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PUBLIC EMPLOYEES’ FREEDOM OF ASSOCIATION: 
SHOULD CONNICK V. MYERS’ SPEECH-BASED 
PUBLIC-CONCERN RULE APPLY? 

MARK STRAUSS 

INTRODUCTION 

No more than twenty-four hours after defeating her supervisor in a 
grievance dispute, Alice Griffin, then an assistant principal in a Chicago 
public school, was suddenly stripped of her administrative duties and re- 
assigned to a classroom.1 Griffin was sure the reassignment had been 
ordered by her supervisor in retaliation for his defeat at the grievance 
hearing.2 Instead of filing a second grievance, Griffin decided to sue the 
supervisor over the reassignment in federal court. To do so, she would 
have to parlay the wrongdoing that she believed she had suffered into a 
federal cause of action. 

By 1986, the year of Griffin’s reassignment,3 the Supreme Court had 
long recognized that a public employee could not be fired or otherwise 
retaliated against for exercising his or her First Amendment freedom of 
speech.4 At the same time, the Court also recognized the countervailing 
principle that the government, in its role as an employer, had a legitimate 
interest in controlling the speech of its employees in order to maintain 
workplace discipline, harmony, and productivity—goals incompatible 
with unfettered worker expression.5 The Court unified these principles in 
Pickering v. Board of Education,6 where it established that the free speech 
claims of public employees were to be evaluated by balancing the 
worker’s expressive rights against the employer’s reasons for the retali-
atory personnel decision—that is, in light of the employer’s legitimate in-
terest in workplace efficiency.7 Pickering seemed to provide Griffin the 

1. See Griffin v. Thomas, 929 F.2d 1210, 1211 (7th Cir. 1991).
2. See id.
3. See id.
Board of Regents, 385 U.S. 589, 605-06 (1967).
5. See Pickering, 391 U.S. at 568.
6. See Connick, 461 U.S. at 143-44. This doctrine was 
summed up in an observation by Justice Holmes, then sitting on the Supreme Judicial 
Court of Massachusetts, that “[t]he petitioner may have a constitutional right to talk 
politics, but he has no constitutional right to be a policeman.” McAuliffe v. Mayor of 
New Bedford, 29 N.E. 517, 517 (Mass. 1892).
7. See id. at 568. In Pickering, the Court held that a school board could not fire a 
teacher for writing a letter to a local newspaper criticizing the board’s tax policies. See 
ibid. at 569-70.

By 1986, numerous public employees who allegedly had suffered retaliatory personnel 
treatment in response to expressive activities had sought relief under Pickering—many
Griffin no doubt was alert, however, to the Supreme Court's 1983 decision in *Connick v. Myers.* By that time, as one commentator observed, the Court regarded *Pickering* as "exploited and debased" by litigious public employees flooding the courts with "glorified workplace gripes." *Connick* sharply curtailed the ability of plaintiffs to prevail in *Pickering* claims. It did so by imposing on public employees a new threshold requirement for gaining access to federal court: in order to state a cause of action, the speech allegedly trammeled must have addressed "matters of public concern." Only if a plaintiff's speech met this threshold could a court proceed to the balancing test set forth in *Pickering.* If a particular employee's speech dealt with matters "of only personal interest... a federal court [was] not the appropriate forum" for vindication of that employee's rights.

Griffin's original grievance consisted of a complaint about an evalu-
tion of her job performance. As such, the grievance plainly constituted speech of only personal concern. Connick thus foreclosed a lawsuit for infringement of Griffin's freedom of speech. Accordingly, Griffin advanced another claim: that the reassignment, imposed in retaliation for a grievance brought through her union, deprived her of her First and Fourteenth Amendment rights to freedom of association—a claim to which Connick's public-concern rule assertedly did not apply.

Griffin's claim thus raised a question that has caused disagreement among the courts: should Connick's free-speech-based public-concern rule apply to claims based on the right to freedom of association?

Some courts have held or assumed without discussion that the rule should apply, with the public-concern inquiry focusing on the expression sought to be advanced by the plaintiff through his associational membership. This view denies causes of action to plaintiffs such as Griffin. Courts so holding justify their conclusions with two main arguments: first, that Connick relied on a series of cases addressing both expressive and associational rights; and second, that to hold otherwise would protect association more than speech, whereas the Supreme Court has been disinclined to create a hierarchy of First Amendment labels.

Other courts have held or assumed without discussion that the Connick rule should not apply. This view allows plaintiffs like Griffin to assert freedom-of-association claims independent of any freedom-of-speech claim. Courts so holding also justify their conclusions with two main arguments: first, that the right of association has long been held to embrace broad areas of association plainly not of public concern; and second, that when a public employee files a union grievance (a recurring fact-pattern in such cases), the employee is exercising his constitutional right to petition for redress of grievances, and associational activity for such First Amendment ends is generally protected.

In April 1991, the Seventh Circuit sided with the first group of courts and applied the public-concern requirement in Griffin v. Thomas, thus upholding summary judgment for the school district. Yet disagreement

13. See Griffin v. Thomas, 929 F.2d 1210, 1211 (7th Cir. 1991).
14. See id. at 1214-15.
15. See id. at 1211.
17. See infra notes 108-114 and accompanying text.
18. See infra note 115 and accompanying text.
20. See infra notes 30-37 and accompanying text.
on this question remains.

This Note attempts to settle this division in authority. It argues that the reasoning on both sides of this dispute has, by and large, fallen wide of the mark. Part I explains how the Supreme Court has delineated two categories of constitutionally protected association: expressive association and intimate association. Part II submits that these doctrines compel certain straightforward answers: first, that Connick's public-concern rule must be applied to claims based on the right of expressive association, because this right derives from freedom of speech; and second, that Connick's public-concern rule must not be applied to claims based on the right of intimate association, because this constitutionally recognized right, by definition, protects associations of highly personal interest. Part II also considers how the lower courts have deviated from these principles. Part III explores the theoretical debate over the function of the First Amendment that lurks behind the question of Connick's applicability to associational claims. It explains how this question creates a confrontation between two competing theories of the First Amendment—namely, the Meiklejohn theory (that the First Amendment should shelter only public-issue speech) and the liberty theory (that the First Amendment should protect virtually all expression relevant to individual self-realization). Part III also explains the seeming hostility or inattention of the courts to the pertinent Supreme Court doctrines as a function of this theoretical dispute. Finally, this Note concludes that, whatever theoretical objections the courts may have to Connick and to the theory of the First Amendment underlying that decision, and however sound these objections may be, Supreme Court doctrine nevertheless mandates the application of Connick's public-concern rule to the First Amendment association claims of public employees.

I. SUPREME COURT DOCTRINE

Although the right to freedom of association is not expressly set out in the Constitution, the Supreme Court has long recognized such a right, albeit a limited one.22 In particular, the Court has delineated two categories of protected association: "expressive association," and "intimate association."23 Expressive association is the right to join with others for the purpose of engaging in activities protected by the First Amendment.24 Intimate association is the right to maintain highly personal relationships free from unjustified government interference.25 At times, particularly in the 1950s and early 1960s, the Court seemed to entertain a more expansive notion of the right of association, and to suggest that this

23. Id. at 618-23; see also infra text accompanying notes 30-80 (discussing rights to expressive and intimate association).
25. See infra notes 63-80 and accompanying text.
right encompassed groups organized for a wide range of purposes and that it stood independently and on an equal footing with other fundamental rights.\(^2\) Yet, particularly since \textit{Roberts v. United States Jaycees},\(^2\) the Court has displayed a dedication to these two formalized categories (expressive association and intimate association) as the governing doctrines for evaluating associational claims.\(^2\) The Court has settled into a pattern of testing associational claims against these doctrines to ascertain whether grounds for protection exist.\(^2\)

A. freedom of expressive association—A First Amendment Doctrine

Expressive association is the right to associate for the purpose of engaging in activities independently protected by the First Amend-


The Court has recognized a third, subordinate type of freedom of association—the freedom to associate in labor unions and trade associations. See Nowak & Rotunda, supra, § 16.41, at 1063. This lesser right is protected as an aspect of liberty under the due process clause. Unlike expressive and intimate association, however, this right is not deemed fundamental, see \textit{id.}, and the Court has been disinclined to invalidate rationally-related legislation restricting it. See, e.g., Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (upholding statute prohibiting racially discriminatory labor union membership practices); see also supra note 11 (discussing rights of workers in labor unions).

\(^{29}\). See Stanglin, 490 U.S. at 23-26; \textit{New York State Club Ass'n}, 487 U.S. at 11-13; Board of Directors of Rotary Int'l, 481 U.S. at 544-49; \textit{Roberts}, 468 U.S. at 617-19.
ment—assembly, petition for redress of grievances, worship, and speech. Thus, expressive association, as expounded by the Supreme Court, is not a free-standing or independent right, but rather a "correlative" or "ancillary" one. Expressive association exists solely as an instrument for or a means of preserving and enhancing the primary First Amendment liberties of assembly, worship, petition, and speech. The rationale offered for this "instrumental" freedom of association is that these primary First Amendment liberties "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."

As for the right's function regarding speech in particular, the right of expressive association guarantees that "by collective effort individuals can make their views known, when individually, their voices would be faint or lost." Although the cases involve groups, the Court's rhetoric is cast in terms of the rights of individuals, which have to be safe-

30. The right of association should be distinguished from the related right of assembly. The right of assembly is the right physically to hold and attend meetings, marches, pickets, demonstrations, parades, and the like. See Hague v. Committee for Indus. Org., 307 U.S. 496, 512 (1939); Nowak & Rotunda, supra note 28, § 16.54, at 1130. The right of association, on the other hand, is more; it includes the right to "express one's attitudes or philosophies by membership in a group or by affiliation with it." Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (emphasis added). Although the Court generally speaks of the right of association as deriving from the right to free speech, some commentators believe the right of association provides a more "logical basis" for the right of association. C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 1030-32 (1978). Professor C. Edwin Baker contends that "an association is merely an assembly dispersed over time and space." Id. at 1032.

31. The right to petition the government for redress of grievances is the right to appeal to the government and to the courts. See United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 221-22 (1967). Some of the courts that have dealt with public employee freedom of association claims have equated union "grievances" with such constitutionally protected grievances. See Stellmaker v. DePetrillo, 710 F. Supp. 891, 892-93 (D. Conn. 1989); Gavrilles v. O'Connor, 579 F. Supp. 301, 304 (D. Mass. 1984). Arguably, however, this view is erroneous. See infra text accompanying notes 100-03.


34. Roberts, 468 U.S. at 622; Emerson, supra note 26, at 2.

35. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988); Roberts, 468 U.S. at 618; see also Leading Cases, supra note 28, at 204 ("[T]he Court thus underscored the instrumental role of freedom of association not just in defining the source of the right, but also in framing the analysis suitable for protecting that right.").

36. See Roberts, 468 U.S. at 618.

37. Id. at 622; see also New York State Club Ass'n, 487 U.S. at 13 ("[T]he ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government.").


guarded through freedom of association. As one commentator has remarked, the right of expressive association has "traditionally been little more than a shorthand for safeguarding an individual's [right to free speech] when he exercises [it] through a group." While at times the Court has opined that freedom of expressive association extends to groups organized for social, economic, or cultural purposes, the cases nevertheless suggest that some sort of political or ideological tie is necessary to legitimize an associational claim.

Thus, in *NAACP v. Alabama ex rel. Patterson*, the first modern decision to recognize a freedom of association, the Court reversed a contempt order against the NAACP for refusal to disclose a membership list because the right of association embraced that group's banding together "for the advancement of beliefs and ideas." With similar rhetoric, the Court invalidated a statute limiting voter-participation in more than one party primary and a second statute limiting political contributions. In another line of cases, the Court annulled legislation restricting the rights of organizations to provide their members with legal representation, deeming lawyering and litigation in these instances to be essential for petition and speech. By contrast, the Court summarily upheld legislation regulating health maintenance organizations—associations whose endeavors, while important, were deemed unrelated to any First Amendment activity.

In perhaps the most striking set of decisions, the Supreme Court upheld laws compelling certain private groups to admit unwanted mem-

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43. See Torke, *supra* note 26, at 55.
44. 357 U.S. 449 (1958).
45. See *Emerson*, *supra* note 26, at 1; Raggi, *supra* note 26, at 2.
46. *Patterson*, 357 U.S. at 460.
50. See *Garcia v. Texas State Bd. of Medical Examiners*, 421 U.S. 995, 995 (1975); see also *Tribe, supra* note 26, § 12-26, at 1011-12 (describing contrast between lawyering and health care cases); Raggi, *supra* note 26, at 9 n.41:

The Mine Workers were facilitating the means by which their members could petition the courts, a right expressly safeguarded by the first amendment, but while the Court has recognized the importance of medical care as a necessity of life, it has yet to recognize it as a constitutionally protected right. And *without* some underlying constitutional right, specifically *without* some underlying first amendment right, a group has not been able to gain Court recognition of its freedom of association.*

(emphasis added) (citations omitted).
Each group defended itself by asserting a right of association that encompassed the privilege to exclude whomever it pleased; and each such defense was rejected by the Court because the group failed to prove that its exclusionary policies were necessary for the accomplishment of activities protected by the First Amendment. In Runyan v. McCrary, for example, Justice Stewart stated that the right to freedom of association would protect segregation-minded parents if they wanted to send their children to a school advocating segregation, but not if they wanted to send their children to a school implementing that doctrine. There was no showing that "discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." Conversely, the Court made clear that associations formed for the advocacy of political ideas could not similarly be compelled to admit members with different political views, since such would alter the group's protected expression.

53. See id. at 176.
54. Id. (alteration in original) (citation omitted); see also New York State Club Ass'n, 487 U.S. at 13:

[The law] does not affect . . . the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs 'to abandon or alter' any activities that are protected by the First Amendment. If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end.

(citations omitted); Board of Directors of Rotary Int'l, 481 U.S. at 548 ("[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."); Roberts, 468 U.S. at 626 (holding that right of expressive association does not protect Jaycees from mandate of Minnesota Human Rights Act ordering the admission of women, because Jaycees made no showing that ability to engage in protected expressive activities thereby would be impaired).

55. See New York State Club Ass'n, 487 U.S. at 13.

The Court has recognized two wholesale exceptions to this principle of non-interference with the right to political association—patronage dismissals and the Hatch Act. Under the first exception, dismissals and other unfavorable personnel decisions taken on the basis of party affiliation, while implicating the right of association and speech, are held to be justified under certain circumstances as serving the compelling interest of ensuring effective and efficient government employees. See Rutan v. Republican Party, 110 S. Ct. 2729, 2735-37 (1990); Branti v. Finkel, 445 U.S. 507, 517-20 (1980); Elrod v. Burns, 427 U.S. 347, 360-63 (1976).

Two modern cases are particularly instructive as to the scope of the right of expressive association: \textit{NAACP v. Claiborne Hardware Co.},\textsuperscript{56} and \textit{City of Dallas v. Stanglin}.\textsuperscript{57} In \textit{Claiborne Hardware}, the Court held that an NAACP-organized boycott of white Mississippi businesses, although superficially an "economic" undertaking, actually constituted a group "political" endeavor entitled to First Amendment protection.\textsuperscript{58} Accordingly, the Court held the boycott beyond the reach of rational state regulation.\textsuperscript{59} In \textit{Stanglin}, by contrast, the Court held that since teenagers socializing in a roller skating rink were not engaged in political conduct, they enjoyed no regulatory immunity (in this case, from an ordinance restricting the rink to teenagers of certain ages).\textsuperscript{60} The \textit{Stanglin} Court, moreover, expressly refuted the theretofore tentative idea of a "generalized right of 'social association,'"\textsuperscript{61} conceding only that group activity need not "pertain directly to politics" to be protected by the First Amendment.\textsuperscript{62}

\textbf{B. Freedom of Intimate Association—A Substantive Due Process Doctrine}

The right of intimate association\textsuperscript{63} is the right to form and preserve "highly personal relationships [free] from unjustified interference by the State."\textsuperscript{64} The Constitution protects intimate association as a fundamental aspect of the right to liberty guaranteed by the due process clauses, and as an implicit part of the Bill of Rights.\textsuperscript{65} Intimate association is closely related to the fundamental right to privacy.\textsuperscript{66} Justice Brennan set forth the rationale for such a right in his opinion for the Court in \textit{Roberts}:

\begin{quote}
[C]ertain kinds of personal bonds have played a critical role in the
\end{quote}

\textsuperscript{56} 458 U.S. 886 (1982).
\textsuperscript{57} 490 U.S. 19 (1989).
\textsuperscript{58} See \textit{Claiborne Hardware}, 458 U.S. at 914-15.
\textsuperscript{59} See id.
\textsuperscript{60} \textit{Stanglin}, 490 U.S. at 24-25.
\textsuperscript{61} Id. at 25.
\textsuperscript{62} Id. (emphasis added).
\textsuperscript{64} \textit{Roberts}, 468 U.S. at 618; \textit{accord} Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).
\textsuperscript{65} The Court first used the terms "intimate association" in \textit{Roberts} in 1984. \textit{See Roberts}, 468 U.S. at 618. Yet in so doing, it embraced a phrase coined four years earlier by Professor Kenneth Karst. \textit{See Kenneth L. Karst, The Freedom of Intimate Association}, 89 Yale L.J. 624, 624-25 (1980). Karst was summing up what he perceived as the "single theme" in a line of Supreme Court decisions pertaining to constitutional protection of certain close relationships. \textit{Id}. The Court has displayed a dedication to Karst's formulation.

\textsuperscript{66} See \textit{Board of Directors of Rotary Club Int'l}, 481 U.S. at 545; \textit{Roberts}, 468 U.S. at 618-19; Nowak & Rotunda, \textit{supra} note 28, § 16.41, at 1063; Karst, \textit{supra} note 64, at 624-25.
culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Thus far, the Supreme Court has adhered to an extremely narrow construction of the right of intimate association, perceiving it to inhere only in relationships that involve the "creation and sustenance of a family"—marriage, childbirth, child rearing and education, and cohabitation with relatives. The Court has declined to extend this right to unrelated persons living together, and to homosexuals privately engaging in consensual sodomy. Justice Scalia, for his part, appears to resist the notion that a right of intimate association even exists. In Bowers v. Hardwick, moreover, the Court seemed to call this entire doctrine into question by suggesting that the generally cited cases hinged on the existence of family planning issues, not of personal relationships.

Still, the Court has expressly declined to rule out the possibility that protected intimate association may exist beyond the family. The Court has adopted arguably flexible factors for judging whether an association is sufficiently intimate to warrant protection: size, purpose, selectivity, and whether members are secluded from others in critical aspects of the relationship. Indeed, at least one commentator views these factors as "pregnant with potential" for embracing a wide range of small groups.

II. A DOCTRINAL APPROACH

The Supreme Court doctrines compel certain straightforward answers to the question of whether Connick's public-concern rule should apply to the freedom-of-association claims of public employees. Simply put, the

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68. Id. at 619.
72. See Moore v. City of East Cleveland, 431 U.S. 494, 500-06 (1977) (plurality opinion).
76. 478 U.S. 186 (1986).
77. See id. at 190-91.
78. See Board of Directors of Rotary Int'l, 481 U.S. at 545.
80. Torke, supra note 26, at 50.
rule should apply to those claims based on the right of expressive association, but not those based on the right of intimate association.\footnote{81}{See infra notes 83-91 and accompanying text.} Surprisingly, the lower courts that have considered the question thus far have, through either misunderstanding or disregard of the pertinent doctrines, failed to articulate these answers.\footnote{82}{See infra notes 118-23 and accompanying text.}

A. Proposed Rule for Claims Based on the First Amendment Right of Expressive Association

With respect to claims based on the First Amendment right of association (the right of expressive association\footnote{83}{See supra notes 30-37 and accompanying text.}) the Court's decisions clearly mandate application of Connick's public-concern rule. These decisions further mandate that the public-concern inquiry focus on the expression sought to be advanced by the plaintiff through the associational membership. These conclusions follow whether one reasons from a doctrinal or a precedential standpoint.

From a doctrinal standpoint, Supreme Court jurisprudence holds that the right of expressive association must be anchored in some activity independently protected by the First Amendment.\footnote{84}{See supra notes 30-37 and accompanying text.} It follows that no right can arise in connection with activity specifically denied the independent protection of the First Amendment, such as the expression of public employees on issues of personal nature.\footnote{85}{The personal-issue speech of public employees under Connick is a classic example of such an activity. Cf. City of Dallas v. Stanglin, 109 S. Ct. 1591, 1595 (1989) (holding that teenagers in roller skating rink enjoy no right of expressive association because there is no indication they engage in "expressive activity . . . protected by the First Amendment").}

From a precedential standpoint, virtually every Supreme Court case to recognize a right of expressive association—and certainly every modern case to do so—involved a group that was engaged in political or ideological advocacy.\footnote{86}{See Torke, supra note 26, at 55; see also supra notes 44-61 and accompanying text (discussing expressive association cases).} Accordingly, a threshold requirement tantamount to the...
public-concern rule set forth in *Connick* arguably already attends the right of expressive association. In fact, Justice O'Connor suggested as much in her concurring opinion in *Roberts v. United States Jaycees*. The former, Justice O'Connor wrote, enjoyed First Amendment protection, while the latter was subject to rational state regulation. The Court as a whole seemed openly to support such a binary view in *City of Dallas v. Stanglin*. There the Court suggested that associational speech pertaining only, either directly or indirectly, to politics enjoyed special First Amendment protection. Thus, any "extension" of *Connick*'s public-concern rule to the sphere of expressive association would be superfluous, as the rule is already firmly ensconced there.

It is fair to observe, however, that this precedential argument is prone to the criticism that it is purely inductive, and thus results in an unjustified conclusion. Indeed, the fact that previous cases happened to involve group speech of public concern is not reason to establish public concern as a formal threshold for protection. Still, the doctrinal rationale set forth above provides ample reason for holding the public-concern rule applicable to association claims.

The lower courts considering the applicability of *Connick*'s public-concern rule to public employees' First Amendment association claims have, by and large, misunderstood or disregarded the pertinent doctrines and precedents. The common theme is a lack of attentiveness to the Court's instrumental theory—that expressive association exists merely as an instrument for securing the primary First Amendment right to free speech.

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88. *Id.* at 634 (O'Connor, J., concurring).
89. *See id.* at 634-35 (O'Connor, J., concurring).
92. Arguably then, the first, doctrinal rationale discussed above emerges as the preferred basis for such a holding. *Connick* itself relied on the same inductive rationale, but with respect to speech alone. *See Connick v. Myers*, 461 U.S. 138, 144-47 (1983). Commentators have criticized *Connick* on this basis. *See, e.g.*, Estlund, *supra* note 9, at 3:

A long tradition of special solicitude for speech on public issues played a crucial role in the growth of First Amendment doctrine, but it did not take the form of an explicit threshold test or category .... [T]he public concern test introduced in *Connick* marks a fundamental departure from this scheme; D. Gordon Smith, *Comment, Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. Chi. L. Rev. 249, 256 (1990) [hereinafter *Beyond Public Concern*] ("[T]hat these previous cases had involved speech of public concern was not reason, in itself, to limit constitutional protections to speech of public concern.").
93. *See supra* text accompanying notes 84-85.
As a consequence, these courts have yet to articulate either the doctrinal or precedential arguments outlined above.

Courts holding Connick inapplicable\(^4\) have generally advanced two arguments. First, they have seized on statements in various Supreme Court opinions suggesting that the First Amendment right of association is not limited to groups organized for political ends, but extends to those formed for economic, cultural, or social ends as well.\(^5\) They have reasoned, on this basis, that the First Amendment right of association must embrace associations regardless of whether their expressive activities are of public concern.\(^6\) Yet, even if the Supreme Court statements upon

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\(^5\) See Hatcher, 809 F.2d at 1557-58 (citing Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)); see also supra text accompanying note 26 (discussing statements seized upon).

\(^6\) See, e.g., Hatcher, 809 F.2d at 1558 ("[A]pplication of a requirement that associational activity relate to a matter of public concern . . . would overturn Supreme Court . . . jurisprudence . . .").

In a variation of this argument, some courts have maintained that Connick's public-concern rule must not be applied to associational claims because the First Amendment protects the right of public employees to form and join labor unions. See, e.g., Parker v. Cronvich, 567 F. Supp. 1073, 1076 & n.7 (E.D. La. 1983) ("[P]laintiffs have also alleged that Sheriff Cronvich . . . fired them because of (a) their support for Cronvich's political opponent, and (b) their membership in the Union. If only the latter were true, defendants would have violated the plaintiff's freedom of association."). A number of lower courts hold that the First and Fourteenth amendments guarantee the right to unionize. See Lontine v. VanCleave, 483 F.2d 966, 967 (10th Cir. 1973); AFSCME v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 288-89 (7th Cir. 1968); see also Note, Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1678 (1984) [hereinafter Developments in the Law]. The Supreme Court has yet to address the issue squarely. See Developments in the Law, supra, at 1678 n.11. A number of cases have suggested that the Supreme Court recognizes such a constitutional right. See Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979) (per curiam); Elfrandt v. Russell, 384 U.S. 11, 15-17 (1966). Yet the rhetoric of the Supreme Court's modern decisions suggests the contrary. See, e.g., Roberts, 468 U.S. at 637-38 (O'Connor, J., concurring):

A State is free to impose rational regulation of the membership of a labor union representing 'the general business needs of employees.' . . . The Court has thus ruled that a State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances . . . . (citation omitted); see generally, James G. Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189 (1984) (arguing that labor activities occupy "black hole" on hierarchy of First Amendment values). Some courts manage to skirt the issue by holding union-related association to be not only protected by the First Amendment, but also of public concern. See, e.g., Terry v. Village of Glendale Heights, No. 86-C4468, 1989 WL 106623, at *6 (N.D. Ill. Sept. 13, 1989) ("[S]peech accompanying [the plaintiff's] successful effort to organize Village maintenance workers . . . is of public concern"). This view is tenuous, however, in light of Connick, which held a public employee's efforts to rally coworkers for a grievance committee to be expression of only personal interest. See Connick v. Myers, 461 U.S.
which these lower courts relied were not dicta, as the cases suggest they were,97 these courts have overlooked the fact that the right of expressive association exists not independently, but rather as an instrument for safeguarding the primary First Amendment liberties.98 In other words, even if this freedom extended to groups regardless of whether their activities were of public concern, it plainly could not extend to groups whose activities have been specifically denied First Amendment protection.99

The second argument advanced by those courts is that when a public employee files a union “grievance,” such action is, in a constitutional sense, the petition of government for the redress of grievances.100 Those courts assume that the First Amendment right to petition can anchor an associational claim, given that group activity for First Amendment ends is generally protected.101 When the Supreme Court speaks of the First Amendment right to petition the government for the redress of grievances, however, it is referring to the right to appeal to the legislature and the judicial system102—not the right to challenge a decision of the government as an employer. The Connick Court, in fact, effectively ruled out such an argument in refusing to countenance the respondent’s “attempt to constitutionalize the employee grievance.”103

As a general matter, courts holding Connick inapplicable to association claims104 not only have permitted plaintiffs to circumvent the Connick rule, but also have undermined the Court’s expressive association doctrine. Plaintiffs deprived of free speech claims by Connick, but whose expressive activities happened to involve groups, have been permitted to proceed under the rubric of freedom of association.105 This has led to the anomaly of groups, and of individuals who are associated with groups, being accorded greater freedom of expression than solitary individuals.106

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97. See supra text accompanying notes 26-29, 95.
98. See supra text accompanying notes 33-37.
99. See supra notes 33-61 and accompanying text.
104. See supra note 19.
105. See, e.g., Gavrilles v. O’Connor, 579 F. Supp. 301, 304 n.* (D. Mass. 1984) (“[I]t is unlikely plaintiff has stated a claim for violation of her First Amendment freedom of speech, since her [union] grievance was a matter only of personal interest . . . . Nonetheless . . . I have ruled that Count II states a claim for violation of plaintiff’s First Amendment freedom of association . . . .”) (citations omitted).
106. See id.
These results turn on its head the doctrine that expressive association is a function of the rights of solitary individuals.\textsuperscript{107} Courts correctly holding \textit{Connick}'s public-concern rule applicable\textsuperscript{108} have seemed little more attentive to Supreme Court doctrine. None has expressly relied on the Court's instrumental theory of First Amendment association.\textsuperscript{109} Instead, they have offered a patchwork of legalistic rationales that seem to presuppose a right of association existing independently of, and on an equal footing with, the right to free speech.

The first argument set forth by these courts is that \textit{Connick} expressly relied\textsuperscript{110} on a series of McCarthy era decisions striking down loyalty oaths imposed on public employees,\textsuperscript{111} decisions which "deal[t] with speech and associational rights."\textsuperscript{112} These courts reason that because "\textit{Connick} itself, although essentially a speech case, contain[ed] associational overtones,"\textsuperscript{113} the public-concern rule should apply to associational claims as well.\textsuperscript{114} The second argument set forth by these courts is that to hold otherwise would protect the right of association more than the right to speech, whereas in the "closely related area of the first amendment's petition clause, the Supreme Court emphatically has eschewed establishing, among first amendment expression rights, a hierarchy of labels."\textsuperscript{115} Again, the language used, in this case by the Seventh Circuit, suggests a lack of attentiveness to the Supreme Court's instrumental theory in favor of the idea that speech, petition, and association stand side-by-side in the constellation of First Amendment liberties.

\textsuperscript{107} See supra notes 33-61 and accompanying text.
\textsuperscript{109} See cases cited supra note 108.
\textsuperscript{111} See generally Keyishian v. Board of Regents, 385 U.S. 589 (1967) (holding that anti-communist loyalty oath may not be imposed as a condition of public employment); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (holding loyalty oath imposed on teachers unconstitutional); Shelton v. Tucker, 364 U.S 479 (1960) (holding that requirement that teachers file affidavits on organizational memberships violates right of associational freedom); Wieman v. Updegraff, 344 U.S. 183 (1952) (holding that loyalty oath imposed on public employees violates Due Process Clause of Fourteenth Amendment).
\textsuperscript{112} Griffin v. Thomas, 929 F.2d 1210, 1213 (7th Cir. 1991) (emphasis added).
\textsuperscript{114} See id. at 24-25; see also Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985) ("In other words, Pickering and \textit{Connick}, while themselves speech cases, are based upon freedom of association cases.").
\textsuperscript{115} Griffin, 929 F.2d at 1213-14 (citing McDonald v. Smith, 472 U.S. 479, 485 (1985)).
Although the arguments of these courts suggest some feel for the relevant precedents, they miss the larger, more fundamental, doctrinal basis for rejecting the plaintiffs' claims. Doctrine mandates that the right of expressive association must be anchored in some activity independently protected by the First Amendment.\textsuperscript{116} It follows that no such right can attend activity specifically denied the independent protection of the First Amendment, such as the personal-issue expression of public employees under \textit{Connick}.\textsuperscript{117}

B. \textit{Rule for Claims Based on the Substantive Due Process Right of Intimate Association}

Regardless of whether the Supreme Court continues to construe intimate association narrowly, \textit{Connick}'s expression-based public-concern rule should be held inapplicable to claims based on this distinct, substantive-due-process based right. To conclude otherwise would be contrary to the very function of this right—to safeguard certain associations of highly personal interest.

In contrast to the disagreement over the public-concern rule's applicability to First Amendment association claims, the rule's irrelevance to due-process claims seems a foregone conclusion. Indeed, a long line of lower court decisions addresses the extent to which public employers may discipline employees for maintaining private relationships of which the employers disapprove,\textsuperscript{118} and no case has made the mistake of invoking \textit{Connick}'s public-concern rule. Courts are sharply divided, however, as to how much protection public employees' private associations should be accorded, with most cases involving employees disciplined for cohab-

\begin{footnotes}
\item[116] See supra note 85.
\item[117] See supra notes 11-12 and accompanying text.

Early such cases spoke of the employee's interest as the right to privacy as recognized by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), and its progeny. \textit{See} Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328, 1333-34 (W.D. Pa. 1977), \textit{aff'd}, 578 F.2d 1374 (3d Cir.), \textit{cert. denied}, 439 U.S. 1052 (1978). Later decisions have observed that the right to privacy is coextensive with the right of intimate association subsequently enunciated by the Supreme Court in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and have used the terms interchangeably. \textit{See}, e.g., Fleisher, 829 F.2d at 1500 ("[T]he freedom of intimate association is coextensive with the right of privacy; both . . . describe that body of rights that protect intimate human relationships from unwarranted intrusion or interference by the state.").
\end{footnotes}
iting with persons other than their spouses. While some courts have held such extramarital relationships protected, others have refused to so hold. The former decisions seem tenuous in light of Bowers v. Hardwick. There, the Supreme Court declined to extend constitutional protection to homosexuals privately engaging in consensual sodomy, opining that some connection to "family, marriage, or procreation," and not merely to "private sexual conduct," was required to entitle an activity to protection. Moreover, although all of these due-process decisions have refrained from applying Connick's public-concern rule, many have invoked the Pickering-Connick axiom that the government's interest should be given greater deference when its actions intrude on the rights of its own employees than when they intrude on the rights of citizens in general. In sum, although the public-concern rule is not applied to claims based on the right of intimate association, this right will likely provide public employees with scant protection for their associations.

III. THEORETICAL DEBATE OVER THE FUNCTION OF THE FIRST AMENDMENT

Lurking in the background of this debate over Connick's applicability to public employee claims based on the First Amendment freedom of association (as opposed to the due-process right of intimate association) is a more general theoretical debate over the function of the First Amendment. In particular, this question creates a confrontation between the idea that the First Amendment should protect only public-issue speech, a principle showcased in Connick, and the idea that, although protection of public-issue speech should be of central importance, the First Amendment should protect virtually all expression relevant to individual self-fulfillment and self-realization. These competing theoretical considerations provide a basis for analyzing, and perhaps explaining, the seemingly anomalous lower court cases dealing with the applicability of Connick's public-concern rule to association claims.

A. Alexander Meiklejohn and the Political Theory of the First Amendment

The notion that the First Amendment should protect only expression relevant to self-governance—in other words, expression of public con-

119. See supra note 118.
120. See supra note 118.
121. 478 U.S. 186 (1986).
123. See, e.g., Kukla v. Village of Antioch, 647 F. Supp. 799, 805 (N.D. Ill. 1986) ("Thus when the benefit at stake is a government job, and the individual's exercise of a right interferes with the provision of government services, the government interest carries more weight in the balance against the exercise of the right.").
124. See infra notes 126-31 and accompanying text.
125. See infra notes 132-35 and accompanying text.
cern—is closely associated with the theories of Professor Alexander Meiklejohn. Meiklejohn originally argued that the First Amendment should protect only speech that related directly to self-government. Later, however, Meiklejohn embraced a more expansive view of speech relating to self-government, deeming it to include "novels and dramas and paintings and poems." Proponents of judicial restraint, such as Professor Lillian R. BeVier and Judge Robert Bork, have breathed new life into Meiklejohn's original ideas. Professor BeVier, for example, maintains that the "central relationship between political speech and the constitutionally established processes of representative democracy" mandates a strict, political-speech interpretation of the First Amendment. Meiklejohn's various conceptions of the ambit of First Amendment coverage seem much on the mind of the Court today.

B. The Liberty Theory of the First Amendment

Other theorists, notably Professors Steven H. Shiffrin, Martin H. Redish, and C. Edwin Baker, champion the rival "liberty" theory of the First Amendment. This theory holds that the First Amendment should embrace not only political expression, but virtually all expression relevant to individual self-fulfillment and self-realization. Professor Baker locates

126. See Alexander Meiklejohn, Free Speech and its Relation to Self-Government 94 (1948) [hereinafter Meiklejohn, Free Speech].
127. See id. at 22-27.
130. BeVier, supra note 129, at 302.

Commentators who favor greater associational freedom espouse similar views. They stress the critical importance of individual involvement in associations not only in furthering self-governance, but also in promoting individual self-fulfillment and self-realiza-
the rationale for this view in the social contract: in order for the state to justify the imposition of legal obligations on the individual, the state must respect individuals' "dignity and equal worth," and this entails honoring their rights to self-definition. Professor Shiffrin, for his part, states the following:

[A] major purpose of the first amendment . . . is to protect the romantics—those who would break out of classical forms: the dissenters, the unorthodox, the outcasts. The first amendment's purpose and function in the American polity is . . . to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all.134

The Supreme Court has yet to adopt a single, all-embracing theory of the First Amendment such as those outlined above. Rather, the Court has deployed the rhetoric of the different theories as the circumstances have warranted.135

C. Meiklejohn, Connick, and Criticism

As between these two theories, Connick signified the "Meiklejohnization" of the First Amendment rights of public employees.136 Given the oft-declared centrality of speech of public concern to the First Amendment,137 it was altogether convenient for the Court to seize upon this concept, transform it into a threshold rule, and use it as a tool for limiting a perceived flood of public-employee free-speech claims.138 Yet commentators almost uniformly have been hostile toward Connick, perceiving a number of theoretical and practical pitfalls associated with its approach.

Commentators maintain, to start, that Connick's reasoning was purely inductive, and thus resulted in an unjustified conclusion. "[T]he fact that these previous cases had involved speech of public concern," one commentator has asserted, "was not reason, in itself, to limit constitutional protections to speech of public concern."139 Professor Cynthia L.

133. Baker, supra note 132, at 991.
134. Shiffrin, supra note 132, at 5.
135. Compare New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("The publication here . . . communicated information, expressed opinion, recited grievances, and protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.") with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.").
136. See Estlund, supra note 9, at 2 & n.11.
137. See, e.g., Sullivan, 376 U.S. at 266.
138. See Estlund, supra note 9, at 12.
139. Smith, supra note 92, at 256; see also Estlund, supra note 9, at 2 ("Connick . . . introduced, for the first time in the history of modern First Amendment jurisprudence,
Estlund, perhaps Connick's most strident critic, argues further that the danger of Connick is that the public-concern rule will "generate, by the inexorable operation of stare decisis, a judicially approved catalogue of legitimate subjects of public discussion." Professor Estlund maintains not only that judges are ill-qualified to identify legitimate subjects of public discussion, but also that for them to do so conflicts with the basic tenet of democratic self-governance that the people—not the government—should control the public agenda.

The rule, Professor Estlund contends, will thus tend to "undermine the protection of the very speech it singles out for solicitude."

Moreover, commentators have observed that application of the rule has proven wildly unpredictable, with some commentators actually cataloging the similar cases that have resulted in divergent outcomes. This suggests that much speech mistakenly has been and will be denied protection.

Professor Robert Post suggests that a significant cause of this unpredictability is an explicitly content-based category of privileged 'public issue' speech that alone is entitled to certain important protections.

140. Estlund, supra note 9, at 3.
141. See id.
142. See id. at 30; see also Roberts v. United States Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) ("[I]t is the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion.").

Professor Robert Post advances the same argument, concluding that the public-concern rule thereby creates a "doctrinal impasse." Robert C. Post, The Constitutional Concept of Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 670 (1990). "Speech can be deemed irrelevant for national self-definition only in the name of a particular, substantive vision of national identity. If this is done with the authority of the law, possible options for democratic development will be foreclosed." Id. at 671.

143. Estlund, supra note 9, at 28.
144. See infra note 145.
145. As one indicia of this unpredictability, the Supreme Court itself twice split five to four as to whether particular speech met the test. Compare Rankin v. McPherson, 483 U.S. 378, 386 (1987) (concluding that respondent's statement was of public concern) and id. at 392 (Powell, J., concurring) (agreeing with id. at 397-98 ( Scalia, J., dissenting) (concluding that respondent's statement was not of public concern); compare also Connick v. Myers, 461 U.S. 138, 149 (1983) (concluding that only one of several statements made by respondent was of public concern) with id. at 162-63 (Brennan, J., dissenting) (concluding that all of the statements made by respondent were of public concern). Professor Stephen Allred surveyed lower court cases decided pursuant to these two Supreme Court decisions, only to conclude that they too were characterized by "conflict and confusion." Allred, supra note 103, at 44. "[T]he courts have not defined with certainty what speech is protected; indeed, little more emerges . . . than an identification of the variables, often contradictory, which influence the determination of whether speech is protected." Id. at 81 (emphasis added); see also Toni M. Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. Cal. L. Rev. 3, 25-37 (1987) (describing Supreme Court's First Amendment jurisprudence concerning public employees as "vague" and "internally inconsistent"); R. George Wright, Speech on Matters of Public Interest and Concern, 37 De Paul L. Rev. 27, 28-29 (1987) (observing that public-concern rule "has resulted in substantial numbers of inconsistent, irreconcilable decisions"); Peter C. McCabe, III, Note, Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees, 60 Ind. L.J. 339, 358-59 & n.143 (1984-85) (surveying inconsistent decisions); Smith, supra note 92, at 258, 359 at n.143 ("The most
unpredictability is the question of whether the rule is intended to be interpreted as normative or descriptive. That is, should the rule test for whether particular speech ought to be of public concern (the normative view), or whether it already is of public concern (the descriptive view)?

To date, the Court has not provided precise guidance on this question.

D. Meiklejohn, Connick, and the Lower Courts

Because the public-concern rule has its roots in a general First Amendment theory, Connick's critics worry that there is nothing to impede the rule from "overtaking all of First Amendment doctrine." Application of the rule to the First Amendment association claims of public employees would indeed seem a step in this direction. The Court's instrumental theory, however, mandates this step. Application of the rule should be viewed as a necessary corollary of Connick, not as an instance of Connick's overtaking another area of the First Amendment. Nevertheless, this perception of the public-concern rule as a problematic new doctrine threatening to overrun the First Amendment suggests an explanation for the behavior of the lower courts.

In particular, courts holding Connick inapplicable to the First Amendment association claims of public employees arguably are motivated by an unspoken hostility toward not only the public-concern rule but also the Meiklejohn concept of the First Amendment in general. Speaking in terms of an independent right of association protecting groups engaged in even non-political activities, these courts adroitly, perhaps disingenuously, circumvent Connick's imposition of the Meiklejohn concept and

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fundamental problem with the public concern threshold test has emerged from attempts to apply it: no one knows what 'public concern' is.

146. See Post, supra note 142, at 669.
147. See id.
148. See id. at 668-69.
149. See supra text accompanying notes 136-138.
150. Estlund, supra note 9, at 27. Indeed, Professor Estlund maintains that the rule represents an "Emerging First Amendment Category" of potentially broad application. See id. at 1, 23. The Supreme Court has already explicitly applied the rule outside of the public-employment context once, in the field of defamation. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755-61 (1985) (holding that allegedly libelous speech that is not on a matter of public concern thus enjoys no special constitutional immunity); cf. Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975) (holding that action for invasion of privacy cannot be asserted when publicized subject matter is of public record). Estlund maintains that the Court has used criteria resembling the rule in a wide array of contexts, including a communicative tort case, see Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988), a statutory invasion of privacy action, see Florida Star v. B.J.F., 491 U.S. 524, 530-36 (1989), and a flag-burning case, see Texas v. Johnson, 491 U.S. 397, 402-06, 410-22 (1989). See Estlund, supra note 9, at 23-28. Estlund bluntly suggests that the Court deployed the rule because it is a "versatile doctrinal tool . . . well-suited to the task of taking or keeping the Constitution out of vast areas of the law, a task that seems to be much on the mind of a majority of the Court today." Id. at 27.
151. See, e.g., supra notes 83-91 and accompanying text (advocating application of Connick's public-concern rule to public employees' First Amendment association claims).
152. See supra text accompanying notes 83-91.
follow a preferred liberty approach. In *Hatcher v. Board of Public Edu-
cation & Orphanage*, for example, the Eleventh Circuit conceded that *Connick* foreclosed the plaintiff’s claim as to free speech, but held that the plaintiff nonetheless alleged a First Amendment infringement because “*Connick* is inapplicable to freedom of association claims.” This must be the case, the *Hatcher* court reasoned, because the Supreme Court has declared that the First Amendment right of association protected groups organized not only for political purposes, but also for cultural, social, and economic ends. By neglecting the Supreme Court’s instrumental conception of First Amendment association, and by invoking language associated with a preferred liberty concept of the First Amendment, the *Hatcher* court thus successfully portrayed application of *Connick* to associational claims as an unjustified extension of that decision.

But what is truly striking about *Hatcher* is the fact that the court could have ruled for the plaintiff even if it held *Connick* applicable to her claim. Indeed, the plaintiff alleged, *inter alia*, that she was denied a job assignment in retaliation for associating with parents and others in protest of a board of education plan to close several schools. The court could have concluded, appropriately, that this expressive activity involved a matter of concern to the public. That even with these facts the court nevertheless went to great lengths to hold the public-concern rule inapplicable to the plaintiff’s claim suggests a deep aversion indeed for the approach represented by *Connick*.

Courts correctly holding *Connick* applicable to First Amendment association claims display an underlying acceptance—even if a grudging one—of *Connick’s* Meiklejohnization of the First Amendment rights of public employees. Although these courts routinely muddle the issue

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153. *See, e.g.*, *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1557-58 (11th Cir. 1987) (“We do not view *Connick* as a retreat from *NAACP v. Alabama*, in which Justice Harlan wrote for the Court: ‘it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ’ ”) (citation omitted).

154. 809 F.2d 1546 (11th Cir. 1987).

155. Id. at 1556 & n.19, 1558.


158. *Cf.* *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (holding that dismissal of teacher in retaliation for writing letter to local newspaper critical of local school board tax policies violated teacher’s First Amendment rights); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (8th Cir. 1985) (holding that school teacher’s criticism of school board proposal to dismiss principal held to be speech of public concern); *Anderson v. Central Point Sch. Dist. No. 6*, 746 F.2d 505 (9th Cir. 1984) (holding that teacher/coach could not be fired for writing letters to school board members objecting to proposed restructure of school athletic program because such speech met public-concern test); *Allred*, supra note 103, at 50-55 (discussing decisions holding speech on matters of community debate to be of public concern).

159. *See Estlund, supra* note 9, at 2 & n.11.
of the Supreme Court's instrumental theory of First Amendment association, they nevertheless correctly display a sense that the right to freedom of association may not outstrip the right to freedom of speech.\textsuperscript{161} Still, some of these courts have been quick to note, by way of dicta, that under circumstances not involving public employment, the First Amendment protects broad areas of non-political expression, suggesting a preference on their part for a more general liberty-oriented conception of the First Amendment.\textsuperscript{162}

CONCLUSION

The Supreme Court has delineated two categories of constitutionally protected association: expressive association, and intimate association. These two doctrines compel straightforward answers to the question of Connick's applicability to public employees' freedom of association claims: Connick's public-concern rule should be applied to claims based on the right of expressive association because this right exists as an instrument or means of enhancing freedom of speech. Connick's public-concern rule should not be applied to those claims based on the right of intimate association, because this constitutionally recognized right, by definition, protects associations of highly personal interest. While agreeing that the public-concern rule should not apply to intimate association claims, courts are in conflict as to whether this rule should apply to expressive association claims. By and large, courts on each side of the conflict have overlooked the solution offered by the Supreme Court's instrumental theory of expressive association. Even the courts holding Connick applicable to these claims have preferred a patchwork of legalistic arguments to this uncomplicated, doctrinally based solution. The disagreement among the courts perhaps may be understood best as a theoretical struggle over the function of the First Amendment, with those holding the rule inapplicable displaying hostility toward the political-speech theory of the First Amendment exemplified by Connick, and those applying the rule, displaying support for or acquiescence to this theory. Notwithstanding objections to Connick, Supreme Court doctrine mandates application of the public-concern rule to the First Amendment association claims of public employees. While the opposite holds true for claims based on the right of intimate association, the Supreme Court's narrow construction of this right sharply limits its utility for asserting associational claims.

\textsuperscript{160} See supra text accompanying notes 108-17.

\textsuperscript{161} See supra text accompanying notes 108-17. This is reflected in their conclusions that if a public employee's individual speech must be tested for public concern, so must a public employee's associational expression.

\textsuperscript{162} See Griffin v. Thomas, 929 F.2d 1210, 1213 (7th Cir. 1991); see also Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985) (stressing fact that speech not on matters of public concern is not "totally beyond the protection of the First Amendment") (citation omitted).