CONSTITUTIONAL LAW—FIRST AMENDMENT—PUBLIC EMPLOYEES' RIGHT TO FREE SPEECH IN THE WORKPLACE EXPANDED—*Rankin v. McPherson*, 107 S. Ct. 2891 (1987).

The United States Constitution guarantees that freedom of speech will not be abridged.[1] In interpreting this seemingly absolute right, however, the Supreme Court has declared that certain forms of speech do not enjoy full constitutional protection.[2] This has been the case with public employees' right to free speech in the workplace.[3]

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[1] U.S. CONST. amend. I. In interpreting the first amendment, at least one commentator has suggested that first amendment rights are "absolute" in that they are not subject to exceptions. *See* Meikeljohn, *The First Amendment is an Absolute*, SUP. CT. REV. 245, 248 (1961). In adopting this "absolutist" position, Justice Black has explained:

> To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights . . . make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas—whatever the scope of those areas may be.

Black, Bill of Rights, *reprinted in* 35 N.Y.U.L. REV. 865, 874-75 (1960).

In rejecting Justice Black's position, and advocating a "balance" between the rights of the individual and the interests of the government, Justice Harlan has stated:

> At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," 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 through a literal reading of the First Amendment.

Konigsberg v. State Bar, 366 U.S. 36, 49-50 (1961).

[2] The Court has determined that certain types of speech are beyond the scope of constitutional protection. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libelous utterances); Harisiades v. Shaughnessey, 342 U.S. 580 (1952) (advocacy of force or violence); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Frohwerk v. United States, 249 U.S. 204 (1919) (seditious utterances). One commentator has explained that the government "abridges" speech in these instances because of the specific idea expressed or because of the effect produced by the awareness of such idea. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789-90 (2d ed. 1988). The Court has also identified other forms of speech as those deserving a lesser degree of constitutional protection. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (commercial speech); F.C.C. v Pacifica Found., 438 U.S. 726 (1978) (offensive speech); Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976) (near-obscene speech); Pickering v. Board of Educ., 391 U.S. 563 (1968) (public employee speech). Speech in these categories has been described as belonging to an "intermediate category" which receives "less-than-complete constitutional protection." L.TRIBE, *supra*, § 12-18, at 930.

[3] *See infra* notes 31-115 and accompanying text. *See also* Rosenbloom, *The Constitution and the Civil Service: Some Recent Developments, Judicial and Political*, 18 U. KAN. L.

With respect to the public sector,[4] the Supreme Court has struggled to articulate the appropriate standards to govern free speech claims of employees.[5] As a threshold issue, the Court has required that employee speech address a matter of public concern to enjoy constitutional protection.[6] Additionally, an employee's right to comment on matters of public concern must outweigh the government's interests in efficiency and harmony in the workplace.[7] Relying on this established framework, the Court in *Rankin v. McPherson*[8] broadly interpreted the concept of public concern, and in balancing the competing interests involved, focused on the actual disruption that occurred in the workplace.[9]

In January of 1981, Ardith McPherson, a nineteen-year-old black woman, was hired by the constable's office in Harris County, Texas, to work as a data entry clerk.[10] The constable's office was charged with certain limited law enforcement functions,[11] and all employees in the office held the title of deputy

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REV. 839, 840-55 (1970) (tracing the Supreme Court's treatment of first amendment protection extended to public employees).

4 Employment relationships in the public sector involve the state action necessary to trigger first amendment analysis under 42 U.S.C. § 1983 (1982). *See* Rankin v. McPherson, 107 S. Ct. 2891 (1987). Employment relationships in the private sector, however, are generally governed by the "employment at will" doctrine, which dictates that an employee may be terminated "for good cause, for no cause or even for cause morally wrong." Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Waters, 132 Tenn. 527, 179 S. W. 134 (1915). Employees subject to employment at will are afforded first amendment protection under § 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982), and under common law remedies for the tort of wrongful discharge. *See* Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42, 53-60 (1987) (discussing first amendment protection afforded private employees under constitutional, statutory and common law).

5 *See e.g.*, Connick v. Myers, 461 U.S. 138 (1983) (public employee speech must address a matter of public concern); Pickering v. Board of Educ., 391 U.S. 563 (1968) (balance between interests of government and rights of employee must be struck); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (public employment may not be conditioned on surrender of constitutional rights); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (any reasonable restraint on public employee speech permissible).

6 *See, e.g.*, Connick v. Myers, 461 U.S. 138, 143-48 (1983).

7 *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

8 107 S. Ct. 2891 (1987).

9 *Id.* at 2898-99.

10 *Id.* at 2894-95. McPherson was only required to pass a typing test to qualify for this position. Brief for Respondent at 4, Rankin v. McPherson, 107 S. Ct. 2891 (1987) (No. 85-2068).

11 *See Rankin*, 107 S. Ct. at 2894. Constable Rankin testified that the major function of the constable's office was the service of civil process in Harris County. *Id.* at 2891 n.1. In fact, 80% of the office's budget is devoted to this function. *Id.* The

constable.[12] Although she held this title, McPherson was not a commissioned officer and had no law enforcement responsibilities.[13] Rather, her duties were limited to operating a computer terminal in a private office, allowing her no contact with the public in the course of her job.[14]

On March 30th, 1981, McPherson and three co-employees heard an announcement over an office radio that an attempt had been made to assassinate President Reagan.[15] Upon hearing the news, McPherson began discussing the event and the policies of the Reagan administration with a fellow employee, Lawrence Jackson.[16] McPherson first commented that she thought the attempted assassination would happen "sooner or later" and that "it would be [done by] a black person . . . because . . . most [are] on welfare and CETA, and . . . use medicaid."[17] When Jackson commented that the Reagan administration had been reducing medicaid and food stamp payments, McPherson responded, "shoot, if they go for him again, I hope they get him."[18]

Unbeknownst to McPherson, another deputy constable had

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routine enforcement of criminal laws is done by the local police departments. *See id.*

[12] *Id.* at 2894. McPherson held the title of deputy constable *only* because all persons employed by the constable's office, regardless of their function, were given the title. *Id.*

McPherson was required to give the following oath of office: "I, Ardith S. McPherson, do solemnly swear (or affirm), that I will faithfully execute the duties of Clerk of Harris County, Texas, and will to the best of my ability preserve, protect and defend the Constitution and laws of the United States and of this [s]tate." McPherson v. Rankin, No. H-81-1442, 37 (S.D. Tex. Apr. 15, 1983), *vacated and remanded*, 736 F.2d 175 (5th Cir. 1984), *rev'd*, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987).

[13] *Rankin*, 107 S. Ct. at 2894. McPherson did not wear an official uniform. *Id.* Additionally, McPherson was neither permitted to carry a gun nor authorized to make arrests. *Id.*

[14] *Id.* at 2894-95. McPherson's primary responsibility was typing data into a computer which recorded the service of civil process in the county. *Id.* at 2895.

[15] *See id.* Both McPherson and her co-employees were situated at their computer terminals which were only a few feet apart when they heard the news report. Brief for Respondent, *supra* note 10, at 5.

[16] *See Rankin*, 107 S. Ct. at 2895.

[17] *Id.*

[18] *Id.* Initially, the district court found McPherson's comment to be: "I hope if they go for him again, they get him." McPherson v. Rankin, No. H-81-1442, 38 (S.D. Tex. Apr. 15, 1983), *vacated and remanded*, 736 F.2d 175 (5th Cir. 1984), *rev'd*, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987). On remand, the district court made no explicit finding regarding McPherson's statement. McPherson v. Rankin, No. H-81-1442 at 179 (S.D. Tex. Jan. 21, 1985), *rev'd*, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987). The Supreme Court found that the distinction between the two versions was not significant. *Rankin*, 107 S. Ct. at 2895 n.3.

entered the room during the broadcast and overheard her last comment.[19] He immediately related the remark to Constable Rankin, who then summoned McPherson to his office.[20] When asked by Rankin if she had made the comment, McPherson admitted that she had, but later testified that she also explained to him that she did not mean anything by it.[21] Immediately after the confrontation, Rankin fired McPherson.[22]

McPherson brought an action in the United States District Court for the Southern District of Texas, alleging that Rankin discharged her in violation of her first amendment rights.[23] After a hearing, the district court granted defendant Rankin's motion for summary judgment.[24] Subsequently, the Court of Appeals for the Fifth Circuit vacated and remanded for a trial on the merits, noting that genuine issues of material fact remained concerning the context in which McPherson made her statement.[25] On remand, the district court ruled that McPherson's remarks were not constitutionally protected and again entered judgment for the defendant.[26]

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19 *Rankin*, 107 S. Ct. at 2895.

20 *Id.*

21 *Id.* In the first hearing of the case, Rankin testified that when he asked McPherson if she meant it, she responded, "I sure do." *McPherson*, No. H-81-1442 at 38. In both trial level proceedings, the district courts made no explicit finding regarding which statement they found credible. *Rankin*, 107 S. Ct. at 2895 n.4. In the second hearing, however, Judge Black noted: "I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context." *McPherson*, No. H-81-1442 at 181.

22 *Rankin*, 107 S. Ct. at 2895.

23 *Id.* McPherson brought the claim under 42 U.S.C. § 1983 which provides, in pertinent part:

> Every person who, under color of [law] . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 (1982). Rankin sought recovery for lost wages, costs and fees as well as reinstatement of her position and other equitable relief. *Rankin*, 107 S. Ct. at 2895.

24 McPherson v. Rankin, No. H-81-1442 (S. D. Tex. Apr. 15, 1983), *vacated and remanded*, 736 F.2d 175 (5th Cir. 1984), *rev'd*, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987). The court granted this motion on the ground that McPherson's discharge had been proper since her remarks were not constitutionally protected. *McPherson*, No. H-81-1442 at 8.

25 *McPherson*, 736 F.2d at 180.

26 McPherson v. Rankin, No. H-81-1442 (S.D. Tex. Jan. 21, 1985), *rev'd*, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987).

On appeal, the court of appeals reversed, recognizing McPherson's superior right to free speech in the workplace.[27] The United States Supreme Court granted certiorari[28] and affirmed the decision of the court of appeals.[29] In so doing, the Supreme Court held that McPherson's remark addressed a matter of public concern, and that her interest in speaking outweighed her employer's interests in efficiency and discipline in the workplace.[30]

Historically, the first amendment rights of public employees were severely restricted in the workplace.[31] Since public employment was considered a privilege and not a right, the government could place any conditions on employment which were considered "reasonable."[32] This limited view of constitutional protection was expressed by Justice Holmes in *McAuliffe v. Mayor of New Bedford*[33] when he determined that a "[policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[34]

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27 *McPherson*, 786 F.2d at 1238-39. Upon finding that McPherson's speech addressed a matter of public concern, the court then determined that her first amendment rights outweighed the countervailing interests of her employer. *Id.* In so holding, the court employed the standards set forth by the Supreme Court to evaluate public employees free speech claims. *Id.* at 1235-36 (citing Connick v. Myers, 461 U.S. 138, 140-51 (1983)).

28 Rankin v. McPherson, 107 S. Ct. 313 (1986).

29 *See* Rankin v. McPherson, 107 S. Ct. 2891 (1987).

30 *Id.* at 2897-900.

31 *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

32 *See generally* Note, *The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?*, 37 GEO. WASH. L. REV. 409, 409 (1968) (authored by Henry V. Nickel); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442-45 (1968) (examining the history of the right/privilege distinction and its harsh consequences); Rosenbloom, *supra* note 3, at 839-40 (examining the judicial development of the doctrine of privilege). Professor Rosenbloom explains the premise underlying conditional public employment as follows: "[W]hen a citizen accepts public employment he voluntarily accepts all the conditions which go with it. Although these conditions may interfere with the employee's constitutional rights, his rights are not violated in the constitutional sense because his acceptance of these restrictions is voluntary rather than compelled." *Id.* at 840.

33 155 Mass. 216, 29 N.E. 517 (1892).

34 *Id.* at 220, 29 N.E. at 517. Justice Holmes further stated:

> There are few [employment opportunities] for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.

Id. at 220-21, 29 N.E. at 517-18. This view was also expressed in *Ex parte* Curtis,

This right/privilege distinction was maintained by the Court in early cases involving associational rights of public employees.[35] In a leading case, *Adler v. Board of Education*,[36] school teachers challenged the constitutionality of a New York statute which prohibited employment of persons who belonged to any organization which advocated the unlawful overthrow of the government.[37] Applying the Holmes rationale, the Court determined that such reasonable conditions of employment did not infringe upon the employees' right to free speech.[38] Declining to define public employment as a "right," the Court suggested that employees who are not satisfied with the terms of their employment are free "to retain their beliefs and associations and [seek work] elsewhere."[39]

The Court eventually modified its position in *Adler* when faced with constitutional challenges to state-mandated loyalty oaths.[40] In *Wieman v. Updegraff*,[41] the Court considered the constitutionality of an Oklahoma statute which required candidates for state employment to disclaim membership in communist or other subversive organizations as a condition of employment.[42]

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106 U.S. 371 (1882), where the Court upheld a federal statute regulating the political activities of federal employees. *Curtis*, 106 U.S. at 375.

35 *See, e.g.*, Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (dismissal of city employee for failure to execute a "loyalty" oath upheld); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (statute requiring candidates for public office to take oath upheld); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (statute restricting the political activities of federal employees upheld); United States v. Wurzbach, 280 U.S. 396 (1930) (statute forbidding members of Congress from receiving political contributions upheld).

36 342 U.S. 485 (1952).

37 *Id.* at 486-87. The statute made any employee ineligible for employment or subject to dismissal who "helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state . . . shall be overthrown by force or violence, or by any unlawful means." The Feinberg Law, N.Y. LAWS ch. 360 (1949), *as amended by* N.Y. LAWS, ch. 681, § 1 (1953), *amending* N.Y. EDUC. LAW § 3022 (McKinney 1953) (repealed 1967).

38 *See Adler*, 342 U.S. at 492.

39 *Id.*

40 *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952).

41 344 U.S. 183 (1952).

42 *Id.* at 186. The statute provided, in part, that all state officers and employees must take a loyalty oath as a condition of employment. The oath required an employee to affirm that he was not a member of any organization which advocated the overthrow of the United States government. OKLA. STAT. ANN. tit. 51, § 37.1 - .8 (West Supp. 1952) (repealed 1953). The Supreme Court of Oklahoma upheld the

Distinguishing prior case law involving similar statutes,[43] the majority held that the denial of employment solely on the basis of innocent association violated the due process clause of the fourteenth amendment.[44] While the Court did not explicitly abandon the right/privilege distinction, it did acknowledge that constitutional protection attaches when the denial of public employment is patently arbitrary or discriminatory.[45]

During the following decade, the Court continued to protect the constitutional rights of public employees in certain areas.[46] In 1960, the Court in *Shelton v. Tucker*[47] struck down an Arkansas statute which required teachers to disclose any organization to which they belonged or contributed within the past five years.[48] Citing *Wieman* for the proposition that the fourteenth amendment protects all persons "no matter what their calling,"[49] the Court held that such a disclosure requirement violated the associational freedoms guaranteed by the Constitution.[50] Similarly, in *Cramp v. Board of Public Instruction*,[51] an employee challenged

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constitutionality of the act without considering whether the employee had knowledge of the organization's subversive activities. Board of Regents v. Updegraff, 205 Okla. 301, 237 P.2d 131 (1951), *rev'd sub nom.* Wieman v. Updegraff, 344 U.S. 183 (1952).

43 The Court noted that in prior cases, the statutes involved were construed to require scienter before state employment could be denied on disloyalty grounds. *Wieman*, 344 U.S. at 188-91 (citing Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952)). In the present case, however, the Court noted that the statute was broadly interpreted to deny employment solely on the basis of membership, which included innocent association with an organization. *Id.* at 190.

44 *See id.* at 191.

45 *See id.* at 191-92.

46 *See, e.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961); Shelton v. Tucker, 364 U.S. 479 (1960). *See* Note, *Public Employees' Free Speech Rights:* Connick v. Myers *Upsets the Delicate Pickering Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173, 174 (1984-85) (authored by Andrew C. Alter).

47 364 U.S. 479 (1960).

48 *Id.* at 480-81. Specifically, the statute in question compelled every teacher, as a condition of employment to annually file a statement listing every organization to which he had belonged for the past five years. *Id.* Further, the statute provided that any contract entered into with a teacher who had not signed the statute was void. *Id.*

49 *Id.* at 487 (citing Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

50 *Id.* at 490. The Court noted that the "indiscriminate sweep of the statute" violated the due process rights guaranteed by the Constitution. *Id.* The majority explained that "[t]he statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the [s]tate's legitimate inquiry into the fitness and competency of its teachers." *Id.*

51 368 U.S. 278 (1961).

the validity of a mandatory loyalty oath which precluded those who lent their "aid, support, advice [or] counsel" to the communist party from obtaining state employment.[52] Recognizing the inherent vagueness of such an oath, the Court struck down the statute as violative of the fourteenth amendment.[53] By holding that state employment should not be conditioned with arbitrary restrictions, the majority in both cases indicated a growing awareness of public servants' constitutional rights.[54]

The Court continued to limit the scope of permissible conditions which could be placed on public privileges as evidenced by its decision in *Sherbert v. Verner*.[55] In construing the free exercise clause of the first amendment, the majority in *Sherbert* determined that "the liberties of religion and expression may [not] be infringed by the denial of or placing of conditions upon a benefit or privilege."[56] This reasoning laid the foundation for the Court's ultimate rejection of the right/privilege distinction in *Keyishian v. Board of Regents*.[57] In *Keyishian*, the Court invalidated the statute at issue in *Adler*, which required teachers to deny membership in communist organizations as a condition of employment.[58] In so

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[52] *Id.* at 279-80. The plaintiff, a Florida school teacher, refused to take the oath, although he maintained that he was not involved in any of the forbidden activities. *Id.* at 280. He alleged that he was unlawfully terminated in violation of his first and fourteenth amendment rights. *Id.*

[53] *Id.* at 288. The Court explained that a statute is unconstitutionally vague when reasonable persons could disagree as to the meaning of its language and the scope of its application. *Id.* at 287 (citing Connally v. General Const. Co., 269 U.S. 385, 391 (1926)). Moreover, in *Cramp*, the Court noted that the statute's unconstitutional vagueness was compounded by the fact that it also interfered with first amendment rights. *See id.* at 287-88 (citations omitted).

[54] In both cases, the Court relied on *Wieman* in holding that the imposition of arbitrary restrictions on public employees first amendment rights violates the fourteenth amendment. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 288 (1961) (citing Wieman v. Updegraff, 344 U.S. 183, 192 (1952)); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (citing Wieman v. Updegraff, 344 U.S. 183, 192 (1952)). *See generally* Note, Connick v. Myers: *Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429 (1984) (authored by Stephen Allred) (discussing the historical emergence of public employees' first amendment rights).

[55] 374 U.S. 398 (1963). In *Sherbert*, the Court struck down a South Carolina statute which denied unemployment benefits to a Seventh-Day Adventist whose religious beliefs prevented her from working on Saturday. *Id.* at 404. The Court determined that the statute violated the free exercise clause of the first amendment. *Id. See also* Note, *supra* note 32, at 412 (discussing the development of *Sherbert* in the employee rights context).

[56] *Sherbert*, 374 U.S. at 404 (citing Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 390 (1950); Hannegan v. Esquire, Inc., 327 U.S. 146, 155-56 (1946)).

[57] 385 U.S. 589 (1967).

[58] *Id.* at 608. More specifically, pursuant to the statute, a presumption of dis-

doing, the Court rejected the notion that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[59] Thus, *Keyishian* established the principle that public employment, once granted, may not be restricted by otherwise unconstitutional conditions.[60]

In the year following *Keyishian*, the Court retreated from vagueness and overbreadth analysis and instead developed more specific guidelines for evaluating public employee free speech claims.[61] In *Pickering v. Board of Education*,[62] the school board dismissed a teacher after he wrote a letter to the local newspaper criticizing certain board policies.[63] In reviewing Pickering's claim, the Court initially noted that an employee cannot be dismissed for exercising his first amendment rights, unless he has made knowingly false or reckless statements.[64] Conversely, the Court maintained that in the context of public employment, certain state interests may justify imposing conditions which would otherwise be unconstitutional if applied to the public at large.[65]

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qualification arose from proof of membership. *Id.* This presumption could be rebutted by denying membership in such an organization, by denying that such an organization condones the overthrow of government by violence or by denying knowledge of such advocacy. *Id.* In this regard, the Court held that the statute was unconstitutionally vague and overbroad. *Id.* at 609.

59 *Id.* at 605.

60 *See id.* at 609-10. *See also* Lee, *Freedom of Speech in The Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1115 (1988) ("The Court [in *Keyishian*] articulated the unconstitutional conditions doctrine.").

61 *See* Pickering v. Board of Educ., 391 U.S. 563, 569-70 (1968). *See generally*, Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L. J. 376, 381 (1979) (discussing the impact of the *Pickering* decision).

62 391 U.S. 563 (1968).

63 *Id.* at 564-65. The school board dismissed Pickering after a full hearing before the board and a determination that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district," and thus, in contravention of the applicable Illinois law. *Id.*

64 *Id.* at 574. The Court noted that the "core value[s]" of the first amendment are best served by having "free and unlimited debate on issues of public importance." *See id.* at 573. In so doing, the majority noted that recovery of damages by public officials for statements made about them are not authorized unless such statements are made with either knowledge of their falsity or reckless disregard for their truth. *Id.* (citing New York Times v. Sullivan, 376 U.S. 254 (1964)). Similarly, the Court held that in the instant case, "absent proof of false statements knowingly or recklessly made by [Pickering, his] exercise of his right to speak on issues of public importance may not furnish the basis for dismissal from public employment." *Id.* at 574. For a discussion of *Pickering* and *New York Times*, see Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of Pickering and Tinker*, 8 GA. L. REV. 900, 904 n.23 (1974).

65 *Pickering*, 391 U.S. at 568. For a discussion of the weights assigned to the state interests in various occupations, see Note, *supra* note 61, at 381 n.43.

Faced with these competing interests, the Court developed a balancing test in which the rights of the employee, in commenting upon matters of public concern, would be weighed against the state's interest in promoting the efficiency of its public service.[66]

Recognizing the impracticability of setting forth a general standard upon which all statements could be judged, Justice Marshall, writing for the majority, framed the balancing test in broad terms.[67] At the outset, he articulated several factors relevant to analyzing a constitutional claim.[68] When the parties' working relationship does not require confidence and loyalty in order to function properly, the Court reasoned that the state's interest in restricting the speech is weakened.[69] By contrast, the majority noted that any detrimental impact that the speech might have on the efficient functioning of the government will tip the balance in favor of the employer's right to limit the speech.[70] Additionally, the Court determined that when a comment made by a public employee involves a matter of legitimate public concern, a great interest exists in preserving the employee's speech.[71] Applying this criteria to the facts in *Pickering*, the majority held that any interference with the state's interest was outweighed by Pickering's right to comment on school board policy without fear of retaliatory dismissal.[72]

Subsequent decisions by the Court attempted to delineate the parameters of the *Pickering* balancing test.[73] In *Perry v.*

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66 *Pickering*, 391 U.S. at 568-73.

67 *See id.* at 569. The balancing test has been criticized for failing to indicate the relative weights to be accorded to the interests of the state and its employees, and for failing to specify the proper scope of the state's interest. *See* Note, *Public Employees May Speak a Little Evil*, 3 W. NEW ENG. L. REV. 289, 297 (1980) [hereinafter *Public Employees*]; Note, *supra* note 64, at 917-18.

68 *See Pickering*, 391 U.S. at 570.

69 *See id.* The Court reasoned that Pickering's statements were not directed towards anyone who "would normally be in contact [with him] in the course of his work as teacher." *Id.* at 570-71. The Court further noted that Pickering was not in a position where the maintenance of "discipline by immediate superiors or harmony among coworkers" would be jeopardized. *Id.* at 570.

70 *See id.* at 571. The Court found that Pickering's speech did not have a per se detrimental effect on the board, and at most would not have an impact "beyond its tendency to anger the [b]oard." *Id.* Moreover, as the more informed members of the community, the Court recognized that teachers should be able to "speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 571-72.

71 *Id.* The Court noted that Pickering's attack on the allocation of school board funds addressed a matter of public concern. *Id.* at 572. Because the issue would be resolved through a referendum, the Court reasoned that free and open debate on the issue was necessary. *See id.*

72 *See id.* at 572-73.

73 *See, e.g.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979);

Sindermann,[74] the Court reinforced the notion that public employees, as informed citizens, should be free to voice their opinion on matters of public concern.[75] Sindermann, a nontenured college professor, became involved in public disagreements over policies of the school's Board of Regents.[76] After the board failed to renew his employment contract, Sindermann alleged that he was denied employment because of his public criticism of the school's policies, thus in violation of his first amendment rights.[77] At the outset, the Court noted that Sindermann had raised a valid constitutional issue despite his lack of tenure.[78] Relying on *Pickering*, the Court then determined that a public servant's criticism of his superiors on matters of public concern may warrant constitutional protection and may therefore be an impermissible basis for his dismissal.[79]

While the *Pickering* Court did not specify the appropriate burden of proof to be borne by each party under the balancing test, the Court later confronted this issue in *Mount Healthy City School District Board of Education v. Doyle*.[80] In *Mount Healthy*, a nontenured teacher named Doyle, informed a local radio station of the contents of a school memorandum that established a dress code for teachers.[81] The radio station promptly announced the

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Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann, 408 U.S. 593 (1972).

74 408 U.S. 593 (1972).

75 *See id.* at 598. *See also* Note, *supra* note 54, at 441-42.

76 *Perry*, 408 U.S. at 594-95. Specifically, as President of the Texas Junior College Teachers Association, Sindermann supported a proposal to elevate all junior colleges in the state, including Odena State College, where he was employed, to four-year status. *Id.* at 595. The college's Board of Regents at Odena opposed this change. *Id.*

77 *Id.* at 595. Although the board did not release an official statement specifying the reasons for their decision, they did issue a press release which alleged "insubordination" on the part of Sindermann. *Id.* at 595 & n.1.

78 *See id.* at 598. The Court explained that "[p]lainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment." *Id.* (citing Pickering v. Board of Educ., 391 U.S. 563 (1968)).

79 *Id.* The Court therefore remanded the case, holding that the grant of summary judgment against Sindermann was improper. *Id. See* Note, *supra* note 54, at 441 (discussing the ramifications of the *Sindermann* decision).

80 429 U.S. 274 (1977). *See* Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365, 369-70 (1977) (explaining that because of the ambiguity in *Pickering*, lower federal courts were forced to assign weights to the variables in the balancing test).

81 *Mount Healthy*, 429 U.S. at 282.

policy in its news broadcast.[82] When the school board failed to renew Doyle's employment contract, they cited the news report, among other incidents, as the reason for their decision.[83]

In applying the *Pickering* balancing test, the Supreme Court agreed with the lower court that Doyle's communication was protected under the first amendment.[84] The majority, however, rejected the lower court's finding on the burden of proof.[85] The Court reasoned that merely demonstrating that the employee's speech was a factor in his dismissal could possibly place him "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[86] Accordingly, the Court held that the burden is on the employee to demonstrate that his speech was the "motivating factor" in his loss of employment.[87] After meeting this preliminary requirement, the Court determined that the employer must then demonstrate, by a preponderance of the evidence, that the employee could have been dismissed, absent his protected conduct.[88] Thus, while clarifying the appropriate burden of proof, the *Mount Healthy* decision presented an additional obstacle to employees attempting to demonstrate infringements on their

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82 *Id.* After the broadcast, Doyle apologized to the school principal, recognizing that he should have communicated his intentions to the school before releasing the information to the radio station. *Id.*

83 *Id.* at 282-83. The school board, in its statement of reasons for Doyle's dismissal, noted that the news broadcast "raised much concern not only within this community, but also in neighboring communities." *Id.* at 283 n.1. The school board also listed Doyle's "lack of tact in handling professional matters" and his use "[of] obscene gestures to correct students" as additional support for its decision. *Id.*

84 *Id.* at 284. The Court explained:

> There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments.

Id.

85 *See id.* at 285-86.

86 *Id.* at 285. Furthermore, the Court maintained that the "constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-86.

87 *Id.* at 287 (footnote omitted).

88 *Id.* The Court noted that a similar "but for" test is constitutionally mandated in the criminal procedure context. *Id.* at 286-87 (citing Parker v. North Carolina, 397 U.S. 790 (1970); Wong Sun v. United States, 371 U.S. 471 (1963); Lyons v. Oklahoma, 322 U.S. 596 (1944); Nardone v. United States, 308 U.S. 338 (1939)). *But see* Note, *supra* note 61, at 384-85 (criticizing the criminal procedure analogy drawn by the Court).

first amendment rights.[89]

In a later clarification of the *Pickering* test, the Court extended the scope of protected speech to include communication in a private environment.[90] In *Givhan v. Western Line Consolidated School District*,[91] a school teacher was dismissed after criticizing certain school board policies during private conversations with her employer.[92] Recognizing that speech on matters of public concern is constitutionally protected, the Court held that this protection also extends to an employee who chooses to communicate privately with her employer.[93] Significantly, the majority also articulated other factors which may be considered in arriving at the appropriate *Pickering* balance.[94] In addition to the context of the speech, the Court noted that the "manner, time, and place in which [the statement] is delivered" are also relevant considerations.[95]

The Court reformulated the elements of the *Pickering* test in

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89 One commentator has explained:

> The rationale for *Mount Healthy* is superficially appealing: An employee should not be placed in a better position by exercising constitutional rights than the employee would have occupied by having done nothing. . . . As a practical matter, however, *Mount Healthy* does far more than prevent windfalls for employees who would have been terminated regardless of their protected speech. . . . Consequently, if employers provide reasons for an employee's termination, they typically will offer neutral, performance based reasons. To show that these reasons are pretextual can be extremely difficult, in that few workers boast a perfect record. . . . A patient public employer, assisted by able counsel, can be rid of nearly any troublesome employee.

Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S.C.L. REV. 3, 19 (1987).

For an analysis of the practical effect of the *Mount Healthy* decision, see Wolly, *What Hath Mount Healthy Wrought?*, 41 OHIO ST. L.J. 385 (1980).

90 *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

91 439 U.S. 410 (1979).

92 *Id.* at 412-13. The school district contended that its decision was justified on the basis of other incidents of misconduct which had occurred in the past. *Id.* at 412 n.2.

93 *Id.* at 413. Because the *Givhan* case was tried prior to the decision in *Mount Healthy*, the Court remanded the case so that the causation element could be properly decided in light of the standards established in *Mount Healthy*. *Id.* at 416-17.

94 *Id.* at 415 & n.4.

95 *Id.* The Court explained that although both private and public expression are protected under the first amendment, the interest balanced in each context will necessarily differ. *Id.* The Court reasoned that "[w]hen a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Id.* For an analysis of the *Givhan* decision, see Note, *Public Employees, supra* note 67, at 308-10.

the seminal case of *Connick v. Myers*.[96] In *Connick*, assistant district attorney Sheila Myers opposed her employer's decision to transfer her to another division of the criminal court.[97] Consequently, she circulated a questionnaire among her co-workers soliciting their views on various office policies.[98] Myers's employer thereafter discharged her, citing her "insubordination" in circulating the questionnaire as the basis for dismissal.[99] Myers challenged her employer's actions, contending that her termination violated her constitutionally protected right to free speech.[100]

In upholding Myers's dismissal, the Court posited that as a threshold issue, employee speech must involve a matter of public concern to enjoy constitutional protection.[101] The Court explained that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' "[102] and accordingly, warrants strenuous review of possible constitutional violations.[103] By contrast, when employee speech involves a personal matter, and is not related to any social or political thought, it does not enjoy the same protection.[104] To determine whether employee speech involves a matter of public concern, the Court held that the form, content and context of a given statement must be evaluated.[105]

In reviewing the questionnaire, the Court determined that the question posed by Myers concerning pressure to work on an office-supported campaign addressed a matter of public concern thus triggering further analysis.[106] The Court then balanced My-

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96 461 U.S. 138 (1983).

97 *Id.* at 140.

98 *Id.* at 141. The questionnaire consisted of fourteen questions addressing issues of office morale and fairness of office procedures, the need for a grievance committee, the existence of a "rumor mill" within the office and pressure to work on political campaigns. *See id.* at 155-56. One of Myers's supervisors characterized her activities in distributing the questionnaire as causing a "mini-insurrection." *Id.* at 141.

99 *Id.* District Attorney Connick also cited Myers's refusal to accept the transfer as the basis for her dismissal. *Id.*

100 *Id.*

101 *See id.* at 143. The Court pointed out that *Pickering* and its progeny indicated the importance of protecting speech on matters of public concern. *Id.*

102 *Id.* at 145 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)).

103 *Id.*

104 *Id.* at 146-48.

105 *Id.* at 147-48 (footnote omitted).

106 *Id.* In so ruling, the Court explained: "We have recently noted that official pressure upon employees to work for political candidates not of the workers own choice constitutes a coercion of belief in violation of fundamental constitutional

ers's right to speak against the government's interest in effectively fulfilling its responsibilities to the public.[107] In so doing, the Court considered the time, place and manner in which Myers distributed her questionnaire.[108] Noting that Myers solicited responses during working hours, the Court found her actions increased the possibility that the efficient functioning of the office was jeopardized.[109] The Court, in analyzing the context in which the dispute arose, observed that the questionnaire was distributed as a result of a disagreement over Myers's proposed transfer and characterized it simply as an "employee grievance."[110] In striking the balance in favor of the government, the Court determined that Myers's speech had the potential effect of disrupting her office, undermining her supervisor's authority and damaging close relationships, and was therefore not constitutionally protected.[111]

In dissent, Justice Brennan criticized the majority's approach to defining public concern as well as their application of the *Pickering* test.[112] According to Justice Brennan, the majority improperly considered the context of Myers's speech when evaluating whether it touched upon a matter of public concern.[113] Addi-

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rights." *Id.* at 149 (citing Branti v. Finkel, 445 U.S. 507, 516-17 (1980); Elrod v. Burns, 427 U.S. 347 (1976)). The Court also determined that the remaining questions regarding the trust that Myers's co-workers possessed in their superiors, office morale and the need for a grievance committee did not involve matters of public concern. *Id.* at 148.

107 *Id.* at 150-54.

108 *Id.* at 152.

109 *Id.* at 153 (emphasis added). The Court noted that even the potential for undermining office functions may result in upholding the employer's disciplinary action. *See id.* at 151-52. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 152 (footnote omitted).

110 *Id.* at 153-54. In light of the factual distinctions in every case, the Court emphasized that it was not attempting to "lay down a general standard against which all such statements might be judged." *Id.* at 154 (quoting Pickering v. Board of Educ., 391 U.S. 563, 569 (1968)). In applying the balancing test, the Court reasoned that "the [s]tate's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id.* at 150. Since Myers's remark only touched upon a matter of public concern in a "limited sense," the Court determined that Connick was not required to tolerate his employee's action in this instance. *Id.* at 154.

111 *See id.* at 151-54.

112 *Id.* at 156-70 (Brennan, J., dissenting).

113 Justice Brennan explained that

> the Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context in which a statement is made, is to be weighted *twice*—first in determining whether an employee's speech

tionally, the dissent disputed the Court's conclusion that only one of Myers's questions touched on a matter of public concern.[114] Finally, Justice Brennan accused the majority of misapplying the *Pickering* test by examining only the potential for disruption in the efficient functioning of the District Attorney's office.[115]

Although *Connick* introduced a new framework for analyzing employee speech claims, it offered only a sparse definition of the new threshold requirement of "public concern."[116] As a result, lower courts analyzed public employee free speech claims without the benefit of clearly articulated guidelines.[117] It was against this background of uncertainty that *Rankin v. McPherson*[118] was decided.

Justice Marshall, writing for the Court, began his analysis by noting that the government, as an employer, cannot dismiss an employee in violation of her first amendment right to free speech.[119] By contrast, the Court recognized that in order to maintain the effective functioning of the public service, the gov-

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addresses a matter of public concern, and then in deciding whether the statement adversely affected the government's interest as an employer.

Id. at 157-58 (Brennan, J., dissenting) (emphasis in original).

114 *Id.* at 158 (Brennan, J., dissenting). Justice Brennan posited that the majority, in so reasoning, "impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal." *Id.*

115 *Id.*

116 *See* text accompanying *supra* notes 101-05.

117 *Compare* McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986) (police officer's comments to newspaper reporter that his paper printed "only what the city officials wanted" was made out of spite and did not address a matter of public concern); Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) (teacher's criticism of "collegiate registration" policy of high school a personal grievance and therefore did not address a matter of public concern); Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984) (disclosure of an internal report by policeman to newspaper regarding low morale and other office problems in Emergency Operations Center did not address a matter of public concern) *with* Lewis v. Harrison School Dist., 805 F.2d 310 (8th Cir. 1986) (principal's speech to school board criticizing superintendent's decision to transfer principal's wife from junior high school to high school addressed a matter of public concern); Brown v. Texas A & M Univ., 804 F.2d 327 (5th Cir. 1988) (student employee speech on possible self-dealing of faculty members in university arguably addressed a matter of public concern); Eiland v. City of Montgomery, 797 F.2d 953 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 3263 (1987) (poetry composed of police officer mimicking mayor during local election addressed a matter of public concern).

For a discussion of lower federal courts' applications of *Connick*, including the weights assigned to various elements in the balancing test, see Massaro, *supra* note 89, at 20 & nn.95-96.

118 107 S. Ct. 2891 (1987).

119 *Id.* at 2896 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). Justice Marshall was joined by Justices Brennan, Blackmun, Powell, and Stevens.

ernment must have authority to make appropriate personnel decisions.[120] Citing the analysis set forth in *Pickering* and its progeny, the Court determined that a balance between the rights of the citizen in commenting upon matters of public concern, and the state's interests in the efficient functioning of the workplace, must be achieved.[121] Initially, the majority noted that to warrant constitutional protection, a public employee's speech must address a matter of public concern.[122]

Focusing on McPherson's remark in context, the majority determined that her statement "plainly dealt with a matter of public concern."[123] To support this conclusion, Justice Marshall initially observed that McPherson made her comment in the course of a discussion concerning the policies of the Reagan administration.[124] Additionally, the Court noted that McPherson's comment was prompted by the news of an assassination attempt on the President.[125] Moreover, the Court explained that in determining whether McPherson's speech addresses a matter of public concern, the controversial or inappropriate nature of her statement is irrelevant.[126] Thus, Justice Marshall asserted that McPherson should not be denied constitutional protection sim-

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120 *Id.* The Court maintained that to "review . . . every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.*

121 *Id.* (citing Connick v. Myers, 461 U.S. 138, 140 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)). The Court declared that such a balance "is necessary in order 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.*

122 Id. at 2896-97 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

123 *Id.* at 2897. The Court noted that the district court, in its second hearing of the case, did not explicitly apply the elements of the balancing test since they found that McPherson's speech did not address a matter of public concern. *Id.* at 2897 n.8. Instead, the district court stated: "I don't think it is a matter of public concern to approve even more to the second attempt at assassination." *Id.* Additionally, the Court noted that the district court merely determined that McPherson's comments were "something more than political hyperbole. They expressed such dislike of a high government official as to be violent words, in context." *Id.* The Court characterized such factual findings as "ambiguous" and "unintelligible in First Amendment terms." *Id.* Moreover, the majority pointed out that the lower court's factual findings are subject to constitutional review. *Id.*

124 *Id.* at 2897.

125 *Id.* at 2898. In this regard, the Court characterized McPherson's speech as a response to an event of "heightened public attention." *Id.* The Court also emphasized that the private nature of McPherson's speech did not alter the constitutional analysis. *Id.* at 2898 & n.11 (citing Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979)).

126 *Id.* The Court also noted that McPherson's remarks were not punishable under federal law. *Id.* (citing 18 U.S.C. §§ 871 (a), 2385 (1982)).

ply because her comment was not a positive critique of government policy.[127]

Having met the threshold requirement of addressing a matter of public concern, the Court proceeded to analyze McPherson's speech by balancing the competing interests of her and her employer.[128] In so doing, the Court noted that the time, place and manner of a given expression, as well as the context in which it arose, must be considered.[129] The majority also stated that certain state interests may outweigh a public employee's interest in exercising her first amendment rights.[130] For example, when a statement has the effect of interfering with office productivity, impairing personnel relationships or impeding the speaker's job performance, the Court declared that the state's interests are strengthened.[131]

Finding the state's interests insufficient to justify McPherson's discharge, the Court noted that there was no evidence to indicate that her statement interfered with the efficient operation of the constable's office.[132] Relying on the testimony of Constable Rankin, the Court observed that interference with office functions was not a consideration in his decision to discharge McPherson.[133] Additionally, the Court determined that McPherson's comments did not have the effect of tainting the public image of the constable's office.[134] Rather, the Court noted that McPherson had engaged in a private conversation with a co-employee in an area that was not accessible to the public.[135]

In assessing the circumstances surrounding McPherson's

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127 *See id.* In so finding, the Court articulated that " 'debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

128 *Id.*

129 *Id.* at 2898-99 (citing Connick v. Myers, 461 U.S. 138, 152-53 (1983); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979)).

130 *See id.* at 2899.

131 *Id.*

132 *Id.*

133 *Id.* Specifically, the Court noted that "[t]he Constable was evidently not afraid that McPherson had disturbed or interrupted other employees—he did not inquire to whom [she] had made the remark and testified that he 'was not concerned who she had made it to.' " *Id.* (citation omitted).

134 *Id.* The Court declared that "[n]ot only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the constable that the remark demonstrated a character trait that made [her] unfit to perform her work." *Id.* (footnote omitted).

135 *Id.* Moreover, the Court observed that there was no evidence that any other employee who worked in the office, except Jackson, had heard the comment. *Id.*

dismissal, the Court concluded that Rankin fired McPherson on the basis of the *content* of her speech.[136] In so finding, the Court pointed out that Constable Rankin had expressed great concern that McPherson had "meant it" when she commented on the attempted assassination of the President.[137] In discharging an employee under these circumstances, however, the Court asserted that the weight given to the content of the speech must vary with the type of role that the employee plays in the agency.[138] More specifically, the Court held that when an employee, such as McPherson, "serves no confidential, policymaking, or public contact role," the state's interest in suppressing the employee's speech is weakened.[139] As a clerical employee, the Court reasoned that McPherson's position was only marginally related to the effective functioning of the constable's office.[140] Considering the limited law enforcement function of the agency, the nature of McPherson's statement and her position in the office, the Court concluded that McPherson's right to make such a statement outweighed any countervailing state interests.[141]

Justice Powell wrote a separate opinion concurring in the Court's judgment.[142] Observing that McPherson had engaged in a purely private conversation, he posited that the extensive analysis undertaken by the majority was unnecessary.[143] Justice Powell, however, agreed with the Court's conclusion, to the extent that such constitutional review was required.[144] Most importantly, he approved of the majority's determination that the

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136 *Id.* (emphasis in original). The Court explained that "[w]hile the facts underlying Rankin's discharge are, despite extensive proceedings in the District Court, still somewhat unclear, it is undisputed that he fired McPherson based on the *content* of her speech." *Id.* (emphasis in original) (footnote omitted).

137 *Id.* at 2899-900 (emphasis in original). The Court found that Rankin simply concluded that McPherson "was not a suitable employee to have in a law enforcement agency." *Id.* at 2900.

138 *Id.* The Court explained that "[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Id.*

139 *Id.*

140 *See id.* The Court noted, however, that "[t]his is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer." *Id.* at 2900 n.18.

141 *Id.* at 2900.

142 *Id.* at 2900-01 (Powell, J., concurring).

143 *Id.* at 2901 (Powell, J., concurring) (citing Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968)).

144 *Id.*

speech addressed a matter of public concern.[145] Moreover, according to Justice Powell, constitutional protection should generally extend to private conversation "at all levels of the workplace," since the risk that such speech might interfere with the efficient functioning of a public office is remote.[146] Thus, Justice Powell concluded that McPherson's private comments were protected under the first amendment.[147]

In his dissenting opinion, Justice Scalia initially criticized the majority for "significantly and irrationally" expanding the definition of public concern.[148] The dissent claimed that the district court, by describing McPherson's remark as "violent words" rather than "mere political hyperbole," properly determined that her comment did not address a matter of public concern.[149] Characterizing the lower court's conclusion as "reasonable and supported by the evidence," the dissent described the majority's finding as a "distortion of both the record and the Court's prior decisions."[150]

The dissent first maintained that the conversation preceding McPherson's remark did not alter the status of her speech.[151] In Justice Scalia's opinion, the majority erred by construing McPherson's entire conversation with her co-worker as evidence of the *content* of her speech.[152] More appropriately, the dissent posited that McPherson's criticisms of the President's policies only

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145 *Id.* Justice Powell further stated that "[i]f a statement is on a matter of public concern . . . it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace." *Id.*

146 *Id.* In fact, Justice Powell explained that "[t]he risk that a single, off-hand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful." *Id.*

147 *Id.*

148 *Id.* at 2902 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist, Justices White and O'Connor. The dissent further criticized the majority for "carv[ing] out a new and very large class of employees— . . . those in 'nonpolicymaking' positions—who, [according to the majority's decision], can never be disciplined for statements that fall within the Court's expanded definition." *Id.*

149 *Id.* at 2903 (Scalia, J., dissenting) (citing McPherson v. Rankin, 786 F.2d 1233, 1235 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987)).

150 *Id.* at 2902-03 (Scalia, J., dissenting).

151 *See id.* at 2903 (Scalia, J., dissenting). More specifically, Justice Scalia stated that there "[is] no basis for the Court's suggestion . . . that McPherson's criticisms of the President's policies that immediately preceded the remark can illuminate it in such fashion as to render it constitutionally protected." *Id.*

152 *See id.* (emphasis in original).

revealed the *motive* for her subsequent comment.[153]

The dissent next proceeded to distinguish McPherson's comment from other statements previously made by public employees which legitimately addressed matters of public concern.[154] Justice Scalia noted, for example, that the speech in *Connick* concerned pressure to work in political campaigns and the comment in *Pickering* involved criticism of school board financing policies.[155] By contrast, the dissent asserted that McPherson's statement was closer to other types of speech which do not enjoy first amendment protection, such as advocacy of force or violence.[156] Unlike speech "lying within the 'heart' of the First Amendment's protection,"[157] the dissent posited that McPherson's speech fell squarely within that unprotected category of expression which can neither be criminalized nor addresses a matter of public concern.[158]

Moreover, the dissent challenged the majority's method of classifying McPherson's comment as speech addressing a matter of public concern, contending that the Court failed to adequately explain how it arrived at its conclusion.[159] Justice Scalia rejected the Court's reasoning that when a comment follows an attempted assassination, an event of "heightened public attention," it nec-

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153 *Id.* (emphasis in original). The dissent stated that the "criticisms merely reveal the speaker's *motive* for expressing the desire that the next attempt on the President's life succeed, in the same way that a political assassin's remarks to his victim before pulling the trigger might reveal a motive for that crime." *Id.* (emphasis in original). The dissent therefore concluded that "the majority's magical transformation of the *motive* for McPherson's statement into its *content* [was] as misguided as viewing a political assassination preceded by a harangue as nothing more than a strong denunciation of the victim's political views." *Id.* (emphasis in original).

154 *Id.* (citing Connick v. Myers, 461 U.S. 138, 149 (1983); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979); Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 282 (1977); Perry v. Sindermann, 408 U.S. 593, 595 (1972); Pickering v. Board of Educ., 391 U.S. 563, 566 (1968)).

155 *Id.*

156 *Id.* (citing Harisiades v. Shaughnessy, 342 U.S. 580, 591-92 (1952)). The dissent also listed assassination threats against the President (citing Frohwerk v. United States, 249 U.S. 204, 206 (1919)); fighting words (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); and epithets or personal abuse (citing Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)) as similarly unprotected categories of speech. *Id.*

157 *Id.* at 2903-04 (Scalia, J., dissenting) (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).

158 *Id.* at 2904 (Scalia, J., dissenting) (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).

159 *Id.* The dissent maintained that the Court "does not *explain* how a statement expressing approval of a serious and violent crime—assassination of the President—can possibly fall within [the] category [of public concern]." *Id.* (emphasis in original).

essarily addresses a matter of public concern.[160] To condone such reasoning, according to the dissent, would serve to elevate any speech with which the public might be "concerned" to a constitutionally protected status.[161] Such an approach, the dissent concluded, irrationally expands the definition of public concern.[162]

While maintaining that McPherson's speech did not meet the threshold requirement of addressing a matter of public concern, the dissent nonetheless proceeded to analyze McPherson's speech by balancing the interests of both parties.[163] In so doing, Justice Scalia emphasized that the issue was whether Rankin's interest "*in preventing the expression of such statements in his agency* outweighed [McPherson's] First Amendment interest in making the statement."[164] The dissent declared that under this analysis, the severity of the sanction imposed upon the employee is irrelevant should the interests of the government ultimately prevail.[165]

Applying the balancing test, the dissent determined that the interests of Constable Rankin in preventing the statement outweighed McPherson's right to freedom of speech.[166] Stressing the law enforcement function of the constable's office, Justice Scalia contended that Constable Rankin had a strong interest in suppressing any statements made by his employees which condoned or encouraged violent actions.[167] Additionally, the dissent emphasized that within the confines of a law enforcement agency, such a statement could have the potential for undermining office relations.[168] Moreover, the dissent hypothesized that to a limited

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160 *Id.* Justice Scalia asserted: "I cannot respond to this progression of reasoning except to say that I don't understand it." *Id.*

161 *See id.* The dissent posited that to accept such reasoning would "obviously [be] untenable," since the public would clearly be "concerned" about an attempted assassination of the President. *Id.* The dissent emphasized its point by declaring that "[t]he public would be 'concerned' about a statement threatening to blow up the local federal building . . . yet that kind of 'public concern' does not entitle such a statement to any First Amendment protection at all." *Id.*

162 *See id.*

163 *Id.*

164 *Id.* (emphasis in original). The dissent maintained that the court incorrectly described the balancing test as whether "Rankin's interest *in discharging* [*McPherson*] outweighed her rights under the First Amendment." *Id.* (emphasis in original).

165 *Id.*

166 *Id.* at 2905 (Scalia, J., dissenting).

167 *Id.* at 2904 (Scalia, J., dissenting). Justice Scalia asserted that such interest exists, "regardless of whether the statements actually interfere with office operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work." *Id.*

168 *Id.* at 2904-05 (Scalia, J., dissenting). In fact, the dissent pointed out that

extent, McPherson might have some contact with the public in the course of her duties.[169] In light of these considerations, Justice Scalia contended that McPherson's comment might have the effect of undermining public confidence in the constable's office and should therefore be denied constitutional protection.[170]

Concluding his dissent, Justice Scalia challenged the majority's assertion that nonpolicy-making employees pose little threat to a public agency's successful function.[171] To the contrary, the dissent reasoned that an employee such as McPherson can damage working relationships and undermine public confidence in an agency to the same extent as policy-making employees.[172] The result of creating an exception for nonpolicy-making employees, according to the dissent, will be to allow such employees to freely advocate ideas which are contrary to the goals of public service.[173]

The Supreme Court's adjudication of public employees' free speech claims illustrates that the public sector is a difficult environment for the Court to articulate sound constitutional principles. Indeed, it was not until 1968 in *Pickering* that the Court developed a test to balance an employee's interest in speaking in the workplace against the government's interest in promoting the efficiency of the public service it performs.[174] And while *Pickering* stressed that it was not "lay[ing] down a general standard against which all statements may be judged,"[175] the *Connick* case, decided just fifteen years later, did just that— imposed the threshold requirement that all public employee speech address a matter of public concern to enjoy constitutional protection.[176]

The public concern requirement of *Connick* is an illogical extension of *Pickering* and the immediate case law which developed from that decision. While the *Connick* Court cited the need for

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McPherson's remark was brought to Constable Rankin's attention because the deputy reporting the incident was "very upset" by it. *Id.* at 2905 (Scalia, J., dissenting).

169 *Id.*

170 *Id.*

171 *Id.* Justice Scalia characterized such a proposition as "simply contrary to reason and experience." *Id.*

172 *See id.*

173 *See id.* To illustrate his contention, Justice Scalia claimed that the consequence of the majority's decision will be to allow "nonpolicymaking employees of the Equal Employment Opportunity Commission . . . to make remarks on the job approving of racial discrimination, [and to allow] nonpolicymaking employees of the Selective Service System to advocate noncompliance with the draft laws." *Id.*

174 *See* text accompanying *supra* notes 62-72.

175 *Pickering*, 391 U.S. at 569.

176 *See* text accompanying *supra* notes 96-111.

efficient management of the workplace as justification for its new standard,[177] the public concern requirement precludes inquiry into that very matter. Instead, it directs the analysis to the nature of the speech at issue, by focusing on the context, form and content of the employee speech.[178] Thus, under *Connick*, a particular statement can be deprived of constitutional protection for failing to address a matter of public concern without having caused any actual disruption in the workplace— arguably the controlling issue in speech claims in this area.

Faced with the guidance of the *Pickering* balancing test as well as the newly developed threshold test of *Connick*, the *Rankin* Court decided that a statement approving of the assassination of the President addressed a matter of public concern, and furthermore, that it was entitled to constitutional protection.[179] At first glance, the *Rankin* decision appears, as the dissent charged, to "significantly and irrationally"[180] expand the concept of public concern. Indeed, McPherson's statement was unlike the letter criticizing educational policies protected in *Pickering*[181] or the legislative testimony of a professor protected in *Sindermann*.[182] Arguably, McPherson's statement is less "[essential] to self-gov-

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177 The *Connick* Court explained: "When employee expression cannot be fairly considered as relating to any 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.

178 In discussing the flaws inherent in the *Connick* test, one commentator has explained:

> In the public employee speech context, however, if the speech is of public concern, the Court balances— a process which some commentators criticize as less protective than normal first amendment scrutiny of nongovernmental speech. This inconsistent treatment may be justified by the special nature of the public workplace setting and judicial concern for managerial and workplace efficiency, as is suggested by the language in *Connick*, *Pickering* and *Rankin*. The public concern requirement, however, does not directly address this problem because it focuses on the *nature* of the speech in question rather than on whether the speech interfered with workplace efficiency. Formulating the threshold inquiry in a way that prevents judicial consideration of the actual disruptive impact of the employee's speech thus runs contrary to the Supreme Court's objectives.

Lee, *supra* note 60, at 1125.

179 *Rankin*, 107 S. Ct. at 2900.

180 *Id.* at 2902 (Scalia, J., dissenting). *See* text accompanying *supra* notes 148-62.

181 For a discussion of the *Pickering* decision, see text accompanying *supra* notes 62-72.

182 For a discussion of the *Sindermann* decision, see text accompanying *supra* notes 74-79.

ernment"[183] than *Connick*'s speech on adverse working conditions which the Court described as a "personal grievance" not entitled to constitutional protection. Upon closer examination, however, the *Rankin* decision, may, in effect, have signalled a welcomed retreat to the general balancing standards announced in *Pickering*.

The analytical flaw in the *Rankin* decision appears to stem from the Court's adherence to the public concern requirement of *Connick*. In order to balance the competing interests in favor of McPherson and assert that her comment had in fact caused no significant disruption in the workplace, the Court was forced to define her speech as one addressing a matter of public concern. The Court did so without developing the meaning of "public concern" in a reasoned manner, and without drawing on prior case law in defining the concept. Rather, the *Rankin* majority abruptly arrived at a conclusion which it did not adequately explain: McPherson's speech addressed a matter of public concern since it followed "what is certainly a matter of heightened public attention—an assassination attempt on the life of the President."[184] The inability of the *Rankin* Court to fashion the parameters of its own standard suggests that the public concern requirement is inappropriate as a threshold inquiry.

Indeed, commentators reviewing the public concern requirement espoused in *Rankin* and *Connick* have criticized its vagueness as well as its subjectivity.[185] Moreover, as a threshold inquiry designed, ultimately, to protect first amendment rights, the public concern requirement has been characterized as unnecessarily narrow.[186] Although the majority in *Rankin* emphasized that speech on "public issues should be uninhibited, robust and wide-

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183 *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

184 *See Rankin*, 107 S. Ct. at 2898 (footnote omitted). In response to the majority's reasoning, the dissent expressed: "I cannot respond to this progression of reasoning except to say that I do not understand it." *Id.* at 2904 (Scalia, J., dissenting).

185 *See, e.g.*, Massaro, *supra* note 89, at 27-33.

186 One commentator has explained:

> A second problem with the matter of public concern restriction is that the categorization is too narrow. . . . Indeed, even in the obscenity area the Court has eschewed a restrictive approach to free speech and concluded that states can proscribe only material that, taken as a whole, lacks serious literary, artistic, political or scientific value. This test embraces speech of "social value," which would not be limited to speech that involves "public" issues of political or social change.

Massaro, *supra* note 89, at 29 (footnote omitted).

open,"[187] the Court has, in other contexts, accorded protection to expression having only social, artistic or literary value.[188] Under the public concern threshold issue summarily reinforced by the *Rankin* Court, however, an employee speaking on a purely private matter, having no public significance, is denied the opportunity to demonstrate that her first amendment interests should be protected.

Had *Rankin* been decided on the heels of *Pickering*, and decided under its precepts, the Court would have arrived at the same conclusion yet could have approached McPherson's free speech claim in a more principled fashion. Unconstrained by the public concern requirement, the Court's emphasis on the actual disruption in the workplace, as a factor in the balancing process, would be consistent with reasons advanced by the *Pickering* Court in limiting first amendment rights in the public employee context. By choosing to analyze McPherson's claim within the existing *Connick* framework, however, the *Rankin* decision adds only more confusion to the already ambiguous concept of public concern. Thus, while the *Rankin* decision might signal a victory for employees' first amendment rights, its vitality is necessarily limited until the Court reformulates an approach to public employee free speech claims which is consistent with its objectives.

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187 *Rankin*, 107 S. Ct. at 2898 (quoting New York Times v. Sullivan, 376 U.S. 254 (1964)).

188 *See, e.g.*, Miller v. California, 413 U.S. 15, 34 (1972) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.").