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## *Waters v. Churchill*: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court

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*WATERS v. CHURCHILL*:<sup>1</sup>  
GOVERNMENT-EMPLOYER EFFICIENCY, JUDICIAL  
DEFERENCE, AND THE ABANDONMENT OF  
PUBLIC-EMPLOYEE FREE SPEECH BY THE  
SUPREME COURT

INTRODUCTION

The speech and assembly clauses of the First Amendment<sup>2</sup> allow for the expression of individual opinion, the exploration of conflicting ideology and belief, and the preservation of a representative democracy.<sup>3</sup> While the Supreme Court ac-

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<sup>1</sup> 114 S. Ct. 1878 (1994).

<sup>2</sup> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I. The First Amendment is applicable to state actors through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech . . . protected by the First Amendment from abridgement by Congress [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

<sup>3</sup> Justice Holmes articulated the importance of free speech values in shaping the conceptual framework of the Constitution in his compelling dissent in *Abrams v. United States*, 250 U.S. 616 (1919):

[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 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.

*Id.* at 630. See also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring):

Those who won our independence 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 ordinarily 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

knowledges that freedom of speech occupies a "preferred position" in constitutional jurisprudence,<sup>4</sup> the Court has determined that this freedom is subject to limitation by the government.<sup>5</sup> In particular, considerable limitations are now firmly established in the government workplace, where public-employee speech receives little first amendment protection.

The Supreme Court first directly confronted the issue of government restrictions on public-employee speech in 1968.<sup>6</sup> In *Pickering v. Board of Education*,<sup>7</sup> the Court established an analytical framework that balanced the employee's interest in speaking on matters of public concern against the government employer's interest in suppressing that speech in order to maintain workplace efficiency.<sup>8</sup> In its first application of this balancing test, the Court rigorously reviewed the government's

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American government.

See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."); *Masses Publishing Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y. 1917) (Hand, J.) ("[The] right to criticize either by temperate reasoning, or by immoderate and indecent invective, [is] normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."), *rev'd*, 246 F. 24 (2d Cir. 1917).

For a review of the philosophical underpinnings of freedom of speech, see JOHN MILTON, *AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* (1644), and JOHN S. MILL, *ON LIBERTY*, CH. II (1859).

<sup>4</sup> In *United States v. Carolene Products*, 304 U.S. 144 (1938), Justice Stone expressed the notion that some constitutional liberties such as freedom of speech deserve more vigilant judicial protection against the political process: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth [Amendment.]" *Id.* at 152-53 n.4. Five years later, the Court unequivocally stated that "freedom of speech . . . [is] in a preferred position." *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

<sup>5</sup> See *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (Harlan, J.): [W]e reject the view that freedom of speech . . . as protected by the First and Fourteenth Amendments, [is] "absolute," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

<sup>6</sup> See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), discussed *infra* text accompanying notes 21-39.

<sup>7</sup> 391 U.S. 563 (1968).

<sup>8</sup> See *id.* at 568 and *infra* notes 21-39 and accompanying text.

justifications for limiting employee speech in the workplace. In later decisions, however, the Court relinquished its oversight role and increasingly deferred to government justifications for restrictions on employee speech.<sup>9</sup>

During the 1994 Term, the Court revisited the issue of public-employee speech rights. In *Waters v. Churchill*,<sup>10</sup> the Court considered whether the established balancing test should apply to the employee's speech as determined by the government employer or as determined by a neutral factfinder. A divided Court held that the balancing analysis should be based on what a government employer reasonably believes an employee said.<sup>11</sup> Although the Court required the government employer to engage in an investigation before disciplining the employee for his or her speech, it did not explain when such an investigation is constitutionally mandated, what type of investigation is appropriate under particular circumstances, or how

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<sup>9</sup> See *Connick v. Myers*, 461 U.S. 138 (1983), *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), and *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), discussed *infra* text accompanying notes 40-85.

Numerous commentators, as well as members of the Court, have severely criticized this retreat from meaningful judicial scrutiny. See, e.g., Richard H. Hiers, *First Amendment Speech Rights of Government Employees: Trends and Problems in Supreme Court and Fifth Circuit Decisions*, 45 SW. L. J. 741, 824 (1991) ("But when important interests are present on both sides of the scales, the court should be especially meticulous in assessing their weight as well as any actual negative effects of the employee's speech upon bona fide . . . governmental interests."); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 77 (1987) ("Subduing [the] voices [of public employees] may hamper the flow of information about government operations, impair employee well-being, and reduce overall government effectiveness. Silence of this order is a central first amendment concern. It deserves the Court's full first amendment attention."); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse . . . simply because superiors disagree with the content of employees' speech."); *Connick*, 461 U.S. at 168 (Brennan, J., dissenting) ("Such extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning the operations of the agency for which they work.").

<sup>10</sup> 114 S. Ct. 1878 (1994).

<sup>11</sup> *Id.* at 1878 (plurality opinion by Justice O'Connor upholding broad powers of government employers to limit public employees' first amendment rights yet requiring employer to conduct a reasonable investigation before discharging an employee for speech); *id.* at 1891 (Souter, J., concurring in judgment to clarify that a government employer must actually believe its investigation results); *id.* at 1893 (Scalia, J., concurring in judgment yet severely criticizing the investigation requirement).

a government employer should balance its own efficiency interests against an employee's free speech interests.<sup>12</sup> *Waters* thus provides little guidance to government employers and employees in determining either the scope of the substantive free speech right within the workplace or the procedural requirements necessary to safeguard that right. More importantly, *Waters* indicates that the Court has abandoned a genuine judicial review of government employers' decisions based on employee speech merely because the government was acting in its capacity as employer rather than as sovereign. The Court's withdrawal weakens the preferred position of freedom of speech in the constitutional scheme and jeopardizes the first amendment rights of eighteen million federal, state and local public employees.<sup>13</sup>

This Comment argues that the Supreme Court should adopt a balancing test that provides more protection for public-employee speech. Part I of this Comment examines the development of the Court's public-employee speech doctrine, focusing on several important precedents that create the conceptual and analytical context for *Waters*. Part II reviews the facts and procedural history of *Waters*, and describes the sharp theoretical and practical differences among the various opinions. Part III argues that the Supreme Court, under the guise of creating first amendment procedural safeguards for employee speech, has actually provided government employers with a potent means for further stifling employee speech within the workplace. The fundamental flaw in the analysis of the *Waters* plurality is the acceptance, and further entrenchment, of a false dichotomy between the government's interest in acting efficiently as employer and as sovereign. Part IV recommends an alternative analysis that, instead, would balance the potentially greater impact of employee speech on workplace reform and public awareness against a government efficiency interest that remains the same regardless of whether the government is acting in its capacity as employer or sovereign. This approach would provide the appropriate level of protection for free speech rights while preserving judicial deference to gov-

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<sup>12</sup> See discussion *infra* text accompanying notes 147-216.

<sup>13</sup> See U.S. Dept. of Commerce, Statistical Abstract of the United States, Table No. 500, at 318 (113 ed. 1993) (figure from 1991).

ernment interests in efficiency.

## I. THE HISTORY OF EMPLOYEE SPEECH

### A. *The Right-Privilege Distinction and Associational Liberty*

Historically, the Supreme Court has viewed government employment not as a "right" justifying constitutional protection, but merely as a "privilege" that the government could deny for any reason.<sup>14</sup> The right-privilege distinction afforded the government wide latitude in abridging the first amendment rights of its employees. Until the late 1950s, judicial review focused on public employees' "freedom of association," a liberty not explicitly mentioned in the First Amendment but nevertheless derived from the specific rights of speech, press, assembly and petition.<sup>15</sup> In conjunction with the Cold War effort to root out Communists and other "subversives" from government, the Court upheld a variety of government rules that conditioned public employment on the taking of loyalty oaths by employees or the disclosure of employees' past membership in certain organizations.<sup>16</sup>

The Warren Court reversed this trend in a series of deci-

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<sup>14</sup> This view stemmed from Justice Holmes's decision in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892), where he observed that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

<sup>15</sup> See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1062-69 (4th ed. 1991):

The Court has deduced the right to associate for expressive activity from the express guarantees found in the First Amendment. [Currently] . . . [t]he government cannot limit this right to associate unless the limitation serves a compelling government interest unrelated to the suppression of ideas and this governmental interest cannot be furthered through means that are significantly less restrictive of the associational or expressive freedom.

<sup>16</sup> See, e.g., *Lerner v. Casey*, 357 U.S. 468 (1958) (sustaining the discharge of a municipal employee who refused to answer questions relating to allegedly subversive associations for fear of self-incrimination); *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (sustaining a New York State law that required teachers to take a loyalty oath); *Garner v. Los Angeles Bd. of Pub. Works*, 341 U.S. 716 (1951) (upholding a municipal ordinance that required each city employee to swear that he or she had neither personally advocated the overthrow of the government nor belonged to an organization which advocated such overthrow within the past five years).

sions that systematically struck down state and federal legislation premised on the right-privilege distinction and aimed at public employees' freedom of association.<sup>17</sup> By 1967, the Court had thoroughly repudiated the notion that a public employee had to sacrifice associational rights to obtain or keep a government job. In *Keyishian v. Board of Regents*,<sup>18</sup> the Court held that the New York State Board of Regents could not dismiss a tenured university professor who refused to sign an affidavit swearing that he had never been a member of the Communist Party.<sup>19</sup> Recognizing that the "danger of [the] chilling effect upon the exercise of vital first amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed,"<sup>20</sup> the Court restricted the government's ability to punish those employees who would not sacrifice constitutional liberties for employment opportunities.

#### B. *The Court Attempts a Balancing Approach: Freedom of Speech v. Government Efficiency*

When hysteria over subversion in government subsided during the early 1960s, the Court redirected its inquiry into government regulation of public-employee speech. In the seminal case of *Pickering v. Board of Education*,<sup>21</sup> the Court began

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<sup>17</sup> In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court struck down a state law that required nonresident corporations to reveal the names and addresses of all members residing in the state, holding that "[s]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 461. The Court also used this approach in decisions concerning restrictions on freedom of association in the government workplace. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down an Arkansas law requiring teachers to sign affidavits containing the names of all organizations to which they belonged or contributed in the past five years).

<sup>18</sup> 385 U.S. 589 (1967).

<sup>19</sup> The New York State Legislature had codified this requirement in what became known as the "Feinberg law." This law charged the Board of Regents with the responsibility of creating a list of "subversive" organizations. If the Board found that a teacher was a member of one of these groups, he or she could be summarily dismissed. Any current faculty member who failed to sign the affidavit could also be dismissed. The Court had upheld the constitutionality of the Feinberg law in *Adler v. Board of Educ.*, 342 U.S. 485 (1952), but claimed in *Keyishian* that "constitutional doctrine which has emerged since that decision has rejected [Adler's] major premise." *Keyishian*, 385 U.S. at 605.

<sup>20</sup> *Keyishian*, 385 U.S. at 604.

<sup>21</sup> 391 U.S. 563 (1968).

to explore and define the scope of an employee's right to express opinions about or in connection with the government workplace. *Pickering* involved an Illinois Supreme Court decision upholding a school board's dismissal of a teacher for writing a letter to a local newspaper criticizing the board's handling of various financial matters.<sup>22</sup> The Supreme Court reversed, asserting that the government may not constitutionally compel public employees to relinquish their rights as ordinary citizens to speak on matters of public concern, especially in connection with the operation of the government workplace where they are employed.<sup>23</sup> The Court noted, however, that the State has interests in regulating public-employee speech "that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."<sup>24</sup> The Court concluded that it must balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>25</sup>

Although the *Pickering* Court did not establish a general constitutional standard to control every situation in which a

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<sup>22</sup> The school board had proposed two bond issues and two tax increases in an effort to raise revenues for the building of new schools and to provide additional funds for existing educational and athletic programs. The school board justified Mr. Pickering's dismissal by claiming that numerous statements in his letter were false, and that the publication of the letter "would be disruptive of faculty discipline, and would tend to foment controversy, conflict and dissension among teachers, administrators, the Board of Education, and the residents of the district." *Id.* at 566-67. The Court rejected both of these contentions. See *infra* notes 36-39 and accompanying text.

<sup>23</sup> *Id.* at 568 (citing *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Shelton v. Tucker*, 364 U.S. 479 (1960) and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)).

<sup>24</sup> *Id.* The Court cited no authority for this proposition. The Court's acceptance of this proposition necessarily meant that an individual's interests in free speech would receive less constitutional protection depending on whether he or she spoke as a citizen or as an employee.

<sup>25</sup> *Id.* The Court tied Pickering's free speech interests to his status as a citizen and not as an employee. This distinction freed the Court from the responsibility of delineating the scope of a public employee's free speech rights, and from determining whether Pickering may have had a *greater* interest in his speech as an employee rather than as a citizen. The Court maintained that it only had to decide whether Pickering's speech addressed a matter of public concern and was protected against libel according to the "actual malice" standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).



government employer sanctioned an employee because of speech,<sup>26</sup> it did provide a loose set of criteria to guide lower courts in balancing employer and employee interests. The Court listed several inquiries important for a proper consideration of the government's interests. First, did the employee's speech result in a breakdown of discipline between superiors and employees or lead to disharmony between coworkers?<sup>27</sup> Second, did the employee's speech affect any personal loyalty or confidence necessary to sustain a specific employment relationship?<sup>28</sup> Third, did the employee's speech interfere with the operation of the government agency generally?<sup>29</sup> Finally, was the employee's speech evidence of incompetence sufficient to constitute an independent basis for dismissal?<sup>30</sup> The Court also enumerated factors important in considering the employee's interests, including whether the employee spoke on matters of legitimate public concern,<sup>31</sup> whether the particular employee was a member of a class that could provide knowledgeable and informed opinions regarding the issue,<sup>32</sup> and the particular forum in which the employee uttered his or her speech.<sup>33</sup>

Applying these factors, the Court concluded that the First Amendment protected Pickering's speech.<sup>34</sup> The Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on is-

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<sup>26</sup> The majority claimed that:

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

*Pickering*, 391 U.S. at 569. The Court failed here to maintain its distinction between the free speech rights of an individual as a citizen and as a public employee.

<sup>27</sup> *Id.* at 570.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 572-73.

<sup>30</sup> *Id.* at 573 n.5.

<sup>31</sup> *Pickering*, 391 U.S. at 573-74. The Court did not attempt to define what it meant by "public concern," either through its own analysis or through reliance on precedent. Instead, it simply reached the conclusion that Pickering's speech was in fact "a matter of legitimate public concern." *Id.* at 571.

<sup>32</sup> *Id.* at 572.

<sup>33</sup> *Id.* at 571-73.

<sup>34</sup> *Id.* at 574.

sues of public importance may not furnish the basis for his dismissal from public employment."<sup>35</sup> The Court also determined that proper school administration was a matter of legitimate public concern that required "free and open debate."<sup>36</sup> Furthermore, Pickering's position as a teacher assured his ability to comment knowledgeably on this issue.<sup>37</sup> Finally, the Court flatly rejected the school board's contentions that Pickering's speech had damaged the reputations of its members and would disrupt the efficient operation of the schools and the board itself.<sup>38</sup> The Court thus held that Pickering's interest in his speech as a citizen outweighed the school board's interest in restricting that speech.<sup>39</sup>

*Pickering* clearly established that citizens do not surrender their constitutional rights as a condition of public employment. Nevertheless, the *Pickering* Court recognized that the government, acting as employer rather than as sovereign, can restrict those rights in order to protect its interests in efficiently discharging its assigned responsibilities. *Pickering* required lower courts to conduct a stringent review of the employee's speech

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<sup>35</sup> *Id.* at 574.

<sup>36</sup> *Pickering*, 391 U.S. at 571-72.

<sup>37</sup> The Court stated that "it is essential that [teachers] be able to speak out freely on such questions [as the operation of schools] without fear of retaliatory dismissal." *Id.* at 572.

<sup>38</sup> *Id.* at 569-71. The majority concluded that: (1) according to the record, no one in the community responded to Pickering's statements except the school board; (2) the statements were not directed at any persons with whom the appellant had a close working relationship which could thereby be undermined; and (3) "[n]o evidence was introduced at any point in the proceedings regarding the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made." *Id.* at 567. The Court would not incorporate this final consideration into its balancing approach in future cases. Instead, it abandoned the requirement that a government employer introduce specific evidence that an employee's speech actually disrupted the government workplace, *Connick v. Myers*, 461 U.S. 138, 151 (1983), and substituted a judicial exploration into the *potential* adverse consequences of the speech within the workplace. *Waters v. Churchill*, 114 S. Ct. 1878, 1890 (1994).

<sup>39</sup> The Court addressed a similar issue in *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, the Court ruled that an untenured college professor was entitled to a due process hearing to determine if he was in fact fired for exercising his first amendment right of free speech. The professor had criticized a Texas school board decision that opposed the elevation of the college from a two-year to a four-year program. Subsequently, the school board did not renew his employment contract. The Court held that the teacher's criticism of the board's decision was a matter of public concern and therefore constitutionally protected. *Id.* at 593.

and its impact on the employer's workplace in order to ensure a proper balancing of interests in each case. The balancing analysis enunciated in *Pickering*, however, did not address several important issues. In particular, the Court did not clarify the type of causal link that a public employee must demonstrate between his or her speech and the government sanction in order for employment to be constitutionally protected.

### C. *The Court Tips the Scales in Its Balancing Approach*

After *Pickering*, it was unclear whether a government employer could discharge an employee based on a combination of constitutionally protected and unprotected speech. The Supreme Court resolved this issue in *Mount Healthy City School District Board of Education v. Doyle*.<sup>40</sup> Doyle, an untenured public school teacher, called a local radio station and described the contents of a memorandum that he had received regarding the school board's plan to promulgate a new dress code for teachers.<sup>41</sup> He also engaged in a number of confrontational incidents with both students and staff at the school.<sup>42</sup> The board subsequently decided not to renew Doyle's employment contract, claiming that these incidents and the call to the radio station sufficiently demonstrated Doyle's lack of professional tact as well as his insincerity in fostering healthy school relationships.<sup>43</sup> The district court held that the First Amendment protected Doyle's telephone call to the radio station.<sup>44</sup> The court decided that because this protected communication had played a substantial role in the board's decision not to rehire Doyle, the board had to rehire him with back pay.<sup>45</sup> The Sixth

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<sup>40</sup> 429 U.S. 274 (1977).

<sup>41</sup> *Id.* at 282.

<sup>42</sup> Doyle referred to a particular group of students as "sons of bitches," and had made obscene gestures to two female students whom he claimed disobeyed his instructions. *Id.* He also criticized cafeteria staff about the quality of their service. *Id.* The district court found that the First Amendment would allow the board to fire Doyle based solely on this conduct. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 284. The district court accepted Doyle's reasoning that instituting the dress code illustrated the board's view "that there was a relationship between teacher appearance and public support for bond issues." *Id.* at 282.

<sup>45</sup> *Mount Healthy*, 429 U.S. at 284. In reviewing the two reasons given by the board for terminating Doyle's employment, the court stated that "[i]f a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in

Circuit affirmed.<sup>46</sup>

After applying the balancing test required by *Pickering*, a unanimous Supreme Court agreed with the lower courts' conclusion that the First Amendment protected Doyle's telephone call to the radio station.<sup>47</sup> Under *Pickering*, this finding should have ended the Court's analysis. Nevertheless, the Court rejected the notion that Doyle was entitled to remedial action simply because his protected speech might have played a substantial role in his termination.<sup>48</sup> The Court feared that predicated government-employer liability on speech that did not concern the challenged action would encourage a public employee in danger of being discharged for unrelated reasons to engage in constitutionally protected speech. In so doing, the employee could "prevent his employer from assessing his performance record and reaching a decision not to rehire [him solely] on the basis of that record."<sup>49</sup> To avoid this "undesirable consequence," Justice Rehnquist concluded that a public employee had the dual burden of proving that: (1) his or her conduct was constitutionally protected;<sup>50</sup> and (2) this conduct was a "substantial factor" or a "motivating factor" contributing to the government's employment decision.<sup>51</sup> If a public employee satisfied this two-pronged test, the government employer could then prove "by a preponderance of the evidence that it

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the decision not to renew [the contract]—even in the face of other permissible grounds—the decision may not stand." *Id.*

<sup>46</sup> *Doyle v. Mount Healthy City Sch. Dist. Bd. of Educ.*, 529 F.2d 524 (6th Cir. 1975).

<sup>47</sup> *Mount Healthy*, 429 U.S. at 284. Nevertheless, the Court noted that "[t]he District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct." *Id.* at 283. The Court did not expressly state any tests of its own.

<sup>48</sup> *Id.* at 285.

<sup>49</sup> *Id.* at 285-86. Justice Rehnquist asserted that:

[a] rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

*Id.* at 285.

<sup>50</sup> *Id.* at 287. The Court gave no indication of how the employee should attempt to prove this constitutionally protected status to the satisfaction of a court.

<sup>51</sup> *Id.* at 287. Justice Rehnquist did not explain whether the "substantial factor" standard and the "motivating factor" standard required the same level of proof, although the latter would appear to be a less stringent test.

would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."<sup>52</sup> The Court assumed that this "but-for" causation analysis<sup>53</sup> adequately protected a public employee's constitutional rights while furnishing the government employer with the necessary flexibility in making its employment decisions.<sup>54</sup>

The *Mount Healthy* approach reveals the Supreme Court's growing reluctance to interfere with employer decisions and its increasing deference to government justifications for sanctioning public-employee speech. The Court added a new dimension to its balancing analysis by saddling a public employee with the initial evidentiary burden of proving that his or her speech was constitutionally protected *and* a substantial factor for the government employer's sanction.<sup>55</sup> More importantly, the *Mount Healthy* approach allows a government employer to escape constitutional liability by demonstrating that it would have reached the same employment decision in the absence of such protected speech.<sup>56</sup> This approach makes little sense if the public employee has already proven that the government's actions were substantially based on constitutionally protected speech.<sup>57</sup> Thus, *Mount Healthy* removes a potential evidentiary problem for government employers who sanction an employee based on both constitutionally permissible and impermissible reasons.

Although the *Mount Healthy* causation analysis creates new evidentiary burdens concerning a government employer's motives for the discharge, it leaves untouched the question of when the offending speech addressed a matter of public con-

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<sup>52</sup> *Mount Healthy*, 429 U.S. at 287.

<sup>53</sup> The Court used this terminology to describe the second prong of the *Mount Healthy* analysis in its decision in *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979), discussed *infra* text accompanying notes 58-65.

<sup>54</sup> *Mount Healthy*, 429 U.S. at 287.

<sup>55</sup> *Id.* (citing *Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 270-71 n.21 (1977) (plaintiff claiming equal protection violation in city rezoning plan must prove that "invidious discriminatory purpose was a motivating factor" in the rezoning decision)).

<sup>56</sup> *Id.*

<sup>57</sup> As with the equal protection analysis in *Arlington Heights*, the *Mount Healthy* Court does not explain why an employee is not immediately entitled to remedial action after proving that her constitutionally protected speech was a substantial or motivating factor in her discharge, instead of merely shifting the burden of justification to the government employer.

cern and thus deserved constitutional protection. In *Givhan v. Western Line Consolidated School District*,<sup>63</sup> the Court held that the First Amendment protects an employee who speaks privately with an employer on a matter of public concern as well as one who engages in public discourse.<sup>63</sup> Givhan had been a public school teacher in Mississippi for eight years when the school district decided not to renew her employment contract.<sup>60</sup> During the year prior to the school district's decision, Givhan had submitted a series of lists to her principal which included Givhan's ideas on more fully integrating the school.<sup>61</sup> The principal claimed these lists were "petty and unreasonable demands" that hindered his work.<sup>62</sup> The Fifth Circuit concluded that unless a government employee actually spoke about a matter of public concern in public, the First Amendment did not protect the speech or require the balancing analysis defined by *Pickering* and *Mount Healthy*.<sup>63</sup>

The Supreme Court unanimously rejected the court of appeals's reasoning. The Court held that first amendment protection is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."<sup>64</sup> The Court determined, however, that judicial review of private speech in this context necessarily must involve the weighing of additional factors: when a public employee personally speaks to an immediate supervisor regarding an issue of public concern, the government employer's efficiency may be threatened not only by the content of the employee's message, but also by the "manner,

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<sup>63</sup> 439 U.S. 410 (1979).

<sup>63</sup> *Id.* at 415-16.

<sup>63</sup> *Id.* at 411.

<sup>61</sup> *Ayers v. Western Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977). The district court characterized the lists as follows:

These [lists] all reflect Givhan's concern as to the impressions on black students of the respective roles of whites and blacks in the school environment. She "requested," among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered "choice;" (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps workers . . . be assigned semi-clerical office tasks instead of only janitorial-type work.

*Id.* (citation omitted).

<sup>62</sup> *Givhan*, 439 U.S. at 414.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 415-16.

time, and place in which it is delivered."<sup>65</sup> Thus, although the First Amendment may guarantee a public employee the freedom to communicate privately with his or her employer on matters of public concern, the Court will protect this freedom only if the balancing analysis reveals that the manner, time and place of the employee's speech did not impinge on government efficiency interests. Like the evidentiary burden imposed by the *Mount Healthy* Court, the manner, time and place factors added by the *Givhan* Court created yet another hurdle for public employees who seek to vindicate their constitutional right to freedom of speech.

The Court incorporated the *Givhan* factors into its analysis when it upheld a discharge punishing publicly made and nonconfrontational employee speech in *Connick v. Myers*.<sup>66</sup> In *Connick*, the Court held that the First Amendment did not protect an assistant district attorney's distribution of a survey to colleagues that communicated her personal concern about office policy and procedure. Moreover, in concluding that the survey addressed matters of public concern "in only a most limited sense," the Court further narrowed the realm in which a public employee would receive constitutional protection for criticizing a government employer.<sup>67</sup>

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<sup>65</sup> *Id.* at 415 n.4 (citations omitted). The Court did not indicate how these additional factors modified the balancing test, but stated simply that "striking the *Pickering* balance in each context may involve different considerations." *Id.*

The Supreme Court has held that the government may regulate the "manner, time and place" of speech uttered in a public forum, provided the content of the speech is not restricted. *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983) (manner, time and place restrictions are valid if they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.") (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Such a restriction on speech is justified:

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The *Grace* and *O'Brien* decisions undeniably contemplate that the Court will use the manner, time and place factors to determine whether the *government* has overstepped its constitutional ability to restrict speech, and not, as *Givhan* implies, to determine whether the particular *speaker* has overstepped the bounds of constitutional protection.

<sup>66</sup> 461 U.S. 138 (1983).

<sup>67</sup> *See id.* at 154.

Sheila Myers had served with distinction as an assistant district attorney in New Orleans for over five years.<sup>63</sup> In the fall of 1980, District Attorney Connick informed Myers that he was transferring her to another department.<sup>63</sup> Myers opposed the transfer and promptly notified her superiors.<sup>70</sup> She also discussed with them her opinions on various office policies and procedures. After Myers received an indifferent response from her superiors, she prepared and distributed a confidential survey to her colleagues which addressed a range of office topics.<sup>71</sup> When Connick learned about Myers's actions, he promptly fired her.<sup>72</sup>

In a 5-4 decision written by Justice White, the Supreme Court reasoned that "*Pickering*, its antecedents and progeny, lead us to conclude that if Myers's questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."<sup>73</sup> The Court thus implied that first amendment protection for employee speech would attach only if the employee could prove, as a threshold issue, that he or she spoke on a matter of public concern.<sup>74</sup> Otherwise, Justice White noted, the Court would extend "wide latitude" to government employers in managing their employees, and would limit the judicial balancing of interests.<sup>75</sup> In order for a reviewing

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<sup>63</sup> *Id.* at 140.

<sup>63</sup> *Id.*

<sup>70</sup> *Id.* at 140-41. Myers believed that a transfer would result in a conflict of interest because her new position would place her in contact with certain persons on probation whom she currently counseled. *Id.* at 141 n.1.

<sup>71</sup> *Connick*, 461 U.S. at 141. The survey polled the impressions of the other assistant district attorneys "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.*

<sup>72</sup> Connick gave Myers three distinct reasons for the firing: (1) she had refused to accept the transfer; (2) her distribution of the survey was "an act of insubordination"; and (3) particular questions contained in the survey were especially objectionable—namely, those inquiring about employee confidence in superiors' decisionmaking abilities and pressure on employees to work on political campaigns. *Id.*

<sup>73</sup> *Id.* at 146 (citing *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) and *Schmidt v. County Sch. Dist.*, 558 F.2d 932, 934 (10th Cir. 1977)).

<sup>74</sup> Justice White did not provide a workable definition of "public concern," claiming only that the employee's speech must be "considered as relating to any matter of political, social, or other concern to the community . . . ." *Id.*

<sup>75</sup> *Id.*



court to determine whether the employee spoke on a matter of public concern, it must examine the "content, form, and context" of the statements "as revealed by the whole record."<sup>76</sup> The Court gave no indication as to how these factors should be applied or the weight to be accorded to each.

*Connick's* new approach shifted the critical judicial analysis from a careful balancing of employee and employer interests to an inquiry into the employee's reasons for speaking. When Justice White examined Myers's survey, he found that it reflected "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre."<sup>77</sup> The majority did conclude, however, that one question in the survey touched on a matter of public concern—whether any assistant district attorney had ever felt pressured to work in political campaigns.<sup>78</sup> Thus, because the survey contributed to *Connick's* decision to discharge Myers, the Court determined that it must perform a balancing analysis.<sup>79</sup>

The Court emphasized that the "*Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."<sup>80</sup> Moreover, the Court asserted that the nature of the employee's expression, which a court must determine before conducting the *Pickering* balancing analysis, will directly affect the state's burden of justifying the sanctioning of employee speech.<sup>81</sup>

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<sup>76</sup> *Id.* at 147-48.

<sup>77</sup> *Connick*, 461 U.S. at 148. The Court never explicitly analyzed the survey through the "content, form, and context" criteria. Instead, Justice White analyzed Myers's motive for distributing the survey, claiming that her desire was not to inform the public about the policies of the District Attorney's office, but merely to "gather ammunition for another round of controversy with her superiors." *Id.* Of course this determination was irrelevant, as first amendment protection is based on the employee's speech, not the employee's motive.

<sup>78</sup> *Id.* at 149. Justice White claimed that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights [of freedom of association]." *Id.* (citing *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976)). He did not explain why the Constitution prohibits a government employer from pressuring a public employee to work for office supported candidates in political campaigns, but does not prohibit that government employer from discharging an employee who merely questions such a policy through speech.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 150.

<sup>81</sup> *Id.* Justice White claimed that "*Pickering* unmistakably states . . . that the state's burden in justifying a particular discharge varies depending upon the na-

Since the majority had already determined that Myers's survey only superficially addressed a matter of public concern, it would afford much greater judicial deference to Connick's decision and his justifications for the dismissal.<sup>82</sup> The Court thus concluded that "[t]he limited first amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."<sup>83</sup>

*Connick* focused the attention of lower courts squarely on the interests of government employers. After *Connick*, these interests included not only efficiently discharging official duties, but also preventing disruption in the workplace and maintaining proper discipline among subordinates.<sup>84</sup> More importantly, the *Connick* Court held that these interests may justify employment decisions predicated on employee speech which only *potentially* disrupted the workplace.<sup>85</sup> In *Rankin v. McPherson*,<sup>86</sup> however, the Court retreated somewhat from this conclusion.

The dispute in *Rankin* concerned nineteen-year old Ardith McPherson, who served as a "deputy constable" for Harris County, Texas.<sup>87</sup> Her primary responsibility was to perform secretarial functions.<sup>88</sup> While sitting in a private room in the

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ture of the employee's expression." *Id.* See *supra* notes 21-39 and accompanying text.

<sup>82</sup> The majority thus claimed that a "stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Connick*, 461 U.S. at 152.

<sup>83</sup> *Id.* at 154. This language summarized the Court's new rule concerning a government employer's justification for sanctioning employee speech—an employer must only reasonably believe that the employee's speech will affect the employer's efficient discharge of its responsibilities to justify dismissal.

<sup>84</sup> *Id.* at 150-51.

<sup>85</sup> *Id.* at 154. The *Waters* Court would incorporate this "potentially disruptive" rationale directly into the *Connick* balancing analysis. See *infra* notes 167-172 and 251-259 and accompanying text.

<sup>86</sup> 483 U.S. 378 (1987).

<sup>87</sup> The county considered every person who worked for the Constable's office to be a deputy constable, regardless of job function. *Id.* at 380.

<sup>88</sup> The Court described McPherson's responsibilities as follows:

She was not a commissioned peace officer, did not wear a uniform, and was not authorized to make arrests or permitted to carry a gun. McPherson's duties were purely clerical. Her work station was a desk at which there was no telephone, in a room to which the public did not have ready access. Her job was to type data from court papers into a computer that maintained an automated record of the status of civil

back of the stationhouse, McPherson heard a report on the office radio that President Reagan had been shot. Another deputy constable overheard McPherson say, "[I]f they go for him again, I hope they get him."<sup>89</sup> Constable Rankin was told about the remark and summoned McPherson to discuss it with her. When McPherson admitted making the remark, Rankin promptly fired her.

In order to determine whether Constable Rankin had discharged McPherson in violation of the First Amendment, the Supreme Court conducted the *Connick* balancing analysis.<sup>90</sup> The majority held that McPherson's statement, made during a conversation about the policies of the President's administration, clearly addressed a matter of public concern.<sup>91</sup> The Court concluded that Rankin had failed to demonstrate a government interest sufficient to outweigh McPherson's first amendment rights.<sup>92</sup> Thus, the majority held that "[g]iven the function of

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process in the county. Her training consisted of two days of instruction in the operation of her computer terminal.

*Id.* at 380-81.

<sup>89</sup> *Id.* McPherson testified at trial that she had indeed uttered this remark. *Id.* McPherson also testified that she commented on the President's policies concerning welfare, medicaid benefits and food stamps. *Id.*

<sup>90</sup> Justice Marshall, writing for the majority, characterized the *Connick* balancing test as a requirement which serves "to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." *Id.* at 384. He claimed that a government employer providing "public services" should not encounter the same rigorous judicial scrutiny of its employment decisions as it would in its capacity as "entity." Justice Marshall maintained that this discrepancy in the level of judicial scrutiny was necessary because review of every government-employer personnel decision could eventually "hamper the performance of public functions." *Id.* Nevertheless, the majority did not entirely remove these decisions from the realm of judicial scrutiny: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech." *Id.* Of course, this vigilance could only manifest itself through a judicial standard which indeed mandated a rigorous review of all public-employee discharges predicated on speech, regardless of whether a government employer's role is described as "provider of public services" or the more amorphous "government entity."

<sup>91</sup> *Rankin*, 483 U.S. at 386. Justice Marshall observed that the "controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387.

<sup>92</sup> The majority stated that *Connick* required the Court to focus "on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest."

the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment.<sup>793</sup>

#### D. *A Doctrine in Disarray*

During the twenty years between *Pickering* and *Rankin*, the Supreme Court modified both the nature of public-employee speech rights and the scope of judicial review of government-employer decisions affecting those rights. Public employees seeking to vindicate their right to speak freely in the workplace faced an ever-increasing number of substantive and evidentiary hurdles. Building on precedent, the Court created five distinct categories of public-employee speech, only two of which were deemed worthy of genuine first amendment protection. Barring the existence of a statutory or contractual relationship with its employees, the Constitution permits a government employer to discharge a public employee for speech that: (1) concerns a matter of purely private interest;<sup>94</sup> (2) address-

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*McPherson*, 483 U.S. at 388. The majority proceeded sua sponte to search for evidence that McPherson's speech had in any way disrupted the Constable's office or affected the efficient discharge of the Constable's responsibilities, despite the fact that "Constable Rankin testified that the possibility of interference with the functions of the Constable's office had not been a consideration in his discharge of [McPherson] and that he did not even inquire whether the remark had disrupted the work of the office." *Id.* at 388-89.

<sup>93</sup> *Id.* at 392. In a dissenting opinion, Justice Scalia claimed that McPherson's speech did not touch on a matter of public concern and thus failed the threshold requirement of *Connick*. *Id.* at 396. He agreed with the district court's finding that McPherson's speech was "a voicing of the hope that, next time, the President would be killed." *Id.* This speech was a "far cry" from the speech which the Court had considered in *Connick*, *Pickering*, *Mount Healthy* and *Givhan*. *Id.* Moreover, "[Rankin's] interest in preventing the expression of such statements in his agency outweighed her first amendment interest in making the statement." *Id.* at 399. Justice Scalia viewed the majority opinion as creating a new class of public employees whose speech is always protected because of their status as "nonpolicymaking" employees. *Id.* at 393. It appears that Justice Scalia would rather always protect the government's employment decisions from constitutional scrutiny simply because of the government's status as "employer."

<sup>94</sup> See *Connick v. Myers*, 461 U.S. 138, 147 (1983). It is necessary to distinguish between employee speech that addresses matters of personal concern and employee speech that addresses matters of public concern but which is uttered in private. The Court has consistently held that the First Amendment protects only the latter speech. *Rankin v. McPherson*, 483 U.S. 378, 386-87 n.11 (1987) ("The

es a matter of public concern but hinders the effective functioning of the public employer's enterprise;<sup>95</sup> or (3) addresses matters of both public and private concern and limits the effective functioning of the public employer's enterprise.<sup>96</sup> The First Amendment will only protect a public employee's speech when it: (1) addresses a matter of public concern and is non-disruptive;<sup>97</sup> or (2) addresses matters of private and public concern and is nondisruptive.<sup>98</sup> The critical factor in the Court's analysis is the protection of the government-employer's efficiency interests. The recent Supreme Court decision in *Waters v. Churchill*<sup>99</sup> continues to explore this factor while further limiting the right of public employees to speak freely.

## II. WATERS V. CHURCHILL

### A. Background

On October 25, 1982, Cheryl Churchill was hired as a part-time obstetrical nurse at McDonough District Hospital ("MDH"), a municipal hospital located in Macomb, Illinois and incorporated under state law.<sup>100</sup> Churchill continued to work

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private nature of the [employee's] statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (first amendment protection applies when a public employee speaks privately with an employer on issues of public concern).

<sup>95</sup> *Rankin*, 483 U.S. at 388.

<sup>96</sup> *Id.* Under these situations, a court would apply the two-part causation analysis of *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *See supra* notes 40-57 and accompanying text. Of course, this analysis need not be reached at all if the government employer initially convinces a court that the speech, although protected, was potentially disruptive. *See discussion infra* text accompanying notes 240-259.

<sup>97</sup> *Waters v. Churchill*, 114 S. Ct. 1878, 1890-91 (1994).

<sup>98</sup> Once again, the government employer has the opportunity to absolve itself of any wrongdoing in these situations under the *Mount Healthy* analysis. *See supra* text accompanying notes 54-57.

<sup>99</sup> 114 S. Ct. 1878 (1994).

<sup>100</sup> Supreme Court Brief of Respondents at 1, *Waters v. Churchill*, 114 S. Ct. 1878 (1994) (No. 92-1450), 1993 WL 433051 [hereinafter Brief of Respondents]. Churchill's initial status as a part-time employee had significant impact on the reasoning of the district court, which viewed the conflict primarily as involving whether Churchill could legally enforce an expectation of continued employment pursuant to Illinois contract law and the Due Process Clause of the Fourteenth Amendment. *See Churchill v. Waters*, 731 F. Supp. 311, 318 (C.D. Ill. 1990), *rev'd*, 977 F.2d 1114 (7th Cir. 1992), *vacated*, 114 S. Ct. 1878 (1994).

as a part-time employee in the Obstetrics Department until September 16, 1985, when she began serving in a full-time capacity.<sup>101</sup> Churchill received performance evaluations every six months that rated her performance in approximately fifty categories.<sup>102</sup> During the period between October 1982 and December 1985, Churchill demonstrated continued improvement in her work. In fact, a December 1985 evaluation written by Cynthia Waters, Churchill's supervisor, indicated that she had improved to above-standard performance in every category.<sup>103</sup> In the space on the evaluation form for "additional evaluator's comments," Waters noted that "Cheryl has a very bubbly contagious sense of humor most times."<sup>104</sup>

In April 1986, MDH hired Kathy Davis as Vice President of Nursing.<sup>105</sup> Davis soon implemented new administrative policies affecting nurse staffing and training throughout MDH, including a policy known as "cross-training."<sup>106</sup> From its inception, cross-training was a controversial policy that generated much discussion and debate among the medical and nursing staff of MDH.<sup>107</sup> Churchill vocalized her opposition to the new policy, as did the clinical head of the Obstetrics Department, Dr. Thomas Koch.<sup>108</sup> In June 1986, Churchill received her first performance evaluation subsequent to the implementation of the cross-training policy.<sup>109</sup> This evaluation noted a

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<sup>101</sup> *Churchill*, 731 F. Supp. at 312.

<sup>102</sup> *Churchill v. Waters*, 977 F.2d 1114, 1116 (7th Cir. 1992), *vacated*, 114 S. Ct. 1878 (1994).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Churchill*, 731 F. Supp. at 312.

<sup>106</sup> *Id.* Cross-training involved the transfer of full-time nurses to different specialized departments within the hospital from those in which they were normally assigned. Nurses were provided with additional training in the new departments. *Churchill*, 977 F.2d at 1116. They could then be transferred easily between the various MDH departments whenever staff shortages existed in a particular area, thus providing the hospital with more flexibility in its staffing requirements. As the supervising obstetrics nurse, Waters was responsible for the implementation of the new cross-training policy within the department. Brief of Respondents, *supra* note 100, at 2.

<sup>107</sup> *Churchill*, 731 F. Supp. at 312.

<sup>108</sup> *Churchill*, 977 F.2d at 1116-17. Churchill and Dr. Koch had developed a close relationship by the summer of 1986 and were perceived by the hospital administration as "professional allies" in the controversy concerning cross-training. *Id.* at 1117.

<sup>109</sup> *Id.* at 1116.

marked deterioration in Churchill's performance, with a below-standard rating in three of the fifty categories.<sup>110</sup>

On August 21, 1986, a "code pink" emergency occurred in the Obstetrics Department during a caesarean section that Dr. Koch was performing.<sup>111</sup> Dr. Koch ordered Churchill to assist him with the emergency procedure, and Churchill remained in the operating room until he successfully delivered the baby and the emergency abated. Churchill briefly left the operating room to check on the status of another patient who was under her care.<sup>112</sup> While Churchill performed this task, Waters entered the operating room. Churchill returned to the operating room to complete the necessary paperwork for the emergency patient.<sup>113</sup> Waters then ordered Churchill to check on the other patient.<sup>114</sup> Churchill stopped doing the paperwork and told Waters that "[y]ou don't have to tell me how to do my job."<sup>115</sup> Nevertheless, Churchill responded to Waters's order and again went to check on her patient.<sup>116</sup> Dr. Koch reprimanded Waters for interfering with his orders to Churchill. After leaving the operating room, he approached Waters to discuss the incident in more detail. Waters refused to talk with Dr. Koch about the confrontation and instead contacted Stephen Hopper, the President and Chief Executive Officer of MDH.<sup>117</sup>

In a meeting held among Dr. Koch, Waters and Hopper, Dr. Koch criticized not only the behavior of Waters in the operating room but also the new cross-training policy that Davis and Waters had implemented.<sup>118</sup> At a follow-up meeting the next day, Hopper, Davis and Waters discussed Churchill's comment made in response to Waters's order, and decided to discipline Churchill by issuing her a "written warning" for insubordination.<sup>119</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> A code pink is a warning given at MDH to indicate that an emergency situation exists in the Obstetrics Department involving the life of a baby, its mother, or both. *Id.* at 1117 n.2. All available personnel must report to the room to render assistance. *Id.*

<sup>112</sup> *Id.* at 1117.

<sup>113</sup> *Churchill*, 977 F.2d at 1117.

<sup>114</sup> *Id.* at 1117.

<sup>115</sup> *Id.* at 1118.

<sup>116</sup> *Id.* at 1117.

<sup>117</sup> *Churchill*, 731 F. Supp. at 313.

<sup>118</sup> *Id.* at 313.

<sup>119</sup> *Id.* The written warning was part of MDH's established procedures concern-

In January 1987, Churchill received her annual performance evaluation from Waters.<sup>120</sup> This evaluation, unlike the evaluation six months earlier, indicated that her performance had again earned above-standard ratings in every category.<sup>121</sup> At the end of the evaluation, however, Waters included handwritten comments critical of Churchill's attitude and behavior.<sup>122</sup> When Waters and Churchill met in person to discuss the evaluation, Waters did not mention the handwritten comments she had included in the evaluation.<sup>123</sup>

On January 16, 1987, Churchill and a cross-trainee, Melanie Perkins-Graham, took a break from their shifts and retired to a kitchen area located behind the main nurse's station of the Obstetrics Department.<sup>124</sup> Dr. Koch soon entered the department and joined them in conversation at their table. Nurses Jean Welty and Mary Lou Ballew, who remained at the main station, each overheard parts of the conversation.<sup>125</sup> Welty overheard Perkins-Graham remark to Dr. Koch that despite her current status as a cross-trainee, she had been thinking about permanently transferring to the Obstetrics Department.<sup>126</sup> Dr. Koch discussed his prior criticisms of the cross-training policy generally and its implementation by Davis in particular.<sup>127</sup> Churchill agreed with Dr. Koch and stated that

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ing the discipline of its employees. It usually followed "verbal counseling" to the employee by the appropriate supervisor. *Churchill*, 977 F.2d at 1118 n.5.

In the warning Waters issued to Churchill, she claimed that Churchill "had to be asked twice to leave the delivery room," and exhibited a "[g]eneral negative attitude and lack of support toward nursing administration. . . ." *Churchill*, 731 F. Supp. at 313. Although Churchill could have replied to the warning either orally or in writing, or filed a grievance protesting this warning, she did not. *Id.*

<sup>120</sup> *Churchill*, 731 F. Supp. at 313.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* The full comments read:

Cheryl exhibits negative behavior towards me and my leadership—through her actions and body language, i.e., no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

*Id.*

<sup>123</sup> *Id.* When MDH terminated Churchill's employment, it considered these critical comments to be the second written warning issued to Churchill pursuant to its Rules of Dismissal. *Churchill*, 977 F.2d at 1118.

<sup>124</sup> *Churchill*, 731 F. Supp. at 313-14.

<sup>125</sup> *Id.* at 314.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*



the cross-training policy was going to "ruin the hospital."<sup>128</sup> Welty also heard Churchill encourage Perkins-Graham to ignore rumors of Waters's reputation as a difficult boss, because Waters had a "hard job" that could make her moody.<sup>129</sup>

Although Welty overheard most of the conversation among Dr. Koch, Churchill and Perkins-Graham, she did not report it to Waters. Nurse Ballew, who overheard only fragments of this conversation, "construed those portions she [did hear] as negative and intended to dampen the enthusiasm of . . . Perkins-Graham," and reported the incident to Waters.<sup>130</sup> On January 23, Davis conducted a meeting with Waters, Hopper and Perkins-Graham to discuss the nature of the conversation.<sup>131</sup> Perkins-Graham agreed that Churchill's comments about Waters seemed negative and inappropriate, and that Churchill had indeed criticized the new MDH policies within the Obstetrics Department.<sup>132</sup> At a subsequent meeting held on January 26, Davis and Waters decided to ask Hopper to terminate Churchill's employment, despite never interviewing Churchill, Dr. Koch or Nurse Welty regarding the conversation.<sup>133</sup> When Churchill arrived for work the following day, Waters informed her that she was fired because of her "continued undermin[ing] of the department and the hospital administration."<sup>134</sup> Churchill filed a grievance in accordance with hospital procedure, but MDH upheld the discharge.<sup>135</sup>

Churchill then brought an action in federal district court<sup>136</sup> under 42 U.S.C. section 1983 and state law.<sup>137</sup> She

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<sup>128</sup> *Id.* Churchill further claimed that Davis's "administrative decisions seemed to be impeding nursing care." *Churchill*, 977 F.2d at 1118.

<sup>129</sup> *Churchill*, 731 F. Supp. at 314.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Perkins-Graham also mentioned Churchill's comment about Davis "ruining the hospital." *Id.*

<sup>133</sup> *Id.* Both Dr. Koch and Nurse Welty indicated that "they would have supported Churchill's version of the incident." *Churchill*, 977 F.2d at 1118-19.

<sup>134</sup> *Churchill*, 731 F. Supp. at 314.

<sup>135</sup> *Id.* Hopper reviewed the grievance and decided that MDH supervisors had issued Churchill three warnings concerning her behavior, which were enough to satisfy MDH disciplinary guidelines and warrant dismissal. *Id.* The first was the written warning following the operating room incident, the second was Waters's criticism of Churchill in the evaluation, and the third was the January 16 conversation between Churchill and Perkins-Graham. *Id.*

<sup>136</sup> *Id.* at 311. Churchill joined Waters, Davis, Hopper and MDH as defendants in the suit.

<sup>137</sup> Section 1983 states:

claimed that termination of her nursing position at MDH violated her first and fourteenth amendment rights and breached her employment contract.<sup>138</sup> Churchill asserted that MDH had violated her first amendment freedom of speech and due process rights when it discharged her on the basis of speech without first determining if the Constitution actually protected that speech.<sup>139</sup> The district court granted MDH's motion for summary judgment on Churchill's free speech claim, holding that:

Churchill's statements were not protected speech as a matter of law, and even if they were, the hospital's interest in maintaining harmony among the workers and encouraging good working relationships among the employees and supervisors outweighed Churchill's interest in expressing her opposition to the cross-training policy to her co-worker.<sup>140</sup>

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Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

<sup>138</sup> *Churchill*, 731 F. Supp. at 311. The defendants filed a joint motion for summary judgment on all counts. The district court determined that Churchill could sustain her wrongful termination claim under the Due Process Clause of the Fourteenth Amendment only if MDH's employee handbook created a "legally enforceable expectation of continued employment." *Id.* at 318. After examining the handbook, the district court found that none of its provisions contained "clear promises" to an employee sufficient to justify a reasonable expectation of continued employment, such as specific terms defining how an individual was to become a permanent member of the staff or explicit mandatory procedures governing the termination of employees. *Id.* at 319. Moreover, the handbook included a disclaimer "expressly disavow[ing] any intent to be bound," since the contents were "presented as a matter of information only" and "were not to be considered conditions of employment." *Id.* The district court concluded that the handbook could not, as a whole, be read to constitute a promise of employment upon which Churchill could reasonably rely. *Id.* The court therefore held that Churchill did not have an enforceable property interest in her employment, and could not "proceed on her due process claim and [thus] summary judgment would be proper on this basis alone." *Id.* at 320.

<sup>139</sup> *Id.* Churchill contended that the speech indeed addressed a matter of public concern—namely, the effect of the cross-training policy on hospital care. *Id.*

<sup>140</sup> *Churchill*, 977 F.2d. at 1120. The district court also dismissed Churchill's freedom of expressive association claim and denied her partial summary judgment motion on the first amendment due process claim. *Id.*

## B. *The Seventh Circuit Decision*

In reversing the district court's judgment on Churchill's first amendment claim, the Seventh Circuit held that Churchill had introduced enough evidence for a jury to conclude that the First Amendment did protect her speech, and that MDH indeed had violated her free speech rights if it fired her on the basis of that speech.<sup>141</sup> The court of appeals also determined that mere "unawareness" of the protected status of the employee's speech would not insulate a government employer from constitutional liability.<sup>142</sup> Based on Churchill's version of events,<sup>143</sup> the Court found that Churchill's conversation with Dr. Koch and Perkins-Graham undoubtedly touched on matters of public concern, as it addressed both potential violations of state nursing regulations and the quality and level of nursing care provided to patients at MDH.<sup>144</sup> Furthermore, the Seventh Circuit concluded that "when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* at the time of termination."<sup>145</sup> The court of appeals recognized the "delicate

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<sup>141</sup> *Id.* at 1129.

<sup>142</sup> *Id.* at 1128.

<sup>143</sup> On an appeal of a grant of summary judgment, the appellate court "must view the record and all inferences drawn therefrom in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

<sup>144</sup> *Churchill*, 977 F.2d at 1122.

<sup>145</sup> *Id.* at 1127. The Seventh Circuit did not find it necessary to "create a first amendment due process right in order to protect the rights of public employees to speak out on matters of public concern, for we believe that *Mount Healthy* provides adequate safeguards regardless of whether the employer actually *knew* the precise content of the statements for which it fired the employee." *Id.* at 1126. The "adequate safeguards" to which the court refers is the requirement in *Mount Healthy* that a government employer demonstrate "by a preponderance of the evidence that it would have reached the same decision as to [the employee's termination] even in the absence of the protected conduct." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). See *supra* text accompanying notes 46-57. While the court of appeals acknowledged that the "point" of *Mount Healthy* is the "protected conduct," *Churchill*, 977 F.2d at 1127, *Mount Healthy* nevertheless requires a public employee to first prove the speech was indeed protected and played a substantial role in the employer's decision. *Mount Healthy*,

balance" between hospital administrators, supervisors and staff, but emphasized that employment decisions cannot be made which prevent employees from expressing "their constitutionally protected views on matters of public concern."<sup>146</sup>

### C. *The Supreme Court Decision*

The Supreme Court reversed the Seventh Circuit. In a plurality opinion, the Court held that lower courts must apply the balancing test articulated in *Connick*<sup>147</sup> to the speech that the government employer reasonably believed the employee spoke after conducting an investigation into the circumstances surrounding the speech.<sup>148</sup> The plurality eschewed any attempt at clarifying when such an investigation is constitutionally mandated, reconciling itself to answering this question on an ad hoc basis.<sup>149</sup> The Court stated only that any investigatory procedure the government employer uses must be "reasonable" under the circumstances and yield "reasonable" conclu-

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429 U.S. at 284.

<sup>146</sup> *Churchill*, 977 F.2d at 1129.

<sup>147</sup> The *Connick* balancing test, as framed by Justice O'Connor, stated that in order for the speech of a public employee to be protected by the First Amendment: the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

*Id.* at 1884 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968))). See *supra* notes 66-85 and accompanying text.

<sup>148</sup> *Waters*, 114 S. Ct. at 1888-89 (plurality opinion). Curiously, the Court claimed that a conflict had existed among the Circuits on this issue prior to *Waters*. In the cases cited by the Court, however, the actual content of the employee's speech was easily identifiable and thus not a genuine issue in dispute. See *Sims v. Metropolitan Dade Cty.*, 972 F.2d 1230 (11th Cir. 1992) (employee discharged after delivering sermon in front of a crowded congregation which was also subsequently reported in a local newspaper); *Wulf v. Wichita*, 883 F.2d 842 (10th Cir. 1989) (police officer discharged for writing letter to Attorney General alleging department misconduct); *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979) (county probation officer discharged for writing letter to Assistant County Attorney alleging misappropriation of funds by coworkers). These cases differ from *Waters*, where the parties disputed the content of Churchill's conversation with Dr. Koch and Perkins-Graham and thus a jury would have to conduct its own factual inquiry into Churchill's speech.

<sup>149</sup> *Waters*, 114 S. Ct. at 1885-86 (plurality opinion).

sions.<sup>150</sup> If the government employer satisfies these conditions, the Court explained, the judiciary should defer to employment decisions made pursuant to the investigation. In this way, the government, acting in its capacity as employer rather than as sovereign, could achieve its goals in the most efficient and effective manner possible, without excessive interference from a judge or jury invoking strict first amendment protection.<sup>151</sup>

Two concurring opinions attempted to clarify the plurality opinion. The first concluded that the government employer would be constitutionally liable to an employee if it did not actually believe the results of its reasonable investigation. The second claimed that the investigation requirement was a constitutionally unnecessary burden upon the government employers given their ability to fire employees for any reason except retaliation for speech on a matter of public concern. Finally, a dissenting opinion asserted that government employers do not require an additional layer of judicial deference in order to protect their efficiency interests, and that a jury, and not the government employer, must independently evaluate the employee's speech in order to safeguard adequately public-employee first amendment rights.

### 1. The Plurality

Writing for the plurality, Justice O'Connor, joined by the Chief Justice and Justices Souter and Ginsburg, maintained that the primary issue in *Waters* was whether lower courts should apply the *Connick* balancing test either to what the government employer thought its employee said or to what a jury ultimately determined the employee said.<sup>152</sup> According to Justice O'Connor, a government employer is not only in a better position than a jury to determine what an employee said, but is also under a constitutional duty to do so.<sup>153</sup>

The plurality asserted that the First Amendment requires a government employer to protect the substantive free speech

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<sup>150</sup> *Id.* at 1889.

<sup>151</sup> *Id.* at 1888.

<sup>152</sup> *Id.* at 1882.

<sup>153</sup> *Id.* at 1886-87.

rights of its employees through "reliable procedures"—i.e., through investigations, conducted by the employer prior to discharging an employee, that would determine whether the employee had indeed engaged in constitutionally protected speech.<sup>154</sup> According to the plurality, however, the First Amendment does not require a government employer to utilize every procedure that could conceivably safeguard protected speech.<sup>155</sup> Deciding which, if any, procedure was constitutionally required in a particular employment situation involves the consideration of "a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech."<sup>156</sup> Thus, while Justice O'Connor asserted that the First Amendment creates a "strong presumption" against even the honest punishment of an employee's protected speech, she concluded that a court is

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<sup>154</sup> *Waters*, 114 S. Ct. at 1884 (plurality opinion). Justice O'Connor claimed that the Court has "often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech." *Id.* In support of this proposition, the Court cited a number of cases involving certain judicial procedures utilized to protect speech from defamation suits. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (speech is constitutionally protected against libel unless clear and convincing evidence establishes malice); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (burden of proving that potentially libelous speech is false falls on plaintiff); *Bose Corp. v. Consumers Union of United States, Inc.*, 446 U.S. 485 (1984) (appellate court judge must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity). In each of these cases, the speech in question is presumptively constitutional unless the opposing party can establish enough evidence to rebut the presumption. There is no such presumption for employee speech in *Waters*; in fact, the *Waters* Court makes clear that employee speech is presumptively deleterious to the government employer's efficiency interests and thus deserves minimal constitutional protection.

Nevertheless, the Court's holding in *Waters* ultimately does not require a government employer to use a "reliable" procedure when determining if it can sanction an employee's speech in a particular situation without offending the First Amendment. The Court only requires a government employer to use a "reasonable" procedure, a much less accurate standard of constitutional protection.

<sup>155</sup> *Waters*, 114 S. Ct. at 1885 (plurality opinion). Justice O'Connor admitted that "the [analysis] adopted by the Court of Appeals may lower the chances of protected speech being erroneously punished. A speaker is more protected if she has two opportunities to be vindicated—first by the employer's investigation and then by the jury—than just one." *Id.* The Court did not explain why an employee's speech would need to be vindicated through any procedure, whether nonjudicial or judicial, if the free speech clause already fully protected it from encroachment by the government employer.

<sup>156</sup> *Id.* at 1885.

not automatically required to uphold the presumption in such cases.<sup>157</sup>

Instead, Justice O'Connor observed that a court must decide on a case-by-case basis whether the First Amendment compels the government employer to conduct an investigation. She noted that a variety of factors are present in different situations—most notably the cost incurred by the government in implementing a review procedure and the likelihood of a procedure's projected success in protecting the constitutional rights of the employee.<sup>158</sup> More importantly, a court should evaluate these factors in light of the premise, which the Court assumed to be correct, that "the government as employer indeed has far broader powers than does the government as sovereign."<sup>159</sup> Justice O'Connor claimed that when the government acts against free speech in its role as employer, greater deference must be paid to its predictions of harm resulting from employee speech, even if that speech involves a matter of public concern.<sup>160</sup> Such deference is inapplicable, she noted, when the government acts against free speech in its role as sovereign.<sup>161</sup>

The plurality therefore determined that a reduced level of judicial scrutiny was appropriate when the government restrained free speech in its role as employer rather than as

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<sup>157</sup> *Id.* Justice O'Connor agreed that the Constitution protects, and even encourages, free discourse and debate among private citizens, citing *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (freedom of speech permits "tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (the "fitting remedy for evil counsels is good ones."); and *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."). *Waters*, 114 S. Ct. at 1886 (plurality opinion). However, she also asserted that this broad range of substantive freedom of expression was inapplicable in the public-employee context. *Id.* In support of this proposition, the plurality cited *Branti v. Finkel*, 445 U.S. 507 (1980); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973); and *Public Workers v. Mitchell*, 330 U.S. 75 (1947). By analogy, Justice O'Connor reasoned that any first amendment right to an investigation that a public employee may have should also be similarly limited. *Waters*, 114 S. Ct. at 1886-87 (plurality opinion).

<sup>158</sup> *Waters*, 114 S. Ct. at 1885-86 (plurality opinion).

<sup>159</sup> *Id.* at 1886 (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Of course *Pickering* itself had presumed the correctness of this premise.

<sup>160</sup> *Waters*, 114 S. Ct. at 1887 (plurality opinion).

<sup>161</sup> *Id.*

sovereign.<sup>162</sup> Justice O'Connor based this limited scrutiny "on the nature of the government's mission as employer."<sup>163</sup> According to the plurality, the mission of each government agency or entity is to perform the particular tasks for which it is responsible in the most effective and efficient manner possible.<sup>164</sup> A government employer must be allowed to restrain its employees when they engage in conduct that frustrates those tasks.<sup>165</sup> Justice O'Connor concluded that in order for lower courts to conduct a proper first amendment analysis of government employment decisions, they must adhere to the fundamental principle that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."<sup>166</sup>

The Court summarily rejected the approach of the court of appeals, under which lower courts would apply the *Connick* balancing test to the employee's speech as determined by a jury.<sup>167</sup> This approach, the Court stated, would "force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court."<sup>168</sup> Justice O'Connor argued that the better method is to apply the *Connick* test to that speech which the government employer reasonably believed the employee uttered.<sup>169</sup> In this way, a government employer could make employment decisions based on information available at the time of the questionable speech. The employer may consider knowledge of the employee's character, hearsay and past conduct—factors which may not be available to a jury when it is called upon to reconstruct the events leading to the government action.<sup>170</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Waters*, 114 S. Ct. at 1888 (plurality opinion). Curiously, Justice O'Connor used the example of a governor who fires an opinionated deputy to illustrate this proposition. A deputy working with the governor is in a much different employee-employer relationship than a nurse employed by a large municipal hospital, or a teacher employed by a local school board. See discussion *infra* text accompanying notes 221-230.

<sup>166</sup> *Id.* at 1888.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1889.

<sup>170</sup> *Waters*, 114 S. Ct. at 1888 (plurality opinion).



Moreover, a government employer that is able to act upon its own conclusions of fact can more easily assure that an employee's speech is not disruptive and improper.<sup>171</sup> Justice O'Connor concluded that while this approach may "involve some risk of erroneously punishing protected speech," the First Amendment does not require a government employer to adopt the stringent evidentiary procedures used by courts.<sup>172</sup>

The Court insisted, however, that the resulting heightened deference to decisions made by the government acting as employer would not always overcome countervailing first amendment concerns.<sup>173</sup> Justice O'Connor recognized that public employees are typically in the unique position of knowing what is wrong with the government agency that employs them, and that these "informed opinions" are necessary for enhancing public debate.<sup>174</sup> In these situations, the government must make a "substantial showing" that the speech will indeed be disruptive before it can act against the speaker.<sup>175</sup>

Additionally, under the plurality's approach, courts would still consider the "reasonableness of the employer's conclusions" in order to ensure that the employer made its decision in good faith and not as a pretext.<sup>176</sup> Justice O'Connor noted that in any given situation a defendant must meet the standard of a reasonable government employer in similar circumstances. Thus, if a reasonable employer would believe that the First Amendment likely protected the employee's speech, the defendant should demonstrate "a certain amount of care" in its actions.<sup>177</sup> This care must manifest itself in the type of procedure used by the government employer before making an employment decision based on the speech involved in the particular case.<sup>178</sup> Such reasonable care is required regardless of whether the employee has a protected property interest in her job.<sup>179</sup> In situations where employers could reasonably utilize

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1887.

<sup>174</sup> *Id.*

<sup>175</sup> *Waters*, 114 S. Ct. at 1887 (plurality opinion) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987), *Connick v. Myers*, 461 U.S. 138, 152 (1983), and *Pickering v. Board of Educ.*, 391 U.S. 563, 569-71 (1968)).

<sup>176</sup> *Id.* at 1889.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* For a discussion on what constitutes a protected property interest, see

a number of different procedures, however, "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable."<sup>180</sup>

The Court analyzed the circumstances surrounding Churchill's discharge according to this new first amendment methodology.<sup>181</sup> The plurality emphasized that Waters and Davis formally interviewed both Perkins-Graham and Ballew after Ballew reported the critical conversation, while Hopper interviewed Churchill to "hear her side of the story."<sup>182</sup> According to the Court, if this investigation led MDH to believe that Churchill had engaged in constitutionally unprotected speech, and could thus be discharged, this belief would be entirely reasonable and should not be disturbed.<sup>183</sup> Furthermore, the Court held that under the *Connick* test Churchill's speech, as described by Ballew and Perkins-Graham, was not protected.<sup>184</sup> Thus, "[s]o long as Davis and Waters discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive."<sup>185</sup> If, however, Davis and Waters fired Churchill because of her previous nondisruptive speech against MDH's cross-training policy, and such speech was indeed protected, the hospital violated Churchill's first amendment rights. The Court remanded the case for a determination of that issue.

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*supra* note 138.

<sup>180</sup> *Waters*, 114 S. Ct. at 1889 (plurality opinion).

<sup>181</sup> Justice O'Connor noted the discrepancy between Churchill's version of the conversation with Perkins-Graham, corroborated by Dr. Koch and Nurse Welty, and those of Nurses Ballew and Perkins-Graham, but apparently found them insignificant. *Id.* at 1890. The district court judge had decided the facts surrounding Churchill's dismissal on MDH's motion for summary judgment. In reviewing the district court's ruling, the court of appeals held that the "the content of [Churchill's] speech is a question of fact for the jury" and that the "district court erred in taking it upon itself to resolve this disputed issue of material fact against Churchill." *Churchill v. Waters*, 977 F.2d 1114, 1123 (7th Cir. 1992), *vacated*, 114 S. Ct. 1878 (1994).

<sup>182</sup> *Waters*, 114 S. Ct. at 1890 (plurality opinion).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1891.

## 2. Justice Souter's Concurrence

In a concurring opinion, Justice Souter agreed with the plurality's general premise that a government employer could discharge an employee for his or her speech if the employer investigated the circumstances of the speech and, relying on that investigation, reasonably concluded that the First Amendment did not protect the speech.<sup>186</sup> He also emphasized that a government employer will avoid constitutional liability *only* if it actually believes the results of its investigation.<sup>187</sup> A government employer will therefore violate the First Amendment if it acts against an employee "believ[ing] or genuinely suspect[ing] that the employee's speech was protected in its entirety or in that part on which the employer purports to rely in taking disciplinary action."<sup>188</sup> Moreover, Justice Souter reiterated the warnings given by the plurality that the government employer will be constitutionally liable if its investigation is merely a shield for disciplinary retaliation for an employee's past protected speech.<sup>189</sup>

Like the plurality, Justice Souter acknowledged the tenuous constitutional balancing of the government employer's interest in efficiently and effectively accomplishing its goals against the public employee's interest in speaking on matters of public concern.<sup>190</sup> He admitted that allowing a government employer to discharge an employee based upon its own factual investigation could have a chilling effect on public-employee speech, but claimed that such a risk was tolerable in light of the importance of the government employer's interests.<sup>191</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> *Waters*, 114 S. Ct. at 1891 (Souter, J., concurring).

<sup>188</sup> *Id.* at 1892.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* Justice Souter again emphasized a dual requirement: (1) the employer's conduct—i.e., the procedure used to determine the nature of the employee's speech—must be reasonable; and (2) the employer must actually believe the results of its investigation. *Id.* He claimed that attaching liability to a government employer who does not satisfy both requirements maintains "respect [for] the 'long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office.'" *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 154 (1983)). Justice Souter did not explain how the second requirement

Nevertheless, Justice Souter determined that in this case the petitioners would have violated the First Amendment if, after an objectively reasonable investigation into the circumstances surrounding Churchill's conversation with Perkins-Graham, "they doubted the accuracy of the report[s] and fired Churchill for speech, or for a portion of her speech, that they genuinely suspected was nondisruptive (assuming that the speech was actually a matter of public concern)."<sup>192</sup> In attempting to harmonize the varying opinions of the Court, Justice Souter concluded that lower courts should adopt the plurality's reasonableness test as the holding of the Court and the appropriate standard in public-employee speech cases.<sup>193</sup>

### 3. Justice Scalia's Concurrence

Justice Scalia, joined by Justices Kennedy and Thomas, argued that the plurality had not simply created "new procedural protections for established first amendment rights, but rather new first amendment rights."<sup>194</sup> Justice Scalia's primary focus was not government-employer efficiency, but rather the ambiguous role of the judge and jury under the plurality's new standard. He explained that requiring a government employer to investigate employee speech before taking any disciplinary action simply did not comport with the Court's established rule that an employer is constitutionally liable only for retaliating against an employee whose speech addressed a matter of public concern.<sup>195</sup> According to Justice Scalia, the Court had always hesitated when recognizing procedural elements within the First Amendment.<sup>196</sup> Prior decisions, he noted, had limited procedural requirements to those cases involving "alleged governmental deprivation of the freedom of speech specifically through the judicial process, in which con-

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could be proved, or more appropriately, disproved.

<sup>192</sup> *Waters*, 114 S. Ct. at 1892-93 (Souter, J., concurring). Justice Souter noted that this argument was available to Churchill on remand.

<sup>193</sup> *Id.* at 1893.

<sup>194</sup> *Id.* at 1895. Justice Scalia further described the Court's opinion as "unprecedented, superfluous to the decision in the present case, unnecessary for protection of public-employee speech on matters of public concern, and unpredictable in its application and consequences." *Id.* at 1893.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1894.

text procedures are necessarily central to the discussion."<sup>197</sup> Justice Scalia warned that the plurality had created a general constitutional principle that protected substantive speech liberties with procedures that the Court could not define.<sup>198</sup>

Justice Scalia next criticized the plurality's investigation requirement on the ground that the Court's expanded concept of "First Amendment procedure" contradicted other government employment cases decided under the due process clause.<sup>199</sup> He argued that under the due process line of cases, public employees could be dismissed for any reason whatsoever, without a hearing or other type of procedural safeguard, unless they had a protected property interest in their employment.<sup>200</sup> Under the plurality's standard, if a government employer wished to dismiss an employee for reasons relating to speech, the employer must first investigate the nature and content of the speech to determine if the First Amendment protects it. The employer would then have to proceed in a "reasonable manner" with its employment decisions based on the information obtained during the investigation, regardless of whether the information was later found to be incorrect.<sup>201</sup> In essence, Justice Scalia concluded, the plurality opinion converted "the government employer's first amendment liability with respect to 'public concern' speech from liability for intentional wrong to liability for mere negligence."<sup>202</sup>

Justice Scalia also maintained that the investigation requirement was meaningless since the government employer still had to convince a court that the employee's discharge was not an unconstitutional retaliation for speech addressing a

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<sup>197</sup> *Waters*, 114 S. Ct. at 1894 (Scalia, J., concurring). See *supra* note 154.

<sup>198</sup> *Id.* at 1894. Justice Scalia asserted that "[w]e never are informed how to tell mandated speech-safeguarding procedures from nonmandated ones." *Id.*

<sup>199</sup> *Id.* (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972)).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Waters*, 114 S. Ct. at 1895 (Scalia, J., concurring). Justice Scalia explained that *Pickering* and *Connick* did not require the government employer to protect speech that touched on public concern, "but merely forbade government-employer hostility to such speech." *Id.* Justice Scalia thus took the implicit holding of *Connick*—the more substantially an employee's speech addresses a matter of public concern, the more constitutional protection the speech will be afforded—and sought to wield it as an explicit restraint on the power of the judiciary to review government-employer sanctions of employee speech. *Id.* at 1895-96.

matter of public concern. He argued that the Court previously had considered this showing sufficient in protecting a range of constitutional liberties, including first amendment rights, without having to "invent procedural requirements."<sup>203</sup> Justice Scalia concluded that the plurality opinion created so much confusion for government employers regarding the potential liabilities of the investigation requirement that "[w]e will spend decades trying to improvise the limits of this new first amendment procedure that is unmentioned in text and unformed by tradition."<sup>204</sup>

#### 4. Justice Stevens's Dissent

Justice Stevens, joined by Justice Blackmun, argued that the plurality's reasonableness requirement could exculpate a government employer who had wrongfully punished protected speech, and therefore "provide[d] less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights, including contractual and statutory rights applicable in the private sector."<sup>205</sup> Justice Stevens maintained that this reasonableness requirement allowed a government employer to escape the consequences of a mistaken factual investigation by removing "the risk that an impartial adjudicator may come to a different conclusion."<sup>206</sup> He observed that the plurality's analysis permitted a constitutional violation to go unpunished merely because the employer made a reasonable mistake about what the employee actually said, although the First Amendment fully protected the speech.<sup>207</sup> This re-

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<sup>203</sup> *Id.* at 1896. Justice Scalia pointed to the *Mount Healthy* "preponderance of the evidence" test that a government employer must satisfy when demonstrating the veracity of its employment decision. *Id.* at 1895-96. See *supra* notes 40-57 and accompanying text.

<sup>204</sup> *Id.* at 1897-98.

<sup>205</sup> *Id.* at 1898 (Stevens, J., dissenting). Justice Stevens saw this "straightforward" case as involving two simple issues: "(1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee." *Id.* Justice Stevens decided the first issue in one sentence: "Given the [procedural] posture in which this case comes to us, we must assume that Churchill's statements were fully protected by the First Amendment." *Id.* As for the second issue, Stevens claimed that "[o]ur legal system generally delegates the determination of facts upon which important rights depend to neutral factfinders, notwithstanding the attendant risks of error and overdeterrence." *Id.*

<sup>206</sup> *Id.* at 1898.

<sup>207</sup> *Waters*, 114 S. Ct. at 1899 (Stevens, J., dissenting). Justice Stevens claimed

sult, he asserted, illustrated the Court's preference for focusing on the investigative procedures of the government employer rather than on "whether the employee's freedom of speech has been 'abridged.'"<sup>208</sup> Because government agencies so often serve as the vehicles for critical debate and deliberation on matters of public concern, Justice Stevens concluded that any rule which stifled this debate subverted the "profound national commitment" to the freedom of speech.<sup>209</sup>

Of all the varying analytical approaches utilized by the Justices in *Waters*, only Justice Stevens's dissenting opinion incorporates a significant consideration of public-employee freedom of speech interests.<sup>210</sup> He agreed with Justice O'Connor that the Court's task was to apply the *Connick* balancing analysis. Unlike the plurality, however, Justice Stevens would not allow a government employer to supply the factual basis upon which to apply the *Connick* test. Instead, he would require a jury to supply this factual basis.<sup>211</sup> This approach serves two critical functions in public-employee speech cases. First, it "delegates the determination of facts upon which important rights depend to neutral factfinders,"<sup>212</sup> thereby re-

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that the reasonableness of the employer's mistake was important only in determining the employer's liability for damages, a consideration which should not "constrict the substantive reach of a public employee's right of free speech." *Id.* at 1899 n.5.

<sup>208</sup> *Id.* at 1899-1900. The dissent criticized the plurality's emphasis on protecting government efficiency at the expense of public employees' interests in speaking on matters of public concern, noting that "[t]he need for governmental efficiency that so concerns the plurality is amply protected by the substantive limits on public employees' rights of expression." *Id.* at 1899.

<sup>209</sup> *Id.* at 1900 (citation omitted).

<sup>210</sup> Justice Stevens begins his dissent by stating clearly the general principle that "[e]very American has the right to express an opinion on issues of public significance." *Id.* at 1898. He then focuses more specifically on public employees: "The First Amendment . . . demands that the Government respect its employees' freedom to express their opinions on issues of public importance." *Id.* Justice Stevens's recognition of, and adherence to, these critical constitutional principles serves to focus his analysis on a true balancing of interests, and not simply a judicial vindication of government-employer decisionmaking.

<sup>211</sup> The dissent noted that "[o]rordinarily, when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion." *Id.*

<sup>212</sup> *Waters*, 114 S. Ct. at 1898 (Stevens, J., dissenting). Justice Stevens focused on the importance of "impartial adjudicator[s]" and "the ability of juries to find the truth" throughout his opinion, indicating his concern about the ability of a government employer to remain impartial during an investigation. Justice Stevens would,

moving the potential for bias inherent in relying on an employer's investigation of the facts.<sup>213</sup> Second, the risk that the neutral factfinder will arrive at a different conclusion than the government employer serves as a potent deterrent against violations of employee free speech.<sup>214</sup> The awareness of this risk would encourage a government employer to tread cautiously when determining whether to sanction an employee based on speech.<sup>215</sup> More importantly, in order to confront this risk efficiently and effectively, a government employer must standardize its investigatory procedures to ensure that the most comprehensive factfinding occurs in each situation.<sup>216</sup> Yet only Justice Blackmun joined in Justice Stevens's

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however, likely support an approach that involved both an initial investigation by the government employer followed by a jury's separate determination of the facts. In this way, the government employer is motivated to "get its facts straight" before discharging an employee based on speech. *Id.* at 1900.

<sup>213</sup> See *id.* at 1890.

<sup>214</sup> The dissent characterized this risk as "the normal means by which our legal system protects legal rights and encourages those in authority to act with care." *Id.* at 1900. In contrast, the plurality claimed that this risk would affect government efficiency interests by "forc[ing] the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court." *Id.* at 1888. Accepting this premise as true, it is clear that such a result would be necessary to protect adequately an employee's free speech interests. In *Waters*, for example, MDH officials discharged Churchill despite never having conducted interviews with Churchill, Dr. Koch or Nurse Welty regarding the substance of the conversation. MDH would not have committed such a gross lapse in factfinding had they known that a competent trier of fact would be reviewing their actions. Moreover, MDH would not likely have approached Churchill's case outside the disciplinary procedures it had already promulgated in its employee handbook.

<sup>215</sup> Under the plurality's analysis, an employer avoids constitutional liability if its factual conclusions are "reasonable," although mistaken. *Id.* at 1889-90. This reasoning is flawed because the first amendment "violation does not vanish merely because the firing was based upon a reasonable mistake about what the employee said." *Id.* at 1899. Justice Stevens properly asserts that "[t]he reasonableness of the public employer's mistake would, of course, bear on whether that employer should be liable for damages." *Id.* at 1900 n.5 (emphasis added).

<sup>216</sup> This result would not occur under the plurality's analysis because, as Justice O'Connor notes, "there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion." *Id.* at 1889. Thus, without the risk that a jury will arrive at a different conclusion, a government employer has no inducement to conduct a comprehensive investigation before discharging the employee, especially when considering the Court's "greater deference to government predictions of harm." *Id.* at 1887.

Justice O'Connor claims that "[g]overnment employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts,



dissent. The remaining Justices are content to remove the important safeguards a neutral factfinder would provide and permit the government employer to proffer the essentially uncontrovertible evidence upon which courts determine public-employee first amendment rights.

### III. CHILLING PUBLIC-EMPLOYEE FREE SPEECH

The *Waters* Court's investigation requirement might seem to provide public employees with constitutional protections against retaliatory discharge, but in fact it will ensure that most public-employee speech falls outside first amendment protection. In the face of the ongoing and intense debate over reforming the American health care system, a period when the public requires informed opinions and critical discussion, the Court chose to muzzle the voices of health care workers. More broadly, *Waters* indicates the Court's willingness to replace a genuine balancing analysis of public-employee first amendment rights and government-employer efficiency interests with an approach that defers to employer decisionmaking regarding the workplace.

Before *Waters*, a court would conduct a three-step analysis to determine the constitutionality of an employee's discharge based on speech. First, *Connick* and *Mount Healthy* required an employee to demonstrate that his or her speech addressed a matter of public concern and also was a substantial factor in the employer's sanctioning decision.<sup>217</sup> Second, if the employee's speech was found to address matters of public concern, the court would balance the interests of the government employer in efficiently discharging its responsibilities against

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without fear that these differences will lead to liability." *Id.* at 1888. This approach, however, focuses on the efficacy of the investigation requirement only in relation to its burden on the employer's efficiency and liability interests, and not to its vindication of the employee's free speech interests.

<sup>217</sup> To accomplish this task, the court would use the "content, form and context" analysis described in *Connick*. See *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) and *supra* notes 80-85 and accompanying text. In addition, *Connick* required a court to determine whether the speech addressed a matter of significant public concern or a matter of lesser importance, which affected the government employer's burden of justifying its employment decision. *Id.* at 150. The public concern determination was an issue of law; the substantial factor determination was an issue of fact.

the employee's interests in speaking on these matters.<sup>218</sup> Finally, if the court found that the employee's speech did not hinder government-employer efficiency, it applied the *Mount Healthy* causation analysis to determine whether the employer indeed had discharged the employee for constitutionally protected speech.<sup>219</sup> In essence, courts conducted this analysis to determine the substantive scope of the public employee's speech rights in a particular situation and whether those rights had been violated.

Under this analytical framework, lower courts had the power to scrutinize an employer's justifications for discharging an employee and exercise meaningful judicial review. After *Waters*, however, a government employer decides for itself whether the First Amendment protects employee speech and, in most cases, will therefore be free from contradiction by a neutral factfinder.<sup>220</sup> While Justice O'Connor could not articulate a consistent constitutional principle to guide lower courts and public employers and employees in future cases, *Waters* makes it clear that a majority of the Court will permit government employers to define the contours of public-employee speech and its attendant first amendment protection.

### A. *Philosophical Considerations*

While the Supreme Court has never explicitly stated whether it subscribes to a particular first amendment philosophy regarding freedom of speech, its narrow view of public-employee speech seems to emphasize social utility.<sup>221</sup> Begin-

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<sup>218</sup> A court satisfied this inquiry by examining the "manner, time, and place" in which the employee speech was made. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979). Another consideration was that "*Pickering* unmistakably states . . . that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150.

<sup>219</sup> See *supra* notes 40-57 and accompanying text.

<sup>220</sup> If the employer has conducted an investigation, and the Court determines that a reasonable employer could believe the results, the employment decision does not violate the employee's first amendment rights, regardless of whether a court arrives at a different conclusion concerning the protected nature of the speech. See *supra* text accompanying notes 167-177.

<sup>221</sup> The *Connick* Court came closest to acknowledging its adherence to this philosophy, claiming that:

[w]hen employee expression cannot be fairly considered as relating to any

ning with *Pickering*, the Court has consistently limited a public employee's right to speak in the workplace to "matters of public concern."<sup>222</sup> *Connick* and *Rankin* forced employees to prove that their speech addressed a matter of public concern before the Court would even consider whether the employer had violated their first amendment rights.<sup>223</sup> While *Givhan* held that there is no distinction between employee speech on a matter of public concern delivered publicly or privately,<sup>224</sup> *Connick* implemented the use of a sliding scale to "grade" speech which is found to address matters of public concern.<sup>225</sup> Speech which

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matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

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

<sup>222</sup> *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The Supreme Court has never defined "public concern" with any precision, but has chosen instead to determine on an ad hoc basis whether an employee's speech addresses more than a mere "private concern"—another term which has escaped definition.

One commentator has described the substantial difficulties that the Court's public-concern standard poses in free speech cases:

First, and most significant, is that defining a "public concern" is subjective. For example, is one woman employee's request for parental leave a matter of public concern? Does this answer change if she discusses her dilemma with a local news reporter who prints the story in the paper? Is the transfer of one employee a matter of public concern? The transfer of ten employees? Of one black employee? Is a complaint about wages a matter of public concern? A complaint about vacation time? Reciting that the aim of the first amendment is to protect the unfettered exchange of ideas for social and political change does not help us decide which, if any, of these complaints is within the amendment.

Massaro, *supra* note 9, at 27-28.

Lower federal courts have quite divergent views on what type of employee speech constitutes a matter of public concern. See Leon Friedman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions*, 115-20 (June 1995), available in Westlaw, C108 ALL-ABA 33, for a list of representative cases.

<sup>223</sup> See *supra* notes 66-93 and accompanying text.

The Court has never stated explicitly whether the employee's speech must address a matter of public concern of which the employee has intimate knowledge or substantial information. *Pickering* indicates that an employee should have special knowledge. *Pickering*, 391 U.S. at 571-72. *Rankin*, however, suggests that an employee may speak on issues of general public importance in the workplace without interference from the government employer. *Rankin v. McPherson*, 483 U.S. 378, 386-88 (1987).

<sup>224</sup> See *supra* notes 63-64 and accompanying text.

<sup>225</sup> See *supra* text accompanying notes 75-85.

In Justice Brennan's dissent in *Connick*, he explained that:

[t]he proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is

the Court considers to be of less concern to the public is afforded less constitutional protection.

If the Court cannot articulate a workable definition of "public concern," or refuses to categorize issues as involving "public concern" or "private concern," it certainly should not expect that government employers will have greater success. And it is critical to ascertain exactly what the employee said, because according to *Connick*, "a stronger showing [of office disruption] may be necessary if the employee's speech more substantially involved matters of public concern."<sup>225</sup> Thus, a government employer which concluded after an investigation that an employee's speech squarely addressed a matter of public concern would need to exercise more caution before discharging the employee. Yet because the Court does not want to involve itself in what it perceives to be primarily intra-office disputes, it is willing to construe "public concern" quite narrowly. The Court therefore deems public-employee speech like Cheryl Churchill's as addressing only matters of private concern, which sufficiently insulates an employer's actions from constitutional liability while denying an employee's speech adequate constitutional protection.

Yet Churchill's speech, like the teacher's criticisms of desegregation in *Givhan*, undoubtedly addressed more than personal gripes about her relationship with supervisors. MDH's new cross-training policy represented a fundamental change in the manner in which the hospital provided nursing care to its patients, and therefore generated considerable discussion, debate and conflict among hospital personnel. The possibility that a public hospital is incorrectly implementing a new training policy, or that such a policy may threaten the quality of health care that the hospital provides to its patients, certainly qualifies as a matter of public concern.<sup>227</sup> Churchill's conver-

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not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end.

*Connick v. Myers*, 461 U.S. 138, 165 (1983).

<sup>225</sup> *Id.* at 152.

<sup>227</sup> Justice Marshall claimed in *Rankin* that "[j]ust as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." *Rankin*, 483 U.S. at 387 (quoting *Bond v. Floyd*, 385 U.S.

sation with Dr. Koch and Nurse Perkins-Graham addressed these issues, and informed Perkins-Graham about them. While Perkins-Graham may have found Churchill's speech disagreeable, or even offensive, this should not have prevented the Court from carefully considering the content of the speech and extending it proper first amendment protection.<sup>228</sup>

Unfortunately, a majority of the *Waters* Court viewed critical public-employee speech as a cause of workplace problems rather than as a source of potential solutions. Although Justice O'Connor claimed that she did not have to decide whether Churchill's speech addressed a matter of public concern,<sup>229</sup> she nevertheless characterized Churchill's speech as nothing more than "complaining" and "criticism" that could "discourag[e] people from coming to work."<sup>230</sup> Similar to Justice White's approach in *Connick*, Justice O'Connor appears to have focused as much on the potential *motive* behind Churchill's speech as on the actual content of the conversation. Clearly Churchill's motive for speaking is irrelevant to a determination of whether her speech addressed a matter of public concern. The critical motive in cases like *Waters* is that of the government employer which discharged the employee for his or her speech.

More importantly, the Court failed to recognize the value of insights and opinions that employees like Churchill possess about their workplace. Indeed, employees' concerns often serve as the basis for revamping institutional procedures that previously have hindered the efficient discharge of employer responsibilities. The plurality opinion did not acknowledge that MDH employees could contribute to the development and execution of the cross-training policy through critical discussion, nor did the Court consider that the public's interests in quality health care are implicated by such a policy. Certainly the public has a broad interest in hearing, and more importantly participating

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116, 136 (1966) (emphasis added)). In comparison to the speech protected in *Rankin*, Churchill's speech addresses a wider range of policy issues about which the public is concerned.

<sup>228</sup> As the *Rankin* Court noted, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.*

<sup>229</sup> See *infra* notes 251-261 and accompanying text.

<sup>230</sup> *Waters*, 114 S. Ct. at 1890-91 (plurality opinion).

in, the dialogue between health care providers and their employees as they attempt to resolve the range of problems found in public hospitals.

Instead, the *Waters* plurality identified Churchill's speech as pertaining solely to insignificant issues of interpersonal relationships and hospital management. By so narrowly interpreting the parameters of the public-concern standard, the Court attaches first amendment value to an employee's speech only so far as it does not adversely impact the government employer's interest in efficiency. Such a myopic view of public-employee speech also subordinates the public's interest in the employee's speech to this same efficiency interest. This result undermines the essential goal of the public-concern standard—permitting a public employee to speak out in the workplace in order to advance a knowledgeable dialogue on issues that the general public finds important. *Waters* exemplifies the Court's current position that employee speech in the government workplace is rarely a means through which issues of social and political importance are brought to the fore.

#### B. *The Reasonable-Investigation Requirement as a Judicial Impetus Towards Government Efficiency*

Although the *Waters* plurality indicated that its sole task was to determine the correct application of the *Connick* balancing test, it proceeded to alter fundamentally the constitutional rights of public employees and the corresponding liabilities of government employers. The contours of these rights and liabilities, however, are defined vaguely.

The *Waters* plurality created a new investigation requirement for employers on the ground that substantive first amendment rights must be protected through "reliable procedures."<sup>231</sup> Yet it never anchored this requirement to the Con-

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<sup>231</sup> *Id.* at 1884. Justice O'Connor claimed that "[t]his is why we have often held some procedures . . . to be constitutionally required in proceedings that may penalize protected speech." *Id.* In the line of public-employee speech cases beginning with *Pickering*, however, the Supreme Court never indicated a willingness to create a procedural safeguard for substantive free speech rights. The Court went no further than imposing an evidentiary "burden of justifying the discharge on legitimate grounds." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Connick v. Myers*, 461 U.S. 138, 150 (1983)). Indeed, creating this procedural safeguard was

stitution. Justice O'Connor asserted that the First Amendment does not compel the employer to conduct an investigation in every situation where an employee's protected speech serves as the basis for punishment.<sup>232</sup> Though there are an infinite number of possible situations in which public-employee speech may become the source of debate within the workplace, Justice O'Connor made no attempt to determine when the First Amendment requires such an investigation, or to define the necessary scope and substance of the investigation. A government employer is left to wonder when an investigation is constitutionally mandated. The answer, according to Justice O'Connor, depends on such malleable factors as the "cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase."<sup>233</sup>

The plurality's vague articulation of the new investigation requirement is useless to a government employer, and stems from circular reasoning. Under Justice O'Connor's analysis, a government employer must ascertain whether the First Amendment mandates the use of an investigatory procedure by initially determining that the employee's speech implicates substantive first amendment rights.<sup>234</sup> However, a government employer cannot determine that substantive free speech

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unnecessary, as the Court shaped its doctrine by progressively limiting the substantive scope of public employees' free speech rights. *See, e.g., Connick*, 461 U.S. at 138-39 (if a court is convinced that an employee's speech does not address a matter of public concern, no balancing of interests is required); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (public employees have the burden of demonstrating that the First Amendment protects their speech); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (the scope of a public employee's first amendment right to freedom of speech in the workplace is limited in each situation by the government employer's need to "promot[e] the efficiency of the public services it performs").

<sup>232</sup> *Waters*, 114 S. Ct. at 1885 (plurality opinion). This vague language yields the confusing possibility that under certain circumstances, the Constitution does not mandate the use of *any* procedure which will safeguard the employee's substantive free speech rights.

<sup>233</sup> *Id.* at 1886. Exactly *what* type of procedure the government employer should utilize "involves a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech." *Id.* at 1885. The plurality did not indicate how a court reviewing the actions of a government employer should properly measure these ingredients.

<sup>234</sup> Justice O'Connor defines the substantive free speech rights of public employees as the end result of a court's application of the *Connick* balancing test, i.e., speech which both addresses a matter of public concern and does not disrupt the government's interest in efficiency. *See id.* at 1884.

rights are at issue unless it *first* conducts an investigation into the circumstances surrounding the speech. The practical result of this confusion is that a government employer must perform two distinct tasks to avoid potential constitutional liability for employment decisions predicated on speech: (1) conduct an investigation aimed at establishing the facts surrounding the employee's speech; and (2) apply the *Connick* balancing test to those facts to determine whether the First Amendment protects the employee's speech and precludes discharge.<sup>235</sup>

This result flows directly, and intentionally, from the Court's desire to protect and promote government efficiency interests. By implementing this amorphous first amendment investigation requirement, the *Waters* Court seeks to encourage government employers to act "efficiently" before discharging an employee for speech, i.e., to conduct a comprehensive investigation into the facts surrounding the employee's speech to determine whether the speech is actually protected.<sup>235</sup> A

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<sup>235</sup> As Justice O'Connor claims, "[i]f an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, *the manager must tread with a certain amount of care.*" *Id.* at 1889 (emphasis added). This ambiguous language virtually guarantees that a government employer will conduct an investigation which thoroughly analyzes the potential protected nature of the employee's speech. While Justice O'Connor's reasoning provides no workable standard for a government employer, however, it does afford a court substantial leeway in upholding whatever investigative procedures the employer uses.

It has been suggested that the Court should have relied on its prior decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Mathews v. Eldridge*, 424 U.S. 319 (1976) in order to "determine the appropriate degree of procedural protection in *Waters*." *Leading Cases: The Supreme Court, 1993 Term*, 108 HARV. L. REV. 261, 289 (1994). Under a *Roth-Mathews* analysis, the *Waters* Court would hold that the Due Process Clause of the Fourteenth Amendment provided Churchill with a liberty interest "in avoiding erroneous discharge on the basis of protected speech." *Id.* Thus, "[w]hen the government has reason to believe that administrative action may incidentally infringe upon constitutional liberty, a trial court should not defer to administrative factfinding unless the government has complied with due process in reaching its factual determination." *Id.*

This analysis suffers from the same fundamental flaw as the plurality opinion. If a public employee has a substantive liberty interest in preventing arbitrary discharge, the government employer must always conduct an investigation into the content of the employee's speech to avoid violating the due process clause. Once this procedure is complete, however, the employer can nevertheless discipline the employee based on its assertions that it reasonably believed that the First Amendment did not protect the employee's speech. Thus, the employee's freedom of speech is no less susceptible to objectionable infringement by the employer under this analysis than under the plurality's analysis.

<sup>236</sup> The investigation requirement may also be used to supplement the Court's



government employer is thereby fully prepared to defend its employment decision in court as one based on a reasonable investigation yielding reasonable results.

*Waters* thus ensures that the employer's investigative efforts will not be in vain. The Court shields government employers from the risk that a jury will reach a different conclusion regarding the protected nature of an employee's speech after conducting its own investigation.<sup>237</sup> In addition, because the government employer has acted "reasonably" by conducting a thorough investigation,<sup>238</sup> a court applying the *Connick* test to the employer's version of the speech will have little need to interfere with employer decisionmaking. More importantly, *Waters* frees lower courts from the obligation of making their own inquiry into the protected nature of the speech, and from defining the constitutional scope of public-employee free speech beyond each particular case.

At the very least, *Connick* requires a court to analyze, as a threshold issue, whether the employee's speech actually addressed a matter of public concern. *Waters* leaves this analysis in the hands of the government employer. This outcome poses an interesting dilemma, given *Connick's* sliding scale of constitutional protection for employee speech.<sup>239</sup> *Waters* allows a

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causation analysis developed in *Mount Healthy*, which required a plaintiff to "show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor' . . . or 'motivating factor' in the [employer's] decision not to rehire [her]." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Under this standard, the employee's evidentiary burden is quite high, and thus a government employer has little incentive to determine what the employee actually said before making its employment decision. By requiring a government employer to conduct an investigation, the Court forces both parties to get their facts straight before the inception of a lawsuit. Of course, if the employer has conducted a constitutionally acceptable investigation, it becomes irrelevant that the protected speech was a substantial factor in the employee's discharge. After all, it is not "a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters*, 114 S. Ct. at 1890 (plurality opinion).

<sup>237</sup> The Seventh Circuit would disagree with this result: "The status of Churchill's speech is a question of law, but . . . where the content of the speech is in dispute, the substance of the speech is a question of fact for the jury to resolve." *Churchill v. Waters*, 977 F.2d 1114, 1120-21 (7th Cir. 1992).

<sup>238</sup> *Waters* establishes an extremely deferential reasonableness standard of review for government-employer decisions regarding both the type of investigation conducted as well as the results drawn from such an investigation. See discussion *infra* text accompanying notes 240-259.

<sup>239</sup> *Connick v. Myers*, 461 U.S. 138, 150 (1983).

government employer to tailor its justifications to the findings of fact that it makes as a result of its own investigation. That is, a government employer may conclude after an investigation that almost all of the employee's speech addressed a matter of public concern. Yet it can simply claim that it discharged the employee for that part of the speech which did not address a matter of public concern. Considering the extreme deference a reviewing court must give to government-employer decisionmaking under *Waters*, it is highly unlikely that the courts will find any employer's action unreasonable.

C. "Unreasonable" Deference and the Potential-Disruption Standard Void First Amendment Protection

From the plurality's perspective, an excessively burdensome investigation requirement would hamper a government employer's general goal of efficiency.<sup>240</sup> *Waters* thus requires lower courts to apply an extremely deferential reasonableness standard of review when examining: (1) the propriety of the investigative procedure used by the government employer in a particular situation; (2) the conclusions a government employer draws from such an investigation; and (3) the predictions of harm a government employer uses to justify restricting employee speech.<sup>241</sup> Such an examination dramatically changes

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<sup>240</sup> The Court noted that this goal would be almost impossible to achieve if the government employer's decisionmaking process was under the constant scrutiny of a judicial factfinder. *Waters*, 114 S. Ct. at 1888 (plurality opinion).

<sup>241</sup> *Id.* at 1887. The unquestioning quality of this deferential requirement also encourages employees to remain silent where they otherwise may have engaged in dialogue within the workplace. For example:

*Waters* appears to enhance institutional autonomy while reducing individual freedom of speech. While such deference [to employer decisionmaking] touches on a narrow aspect of academic freedom, it could have a chilling effect on faculty speech. Professors are not likely to speak critically of their employer if they believe the employer could dismiss them for interfering with the efficient operation of the institution. Given a national climate in which "political correctness" threatens academic freedom on campuses, how should professors proceed in the wake of *Waters*?

Terrence Leas & Charles J. Russo, *Waters v. Churchill: Autonomy for the Academy or Freedom for the Individual?*, 93 EDUC. L. REP. 1099, 1131 (Dec. 1994).

Other commentators fear that "[a] disruptiveness test that equates all criticism of management with a public agency's interest in efficiently providing public services undercuts the social movement toward managerial reform by making it far

the relevant judicial inquiry from a careful balancing of substantive interests—the scope of the government agency's responsibilities, the impact of the employee's speech on the government's ability to fulfill efficiently those responsibilities, the public's interests in workplace reform and critical policy debate generated by the speech—to a deferential evaluation of the employer's decisions regarding the investigation.<sup>242</sup> Moreover, the task of a court in determining what a "reasonable" government employer would do in a particular situation involving employee free speech seems daunting at best, considering the variety of government employers, the relative importance of the particular "mission" or responsibility each employer must discharge, the number of employees working at any given time, and the different contexts in which employee speech may rise to the level of public concern.

Justice O'Connor's application of the reasonableness stan-

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riskier for employees to criticize management and participate directly in the policy-making process—forms of expression indispensable to developing efficient and cost-effective public services." Bruce Bodner, *Constitutional Rights—United States Supreme Court Gives Public Employers Greater Latitude to Curb Public Employee Speech*—Waters v. Churchill, 114 S. Ct. 1878 (1994), 68 TEMP. L. REV. 461 (1995).

<sup>242</sup> For example, a judicial determination of reasonableness in these cases involves "courts look[ing] to the facts as the employer *reasonably* found them to be." Waters, 114 S. Ct. at 1889 (plurality opinion) (emphasis added). In his concurrence, Justice Scalia hypothesized the potential outcomes for an employer faced with a judicial decision that its investigation was *unreasonable*:

One could say that the discharge without observance of the constitutionally requisite procedures is invalid, and must be set aside unless and until those procedures are complied with. Alternatively, one could charge the employer who failed to conduct a reasonable investigation with knowledge of the protected speech that a jury later finds—producing a sort of constructive retaliatory discharge, and entitling the employee to full reinstatement and damages. Or alternatively again, the jury could be required to determine what information a reasonable investigation would have turned up, and then to decide whether it would have been permissible for the employer to fire the employee based on that information.

*Id.* at 1897.

Justice Scalia asserts that these possibilities are a direct result of the Court's vague and ambiguous investigation requirement. According to him, this problem will only be resolved if the Court completely rejects the notion that the First Amendment provides government employees with the procedural right to an investigation. *Id.* at 1895. Justice Scalia's criticism, however, is misplaced. The plurality's investigation requirement is not necessarily the problem. What presents the philosophical and practical difficulties is the plurality's dual requirement that a court rely on the factual findings of the employer's investigation, and then defer to the employer's decisions made pursuant to such an investigation, with only the perfunctory reasonableness inquiry as a guide.

dard to the facts of *Waters* also demonstrates that the Supreme Court will now treat government-employer decisionmaking with near reverence.<sup>243</sup> For example, the plurality stated that "Churchill's speech *may have* substantially dampened Perkins-Graham's interest in working in obstetrics."<sup>244</sup> Moreover, because Perkins-Graham allegedly viewed Churchill's statements about management as "unkind and inappropriate," Churchill's "complaining . . . *threatened* to undermine management's authority in Perkins-Graham's eyes."<sup>245</sup> The plurality further noted that Churchill's reported statement about the tension between Waters and herself "*could certainly make management doubt* Churchill's future effectiveness."<sup>246</sup> Such unsupported

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<sup>243</sup> Justice O'Connor's unwillingness to put any bite into the reasonableness standard is clear solely from her description of its constitutional necessity. According to Justice O'Connor, the Court has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters*, 114 S. Ct. at 1890. She then casually states that at-will employees like Churchill "generally [have] no claim based on the Constitution at all." *Id.* Apparently public employees should be thankful for the meager level of first amendment protection afforded by the plurality's reasonableness inquiry.

Justice O'Connor further concluded that the petitioners' belief about the unprotected nature of Churchill's speech was entirely reasonable based upon the investigation they had conducted. Justice O'Connor noted that "[b]y the end of the termination process, [MDH] . . . had the word of two trusted employees, the endorsement of those employees' reliability by three hospital managers, and the benefit of a face-to-face meeting with the employee . . . fired." *Waters*, 114 S. Ct. at 1890 (plurality opinion). The plurality did not explain, however, why it was reasonable for MDH to avoid interviewing Dr. Koch, Nurse Welty or Churchill herself regarding the content of the conversation. Moreover, when the MDH administrative board called Churchill to discuss the conversation, it informed her "that the discussion would be limited to (a) the written warning she received; (b) the negative comments on her December 1986 evaluation; and (c) the incident when she criticized Waters and Davis to an unidentified cross-trainee in obstetrics one evening." *Churchill v. Waters*, 977 F.2d 1114, 1119 (7th Cir. 1992). Incredibly, the board never discussed the incident and refused to discuss the substance of Churchill's allegations regarding the cross-training policy. *Id.* There was also no evidence indicating that Waters or Davis "followed the hospital's general guidelines for discipline." *Id.* at 1127 n.10. A majority of the Court evinces little concern that such lapses in a government employer's investigation could lead to the discharge of an employee based on incomplete information or mistaken belief. *Waters* thus suggests that the reasonableness standard is really nothing more than what Justice Scalia referred to as a basic "[j]udicial inquiry into the genuineness of a public employer's asserted permissible justification for an employment decision. . . ." *Waters*, 114 S. Ct. at 1895 (plurality opinion).

<sup>244</sup> *Waters*, 114 S. Ct. at 1890 (emphasis added).

<sup>245</sup> *Id.* at 1890-91 (emphasis added).

<sup>246</sup> *Id.* at 1891 (emphasis added).

generalizations by the Court masked the true issues that Churchill's speech raised—the nature and scope of MDH's obligations as a public hospital to develop safe and effective cross-training policies for its nursing staff, the demands on staff members responsible for implementing such policies, and the resulting effects on public health care. Under *Pickering*, the Court was correct to examine the deleterious impact that Churchill's speech may have had on discipline and harmony within the MDH workplace—but *Pickering* would have required the hospital to prove that such a negative impact actually occurred. After *Waters*, however, it appears that lower courts reviewing public-employee speech cases are free to speculate about the negative impact that the employee's speech may have had in the government workplace.<sup>247</sup> In the process, they can ignore the larger issues of workplace reform and public debate and simply assume away the first amendment rights of the employee.<sup>248</sup>

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<sup>247</sup> The *Waters* Court proffered further examples of employee speech that could hinder a government employer's effective discharge of its responsibilities: (1) "offensive utterance[s] to members of the public;" (2) being "rude to customers;" (3) a governor's deputy "robustly criticiz[ing]" the governor's legislative program; and (4) an employee who counsels a coworker to ignore the rules of the workplace. *Waters*, 114 S. Ct. at 1886 (plurality opinion). Not one of Justice O'Connor's examples, however, remotely involves speech which addresses a matter of public concern—the only substantive free speech right public employees have under the Court's current analysis. A government employer faced with these types of speech would have little difficulty in satisfying *Connick's* "content, form and context" test to justify discharging the employee for uttering unprotected speech.

<sup>248</sup> Prior to *Waters*, actual disruption was generally perceived as the constitutional benchmark for determining when the employee's speech had adversely impacted the employer's efficiency interests. See *Piesco v. City of New York Dep't of Personnel*, 933 F.2d 1149, 1160 (2d Cir. 1991); *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1407 (9th Cir. 1988); *White v. Washington*, 898 P.2d 331, 338 (Ct. App. Wash. 1995). Subsequent cases now rely on the potential disruption standard. See *Tindle v. Caudell*, 56 F.3d 966, 972 (8th Cir. 1995) (police department did not violate the First Amendment by suspending an officer who wore an offensive Halloween costume because "[g]overnment predictions of disruption used to justify restrictions of employee speech are given 'greater deference' than predictions used to justify restrictions on speech by the public.") (citing *Waters*, 114 S. Ct. at 1887); *Zaretsky v. New York City Health and Hosp. Corp.*, 84 N.Y.2d 140, 145, 638 N.E.2d 986, 989, 615 N.Y.S.2d 341, 344 (1994) (noting that the government employer "is under no constitutional or legal obligation to retain an employee whose conduct [it] deems disruptive of its operation"); *Michigan State AFL-CIO v. Michigan Employment Relations Comm'n*, Nos. 184125, 184126, 184227, 1995 WL 472130, at 9 (Ct. App. Mich. Aug. 1, 1995) (state law expanding the prohibition against strikes and disruption by public school employees does not violate First

While not part of its stated objective in deciding the case,

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Amendment since *Waters*, inter alia, does not require "that the disturbance be the intended consequence of the speech").

The dangers of the potential disruption standard to public-employee speech are dramatically illustrated by the well-known case of *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995). In *Jeffries*, City University of New York ("CUNY") professor Leonard Jeffries gave a speech in which he discussed racism in New York public schools and made anti-Semitic remarks. CUNY denied the professor another three-year term as Chairman of the Black Studies Department. The Second Circuit initially found that CUNY had violated Jeffries' first amendment rights, stating that "[CUNY has] provided meager evidence at best that Jeffries' speech had any real disruptive effect on CUNY operations . . . ." *Jeffries v. Harleston*, 21 F.3d 1238, 1247 (2d Cir. 1994). One month later, the Supreme Court remanded the case for analysis in light of *Waters*. The Second Circuit reversed its prior decision:

We are now constrained to hold under *Waters* that the defendants did not violate Jeffries' free speech if: (1) it was reasonable for them to believe that the Albany speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the first amendment value of the Albany speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY, or, at least, for reasons wholly unrelated to the Albany speech.

*Jeffries*, 52 F.3d at 13. This reasoning is contrary to the court's earlier view that "a mere reasonable belief that the speech would interfere with the employer's operations is not enough to discipline an employee," and thus "the defendants bore the burden at trial to show that the speech actually interfered with CUNY operations." *Id.* at 12. *Waters* sent a clear message to lower court judges: public-employee speech frustrates employer decisionmaking and prevents efficient government, and thus the First Amendment offers it only minimal protection.

Nevertheless, some courts have distinguished *Waters* in order to limit its applicability to particular cases. See, e.g., *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1234 (9th Cir. 1994) (emphasizing that under the *Pickering-Waters* line of cases, "public-employee speech deserves far greater protection when the employee is speaking not simply upon employment matters of personal or internal interest but instead 'as a citizen upon matters of public concern'" (citing *Connick*, 461 U.S. at 307), *reh'g en banc granted*, 53 F.3d 1084 (9th Cir. 1995); *Feldman v. Philadelphia Hous. Auth.*, 43 F.3d 823, 831 (3d Cir. 1994) ("Because there is no difference between the facts as found and the facts as the defendants may have viewed them at the time, this case does not present the issues recently addressed . . . in *Waters*"). Indeed, the Supreme Court itself distinguished *Waters* in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), where it conducted a rigorous analysis of the Ethics in Government Act. The Act prohibited certain government employees from receiving honoraria. In finding that the prohibition imposed a significant and unconstitutional burden on employee free speech, the Court concluded that "the Government is unable to justify [the ban] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it." *Id.* at 1015. In a concurring opinion, Justice O'Connor claimed that the *Waters* "principle [of deference to employer decisionmaking] has its limits. . . . As the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification." *Id.* at 1021 (O'Connor, J., concurring). It is likely, however, that lower courts will use *Waters*'s potential-disruption standard with more frequency in public-employee speech cases.

the *Waters* Court therefore revised the *Connick* balancing test. Justice O'Connor maintained that under *Connick*, the First Amendment did not protect Churchill's speech.<sup>249</sup> Inexplicably, she reached this conclusion without first resolving whether Churchill's speech even addressed a matter of public concern—the threshold issue in the *Connick* balancing test. Instead, she simply declared that the Court did not have to determine whether Churchill's speech addressed a matter of public concern because “[a]s a matter of law, this potential disruptiveness [of her speech] was enough to outweigh whatever First Amendment value the speech might have had.”<sup>250</sup> Under this analysis, a government employer confronted with reports of what its employee said can immediately decide to discharge the employee if it believes, based on its knowledge of the employment relationship and the workplace environment, that the speech may disrupt the employer's efficiency interests. Thus, a government employer can base its decision to discharge an employee merely on the speech as *reported*, and not on the speech as determined through an *investigation*.<sup>251</sup> In this situation, a court is not required to determine whether the employee's speech actually addressed a matter of public concern, because whatever first amendment value the employee's speech had is automatically balanced and outweighed by the employer's interest in efficient decisionmaking.<sup>252</sup> Essentially,

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<sup>249</sup> *Waters*, 114 S. Ct. at 1890 (plurality opinion).

<sup>250</sup> *Id.* at 1891.

<sup>251</sup> Justice O'Connor asserted that “[i]t *may be* unreasonable, for example, for the employer to come to a conclusion based on no evidence at all.” *Id.* at 1889 (emphasis added). Therefore, it *may not be* unreasonable in certain circumstances for an employer to discharge an employee without first conducting an investigation. Justice O'Connor admits that “there will often be situations in which reasonable employers would disagree about . . . how much investigation needs to be done. . . . In those situations, many different courses of action will necessarily be reasonable.” *Id.* at 1889. The reasonableness inquiry of *Waters* thus offers no more judicial scrutiny than the pretext inquiry which the Court used in *Mount Healthy*, and assures that few, if any, government-employer investigative procedures will be found “unreasonable.”

<sup>252</sup> It is also possible that the Court contemplated that lower courts will balance the potential disruptiveness of the employee's speech against the necessity of conducting the *Connick* balancing analysis. Thus, if the court resolved that the potential disruptiveness of the employee's speech was great enough, it would not perform a *Connick* balancing test to determine whether the speech indeed addressed a matter of public concern. If the court resolved that the potential disruptiveness of the employee's speech was not that great, it would then apply *Connick*. Justice

then, the *Waters* Court implemented a reverse *Connick* balancing analysis which provides government employers with the means to circumvent the investigation requirement without incurring constitutional liability.

The Court's use of *Connick*'s potential disruption standard will undoubtedly punish employee speech that the First Amendment has previously protected.<sup>253</sup> This standard is dramatically different from the one enunciated in *Pickering*, which required some evidentiary finding that the speech actually affected the government employer's interests.<sup>254</sup> By categorizing Churchill's speech as potentially disruptive, and therefore beyond first amendment protection, *Waters* entirely refocuses the nature of the balancing inquiry and significantly restricts the ability of the judiciary to extend first amendment protection to employee speech. Judges no longer must determine whether, as a matter of law, the employee's speech addressed a matter of public concern.<sup>255</sup> Nor are judges bound to conduct

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O'Connor did not specify a standard against which a court could measure potential disruptiveness.

<sup>253</sup> The Court's deference to the petitioners' predictions of disruption from Churchill's speech is strikingly similar to the deference it typically extends in cases involving economic regulation. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (upholding a Congressional statute establishing aggregate limits of liability for a single nuclear accident within the atomic energy industry); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (sustaining a Kansas law preventing non-attorneys from engaging in debt adjustment); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (upholding an Oklahoma statute prohibiting opticians from placing lenses into eyeglass frames without a prescription from an ophthalmologist or optometrist). In these cases, the Court hypothesized valid legislative objectives in order to sustain the particular government regulation or restriction. For example, the *Williamson* Court held that the state legislature "might have concluded" that prescriptions were sometimes necessary to ensure accurate fittings and to encourage the use of eye examinations. *Williamson*, 348 U.S. at 487. *Waters* demonstrates that the Court has reached that extreme in the public-employee speech context.

<sup>254</sup> In *Pickering*, the school board had alleged that the respondent's letter to the newspaper would damage professional reputations and "foment controversy and conflict among the Board, teachers, administrators, and the residents." *Pickering v. Board of Educ.*, 391 U.S. 563, 570 (1968). The *Pickering* Court noted that "no evidence to support these allegations was introduced at the hearing," and that the board could not have reasonably concluded that the statements were *per se* detrimental to its efficiency interests. *Id.* at 570-71.

<sup>255</sup> See *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) ("The inquiry into the protected status of speech is one of law, not fact.") and *id.* at 150 n.10 ("The Constitution . . . compell[s] us to examine for ourselves the statements in issue and the circumstances under which they [are] made . . . [W]e cannot avoid making an



a *Pickering*-type analysis, where the Court confronted the particular problem of reviewing the facts surrounding an employee's speech when the employer alone had control of those facts.<sup>256</sup> In *Pickering*, the Court noted that "where constitutional rights are in issue an independent examination of the record will be made [by us] in order that the controlling legal principles may be applied to the actual facts of the case."<sup>257</sup> But the *Waters* Court essentially states that the government employer need not "tread with a certain amount of care,"<sup>258</sup> but can act with virtual impunity when it believes, or more likely merely asserts, that the employee's speech potentially disrupts the workplace.<sup>259</sup> After *Waters*, therefore,

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independent constitutional judgement on the facts of the case.") (citations and internal quotations omitted).

The Supreme Court has clearly described the responsibility of the judiciary when it confronts first amendment cases: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)); accord *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). It is during this first part of the *Connick* analysis that public employees' freedom of speech interests are most vulnerable. Independent appellate review of the content of the employee's speech provides another opportunity to determine what the employee actually said, as well as the proper constitutional protection to be afforded the speech.

<sup>256</sup> The *Pickering* Court asserted that the school board, which served as the trier of fact in its review of *Pickering's* letter, "was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal." *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 580 n.2 (1968).

<sup>257</sup> *Id.* The *Pickering* Court proceeded to examine de novo all of the evidence surrounding *Pickering's* letter and the school board's justifications for dismissing *Pickering* based on its contents. It is interesting that the Court performed such a comprehensive review when *Pickering's* letter contained all the facts necessary for a resolution of the case. Unlike *Pickering*, the *Waters* Court simply accepted MDH's version of the facts surrounding Churchill's speech, despite the dramatically conflicting reports which it had obtained. See *supra* notes 245-250 and accompanying text.

<sup>258</sup> *Waters*, 114 S. Ct. at 1889 (plurality opinion).

<sup>259</sup> Moreover, Justice O'Connor ignored one factor that was critical to the Court's decision in *Rankin*—the "responsibilities of the employee within the agency." *Rankin v. McPherson*, 483 U.S. 378, 390 (1987). The *Rankin* Court stated that "[w]here . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-91. It is clear that while Churchill's position did bring her into contact with the public, it did not involve any significant confiden-

lower courts must balance the employee's speech interest in a vacuum.

*D. Government Efficiency and the Sovereign/Employer Distinction*

Because the government acting as employer must achieve a multitude of goals in a variety of capacities, the *Waters* plurality argued that it should not burden government-employer decisionmaking with judicial definitions of efficiency. Justice O'Connor thus broadly redefined government efficiency interests. She claimed that one of a government employer's goals is simply "efficient employment decisionmaking," which includes the employer's ability to restrict employee speech that may interfere with this decisionmaking.<sup>260</sup> If an employee's speech somehow affects the government employer's ability to implement policy decisions as it sees fit, the speech hinders employer efficiency and deserves only minimal first amendment protection. In this way, not only the efficient fulfillment of institutional responsibilities, but also the control of employee behavior, including speech, becomes a legitimate end for the government employer.<sup>261</sup>

The flaw in the *Waters* plurality's approach is that it depends on a false distinction between the government's interests in efficiency when it acts as employer and as sovereign. Justice O'Connor argues that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."<sup>262</sup> The converse of Justice O'Connor's argument, of course, is that an individual's interests in free speech must necessarily depreciate from a significant interest to a subordinate one depending

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tial or policymaking aspects. More importantly, the only reason that Perkins-Graham brought Churchill's comments to the attention of MDH officials was to inform Waters. There is no evidence which indicates that Churchill's speech had any other effect on the efficient functioning of MDH.

<sup>260</sup> *Waters*, 114 S. Ct. at 1888 (plurality opinion).

<sup>261</sup> Unfortunately for public employees, the Court did not similarly characterize the exercise of free speech itself as a legitimate end for government workers.

<sup>262</sup> *Waters*, 114 S. Ct. at 1888 (plurality opinion). Justice O'Connor acknowledged that "we have always assumed [this] premise is correct." *Id.* at 1886.

upon whether the individual is speaking as citizen or as employee. Such a zero-sum analysis prevents the Court from conducting a principled balancing of the competing interests involved in each case because it virtually excludes the First Amendment from judicial consideration.

Judges will be unable to conduct a truly objective balancing unless the Court abandons the untenable distinction between the interests of the government as sovereign and as employer. The interests of the government in efficiency are inherently the same regardless of the capacity in which the government acts. The overall goal of the government is to operate as efficiently as possible under all circumstances. What changes is *not* the government's interest in efficiency, but the impact of the individual's speech on the government's ability to discharge its responsibilities as efficiently as possible. Whether the speaker is a member of the public or a member of the workforce, the government employer must still strive toward efficiently fulfilling its goals. The government's interest in efficiency does not differ when a public university is unable to schedule classes because of students protesting university admission criteria or employees protesting university hiring criteria. Nor does it differ when citizens on a local community board criticize the care available at a municipal hospital or when employees in a local union criticize the care provided at that same hospital. In these situations, the government seeks to discharge its responsibilities as efficiently as possible regardless of whether the *source* of the speech is an employee or a citizen.

What does change, however, is the potential impact of the speech on government efficiency interests, depending on who is speaking. Individuals who exercise their free speech rights while serving as public employees often can affect the efficiency of the government employer more quickly and substantially than like-minded individuals speaking as members of the general public outside the government agency. The solution to this problem is not, as *Waters* suggests, to require a different level of judicial scrutiny when the government acts as employer instead of sovereign.

#### IV. A SUGGESTED APPROACH: RETURNING TO GENUINE BALANCING

A two-step alternative to the *Waters* Court's approach would level the judicial playing field for public employees without undermining a government employer's legitimate interests in efficiency. First, the jury must be restored to its neutral factfinding role in determining the content of the speech for which the government employer allegedly sanctioned the employee. Second, in order to provide adequate first amendment protection to speech that addresses matters of concern to both the employee and the public, courts must abandon the false distinction between the government's efficiency interests when it acts as employer rather than sovereign, and rigorously scrutinize government-employer decisions predicated on employee speech.

Using a jury avoids having the government employer establish the universe of operative facts upon which a court will conduct the balancing analysis. A government employer faced with investigating the speech of an employee with whom it has a tenuous relationship would undoubtedly find it difficult to remain impartial throughout the investigation. This lack of objectivity may also manifest itself earlier in the process, when the government employer makes the initial decision concerning the type of investigatory procedure to utilize. Thus, if an employee like Cheryl Churchill has been particularly outspoken on certain sensitive workplace issues, the government employer would be encouraged to conduct only a cursory investigation into the reported speech before discharging the employee. Such a scenario is especially likely if the government employer also claims that the reported speech was "potentially disruptive," thereby negating the need for a more extensive investigation. A jury is the only adequate check on government employers' broad discretion to discharge employees on the basis of speech.

Moreover, jury factfinding in public-employee speech cases will not hinder government-employer efficiency to any greater degree than the *Waters* plurality's investigation requirement. First, government employers are constantly monitoring employee activities in the workplace and utilize sophisticated recordkeeping techniques to track the information generated.

Reference to those records at trial will suffice in most cases to show that the government employer did not discharge the employee for constitutionally protected speech. Thus, a government employer attempting to sanction an employee for speech would not be forced to utilize more investigative resources in order to convince a jury that its employment decision withstands constitutional scrutiny. Second, and more importantly, the government employer need not undertake a more thorough inquiry than the reasonable investigation required by *Waters*. Where the government employer is not, in fact, taking punitive measures because of protected employee speech, the fruits of a truly reasonable investigation should convince a jury that the employer's action did not run afoul of the First Amendment.

The jury's factfinding responsibilities under this proposed model would be twofold: first, to determine the content of the employee's statements; and second, to determine whether the government employer sanctioned the employee because of those statements. In determining the content of the employee's speech, the jury need not consider the form and context of the speech, because these factors have relevance only in ascertaining whether the employee's speech hindered the government employer's ability to discharge its responsibilities in an efficient manner.<sup>263</sup> In determining whether the employer sanctioned the employee because of his or her speech, the jury must consider the employer's assertions that it acted without regard to the employee's speech at issue, i.e., that it sanctioned the employee for reasons independent of the employee's speech. If the employer can convince the jury that these reasons were valid and not merely pretextual, then the employer has sufficiently carried its evidentiary burden and the claim should be dismissed.

Thus, even with a neutral factfinder, the *Mount Healthy* analysis remains viable protection for the government employer.<sup>264</sup> Unlike *Mount Healthy*, however, the employee is not initially required to demonstrate that his or her speech is both

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<sup>263</sup> As Justice Brennan stated: "It is beyond dispute that how and where a public employee expresses his views are relevant in the second half of the [balancing] inquiry—determining whether the employee's speech adversely affects the government's interests as an employer." *Connick v. Myers*, 461 U.S. 138, 159 (1983).

<sup>264</sup> See *supra* notes 40-57 and accompanying text.

constitutionally protected and a "substantial factor" in the employer's decision. The employee may have spoken only once or as part of an ongoing dialogue within the government workplace. The onus here is on the government employer to prove that it would have sanctioned its employee despite the speech. The government employer does not meet this burden if it defends its actions on a "last straw" theory. That is, the government employer may not claim that the employee's speech was the final incident in a string of prior violations of workplace rules or lapses in performance on the part of the employee which, if taken alone, would have justified sanctioning the employee. So long as the employer sanctioned the employee in response to the employee's speech, a potential constitutional violation has occurred. With a jury reviewing its actions, government employers will be discouraged from immediately sanctioning an employee who speaks out in the workplace and, more importantly, from setting forth spurious reasons for the sanction. Yet a government employer still has ample opportunity to prove that it could constitutionally sanction the particular employee regardless of the employee's speech.

After the jury determines the content of the employee's speech and concludes that the government employer indeed sanctioned the employee because of his or her speech, the judge performs step two of the analysis. Here, the judge must not provide greater deference to the sanctioning decision of the government merely because it acted in its capacity as employer rather than sovereign. Instead, the judge weighs the interests of the employee and the public in the speech directly against the efficiency interests of the government employer, without resorting to various levels of judicial scrutiny that depend upon the capacity in which the government acted.

Under this balancing process, the interests of the employee may be construed more broadly than the current public-concern standard allows to include the full range of interests which an individual citizen may have in exercising the freedom of speech right. Moreover, this process recognizes that the public's interest in efficient government is implicated not only by allowing employees to speak, but also by silencing them. When the government silences an employee who speaks on matters related to the functioning of the government agency

for which he or she works, the public is denied the ability to make informed decisions about how best to reform and improve government. Safeguarding society's power to govern itself through the exchange of information from an individual to the community is at the core of the first amendment's protection for speech and should not be weakened by judicial deference to the government acting in a capacity other than sovereign.

In balancing the interests of the government, a judge must consider whether the employer has: (1) identified the nature and scope of its responsibilities; (2) established that it conducted a full investigation into the substance of the employee's speech; and (3) demonstrated that the employee's speech prevented the employer from discharging those responsibilities in an efficient manner. The efficiency interests of the government employer need not be construed any more broadly than the "effective functioning of the public employer's enterprise" formulation enunciated by the *Rankin* Court.<sup>265</sup> Thus a court must carefully assess the actual impact of the employee's speech on this goal utilizing *Givhan's* "manner, time and place" standard as the basis for the assessment.<sup>266</sup> Whether such factors as "[d]iscouraging people from coming to work for a department," "threaten[ing] to undermine management's authority" and "mak[ing] management doubt [one's] effectiveness" as an employee in fact implicate the government employer's ability to function effectively, as the *Waters* Court contends, can only be determined after a thorough and rigorous review of the evidence in each case.<sup>267</sup> Justice O'Connor's suggestion that a court consider "efficient decisionmaking" to be a universal and independent goal of government employers is simply incompatible with a fair balancing analysis.

Under this proposed model, the government would not be constitutionally liable for sanctioning employees who have engaged in speech that actually affected the ability of the government employer to fulfill its assigned responsibilities efficiently. Government restrictions of employee speech based merely upon speculation and conjecture, however, would not be

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<sup>265</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

<sup>266</sup> See discussion *supra* notes 58-65.

<sup>267</sup> *Waters*, 114 S. Ct. at 1890-91 (plurality opinion).

tolerated, as such actions involve exactly the type of repression which the first amendment was designed to prevent. If the employee's speech did not have a deleterious effect, the First Amendment protects the speech regardless of whether it addressed matters of public concern or private interest. This analysis eliminates the question of whether the government employer sanctioned its employee based on a "reasonable mistake" about the content or protected nature of the employee's speech, or whether the employer simply conducted an inadequate investigation into such speech.

This proposal restores the jury to its traditional role as neutral factfinder and abandons the *Connick* threshold analysis, which requires employees to prove that their speech is constitutionally "protected" before a reviewing court can conduct the balancing analysis. It also rejects the series of "pre-balancing" analyses in *Waters* that force a judge to concentrate almost exclusively on two factors unrelated to the critical first amendment interests at issue: the constitutional parameters of the government employer's investigation as a first amendment procedural requirement; and the level of potential disruption that the government employer contends would have occurred in the workplace as a result of the speech. Instead, the proposal allows both judge and jury to focus their attention squarely on the content of the employee's speech, the speech's impact within the work environment and the employer's justifications for sanctioning the employee because of the speech.

## CONCLUSION

At first glance, *Waters* may appear to provide a measure of judicial protection for public-employee speech rights. The Supreme Court held that the Constitution requires a government employer to conduct a reasonable investigation into an employee's workplace speech before making any employment decision predicated on that speech. Upon closer examination, however, it is clear that *Waters* offers government employers an unprecedented opportunity to control and restrict employee speech. Public employees punished for speaking out at work may no longer submit their case to the rigorous scrutiny of a neutral factfinder, and can expect judicial review to be a rubber stamp of constitutionality for government decisions. More



importantly, the Court's reluctance to articulate any constitutional parameters for the investigation requirement, its confusing reformulation of the already muddled *Connick* balancing analysis, and its expansive redefinition of government efficiency interests exemplify its willingness to abandon public-employee first amendment rights at the door of the government workplace.

*Waters* rests on two flawed premises: first, that the government's interest in efficiency varies depending on whether it acts as sovereign or as employer; and second, that an employee's exercise of first amendment rights naturally leads to disruption in the workplace, interference with the government's ability to discharge its obligations efficiently, and litigation in the courts. Relying on these premises instead of principled reasoning, the *Waters* Court ignores the central values underlying the First Amendment and prevents an objective balancing of interests. The result is an unprincipled limitation of public-employee speech. *Waters* thus leaves public-employee free speech doctrine in such disarray that it fails to provide any consistent guidance to employers, employees or lower courts.

There is no dispute that government employers require flexibility in making those employment decisions that are necessary to fulfill agency responsibilities in an efficient and effective manner. Both the public as well as the government share a common and substantial interest in furthering this goal. Yet these decisions cannot be made in a constitutional vacuum, with public-employee speech rights sacrificed in the name of efficient government. A public employee's comments about his or her employer's policies and practices serve as the basis for workplace reform, increase public awareness of these issues and stimulate debate on a community level. Before silencing public employees, the Court must demand that a government employer clearly identify its particular responsibilities and how the employee speech at issue prevented it from efficiently discharging those responsibilities.

Accordingly, the Court must recognize that public-employee speech advances basic values that the First Amendment protects. The Court cannot continue to balance away the substantive first amendment rights of public employees in order to promote and enhance government efficiency interests with

blind uniformity. It is essential for the Court to accept the inherent conflict in public employment between employees' exercise of individual liberties and employers' efficient discharge of institutional responsibilities. Ultimately, this conflict can only be resolved when the Court regains the will to balance the competing interests critically yet fairly, and restores free speech rights to their preferred position in our constitutional jurisprudence.

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