the school[332] — provided that the principal himself had a "public space" for "expressing, discussing, and deciding."[333]

Taken together, Dewey's and Arendt's justifications for such private communications to be considered public would support such treatment of speech to a limited audience in decisions reached otherwise in a number of lower court cases. They support, e.g., the decision (reached, of course, on separate judicial grounds) in *Wulf v. City of Wichita*,[334] in which the Tenth Circuit found that a police officer's allegations of misconduct in his department — despite his communication of them by letter to only a single person, the state attorney general — were protected public speech.[335] They would support as well the speech in *Callaway v. Hafeman*[336] as public speech, contrary to the Seventh Circuit, which relied on the fact that a public school adminis-

330. *Id.* at 238.

331. *Id.* at 235.

332. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979).

333. *But cf.* Churchill v. Waters, 977 F.2d 1114, 1120-21 (7th Cir. 1992) (holding that speech of nurse employee of a public hospital could be public in nature when it had been conveyed "privately" in a personal conversation to a fellow nursing employee, who was neither the speaker's supervisor, nor a representative of the public, nor — implicitly — a person who might have had any other basis of her own to speak in a "public space" (citing *Givhan*)), *vacated on other grounds*, 114 S.Ct. 1878 (1994).

334. 883 F.2d 842 (10th Cir. 1989).

335. *Id.* at 860 n.26. *Accord*, Conaway v. Smith, 853 F.2d 789, 797 (10th Cir. 1988) (Tenth Circuit supported as public speech, on alternative grounds, employee's comments on official misconduct made privately to a high-level local official). *But cf.* Thomson v. Scheid, 977 F.2d 1017, 1020-21 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2341 (1993). Here the Court of Appeals held that a public employee's report of possible fraud by a public official was purely a matter of "internal department policy" and thus could not be characterized as public speech, when it was transmitted to the employee's departmental superiors. *Id.* This case seems to be squarely in conflict with the Supreme Court's relevant holdings, because it, too, involves speech identified in *Connick* as being of public concern (wrongdoing by public officials) and which, similarly to the speech in question in *Givhan*, was transmitted to the employee's superiors with administrative responsibility.

336. 832 F.2d 414 (7th Cir. 1987).

trator complained privately to a superior about sexual harassment.[337] Consistently with their understandings, Dewey and Arendt would not support as public speech a border patrol agent's polemical letter to a superior couched as "a personal diatribe against Hispanics [and] Catholics."[338] "The letter did not discuss the *general problem* of the rights of illegal aliens [who are Hispanics and Catholics], but merely . . . the . . . [official document] used to inform . . . [such aliens] of their hearing rights."[339] For Dewey the failure of the speech to address a "general problem" (as the court of appeals found) would also make it unfit for the process of forming a public through discussion of consequences having broad effect, while for Arendt this same failure would make the border patrol agent's remarks unfit to appear in a public space, either directly or through an intermediary.

(2) Private Communication Resulting in the Public's Receiving Coherent Information About Its Concerns

As Dewey points out, "[a]n inchoate public is capable of organization only when indirect consequences are *perceived.*"[340] The news media are indispensable for this vital function of informing the public; yet they often fail:

> Without coordination and consecutiveness, events are not events, but mere occurrences, intrusions; an event implies that out of which a happening proceeds. Hence even if we discount the influence of private interests in procuring suppression . . . we have here an explanation of the triviality and 'sensational' quality of so much of what passes as news. The catastrophic, namely, crime, accident, family rows, personal clashes and conflicts, are the most obvious . . . breaches of continuity; they supply the element of shock which is the strictest meaning of sensation; they are the *new* par excellence, even though only the date of the newspaper could inform us whether they happened last year or this, so completely are they isolated from their connections.[341]

Lippmann, from his own perspective, agrees that:

337. *Id.* at 415, 416. The court's explanation that the speaker herself did not want the dispute to be made public, thus putatively canceling any civic importance which it might have had, is inconsistent with Dewey's dictum that public speech is not dependent on the speaker's motive, *see supra* notes 168, 245-46 and accompanying text, and with Arendt's theory that representatives of the public have freedom to speak and act, and thus are not merely "glorified messenger boys" inexorably bound by the instructions of their constituents. ARENDT, *supra* note 329, at 237.

338. Mings v. Department of Justice, 813 F.2d 384, 387 (Fed. Cir. 1987). *But cf.* R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992) (generally holding that racially bigoted remarks are immune from content-based proscriptions).

339. *Mings*, 813 F.2d at 388 (emphasis added). The court of appeals, citing *Givhan*, did hold that "[t]he fact that the . . . letter was directed to an agency official rather than to the public at large would not preclude a finding that . . . [it] addressed a matter of public concern." *Id.*

340. DEWEY, *supra* note 12, at 131 (emphasis added).

341. *Id.* at 180.

> Living adults share, we must believe, the same public interest. For them, however, the public interest is mixed with . . . their private and special interests [associated with passion and sensationalism]. Put this way, we can say . . . that the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently.[342]

Thus a private communication by a public employee to a representative of the news media should be regarded as public speech, so long as the communication is calculated to become part of an interconnected and reasoned general disclosure to large segments of the public, and does not merely lead to reporting of isolated, random, and sensational happenings.

Just such a contribution to a coherent, interconnected explanation of a matter of public concern occurred when an employee reported incidents of racial discrimination within a public agency, "especially in light of the prior protracted history of litigation against [the agency] charging it with racial animus in its employment practices," as well as a legislative investigation into the same matter.[343] Similar grounds would protect the critical remarks about police department administration, given to the press by a police officer in a private interview, when the officer said "it's . . . hard to distinguish the politicians from the criminals," and then linked this caustic remark "to his more general criticism of [city] officials' interference in the police department's affairs."[344]

c. *The Primacy of "Content" — Major Themes*

By arguing against controlling influence for either "context" (understood as the speaker's subjective motive) or "form" (understood as breadth and scope of dissemination), I have — through *negative* argument or refutation — left "content" as that aspect of public speech which, even if not altogether controlling itself, tends to be the predominant consideration in determining whether speech is public. My position is also *positively* supported by the case law itself. For example, the Court in *Connick* elevated to the level of public speech that part of Ms. Meyers' office questionnaire concerned with political campaign work (a matter of content or substance), despite the fact that it had been distributed to only fifteen persons in a single government

342. LIPPMANN, *supra* note 14, at 42. *See also id.* at 126 (freedom of speech in the public interest avoids inciting the passions of the people).

343. Rode v. Dellarciprete, 845 F.2d 1195, 1201-02 (3rd Cir. 1988). The court also found it significant that the news reporter initiated contact with the employee. I believe, however, that such a circumstance should be construed merely as *evidence* of the private comment's relevance to an interconnected report of a matter of public concern (just as the litigation and hearings were such evidence), and not as an element *per se* to a finding of public speech.

344. Biggs v. Village of Dupo, 892 F.2d 1298, 1300, 1302 (7th Cir. 1990); *see also* Matulin v. Village of Lodi, 862 F.2d 609, 613 (6th Cir. 1988) (following *Rode*).

office (a matter of form).[345] In *Givhan* the Court gave controlling force to the public importance of the employee's words over the extremely narrow scope of their communication.[346]

In the course of my attempt to show the role that context and form should have, I have also set out and amplified how the practice of pluralistic convergence — modeled substantially after Professor McKeon's schema — can be used to arrive at stable and more definitive criteria for finding instances of public speech. I have also attempted to show how its acceptance dovetails with traditional Court practice in setting up categories of speech with different degrees of constitutional protection.[347] For example, I have used the thought of Dewey and Arendt to dispose of the need to focus on the speaker's motivation in the name of "context," by showing that — on the one hand, for Dewey — it is only the objective content of the speech that has public value;[348] and that — on the other hand, for Arendt — the very subjective uniqueness of the speech is a condition necessary for that speech to have a public character.[349] Together with Lippmann's congruent views on the transcendent,[350] Dewey and Arendt provide means to escape the ambiguous or equivocal relation of "context" to public speech in the *Connick* opinion.[351] By the same token, I have used this approach to remove a paradox in the relation of "form" to public speech, when that term is used to encompass the unusual *Givhan* sense of "private."[352]

Now I intend to follow up these earlier arguments for the practical usefulness of pluralistic convergence by focusing directly on "content" itself — both on recurring themes and on nascent issues found in the scattered case law. I begin with two strong issues of public policy, one well recognized and the other reasonably well established.

(1) Issues of Heightened Public Concern

(a) Racial, Sexual, and Other Invidious Forms of Discrimination

The Supreme Court in *Connick*, following its precedent in *Givhan*, has found that the "right to protest racial discrimination [is] a matter . . . of public concern," regardless of the form or context in which the

345. Connick v. Myers, 461 U.S. 138, 141, 149 (1983). *See supra* notes 63, 243 and accompanying text. *See also* Berg v. Hunter, 854 F.2d 238, 243 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989) (misuse of public funds controls over aspects of private employment dispute); Zamboni v. Stamler, 847 F.2d 73, 78 (3rd Cir. 1988), *cert. denied*, 488 U.S. 899 (1988) (citing *Connick*); Johnson v. Lincoln Univ., 776 F.2d 443, 451 (3rd Cir. 1985).

346. See supra notes 82-83, 318-22 and accompanying text.

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

348. *See supra* notes 168-70 and accompanying text.

349. *See supra* note 193 and accompanying text.

350. *See supra* notes 199-203, 205 and accompanying text.

351. *See, e.g., supra* notes 299-306.

352. *See, e.g., supra* notes 327-44.

protest occurs.[353] I have already shown in one area of invidious discrimination — sexual discrimination — how our three figures and their thought can converge to make such protests of a public character: for Dewey, racism and other forms of stereotypical discrimination are of a social origin that requires systematic regulation by agents of the public; for Arendt, such discrimination violates the norms of individual uniqueness and of human plurality in a common world; and for Lippmann, the relegation of treatment of persons to irrational stereotyping violates the transcendent ground of rational values.[354]

The lower federal courts, from their judicial perspective, have illustrated the importance of these issues as matters of public concern. In *Johnston v. Harris County Flood Control District*,[355] the Fifth Circuit found that a public employee's testimony before an Equal Employment Opportunity hearing in a *closed* meeting of the county commissioner's court, despite the fact that a *personnel dispute* about another employee's *private* interest was involved, constituted a matter of public concern under the First Amendment, as well as implicating section 703(a) of Title VII of the Civil Rights Act of 1964.[356] Section 703(a) protects an employee from disciplinary action for charging or assisting in a charge of racial, sexual, or other unlawful discrimination under Title VII.[357] Thus speech about racial discrimination and sexual discrimination[358] in a public job are plainly of public concern, and the

353. Connick v. Meyers, 461 U.S. 138, 148 n.8 (dictum).

354. *See supra* notes 164, 191, 201-02 and accompanying text.

355. 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

356. *Id.* at 1577 (construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1982)).

For public employees, the circuits are split over whether the filing of an EEOC charge and a civil rights lawsuit are *inherently* protected by the First Amendment. *Compare* Yatvin v. Madison Metro. School Dist., 840 F.2d 412 (7th Cir. 1988) (First Amendment issue depends on facts of each case) *with* Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) (First Amendment protects filing of lawsuit and charge). ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYMENT DISCRIMINATION LAW, 1987-1989 Supp. 81 & n.37 (2d ed. 1991).

See also Wilson v. UT Health Center, 973 F.2d 1263, 1270 (5th Cir.1992) (holding that failure of public employee's claim pursuant to 42 U.S.C. § 2000e-3(a) does not vitiate a First Amendment claim based on the same incident).

357. *See, e.g.*, The Civil Rights Act of 1964, § 703(a)(1)&(2), 42 U.S.C. § 2000e-2(a)(1)&(2) for the primary proscriptions on such discrimination in employment.

358. *See supra* notes 237-39, and accompanying text. *See also* Starrett v. Wadley, 876 F.2d 808, 812, 814, 816 (10th Cir. 1989) (employee's complaint of sexual harassment unchallenged as a matter of public concern); Matulin v. Village of Lodi, 862 F.2d 609, 612-13 (6th Cir. 1988). In *Starrett* the court of appeals complained that the public agency's "brief on appeal demonstrates shocking obliviousness to the menace of sexual harassment in the workplace." *Starrett*, 76 F.2d at 815. The brief stated, *inter alia*:

> [I]f an improper remark is passed in the office or if the boss gets drunk and makes a pass at a secretary, whether serious or not, it's a jury question and a feast of lawyer's fees. . . .
>
> How much is it worth to a plaintiff if her boss flips her the finger? How much if she "thinks" he made an obscene gesture? . . . How much per pinch

statutory policies against them carry over to section 1983[359] constitutional free-speech actions. Speech about other types of statutorily prohibited workplace discrimination, including discrimination against persons with disabilities,[360] would also be protected.[361]

(b) Judicial, Legislative, and Administrative Proceedings

Where proceedings designed to bring certain matters to public light are concerned, "content" becomes closely associated with the process of airing and resolving the issues that emerge in these proceedings. John Hart Ely's focus on constitutional process in general, and in particular his view that "[t]he expression-related provisions of the First Amendment . . . [serve the process of] ensur[ing] the open and informed discussion of political issues,"[362] is an example of this kind of merger of substantive norms into process. By the same token Dewey and Arendt also tend to view the process *simpliciter* of public speech as the source of public values. In contrast, Lippmann sees substantive truths that exist apart from human discourse, although informed and reasoned discussion is certainly a means of approaching these truths.[363]

The Supreme Court, from its perspective, emphasized the value of process in conferring content protection on employees' speech in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*,[364] when it overturned the proscription that a Wisconsin statute — as interpreted by that state's labor relations agency and its supreme court — placed on rank-and-file school employees' addressing the school board about negotiations with the union. The teacher who was affected had addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government.

> Where the state has opened a forum for direct citizen involvement [in agency proceedings], it is difficult to find justification for exclud-

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on the rear? . . . Is this the sort of raw meat that should be thrown to a jury with no more . . . instruction than to do right?

Id. at 815 n.9.

359. 42 U.S.C. § 1983 (1982).

360. Matulin v. Village of Lodi, 862 F.2d at 612-13. For statutory proscriptions against disability discrimination, see sections 501(b), 503 & 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791(b), 793 & 794(a); tit. I, §§ 101-08 of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111 & note 12117 (1990).

361. *But cf.* Knowlton v. Greenwood Indep. Sch. Dist., 957 F.2d 1172, 1177 (5th Cir. 1992) (school employees complaining of unpaid work in violation of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, held to have engaged in private speech only).

362. JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 93-94 (1980).

363. *See* LIPPMANN, *supra* note 14, at 124-25.

364. 429 U.S. 167 (1976).

> ing teachers . . . who are most vitally concerned with the proceedings. . . .
>
> . . . Whatever its duties as an employer, when the board sits in public meetings to conduct public business and *hear the views of citizens*, it may not be required to discriminate between speakers on the basis of their employment, *or the content of their speech*.[365]

Thus content protection becomes identified with the process itself of "hearing the views of citizens" in a forum set aside for this purpose.

A court of appeals has even extended this process-based protection of an employee's speech to proceedings before a *closed* meeting of an administrative body.[366] In the same manner the right of a public employee to participate in the judicial process is protected. So in a case where a police officer both furnished exculpatory evidence to a criminal defendant's attorney and subsequently testified at trial on the subject of the defendant's guilt or innocence, his speech was protected under *Connick*.[367]

Such protection also extends to legislative hearings. In *Patteson v. Johnson*,[368] the Eighth Circuit held that the Nebraska deputy state auditor's invited testimony, before a state legislative committee where he favored passage of a public bill to require the state auditor to be a certified public accountant, constituted public speech. "[A]s a citizen, as a deputy auditor, and as a CPA, Patteson had a legitimate and substantial interest in speaking his support for the proposed legislation and to speak truthfully in direct response to questions . . . which related to the proposed legislation."[369]

(2) Self-Expression

Despite Justice Brandeis' famous encomium to the value of self-expression in realizing political liberty,[370] commentators have had some difficulty in properly locating self-expression in the pantheon of First Amendment values. Dean Stone, for example, seems to assign a

365. *Id.* at 175-76 (footnote omitted) (all emphasis added).

366. Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1577-78 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). *But cf.* Arvinger v. Mayor of Baltimore, 862 F.2d 75, 78 (4th Cir. 1988) (employee's testimony at co-worker's fair employment hearing was not found to be of public concern).

367. Melton v. Oklahoma City, 879 F.2d 706, 711, 713-14 (10th Cir. 1989), *vacated in nonrelevant part on rehearing en banc*, 928 F.2d 920 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 296 (1991). *Accord*, Buzek v. County of Saunders, Nebraska, 972 F.2d 992, 994, 995 (8th Cir. 1992) (public employee's letter to judge about "[t]he proper sentencing of [a] convicted criminal[ ] is clearly a matter of public concern").

368. 787 F.2d 1245 (8th Cir.), *cert. denied*, 479 U.S. 828 (1986).

369. *Patteson*, 787 F.2d at 1248 (quoting from the district court's memorandum decision). *See also* Martinez v. City of Opa-Locka, Florida, 971 F.2d 708, 712 (11th Cir. 1992) (per curiam) (public employee's speech was clearly a matter of public concern when it was about the unlawful expenditure of public funds and was expressed in testimony before the city's legislative body and in statements to an investigator from the public prosecutor's office).

370. Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

lower value or a restricted field of First Amendment application to self-expression. "Unlike the self-governance and search for truth theories, the self-fulfillment theory does not turn on competition among ideas."[371] Besides seeming to agree with Schauer that there is such a thing as "private" self-expression needing no public space for its revelation to others,[372] Stone fails to note that the "self" *itself* is an idea in its liberal, Lockean connotation.[373] Furthermore, Dewey's idea of the "self" — unlike the Lockean concept of isolated mental substances having no natural social interconnections[374] — is *ex proprio vigore* dependent on relations to others in a socio-political, and quite plausibly competitive context.[375] Finally, constitutive self-expression as propounded by Brandeis and Arendt supports the communication and *competition* of ideas — *political* ideas.

Obviously, then, the constitutive value of self-expression and the instrumental value of furthering political self-governance are closely intertwined in this inquiry, because Brandeis and Arendt exalt *political* self-expression. The question of how *non*political self-expression

371. Stone, *supra* note 3, at 198 n.32.

372. *Cf.* Schauer, *supra* note 73, at 239 (asserting that private and direct communication with a government official is also protected self-expression).

373. LOCKE, *supra* note 315, at 186-87.

> [B]y putting together the *ideas* of thinking, perceiving, liberty, and power of moving themselves, and other things, we have as clear a perception and notion of immaterial substances, as we have of material. For putting together the *ideas* of thinking and willing, or the power of moving or quieting corporal motion, joined to substance of which we have no distinct idea, we have the *idea of an immaterial spirit* [the self] . . . . [W]hilst I know, by seeing or hearing . . . that there is some corporeal being without me, the object of that sensation; I do more certainly know, that there is some spiritual being within me, that sees and hears.

Id. (emphasis added).

374. LOCKE, *supra* note 315. *See also* F.S.C. NORTHROP, THE MEETING OF EAST AND WEST: AN INQUIRY CONCERNING WORLD UNDERSTANDING 87 (1947) ("Because Locke's philosophical theory of a person as a mental substance prescribes no relation between the persons, or mental substances, making up society, there are no social laws prescribed, either by God or by nature.").

375. *Cf.* JOHN DEWEY, HUMAN NATURE AND CONDUCT 18, 79-81, 128-31 (Modern Library ed. 1957) (1922).

> If any . . . theory [which recognizes the individual self] is objectionable, the objection is against the character or quality assigned to the self. . . .
>
> Other persons are selves too. If one's own present experience is to be depreciated in its meaning because it centers in a self, why act for the welfare of others? . . .
>
> To say that the welfare of others, like our own, consists in a widening and deepening of the perceptions that give activity its meaning, in an educative growth [of the self], is to set forth a proposition of *political import.*

Id. at 269-70 (emphasis added).

Cf. Arendt, *Revolution and Public Happiness*, 30 COMMENTARY 413 (1960) ("[T]he contents of the [original] Constitution — that is, the creation and partition of power . . . [gave] rise [to] a new realm where, in the words of Madison, 'ambition would be checked by ambition' (the ambition, of course to *excel* and be of 'significance,' not the ambition to make a *career*)."). *Id.* at 419 (emphasis added).

should be addressed also arises. This issue is more difficult because of the meagre stock of case law which can be considered on point. Our figures, however, have indicated that nonpolitical expression does have a role in defining or serving "the public."[376]

Unfortunately, as I have indicated, there are very few cases that seem to turn on self-expression, in either its political or nonpolitical sense, in drawing the public/private speech distinction. In one such case, *Wilson v. City of Littleton, Colorado*,[377] a police officer, who had "shrouded" his badge with a black band out of respect for a policewoman in another town who had died in the line of duty, was discharged after his refusal to remove it. The court held that his symbolic expression was not public in value because the officer's "personal feeling of grief is not a matter 'of public concern' within the meaning of *Connick*."[378] Here the court, on judicial grounds, found the officer's seemingly unobtrusive display not to be public on what appears to have been an unduly narrow basis. In contrast, the deaths of police officers in enforcing order in society is of public concern both under Dewey's need to examine problems of general social importance and under Arendt's need to provide a public space for concerns other than the banal or the trivial. The fact a police officer has died in the line of duty is not trivial, and the fact that an expression of grief is "personal" simply adds to its authenticity. Moreover, the officer's display of grief did not seem to occupy a disproportionate space in the public realm and showed no tendency to hinder efficient police operations.

The court of appeals in one case, on the other hand, went further than Dewey and Arendt would appear to go in extending public-speech status to self-expression. In *Berger v. Battaglia*,[379] the Baltimore police department had disciplined an officer for his off-duty performance in so-called "blackface" comedy, though his performance did not directly offer any comment on police operations.[380] Purporting to apply the *Connick* test, the court held that "Berger's performances clearly were not purely personal expressions of no concern to the community. Rather, they constituted speech upon a matter of obvious public interest to those considerable segments of the community who willingly attended and sometimes paid to see and hear them."[381]

To the contrary, although a purely "private" citizen might well engage in "blackface" entertainment, especially in view of the Supreme

376. *See supra* notes 178-79, 194 and accompanying text.

377. 732 F.2d 765 (10th Cir. 1984).

378. *Id.* at 768-69. The court found that, "[had] a police officer [been] shot during an ongoing public controversy over the expenditure of public funds to purchase bullet-proof vests for the police force, the topic of police officers' deaths clearly would be of general interest." *Id.* at 769 n.2.

379. 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

380. *Id.* at 993.

381. *Id.* at 999.

Court's recent holding in *R.A.V. v. City of St. Paul*[382] that racial stereotypes and invective *can* be protected from content-based proscription, a police officer's use of offensive stereotyping is distinguishable from the former situation because it can encourage the general public to associate bigotry with the very public institution charged with "front-line" maintenance of law and order. Indeed, on judicial grounds as well, such speech by a police officer could well fall outside the scope of full First Amendment protection, without regard to its content as such, because of its unfavorable "secondary effect" on the public's perception of the police force.[383] From both Dewey's and Arendt's perspectives, a proper evaluation of the officer's "expression" should also have considered as decisive the danger that such expression would have conveyed a perception of official condonation of racism to persons (either inside or outside the department) who knew the official identity of the "blackface" actor. Public perceptions of bigotry in the police would be inimical both to Dewey's requirement that public organs must be shaped by the rational needs of the public and to Arendt's concept of a public space where a plurality of free and equal persons can appear.[384]

382. 112 S. Ct. 2538 (1992).

383. *Id.* at 2546 (citing the "secondary effects" doctrine of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), as a ground for withholding content protection).

384. Arguably this type of analysis of *Battaglia*, as offered by me, tends to shift away from *Connick*'s prong-one emphasis on the nature of the speech to prong-two disruptive-effects balancing. This is the approach taken by the court of appeals in Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992). There an employee of a public agency — the function of which was "to foster [mutual] understanding and tolerance among all of Miami's ethnic groups" — gave an off-duty sermon negative toward Hispanics, in his capacity as a Baptist preacher. *Id.* at 1238. The court held that the sermon met the prong-one public-concern threshold, *Id.* at 1237, but went on to hold that the "substantive danger posed by the speech to the agency's successful functioning" outweighed, in prong-two analysis, the employee's interest in free speech. *Id.* at 1237-38.

See also Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989), in which certain police officers were disciplined for their off-duty operation of a video store selling sexually explicit (but nonobscene) video cassettes. The court of appeals found that their free-speech rights had been violated. It held that "[T]he public concern prong of the *Pickering/Connick* test cannot be applied to a case of nonverbal expression that does not occur at work or is not about work," and thus the officers' "expression" could not be prohibited through the application of this test. *Id.* at 1564. In the alternative, *and directly relevant to the issue discussed in this note*, it held that under Supreme Court precedents this type of expression has sufficient protection to outweigh, in stage-two *Connick* balancing, any adverse *effect* on the officers' employment. *Id.* at 1565-67. It should be noted that the police chief had expressed his concern that "if members of the public knew that officers were renting [such materials], negative public feelings about the distribution of sexually explicit films would erode the public's respect and confidence in the police department." *Id.* at 1566.

Nonetheless, the positions taken by Dewey, Arendt, and Lippmann seem comprehensive enough to encompass the effect of speech upon the public realm within their very conceptions of what public speech means. Thus keeping this kind of "effects" test within prong-one definitional analysis seems appropriate.

Berger v. Battaglia is both unusual and important for this inquiry because it seems to be a case in which a court of appeals used a form of artisitic, nonpolitical expression to label self-expression as public speech. Though both Dewey and Arendt are open to treating nonpolitical expression as speech of concern to the public,[385] *Berger v. Battaglia* is not, for the reasons given above, a case that would illustrate their views on this matter.

(3) Exclusion of the Banal, the Trivial, and the Sensational from the Public Realm

I have by now visited and revisited our figures' convictions that the trivial, the banal, the merely titillating, are not within the realm of the public.[386] One case, *Swank v. Smart*,[387] seems to epitomize the convergence of judicial reasoning with our figures' thinking on this point. A police officer was discharged for "conduct unbecoming an officer" when he, while off duty, "picked up" a seventeen-year-old girl for a late-night ride on his motorcycle. The officer charged that his resulting dismissal "deprived him of his freedom of speech, freedom of locomotion, and freedom of association."[388] Judge Posner quickly dispatched the free-speech claim:

> Casual chit-chat [—] a conversation idle or flirtatious in character [—] . . . is unrelated . . . to the marketplace of ideas . . . . and is not protected. Such conversation is important to its participants but not to . . . [the] objectives, values, and consequences of . . . speech that is *protected* by the First Amendment.[389]

Judge Posner's holding may be interpreted to follow Professor Schauer's observation that some speech is "covered [but] not necessarily protected" under the First Amendment.[390] Private speech such as these "flirtatious" trivia may be "covered" (unlike, e.g., so-called "fighting words" and obscenity, which are totally stripped of First Amendment "coverage"[391]); but because of its low value it may not always be "protected," especially when balanced in the matrix of *Connick/Pickering* counter-values.[392]

Having considered the application of the pluralist approach to public and private speech in public employment, I now turn to its application in the constitutional law of defamation.

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385. *See supra* notes 178-79, 194 and accompanying text.

386. *See supra* notes 173-75 (Dewey); 193 (Arendt); and 203 (Lippmann) and accompanying text.

387. 898 F.2d 1247 (7th Cir.), *cert. denied*, 111 S. Ct. 147 (1990).

388. *Id.* at 1250.

389. *Id.* at 1251 (emphasis added).

390. Schauer, *supra* note 73, at 228.

391. *Id.* (especially nn.49-50 and accompanying text). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

392. *See* Schauer, *supra* note 73, at 228.

C. Defamation

As I have already explained,[393] the Supreme Court — beginning with its landmark decision in *New York Times Co. v. Sullivan*[394] — began to impose a constitutional grid on the common law of defamation by which the plaintiff, depending on his public or private status as the person putatively defamed, is required to show various states of mind by the defendant in order to prove up his case. As the law of constitutional defamation has subsequently evolved, two major factors — the quality of the speech as public or private (as that quality relates to the constitutional value of the speech) and the status of the person targeted by the speaker's words (as that status bears on the targeted person's state-law reputational interest) — have been balanced to arrive at the required state of mind of the speaker who is the defendant. In *Rosenbloom*,[395] *Gertz*,[396] and finally *Greenmoss Builders*,[397] the Court zig-zagged between giving prominence to the nature of the speech or to the status of the speaker's target in determining whether "actual malice", "fault", or strict liability would establish the plaintiff's required proof of the speaker's state of mind (or, in the case of strict liability, no proof of state of mind at all). Thus in some sense balancing is going on in the constitutional defamation cases, similar to the balancing in *Connick*. This balancing is analogous to *Connick*'s because the weight given to the public or private nature of the assertedly defamatory speech corresponds to the weight given to speech found to be public in the first prong of *Connick* when it is placed on the prong-two scales derived from *Pickering*. Similarly, the factor of the public or private status of the person allegedly defamed (which relates to the speech-neutral interest of state-law protection for the interest in reputation identified in *Gertz*) corresponds to the speech neutral interest of governmental efficiency which is placed in *Connick*'s prong-two scales to counterbalance the public value of the speech itself.[398]

393. *See supra* notes 125-46 and accompanying text.

394. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

395. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

396. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

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

398. Dean Stone implies that some kind of "balancing" between the nature and value of the speech and opposing factors occurs and is of the broad categorical type. *See* Stone, *supra* note 3, at 25. The class of speech consisting of "false statements of fact" is given low value in *Gertz*. *Id.* at 194 & n.15. "[C]ategorical balancing . . . defines the precise circumstances in which the speech may be restricted." *Id.* at 195.

Professor Tribe, on the other hand, seems to acknowledge, at least in the case of *Greenmoss Builders*, that the balancing of interests can be *ad hoc*. TRIBE, *supra* note 90, at § 12-13, 878 & n.32. "Where the law is closely confined to the narrow [state-law] purpose of compensating private individuals for injury to their reputational interests, the law is aimed at something other than content . . . . Defamation law in this sense is ideologically neutral, and therefore is remitted to a [case-by-case] balancing test." *Id.*

Professor Tribe explains how the difficulty of identifying the nature of "public speech" has become manifest in the defamation cases:

> As *Dun & Bradstreet [v. Greenmoss Builders, Inc.]* so clearly demonstrated, the *Gertz* Court hardly settled all the issues on the non-public side of libel law [i.e., the issues related to the public or private status of the person allegedly defamed and his interest in reputation]. The courts have scarcely begun the task of differentiating between [the distinct] issues [of whether *speech* is] of public . . . [or] private concern — a subject one can fairly assume will give judges at least as much difficulty as the public figure-private figure distinction.[399]

Because *Greenmoss Builders* incorporated the public/private rationale of *Connick*,[400] the McKeonite schema for fixing common terms with shared meanings for public and private speech in the public employment cases may be transferred to the defamation cases intact. Unlike the former class of cases, however, I do make an attempt to explore the role of the non-speech element to be balanced against the nature of the speech — here, the public or private status of the speaker's target and that person's corresponding content-neutral state-law interest in reputation.[401] Besides generally clearing up the definitional contours of public and private speech, my more specific aim is to complete the logical schema of the categories of protectedness in constitutionalized defamation law, announced but left incomplete in *Hepps*,[402] by showing the converse of *Gertz*, *viz.*, that *private* speech can be associated with *public* figures.[403] This part of the schema — matching *private* speech with a *public* figure — was, of course, left incomplete in my earlier formulation of the *Hepps* schema.

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399. TRIBE, *supra* note 90, at § 12-13, 882.

400. *See supra* notes 142-43 and accompanying text.

401. I go beyond the scope of my inquiry into the *Connick* genre of cases, *see supra* notes 90-91 and accompanying text, because the problem addressed here is somewhat different from the problem addressed in *Connick*. There the problem was to identify the analytically distinct basis for labeling speech "public" under prong one. Here the problem is defined differently because I have adopted, as the problem for resolution, the completion of the schema in *Hepps*. That problem requires not merely a resolution of *what public speech is* (though this is certainly an issue carried over from my analysis of *Connick*), but also (in addition) a resolution of how the state-of-mind element in a defamation case is determined by the relation (as balanced) between (1) the public or private nature of the speech in question, and (2) the plaintiff's content-neutral interest in reputation (as derived from his own public or private status). Stated somewhat differently, while *Connick* and its related cases present a problem of public speech analytically distinct from the content-neutral value ultimately weighed against that speech, *Hepps* presents a problem in which those two values or elements are too intertwined to isolate the nature of the speech for completely separate analysis.

402. *See supra* notes 145, 146 and accompanying text.

403. *See supra* note 136 and accompanying text. *Gertz* balanced the reputational interest of the *private* figure against the *public* nature of the speech.

One case in particular, *Dworkin v. Hustler Magazine, Inc.*,[404] brings to a head this very question of whether an acknowledged public figure exposes her entire life to the public, or retains some "hidden" life about which "private" speech is both possible and actionable as defamatory. Andrea Dworkin, an acknowledged feminist and public figure, putatively suffered pornographic attacks in Hustler Magazine, and sued, *inter alia*, for libel. On an alternative ground for affirming summary judgment against her, the Ninth Circuit held that Dworkin had not proven the state-of-mind element of "actual malice" required of a public figure in *New York Times*.[405] Evidently asserting that some defamatory private *facts* (and not merely opinions or outrageous caricature[406]) were associated with the pornographic portrayals of her, Dworkin argued that " 'defamatory comments made [about a public figure but] on issues not of public concern' disseminated in a 'pornographic' publication should receive no first amendment protection [i.e., strict liability should be imposed]."[407] The court rejected this claim, asserting that only *public* speech was at issue.[408] Dworkin also asked the court to extend *Greenmoss* "to public figure/private concern cases."[409] Had it done so, the court would have filled in (in some manner) the logical gap that I have claimed exists in the schema devised by the Supreme Court in *Hepps*. The court, though, responded: "[W]e doubt that it is possible to have speech about a public figure but not of public concern."[410]

Viewed from the perspective of both the Supreme Court and of my philosophers of the public, both Dworkin and the court of appeals were wrong, but in different ways. Strict liability, as urged by Dworkin, is not appropriate here on judicial grounds. Instead, the strong reputational interest of the *public* target of the speaker's words concerning her *private* life must be balanced against the competing First Amendment interest of the press or others in a public figure, to yield an *intermediate* level for the speaker's state of mind, "fault" (usually negligence), to be proven by the plaintiff. This reasoning is consonant with and symmetrical to the balancing approach taken in *Gertz*, where a First Amendment interest in dissemination of *public* information was balanced against the competing interest of a *private* plaintiff in his reputation, leaving an intermediate level of "fault" to be proven.[411]

404. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989).

405. *Id.* at 1194.

406. *See* generally, Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (protecting such hyperbole as public speech).

407. *Dworkin*, 867 F.2d 1188, 1195 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989) (second alteration added).

408. *Id.*

409. *Id.* at 1196.

410. *Id.* at 1197.

411. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-46 (1974).

Here the same *weights* are balanced, but their respective assignments to the competing interests placed in the constitutional scales are switched. The result, as indicated, is the same: an intermediate state of mind ("fault") between the extremes of actual malice and strict liability.

The Ninth Circuit, moreover, was wrong in claiming that a public figure has no private life and thus no protected reputational interest in preserving this "hidden" domain from public scrutiny. Showing how and why the court of appeals was wrong is critical to resolving the problem of the logical gap in the *Hepps* schema, and the views of Dewey and Arendt establish why even the most public of persons must be deemed to have a private dimension that generates speech of a *private*, not public character.

The entire point of Dewey's *The Public and Its Problems* is to "differentiat[e] . . . political association from other forms of association and of the 'public' from the numerous other groups of men in association."[412] Issues arising from the trivia of sensationalism are, in a very real sense, offensive to the reasonable person, insofar as these trivia deflect reason from its essential function of developing human freedom through rational choice and deliberation in public affairs. For Arendt, the break between the public and private realms may be even sharper. While the authentic self affirms its being only by display in a public realm, there are preconditions of the self, concerned with the biological and economic aspects of mere life, which "need to be hidden"[413] because "[a] life spent entirely in public, [always] in the presence of others, becomes . . . shallow. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, nonsubjective sense."[414] Thus even the most public man must have a private life protected from exposure to avoid the loss of the underpinnings of his public self. For both Dewey and Arendt private matters deserve protection because their abuse through general communication ultimately debases the value of public discourse. Therefore protection of privacy itself also has a derivative First Amendment value (as well as inherent value) to be weighed against the right of the public to have unrestricted information about their leaders and other such figures.[415]

412. MCKEON, *supra* note 9, at 233.

413. ARENDT, *supra* note 13, at 73.

414. *Id.* at 71. *Cf.* Griswald v. Connecticut, 381 U.S. 479, 482 (1965) (recognizing a fundamental right to privacy in "an intimate relation of husband and wife"). Arendt further shares her views on privacy with Justice Brandeis, who co-authored the seminal article, Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), acknowledged to be the root source of the various common-law actions for invasion of privacy.

415. *But cf.* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("Exposure of the self to others in varying degrees is a concomitant of life in a civilized community."). Arendt

When the speech or printed matter portraying the public figure is pornographic, our figures would tend to support its treatment and valuation as private speech, even if it claims no connection with the actual private facts in the public figure's life (as may have been the case in *Dworkin v. Hustler Magazine, Inc.*). Arendt may be taken as a case in point. According to her views, extensive or pointed use of pornography subjects persons to necessity (because of its appeal to the sexual, the biological, and the mindless) and thus reduces the possibility of politics where the domain of the "public," through freedom, is created and displayed. Indeed, the display of pornography makes "public" (in the sense of open to general view) the very type of thing that ought to be kept "private" (hidden). Finally, it disrupts the private domain itself (by its alienating impact on men, women, and children in their familial and intimate relations) — a disturbance which has repercussions in the public realm of politics, because in order to speak and to act in the public space, persons must have a secure basis for their material and biological existence.[416]

In a somewhat similar vein, the Supreme Court, in *Time, Inc. v. Firestone*[417] — resting on the type of analysis emphasizing the status of the speaker, as employed in *Gertz* — has distinguished "public controversies" from all controversies of mere interest to the general public, ruling that "[d]issolution of a marriage [a typically private matter] is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of [sensational or mindless] interest to some portion of the reading public."[418] There is thus something like a convergence in viewpoint, between and among my figures' thought and the Court's legal analysis, that some speech — though about a person well known[419] — is pri-

would strongly disagree, insofar as such "exposure" is destructive of the conditions of life ("the private realm") that are a necessary, though not a sufficient component, of the public realm.

416. I am indebted to my friend Vernon Visick for these insights into Arendt's thought. The Supreme Court and constitutional scholars have, on occasion, tended (on their own grounds) to agree with Arendt's perspective. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 732, 749-50 (1978) ("[C]ertain words depict[ing] sexual and excretory activities in a patently offensive manner" may be restricted in the broadcast media because of "the government's interest in the well-being of its youth and in supporting parents claim to authority in their own household.") (citation omitted); Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 659 (1987) ("Pornogaphy *silences* women. It does not just cause violence, but is *violating*. Pornography is not expression depicting the subordination of women, but is the *practice of subordination* itself.") (alluding to the views of Andrea Dworkin and Catherine MacKinnon). *But cf.* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986) (city ordinance banning pornography is an unconstitutional viewpoint restriction on speech).

417. 424 U.S. 448 (1976).

418. *Id.* at 455.

419. The defamed person in *Firestone* was held not to have been a public figure within the strict meaning of *Gertz*; but, because of her great wealth, social position,

vate, even when its effect is to excite the general interest of the people, because creating this sensationalized effect in a substantial part of the general population is not the same as engaging in speech fit for public concern.

The graphic result of applying this understanding of both the Court's own reasoning, together with Arendt's and Dewey's thought, to the completion of the *Hepps* schema — all in the context of the analysis of *Dworkin v. Hustler Magazine, Inc.* — is illustrated in Figure 2.

		SPEECH CATAGORY	
		PUBLIC	PRIVATE
FIGURE CATAGORY	PUBLIC	*New York Times* Standard: "Malice"	*Dworkin* Standard: "Fault"
	PRIVATE	*Gertz* Standard: "Fault" (Usually Negligence)	*Greenmoss Builders* Standard: Common-Law Strict Liability

Figure 2

The fact is that private speech *can* exist about a public figure; and it *should* receive some degree of protection — scaled *up* from the intrusive standard of *New York Times* requiring proof of the speaker's "actual malice", by scaling *down* the level for the speaker's state of mind to "fault." This revision would protect the value of public speech by diminishing destructive and gratuitous scrutiny into privacy. In this resolution our own three figures converge in a *general* sense by defining a public order separated from private life: Dewey's concern for forming an inchoate public by rejecting isolated sensationalism contrary to such formation; Arendt's creation of a public space by rejecting the banal and the exposure of that meant to be "hidden;" and Lippmann's aspiration for transcendent public values and men who can embody them by rejecting frivolous matters unworthy of their attention.

and her practice of giving press conferences during her highly publicized divorce, she was certainly a person who stirred general popular interest — surely an analogue to a constitutional public figure.

CONCLUSION

In this article I have presented a legal problem and claimed that philosophy is in a special position to augment conventional legal reasoning in the resolution of that problem. The problem involves sorting out broad norms of judicial creation that justify the constitutional protection of speech in general, and then crafting from these norms much more specific conceptions of public and private speech — conceptions only, at best, suggested by those norms — for application to cases that have so far defied neat judicial resolution. I have argued that a special model or prototype called *practical pluralistic convergence* is adequate to this task.

In the course of my argument I have frequently operated at a high plain of abstraction. For example, in Part I, I dealt with the seminal views of Justices Holmes and Brandeis at a general level; but I was required to do so in large part because of the very broad and even philosophical nature of their, particularly Brandeis', views. In Part I, and later in Part III, I also dealt, necessarily, in a general way with the views of the justices and their linkages to the views of Dewey, Arendt, and Lippmann on the nature of the public and the private. Without these generalizations, though, I would not have been able to carry out a critical stage of my argument — connecting judicial concepts without definite or express conceptions of the "public" and the "private" to compatible nonlegal views that have such express and definite conceptions.

But I have always tried to move from the general and abstract to the particular and the concrete; that is the direction of legal reasoning, and of philosophical reasoning as well, insofar as it is practical. In Part II, I analyzed the decisions of the Supreme Court in public employment and defamation cases to identify the genesis of the confusion about the distinction between public and private speech. Finally, in Part IV, after a last formulation of my understanding of convergence that places it in the particulars of concrete situations and not in the abstract fusion of general doctrines, I brought together the various strands of my argument and focused them on the resolution of the specific issues in the tangled case law in the lower federal courts.

The practical worth of this venture ultimately depends on whether that attempt in Part IV to address and resolve problems in the particular cases offers any useful insights to the legal profession in this area of constitutional litigation. Because my analysis clears up ambiguities and conflicts in several important regions of the law — especially those concerned with the role of the speaker's motive in assigning or withholding constitutional protection from his speech, and with determining whether a public figure can have private speech concerning him under the constitutionalized law of defamation — I would argue that there have been some useful insights. In this respect at least I believe that I have fulfilled my initial goal of adding some coherence

to First Amendment jurisprudence, if only in this particular corner of it.

In the article I emphasize the value of pluralism, and argue that it offers a more desirable approach to understanding the underpinnings of First Amendment free-speech law than efforts to build either englobing doctrines that emphasize the comprehensiveness of one justification, such as instrumental political self-governance or constitutive self-realization, or particularized doctrines that insist on the narrowness or exclusiveness of one such justification. In large part the support for pluralism must remain intuitive. This appeal to intuition should have special appeal to lawyers because of their fundamental precept of advocacy that any controversy is capable of being understood and presented from several viewpoints. The claim that pluralism is valid can also be inferred from its actual capacity to explain and work out particular issues. Thus the test of pluralism in this setting lies also in experience — a pragmatic test.

Finally, there is convergence itself. I have argued not only that a plurality of free-speech justifications and corresponding views on the "public" and the "private" exist and must be reckoned with, but also that — through my method of convergence — conflicts among these justifications and their corresponding views can be adjusted and conformed. But convergence itself has a plurality of meanings. Besides the central thrust of working out conflicting meanings in the particularistic settings of the cases, it has at least two other senses that I have touched upon in the argument. One of these senses of convergence has been the congruence of resolutions, reached independently by the courts and the philosophical writers, of particular issues posed in the case law. For example, Dewey and Arendt, on the one hand, and the Supreme Court, on the other, have independently arrived at very nearly the same basis for making the distinction between an issue of genuine public concern and an issue that merely excites the interest of the public.[420] In another sense the method of convergence that I have

420. *See, e.g.*, *supra* notes 176 and 417-19 and accompanying text (discussing the relation between Dewey's and Arendt's thought and the Supreme Court's reasoning in Time, Inc. v. Firestone, 424 U.S. 448 (1976), on this issue). *See also*, *e.g.*, *supra* notes 165-66 and accompanying text (alluding to the convergence between the independently derived views of Dewey, on the one hand, and the holdings of the Supreme Court in Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984), and in Thornhill v. Alabama, 310 U.S. 88, 102 (1940), on the other, on the nature of the distinction between the "public" and the "private"); *supra* note 364 and accompanying text (alluding to the similarity of Dewey's and Arendt's views, on the one hand, and the Supreme Court's reasoning, on the other, in City of Madison, Joint School Dist. No. 8 v. Wisc. Employment Relations Comm'n, 429 U.S. 167 (1976), on the role of the process of discussion in composing issues of public concern); and *supra* notes 295-96 and accompanying text (noting congruence between Dewey's and Arendt's views, on the one hand, and the Supreme Court's holdings, on the other, in Hustler Magazine v. Falwell, 485 U.S. 46 (1988) and Garrison v. Louisiana, 379 U.S. 64 (1964), that the speaker's motive does not alter the protected or unprotected status of the content of speech).

used to resolve the meaning of public and private speech in the particular case law has been congruent with the Supreme Court's methodology of categorical balancing, its prevalent technique for at least the past two decades for deciding whether the content of speech is protected.[421]

These additional senses in which convergence arises, demonstrates that philosophical reasoning and legal reasoning do indeed overlap in some essential ways. Because such is the case, philosophy can truly be a valuable auxiliary to the law as confronted and understood by practicing lawyers and jurists. Thus I consider the methods of philosophy to be entirely appropriate for further inquiry in legal fields beyond the niche of First Amendment jurisprudence where I have tested it here. The method developed here might, for example, be used to resolve conflict in the meanings ascribed to "equality" or to "discrimination" in the Fourteenth Amendment or in interpretations of Title VII of the Civil Rights Act of 1964, insofar as both the constitutional and the statutory provisions apply to affirmative action. It could also be used to achieve some agreement on the nature of consitutional "liberty" or "property" interests. Application of my method to these and other legal problems will, however, have to wait until another day.

421. *See, e.g., supra* notes 3, 90, 278, 290, 311 and accompanying text.