

The Costs of Agencies: *Waters v. Churchill* and the First Amendment in the Administrative State

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In 1987, Cheryl Churchill lost her job for criticizing her employer. Churchill was a public employee holding a probationary nursing position in the obstetrics department of McDonough Hospital in Macomb, Illinois. Alleging that the termination violated her First Amendment rights, she sued the hospital and her supervisor, Cynthia Waters, in federal court. In 1994, her case reached the Supreme Court.¹ The Court held that First Amendment analysis should be applied not to Churchill's actual speech but to what the hospital administrators might reasonably have thought she said.² Because that speech "may have substantially dampened" a fellow employee's interest in working for the obstetrics department,³ the Court explained, it was sufficiently disruptive to fall outside the bounds of First Amendment protection. Regardless of what Churchill had actually said, if the administrators were sincere and reasonable in their belief, they were entitled to summary judgment.⁴

Waters represents the Supreme Court's latest word on the First Amendment rights of government employees. The Court's treatment of this area of First Amendment law has received a fair amount of scholarly attention, and *Waters* itself has been criticized for the way in which it distributes power in the employer-employee relationship.⁵ Certainly it is true that after *Waters*, government employers enjoy greater freedom in terminating employees based on speech. Academic critiques, however, have by and large accepted the

1. See *Waters v. Churchill*, 114 S. Ct. 1878 (1994).

2. See *id.* at 1890.

3. See *id.*

4. See *id.*

5. See, e.g., Bruce Bodner, Recent Decisions, 68 TEMP. L. REV. 461, 483-87 (1995) (arguing that nonhierarchical workplace structures can increase overall efficiency); Patricia C. Camvel, Note, *Waters v. Churchill: The Denial of Public Employees' First Amendment Rights*, 4 WIDENER J. PUB. L. 581, 609-11 (1995) (same). *Waters* largely preserves the substantive rule of *Connick v. Myers*, 461 U.S. 138 (1983), itself an unpopular decision with academics. For criticisms of the *Connick* regime, see, e.g., Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597 (1986); and Tom Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3 (1987).

Court's concept of efficiency and its characterization of the competing interests in *Waters*.⁶ Such critiques are thus left to dispute the judgment of the hospital administrators, and they rely mostly on the contention that employee speech can contribute to workplace efficiency. As an empirical claim about effective management techniques, this argument can be addressed properly only to managers; to judges it is simply an invitation to usurp managerial discretion.⁷

This Note argues that the prevailing focus on *Waters*'s effects in the workplace is misguidedly narrow and leaves the crucial issues unexamined. It contends that at stake in *Waters* is not merely the relationship of the individual employee to the government, nor the government's ability to manage the workplace. Implicated in the Court's analysis, and affected by its ruling, are fundamental concerns about the relationship between the citizen and the government in general, about the scope of the democratic political process, and ultimately about the possibility for public oversight and control of the growing administrative state.

Proper development of these larger issues requires considerable excavation. Part I of the Note discusses the facts of the *Waters* case and the resulting state of the law. It examines the Court's reasoning to uncover the conception of government that motivates the decision and concludes that the Court employs a model in which governmental managers have broad discretion to limit individual liberty in pursuit of governmental efficiency. Part II employs the agency theory developed in corporate law to suggest that the Court's attempt to promote efficiency by deferring to managerial judgment is theoretically misguided. Part III broadens the analysis by questioning the Court's portrayal of *Waters* as a conflict simply between individual liberty and governmental efficiency. It suggests that the Court's libertarian understanding of the First Amendment gives insufficient weight to the value of self-governance. Part IV argues that self-governance is present in the *Waters* analysis, but hidden within the underanalyzed notion of governmental efficiency. This Part then articulates a more complex understanding of efficiency, which reveals that governmental efficiency comprehends not only the narrow instrumental interest recognized by the Court but also a broader societal interest in self-governance, both of which are served by employee speech. Part V then proposes an alternative to the current treatment of public employee speech that recognizes the deeper values at issue and accords them their proper weight.

6. See sources cited *supra* note 5.

7. The question of managerial discretion is logically prior to that of efficient management techniques; if managers should have this sort of discretion, it is no argument to claim that they are making mistakes. See *Waters*, 114 S. Ct. at 1887. What must be examined is the grant of discretionary power, and the above articles fail to come to grips with it.

I. *WATERS V. CHURCHILL*

A. *The Facts*

The facts of *Waters* are disputed. Because the case reached the Court on Waters's motion for summary judgment, Churchill's version is assumed to be the correct one. She described a growing conflict with her supervisor, Cynthia Waters, stemming from Churchill's "opposition to the hospital's improper implementation of a nurse cross-training program."⁸ Churchill felt that the program as implemented "was detrimental to the welfare of patients in the obstetrical ward";⁹ to her, it interfered with proper patient care and endangered patients. She found an ally in Doctor Thomas Koch, the clinical head of obstetrics. Dr. Koch blamed inadequate staffing in obstetrics for the birth of a stillborn baby. Churchill further antagonized Waters by supplying Dr. Koch with information he would otherwise not have been able to obtain about the assignment of inexperienced nurses to the obstetrics ward, thereby assisting him in "his campaign for improved and acceptable nursing care."¹⁰

On January 16, 1987, during her dinner break, Churchill had a conversation with Melanie Perkins-Graham, a cross-trainee. Churchill claimed that the substance of the conversation, which took place in the break room, consisted of her expressions of concern about the cross-training program and its effect on patient care. She denied making any personal criticism of Waters. Her version of the conversation was substantiated at trial by two witnesses who had overheard the conversation. However, Mary Lou Ballew, another nurse who allegedly overheard the conversation, reported to Waters that Churchill had been criticizing the hospital administrators. Perkins-Graham, in a subsequent meeting with Waters, confirmed Ballew's version. Based on these reports, the hospital administrators fired Churchill.

Churchill was an at-will government employee, meaning that she could be fired for any reason or for no reason at all.¹¹ Even at-will employees, however, may not be fired for a reason that infringes upon constitutionally protected rights.¹² The extent of public employee First Amendment rights is

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

9. *Id.*

10. *Id.* at 1117.

11. The Court's public employee speech cases tend to feature at-will employees precisely because the First Amendment is their only protection against termination for speech. Tenured employees, by contrast, often have contractual or statutory protections that exceed the constitutional guarantees. Their First Amendment rights, however, are the same; thus what *Waters* sets out is the extent of the constitutional protection of employee speech in general.

12. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [it may not do so] on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

governed by a line of cases starting with *Pickering v. Board of Education*.¹³ In *Pickering*, a schoolteacher was fired for writing a letter to the editor of a local paper criticizing the school board's funding policies. In holding his dismissal unconstitutional, the Court described the judicial task in such cases as striking "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁴

The Court revisited the *Pickering* balancing test in *Connick v. Myers*.¹⁵ *Connick* dealt with an employee of the New Orleans District Attorney's office fired for distributing an office questionnaire concerning transfer policies, office morale, the handling of grievances, employee confidence in supervisors, and pressure to work on political campaigns. Upholding her dismissal, the Court refined the *Pickering* test by making the question of whether the employee's speech was on a matter of public concern a threshold inquiry: No liability could exist for firing an employee on the basis of speech not on a matter of public concern. If the speech was on a matter of public concern, termination could still be justified if the speech posed a threat of disruption.¹⁶

The outstanding question resolved by *Waters* was whether the *Connick* inquiry should be based upon the actual facts of the case or on what the employer reasonably believed.¹⁷ Justice O'Connor, writing for a plurality of four, noted that "employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores."¹⁸ Courts should not subject an employment decision to review on the facts as determined by a judicial proceeding: "What works best in a judicial proceeding may not be appropriate in the employment context."¹⁹

The Court thus concluded that if the administrators had really believed the account of the conversation provided by Ballew and Perkins-Graham, the firing was justified as a matter of law because "Churchill's speech may have substantially dampened Perkins-Graham's interest in working in obstetrics."²⁰ This was sufficiently disruptive to outweigh her interest in speaking even if her speech was on a matter of public concern.²¹ Since the potential for disruption

13. 391 U.S. 563 (1968).

14. *Id.* at 568.

15. 461 U.S. 138 (1983).

16. *See id.* at 150. The Court concluded that while one of the items on Myers's questionnaire (pressure to work on political campaigns) was on a matter of public concern, the disruptive potential of the questionnaire as a whole justified her dismissal.

17. *See Waters v. Churchill*, 114 S. Ct. 1878, 1888-89 (1994).

18. *Id.* at 1888.

19. *Id.*

20. *Id.* at 1890. The Court continued: "Discouraging people from coming to work for a department certainly qualifies as disruption." *Id.*

21. *See id.*

was dispositive, the Court did not reach the question of whether Churchill's speech (as reported to the administrators) actually was on a matter of public concern.²²

B. *The Result*

Following *Waters*, government employers enjoy very broad discretion in firing at-will employees for speech. Such employees may be fired for speech not on a matter of public concern; even speech within this category justifies termination if it poses a threat of disruption—a determination which the employer makes and to which courts grant substantial deference. Finally, the court's deferential analysis is to be applied not to the actual speech but to what the employer reasonably believed was said, a procedural innovation of no small significance.

From the perspective of traditional First Amendment theory, this legal regime is quite odd. By the standards of ordinary First Amendment praxis, the *Waters* rule is clearly unconstitutional.²³ As a content-based restriction,²⁴ it is presumptively invalid²⁵ and would receive strict scrutiny: The government would be required to show "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."²⁶ Under strict scrutiny, this rule would certainly fall; apprehensions of disruption and reduced governmental efficiency cannot outweigh the fundamental rights protected by the First Amendment.²⁷ The question that must be asked is why Churchill's claim received such different treatment.

C. *The Court's Reasoning*

The *Waters* Court was certainly aware that it was not applying the ordinary canons of First Amendment jurisprudence. It declined to do so because the government, in firing Churchill, was acting not as sovereign but

22. *See id.*

23. Although *Waters* is a judicial decision involving the loss of a job, the resulting rule would be analyzed under the same standards applied to a criminal statute. *See id.* at 1885 ("Speech can be chilled and punished by administrative action as much as by judicial processes; in no case have we asserted or even implied the contrary."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("It matters not that that law has been applied in a civil action, and that it is common law only . . .").

24. A standard which permits punishment for "disruptive" speech focuses on the response to the speech; the Court has treated such regulations as content-based because it is the expressive content of the speech that justifies the sanction. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229 (1963) (invalidating law permitting conviction for speech that brought about condition of unrest).

25. *See Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

26. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); *see, e.g., Boos v. Barry*, 485 U.S. 312, 321 (1988); *Cohen v. California*, 403 U.S. 15, 18–19 (1971). *See generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8 (2d ed. 1988) (discussing strict scrutiny).

27. *See, e.g.,* TRIBE, *supra* note 26, § 12-8.

as employer. It is not obvious that this fact should make a difference.²⁸ From the individual's perspective, it matters very little who inflicts the punishment; the infringement on the freedom to speak is the same. From the perspective of society, the difference is likewise obscure; the value of the speech suppressed does not change. The only entity whose position or interests have changed is the government. So we must ask, as the *Waters* Court did: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?"²⁹

Waters represents the Court's first explicit statement on this question.³⁰ The answer it reaches is not surprising. The government's greater freedom does not stem simply from the importance of governmental efficiency. If this were the sole justification, the government would have no more power to suppress employee speech than it does to silence private individuals. The government's power to suppress speech based on its consequences is extremely limited; the last time the Court upheld a restriction on speech because it might persuade listeners to engage in criminal activity was in 1961.³¹ Where the speech does not expressly advocate crime (and deciding not to work in obstetrics certainly is no crime), the Court has not upheld a restriction since the First World War.³² A private citizen could freely urge all government employees not merely to avoid a particular department but to quit their jobs entirely.

Nor can greater governmental power to suppress speech be premised on the idea that public employees surrender some First Amendment rights by accepting government jobs. A waiver theory would work very well to explain the enhanced governmental power, but it has been decisively rejected by the Court.³³ The *Waters* decision relied neither on the ordinary governmental interest in efficiency nor on a waiver theory. Instead, the Court invoked the government's heightened interest in regulating employee speech.³⁴

The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its

28. See OWEN M. FISS, *LIBERALISM DIVIDED* 62 (1996) (suggesting that employer/sovereign distinction provides no grounds for disparate powers).

29. *Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994).

30. See *id.*

31. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1120 (2d ed. 1991) (citing *Scales v. United States*, 367 U.S. 203 (1961)).

32. See *id.*

33. See *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (stating that public employees do not waive First Amendment rights).

34. See *Pickering*, 391 U.S. at 568 ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

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. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.³⁵

This analysis is tantalizingly elliptical. It tells us *how* cases involving employee speech are to be resolved (put a thumb on the governmental efficiency side of the scale), but not *why*. More specifically, it does not explain what it is about the employer-employee relationship that changes the ordinary First Amendment analysis. In the sections that follow, I attempt to uncover the model of government that funds the Court's reasoning. I first set out relevant differences between employees and nonemployees that normatively justify a heightened governmental interest. These differences prove too narrow to explain the *Waters* rule on a descriptive level, and one of them suggests that employee speech should receive greater protection. Having concluded that the "heightened interest" account fails as a descriptive matter, I then provide a picture of government that descriptively accounts for the *Waters* rule.

1. *The Employee Is Differently Situated When She Speaks*

The most obvious difference between employees and nonemployees is that employees occupy the governmental workplace. The result of this distinction is that employee speech can hamper government efficiency not only as a result of its communicative impact but also just as an activity. An employee who chats with coworkers instead of attending to her job reduces government efficiency just by talking, regardless of the content of her speech. The speech not only causes disruption, it is disruption.

The government clearly has a legitimate interest in restraining the harms threatened by this kind of speech. Speech that is disruption produces a kind of harm that could constitutionally be prohibited were the source a nonemployee.³⁶ Employees should gain no greater rights to disrupt the government by virtue of their status as employees, and restraining speech that is disruption treats them no worse than nonemployees.

The problem with reading *Waters* as a response to the danger of this sort of speech is that *Waters* permits dismissal not merely for speech that is disruption but also for speech that might lead to disruption. It reaches much more than the sort of interference that could be prohibited of private citizens;

35. *Waters*, 114 S. Ct. at 1888.

36. For example, nonemployees may be prohibited from broadcasting their political views into a government workplace at a volume that prevents employees from working. See *Kovacs v. Cooper*, 336 U.S. 77, 79 (1949).

its rule governs private nonworkplace conversations and even letters to the editor. The question under *Waters* is not only whether the *activity* of speech harms governmental efficiency but also whether the *content* of the speech might do so. If it is the content of the speech that is at issue, then the above difference between employee and nonemployee no longer provides a legitimizing limiting principle. On the *Waters* approach, there is no obvious reason that private citizens writing letters to the editor should be more secure than employees gossiping instead of working.

2. *The Employee Is Differently Situated with Respect to the Effects of Her Speech*

The second significant difference between employees and nonemployees is related to the first. An employee who writes a letter to the editor criticizing a governmental agency on Friday afternoon will be cheek to jowl with the objects of her vituperation come Monday. If she is a rank and file employee who has no direct contact with those she criticizes, this may not have a significant effect; if she is a trusted deputy, it almost certainly will.

The existence of relationships of trust and confidence that are essential to agency functioning and that can be undermined or destroyed by employee speech must be considered in crafting the standards of protection. *Waters* and *Connick* both count this factor relevant, but they conceive of it more as an aggravating factor than as a limitation.³⁷ That is, threats to a working relationship enhance the already substantial deference granted to employers' decisions; they do not delimit the legitimate reach of managerial discretion. As was the case with speech that constitutes disruption, *Waters* allows termination for speech that interferes with close working relationships, but its reach is too broad to be justified by this admittedly relevant criterion.

3. *The Employee Is Differently Situated When She Gathers Information*

The final significant difference between employees and nonemployees is that employees are much better placed to observe the working of governmental agencies. Since the information thus obtained is valuable (because democracy requires an informed electorate), employee speech may be more valuable than nonemployee speech. The *Waters* Court makes specific reference to this

37. See, e.g., *Waters*, 114 S. Ct. at 1890; *Connick*, 461 U.S. at 151–52 (“When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”). Both *Waters* and *Connick* suggest that threats to relationships in the workplace generally, rather than between the speaker and other workers, justify dismissal. See *Waters*, 114 S. Ct. at 1890; *Connick*, 461 U.S. at 152. Because a nonemployee could similarly undermine third-party relationships, I do not believe that this danger is an appropriate basis for dismissal.

fact,³⁸ and conceivably the public concern test is an attempt to take into account the informational asymmetry between employees and nonemployees. If so, however, it is a strikingly infelicitous formulation.³⁹

Waters is not clear on the question of why speech on matters of public concern warrants more protection. It states that “a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters.”⁴⁰ Why the employee’s interest in speaking out is greater for these matters is somewhat mysterious; at any rate, this formulation does not reflect any difference between employees and nonemployees. Moreover, given the broad scope of managerial discretion authorized by *Waters* and the deference granted to employers’ predictions of disruption,⁴¹ the protection afforded even this category of speech is weak at best.

It is difficult to make the case that *Waters* responds sensitively to the differences between employees and nonemployees. Its rule works to restrain the dangers posed by the first two differences discussed above, but it does so by amputation rather than surgery. Having extended the employer’s discretion beyond the limits suggested by these differences, it has gone too far to subsequently take into account the third difference, which supports greater protection for employee speech. The idea of a heightened governmental interest in suppressing employee speech is normatively sound, but it does not explain *Waters* on a descriptive level.

4. *Delegation and Deference*

While there are real distinctions that militate in favor of increased governmental power to regulate employee speech, they must be stretched considerably to arrive at the *Waters* rule. On a natural understanding of these differences, the government’s interest in efficiency is adequately protected simply by allowing the employer to fire an employee who is doing a bad job: If the activity of speech is disruptive, or if the employee’s speech reduces her efficiency, the broad scope of the *Waters* rule is not required to justify termination. The true effect of *Waters* is simply to grant the government employer great power to regulate speech in the name of its interest “in promoting the efficiency of the public services it performs through its employees.”⁴² The only principle that produces this result is the principle that governmental employers must have considerable discretion to pursue

38. See *Waters*, 114 S. Ct. at 1887 (“Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions”) (citation omitted).

39. For a detailed analysis of the defects of the public concern test, see *infra* Section V.A.

40. *Waters*, 114 S. Ct. at 1887.

41. See *id.*

42. *Id.* at 1884 (quoting *Connick*, 461 U.S. at 142 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968))) (internal quotations omitted).

efficiency as they see best; thus the government as employer is not subject to the ordinary constitutional limitations.

What distinguishes the government as employer from the government as sovereign? The obvious answer is that the government as employer pursues specific tasks and has limited powers with which to accomplish them. The *Waters* Court adumbrates this conception with its reference to “[g]overnmental agencies . . . charged by law with doing particular tasks.”⁴³ This distinction between sovereign and employer suggests why traditional First Amendment rationales for protecting speech might not apply. Because governmental agencies are charged by law with specific tasks and overseen by the popularly elected government, the danger of overreaching should be less. Thus the role of speech in allowing citizens to prevent government abuse of power—the checking value⁴⁴—is less important. Additionally, the delegation of tasks to experts reduces the role of the individual citizen in decisionmaking. Thus the self-government rationale for free speech—that it facilitates democratic deliberation⁴⁵—is inapplicable.

Hence we can understand *Waters* as following from the principle that where governmental power is limited to the pursuit of specific institutional goals, the checks on that power may be limited as well. This is a somewhat counterintuitive principle, but it accords well with the Court’s general approach of allowing the government greater latitude when it acts in a role other than that of sovereign.⁴⁶ For example, the Postal Service’s interest in accomplishing “the most efficient and effective postal delivery system”⁴⁷ has been held to support a prohibition against solicitation on postal premises.⁴⁸ The Court noted that “Congress has made it clear that ‘it wished the Postal Service to be run more like a business,’”⁴⁹ and that “it is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny” when the government is acting not as lawmaker but as proprietor.⁵⁰ The most charitable way to read *Waters*, then, is as a product of the delegation of power that characterizes the modern administrative state. When a governmental agency is acting “like a business,” it may take actions

43. *Id.* at 1887.

44. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538–39 (locating necessity of checking value in “[t]he government’s monopoly of legitimized violence”).

45. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–27 (1948).

46. It is also roughly the explanation arrived at by at least one noted First Amendment scholar. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 240 (1995) (differentiating First Amendment rules applicable to government in managerial capacity from those applicable in governance).

47. *United States v. Kokinda*, 497 U.S. 720, 732 (1990).

48. See *id.* at 732–33.

49. *Id.* at 732 (citation omitted).

50. *Id.* at 725.

appropriate for an analogous business⁵¹ without facing the ordinary level of First Amendment scrutiny.⁵²

The vision of government that provides the best descriptive account of *Waters* is one in which governmental tasks are delegated to experts who then enjoy broad discretion within their spheres of authority. Government employees have very limited speech rights against their employers because government functions better if the experts are allowed to manage the workplace without interference: The government acting as manager may restrain individual liberty in the name of efficiency. I will refer to this model of the workings of government as the model of delegation and deference.

There are a number of things that can be said about this conception of government. Its vision of disinterested enlightened experts efficiently performing their delegated duties may well be untrue to the facts of the world. Others have made criticisms on these grounds.⁵³ The next Part argues instead that the insights of agency theory suggest that it is theoretically misguided.

II. APPLYING AGENCY THEORY TO GOVERNMENTAL EFFICIENCY

The *Waters* analysis focuses on the efficiency of a particular government agency in performing a particular task.⁵⁴ I will refer to this narrow conception as “task efficiency.”⁵⁵ The question is whether the rule of *Waters* promotes task efficiency. Academic commentary is replete with arguments that, as an empirical matter, task efficiency is increased by employee speech.⁵⁶ As noted above,⁵⁷ these arguments are unsatisfying because if the grant of managerial discretion to employers is legitimate, their decisions to restrict speech are legitimate likewise, even if mistaken. This Part employs the agency theory developed in the corporate context to analyze the initial grant of discretion and asks whether this allocation of power is likely to promote efficiency.⁵⁸

51. There are still some restrictions on governmental action that similarly situated private businesses would not face. For example, the government may not require low-level employees to support a particular political party. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

52. Even this principle does not justify *Waters* entirely, as *Waters* applies not only to employees of government agencies, but also to employees of the executive, legislative, or judicial branches.

53. See sources cited *supra* note 5.

54. See *Waters v. Churchill*, 114 S. Ct. 1878, 1887–88 (1994).

55. The neologism is not pleonastic. Part IV argues that the Court’s conception of efficiency is fundamentally flawed. This Part seeks only to point out a mistake internal to the *Waters* analysis. It accepts the Court’s characterization of efficiency and claims that even on this understanding, the argument for managerial discretion fails.

56. See, e.g., Massaro, *supra* note 5; Bodner, *supra* note 5; Camvel, *supra* note 5.

57. See *supra* note 7.

58. Analogizing public agencies to corporations may seem odd at first. The analogy is quite strong, however. Public money (i.e., tax dollars) supports these agencies, and their managers have a duty to serve the public interest. Public agencies produce services, rather than profits, but surely these services (police protection and medical treatment, for example) are *more* important than stock dividends. Granting these basic facts, what seems odd is that the federal government, which is sufficiently concerned about corporate agency costs to mandate corporate disclosure, shows less regard for agency costs in the public sector. For

The first step in this analysis is the recognition that talk of a "governmental interest in efficiency" is misleading. The government exists only to serve and protect its citizens. Put in more theoretical terms, the government-public relationship is an agency relationship—a relationship "under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent."⁵⁹ The government, as an agent, has no cognizable interests at all; any governmental interest must derive from the interest of the principal: the people.⁶⁰ The people, of course, do have a significant interest in governmental task efficiency: They want it to provide the services that it does as cheaply as possible. Governmental task efficiency may thus be described as provision of services at least cost.

How can governmental task efficiency best be achieved? The problem is that "[i]f both parties to the [agency] relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal."⁶¹ Government employers may be more concerned with increasing their power or perquisites, or protecting their jobs, than with efficiently pursuing the public will. How can the people ensure that they are getting the best deal possible?

The problem of agency costs has received a good deal of attention in the context of corporate law.⁶² A corporation that minimizes agency costs (i.e., one that is more efficient) will be more attractive to investors. In a market where corporations compete for investors' dollars, this means that efficient corporations will survive and inefficient ones will not. Corporate law, and corporate behavior, are thus geared in large part towards the reduction of agency costs.

What is the corporate policy on employee speech? The first principle of corporate law is the separation of ownership and control. The shareholders own the corporation, but they do not run it. This task is delegated to expert managers who enjoy discretion in the context of ordinary business. Management discretion is assured by the business judgment rule, which provides, roughly, that courts will not second-guess the decisions of managers who are informed, disinterested, and not under the influence of third parties.⁶³ Demonstrating that a particular decision was mistaken will not sustain a

a historical development of the corporate analogy, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–36 (1987).

59. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). For further developments of this seminal account, see, e.g., *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* (John W. Pratt & Richard J. Zeckhauser eds., 1985).

60. *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (stating that people, not government, possess absolute sovereignty).

61. Jensen & Meckling, *supra* note 59, at 308.

62. See sources cited *supra* note 59.

63. See, e.g., ROBERT CHARLES CLARK, *CORPORATE LAW* § 3.4, at 123 (1986).

shareholder suit.⁶⁴ This discretion extends to hiring and firing decisions, so an employee who criticizes management runs a substantial risk of being fired and having no recourse. If corporations, which must be efficient to survive, allow managers this much discretion in firing employees for their speech, then must efficiency not be increased by such a rule?

The *Waters* Court appeared to think so. The rule of *Waters* grants managers of governmental organizations a latitude strikingly similar to that of the business judgment rule. If a reasonably informed manager holds a reasonable belief that an employee's speech is potentially disruptive, the employee has no redress, even if subsequent investigation reveals that the speech actually did merit protection.⁶⁵

The *Waters* Court did not explicitly state that it was reasoning by analogy to the corporate context. However, Justice O'Connor's remarks in *Kokinda* about Congress's desire to see the Postal Service "run more like a business"⁶⁶ strongly suggest that this is the paradigm the Court has in mind. The appeal to corporate practice seems, at any rate, the best argument that can be mustered.⁶⁷ But the analogy is imperfect at best. As the following sections discuss, the corporate world employs a broad range of techniques to reduce agency costs. Because these devices are absent from public agencies, the importance of employee speech is magnified.

A. *Corporate Devices for Promoting Task Efficiency*

From the perspective of task efficiency, the potential benefit of free and uninhibited speech by corporate employees is obvious. Employees are often the best positioned to see inefficiencies and abuses in corporate management; at a minimum, they are far better off than the shareholders, who are often entirely ignorant of all but the broadest outlines of corporate policy.⁶⁸ Employee speech can thus play an important role in informing shareholders and allowing them to monitor management. Why, then, have corporations not adopted rules protecting employee speech?

The answer is that in the corporate context, a number of other devices exist that are designed to allow shareholders to monitor and control managers. Much of the information that employees could provide to the public is the

64. See, e.g., *Kamin v. American Express*, 383 N.Y.S.2d 807, 811 (Sup Ct 1976) (dismissing suit alleging managerial mistake for failure to state claim).

65. See *supra* Section I.B.

66. *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (citation omitted).

67. Robert Post has developed a lucid, coherent, and intriguing theory of government authority in the managerial domain. His constitutional rationale, however, seems to be the claim that instrumental standards are appropriate for hierarchical organizations pursuing institutional goals. See POST, *supra* note 46, at 234–39. From a normative constitutional perspective, this argument rather begs the question

68. For example, coworkers are well placed to observe whether the CEO leaves at 4:30 p.m. every day, and the pilot of the corporate jet knows whether it is often taken to Aruba.

subject of federal mandatory disclosure requirements. Federal securities laws require that publicly traded companies make broad and continuous disclosure to shareholders, informing them of how the business is performing and what management's plans are.⁶⁹ They must report management compensation, and compare it to the compensation of managers of comparable firms. The market also plays a role in informing shareholders; stock prices (in theory) reflect all material public information relating to the company.⁷⁰

Shareholders can control managers in that their votes are required to ratify major corporate decisions;⁷¹ they also vote for candidates to the board of directors.⁷² Executive compensation may be tied to corporate performance (and hence to shareholder interests) by grants of stock or options in place of salary.⁷³ A mismanaged corporation may be the target of a takeover bid by outsiders who believe that they can run the corporation more efficiently.⁷⁴ Finally, shareholders dissatisfied with the performance of management may dissociate themselves from the venture by selling their shares in the liquid market.⁷⁵ This exit power is remarkably effective because it uses the market to monitor management. Inefficiencies that may be hidden from the most diligent shareholders will show up on the bottom line, and shareholders will transfer their investment dollars to companies offering better returns. The importance of exit rights is suggested by the fact that in close corporations, where the shareholder has no ability to exit, courts have held controlling shareholders to a higher duty of loyalty.⁷⁶

B. *Task Efficiency in Public Organizations*

In the corporate context, the agency costs created by the delegation of decisionmaking power are controlled by structural features of the principal-agent relationship (e.g., shareholder voting rights and performance-linked executive compensation), federally mandated disclosure, and exit powers that produce a continual competition for investment dollars. The control of agency costs in the citizen-government relationship displays some similar features. Voters can control the constitution of the popularly elected government. The Freedom of Information Act⁷⁷ facilitates the

69. See Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m (1994); 17 C.F.R. § 240.13a (1996).

70. See, e.g., STEPHEN A. ROSS ET AL., CORPORATE FINANCE 368-69 (3d ed. 1988) (describing strong and semistrong forms of market efficiency).

71. See CLARK, *supra* note 63, § 3.1, at 94.

72. See *id.*

73. See *id.* § 6.2.1, at 202-09.

74. See *id.* § 13.2, at 533-35.

75. See *id.* § 1.2, at 14.

76. See, e.g., *Donahue v. Rodd Electrotypes Co.*, 328 N.E.2d 505 (Mass. 1975) (imposing partnership-type fiduciary duty).

77. 5 U.S.C. § 552 (1994).

dissemination of information. Rival political parties stand ready as competing alternatives to the existing government. The federal judiciary jealously guards the First Amendment rights of citizens to comment on and criticize the workings of government.⁷⁸

However, some of the devices that reduce agency costs in the corporate context are unavailable to increase governmental task efficiency. The public does not receive the information impounded in stock prices, which reflect the opinion of sophisticated professionals as to the organization's overall performance, nor is official compensation linked to performance. Finally, citizens lack the shareholder's simplest response to dissatisfaction with management: exit via the sale of shares in a liquid market.⁷⁹

Public control of governmental agencies suffers from the above handicaps and additional difficulties as well. The public does not exert direct electoral control over administrators, nor is electoral ratification required for policy changes.⁸⁰ The people receive no annual statements from their hospitals and police forces. The press, which is perhaps the most effective monitor of government, relies significantly on third parties to call matters to its attention. Freedom of Information Act requests can force disclosure, but the sheer volume of information available upon demand makes effective monitoring very difficult if one does not know where to look. It seems likely that employee speech can significantly enhance monitoring.

The facts of *Waters* lend credence to this supposition. According to Churchill's account, she was performing precisely this monitoring function: providing the director of obstetrics with "information that he would otherwise not have had."⁸¹ The policy about which Churchill was providing information had, according to the director of obstetrics, already caused harm to the public;⁸² certainly its existence was relevant to the hospital's task efficiency. Without Churchill's speech, the information would not be available to the director (who could oppose the cross-training) or the public (who could lobby elected representatives for change). Yet while the Court vigorously protects the speech of the citizen criticizing the government, it offers no such protection for

78. This constitutional commitment to, and judicial solicitude of, speech to inform the public provides a *prima facie* reason to suppose that similar concerns exist in the agency context and require similar protection.

79. The social contract theory of John Locke has sometimes been thought to suggest that individual consent comes from the refusal to exercise an exit power that citizens do possess: the ability to leave the country. The concept of exit as exile has been rightly characterized as an "epistemologically stupid and politically heartless answer" to the problem of consent. STANLEY CAVELL, *THE CLAIM OF REASON* 25 (1979). The point of the shareholders' exit rights, after all, is that they are costless to exercise.

80. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131 (1980) ("[Administrators] are neither elected nor reelected, and are controlled only spasmodically by officials who are.").

81. *Churchill v. Waters*, 977 F.2d 1114, 1117 (7th Cir. 1992), *vacated*, 114 S. Ct. 1878 (1994).

82. Dr. Koch blamed inadequate staffing for the birth of a stillborn baby; the baby was revived but suffered brain damage as a result. See *id.*

government employees, speakers who are uniquely well placed to inform the public about the functioning of governmental agencies.⁸³

C. *Waters and Task Efficiency*

The foregoing analysis should suggest at a minimum that the relation of employee speech to governmental task efficiency is not as obvious as the model of delegation and deference suggests. In fact, the *Waters* decision and the public concern test ignore the significant task efficiency benefits that employee speech can bring. Speech on matters of public concern aids democratic control of government as a whole. It promotes (we hope) informed debate; it ensures that the market of ideas is fully stocked. But this macro-level democratic process is not the concern of the *Waters* Court. Instead, the efficiency it seeks to protect is the task efficiency of the micro level—the task efficiency of an individual governmental agency. The speech that promotes efficiency at this level is speech about the operation of the agency itself, and this type of speech falls outside the scope of matters of public concern, at least as the category is construed in *Connick*.⁸⁴ *Waters* thus gives no protection to precisely the speech that would promote task efficiency by allowing the public to monitor the behavior of governmental agencies.

It may well be true, of course, that greater protection of speech imposes its own costs. But this fact by itself does not suggest that protecting employee speech is a mistake; after all, the problem of agency costs would not exist if

83. The Court does, of course, extend ordinary First Amendment protections to at-will employees. They can no more be fined or imprisoned for speech than can the general public. This protection is somewhat illusory, however, given the ready availability of termination as a sanction. See *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (“[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech.”).

84. *Connick v. Myers*, 461 U.S. 138, 148–49 (1983). The precise scope of “public concern” remains somewhat mysterious. See *Waters v. Churchill*, 114 S. Ct. 1878, 1896–97 (1994) (Scalia, J., concurring) (contrasting *O’Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir. 1993) (using content-based test), with *Gillum v. City of Kerrville*, 3 F.3d 117, 120–21 (5th Cir. 1994) (using context-based test)). Compare *Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984) (“If *Connick’s* rule could be bypassed by the arguments that Murray raises—that public monies and government efficiency are involved—*Connick* would stand for nothing.”), with *Wulf v. City of Wichita*, 883 F.2d 842, 857 (10th Cir. 1989) (stating that public concern includes speech “calculated to disclose wrongdoing or inefficiency or other malfeasance”) (citation omitted) (emphasis added). See generally Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 49–74 (1988) (analyzing public concern cases); Massaro, *supra* note 5, at 25 (stating that doctrine “is vague [and] internally inconsistent”).

What can be said is that the public concern test is the product of a self-governance-based criterion working on a general level. Despite *Connick’s* expansive language, see 461 U.S. at 146 (“political, social, or other concern”), the *Connick* Court uses “political” and “public” almost interchangeably, see *id.* at 145, and it interprets prior employee speech cases largely with a focus on the connection of the speech to the political process, see *id.* at 146. See generally Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 31–37 (1990) (analyzing doctrine). The claim of this Note is that employee speech makes its unique contribution to self-government not when it deals with the political process—which is the focus of the self-government rationale—but when it discloses information about the inner working of agencies. In the administrative state, of course, most matters of internal governmental functioning are far removed from direct electoral control.

there were costless monitoring devices. The extensive disclosure required of corporations is quite expensive; nevertheless, the government thinks monitoring important enough to mandate disclosure rather than leaving it up to the market or managerial judgment. *Waters* embodies an opposite approach. With no market control and no disclosure requirements, it grants employers great latitude in determining how much speech they are willing to tolerate.

This sort of deference goes well beyond granting experts discretion in the pursuit of specific substantive goals; it allows them to control the formal environment in which they operate. This presents a clear conflict of interest because agents who choose less monitoring are more able to deviate from the principal's interest in pursuit of private gain. They thus have an incentive to choose an inefficiently small amount.⁸⁵ Herein lies the Court's mistake. Balancing the costs and benefits of employee speech is difficult, and the rule that best serves task efficiency may be hard to ascertain. What is clear, however, is that workplace superiors should not be the decisionmakers. Regardless of what we believe about efficient managerial techniques, the grant of discretion to regulate speech is ill-conceived.

III. BENEATH THE SURFACE: LIBERTY AND SELF-GOVERNANCE IN *WATERS*

The preceding Part argued that the Court's assimilation of the governmental agency to the private corporation does not produce the result it supposes. If public agencies had to compete on the basis of their task efficiency, the market might well choose those that protected employee speech as a device for minimizing agency costs. Managers, at any rate, are likely to permit a suboptimal level of speech because of their inherent conflict of interest. From a utilitarian perspective, the Court's efficiency concerns are overstated; from a theoretical perspective, its grant of discretion to managers is misguided.

However, the argument as phrased is not yet a constitutional argument. It leaves undisturbed the Court's major premise: that in the hierarchy of values, individual liberty must give way to governmental efficiency in the managerial domain. The previous Part suggests that protecting employee speech may increase task efficiency and that there may be good pragmatic reasons not to allow managers to decide how much protection such speech should receive. All the same, this seems a case for legislative rather than judicial intervention. Task efficiency is a utilitarian aspiration, not a constitutional value, and courts are not the appropriate place to hash out the details of how best to promote it.

85. See, e.g., *Brown v. Glines*, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting) ("Partiality must be expected when government authorities censor the views of subordinates, especially if those views are critical of the censors.").

Yield on the principle and you are only arguing over price. This Part will challenge the Court's major premise, not by claiming that liberty outweighs efficiency, but by suggesting that more is at stake than individual liberty. It will argue that the First Amendment aims to protect not merely individual liberty but also self-governance, that government employee speech directly serves the societal interest in self-governance, and that the *Waters* analysis is, consequently, incomplete. The model of delegation and deference is not only theoretically unwise; it is constitutionally unsound.

A. *Two Theories of the First Amendment*

Weighed against the government employer's interest in efficiency in the Court's test is "the employee's interest in expressing herself on [a matter of public concern]."⁸⁶ The Court conceives of *Waters* as presenting a conflict between individual liberty and government efficiency. While government efficiency cannot ordinarily trump the First Amendment's guarantee of liberty, different rules apply within the managerial domain.⁸⁷

If we accept the Court's analysis on its own terms, the result is hard to challenge. The government must be able to manage the workplace, and application of ordinary standards of First Amendment review would prevent this: It would, for example, prohibit the discharge of a speechwriter who articulated her own beliefs rather than her employer's position.⁸⁸ Importing the First Amendment wholesale into the government workplace cannot be right; individual liberty must give way to managerial authority.

This reasoning is seductively straightforward. However, by casting the First Amendment interest at stake in terms of individual liberty, it presents only half of the picture. Freedom has two faces: the negative freedom (independence or liberty) to conduct one's life without government interference, and the positive freedom (self-governance) to follow self-made laws.⁸⁹ Traditional First Amendment theory, holding a mirror up to Janus, presents two different rationales for protecting speech. On the liberty model, free expression must be protected as a means to self-actualization.⁹⁰ A self-governance-oriented⁹¹ theory, by contrast, locates the importance of free

86. *Waters*, 114 S. Ct. at 1884.

87. See POST, *supra* note 46, at 235.

88. See *id.*

89. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 122-34 (1969).

90. See, e.g., David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62-63 (1974).

91. My use of "liberty" and "self-governance" to characterize competing poles of First Amendment theory does not reflect a general usage; Owen Fiss, for example, employs "autonomy" where I use "liberty." See FISS, *supra* note 28, at 17. The difference is also expressed in terms of speaker- and hearer-centered orientations.

speech in the information it provides to others.⁹²

From this basic difference in values flow several others. The liberty-based account takes speech as fundamentally an individual right, a means of promoting individual self-expression and self-fulfillment. Its paradigm of valuable speech is an expression of the conscientious beliefs and commitments of the individual, those attitudes most directly related to selfhood. The content of this category will differ from person to person, but it will include a broad range of literary, artistic, philosophical, and religious expression. The liberty model thus suggests that protection for speech should be quite extensive.

Courts have extended the protections of the First Amendment to a broad range of expression, and the liberty-oriented model explains this judicial practice well.⁹³ However, it does not so easily explain why the First Amendment's protection is so strong. Self-actualization is an important value, but there is no obvious reason to place it at the heart of constitutional rights.⁹⁴ Restrictions on speech affront only the individuals restricted, and it is not clear why their interest in self-expression is much greater than their interest in, for example, economic liberty.

The self-governance model has an answer to the question of why free speech is so important: It allows citizens to receive the information essential to self-government. Speech rights are for the benefit of society more than the individual; restrictions on speech harm everyone deprived of the information the speech would convey. The self-governance model focuses on speech that increases the amount of relevant information available. It places special emphasis on speech about public policy, speech that conveys information essential to self-governance. Without self-governance, other liberties are meaningless; from this perspective, freedom of speech appears as "the matrix, the indispensable condition, of nearly every other freedom."⁹⁵

The self-governance model does a good job of explaining why First Amendment protection is so strong. However, its explanation is incomplete; a self-governance rationale offers no clear reason to protect literary or artistic speech, which make no obvious contributions to self-government,⁹⁶ and no

92. See MEIKLEJOHN, *supra* note 45, at 24–27 (arguing that free speech is essential because of role in self-government); Blasi, *supra* note 44, at 527 (maintaining that free speech allows citizens to prevent government abuse of power). The following discussion focuses primarily on the self-government rationale.

93. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (stating that "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection")

94. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 25 (1971) ("The principled judge . . . cannot, on neutral grounds, choose to protect speech [as a means of self-expression] more than he protects any other claimed freedom.")

95. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); see also *Carey v. Brown*, 447 U.S. 455, 467 (1980) (characterizing speech about public affairs as resting on "highest rung of the hierarchy of First Amendment values"); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (noting that "speech concerning public affairs is . . . the essence of self-government").

96. See Bork, *supra* note 94, at 26–28 (discussing narrow applicability of self-governance rationale).

reason to protect particular speakers.⁹⁷ Where liberty explained breadth but not strength, self-governance does the reverse. Because courts extend protection that is both broad and strong, most scholars recognize that neither theory, in its pure form, provides an adequate descriptive account of the role of the First Amendment in constitutional theory. Both values must be considered.⁹⁸

B. *Liberty and Self-Governance in Waters*

The existence of two distinct rationales for First Amendment protection poses two theoretical questions for courts. The first is how the two values interact, or what effect should be given the doubled claim to protection. On this issue, public employee speech cases are an odd anomaly in First Amendment jurisprudence. Usually, the two theories reinforce each other: Protection appropriate to the strength of the self-governance interest is extended as broadly as the liberty interest requires. In the *Waters* balancing test, by contrast, the two theories undercut each other.

The Court describes the First Amendment interest at stake as the *individual's* interest in free expression—an obvious nod to the liberty model. However, having set out a liberty-based rationale for protecting speech, the Court then restricts the range of that protection by the self-governance-oriented criterion that the speech be on a matter of “public concern.” This takes the weaker interest—that of the individual in self-expression rather than that of the public in self-governance—and applies it to the narrower category: speech essential to self-governance, rather than speech essential to self-expression. In the language of set theory, the Court restricts First Amendment protection to the intersection, rather than the union, of the liberty and self-governance universes; it then weighs that speech according to only the liberty model. This peculiar conflation of rationales stands First Amendment theory on its head: The usual procedure provides protection that is broad and strong rather than narrow and weak.⁹⁹

The second question for courts is what the relation between the two values is: Are they best understood as conceptually linked, distinct, or competing? On this question, *Waters* runs true to form. The Court sees a strong conceptual linkage between liberty and self-governance; in particular, it sees the protection of liberty as the only legitimate way to promote self-governance. Even when self-consciously promoting free speech in the name of self-governance, the Court does so using a liberty-based conception: Because free speech is

97. If two speakers intend to convey the same information, silencing one is no harm from the perspective of self-government. (This statement, though correct in essence, is somewhat overbroad; for example, the identities or number of speakers may be part of the information the speakers convey.)

98. See *TRIBE*, *supra* note 26, § 12-1, at 789.

99. See *supra* note 93.

essential to self-governance, the government may not infringe on the rights of speakers.¹⁰⁰ The result is the libertarian focus reflected in *Waters's* invocation of the individual's interest in expression.

Where the Court adheres to the linkage model and the consequent libertarian jurisprudence, contemporary First Amendment theory increasingly sees liberty and self-governance as competing. Modern legal realists and others claim that the formal neutrality of treatment dictated by a liberty model merely accomplishes the translation of existing inequalities of wealth and power into speech.¹⁰¹ Self-governance requires a rich and balanced public debate, and in an expressive environment dominated by moneyed interests, this ideal discourse can be produced only by governmental redistribution of speech rights.¹⁰² The difficulty with this approach is that it runs directly against the traditional libertarian understanding; in trying to provide a rich and balanced public debate, the government must favor underrepresented views and unavoidably infringes on the liberty of some individual speakers.¹⁰³ As Owen Fiss puts it, "the First Amendment appears on both sides of the equation."¹⁰⁴

What is especially interesting about *Waters* is that it presents a situation in which liberty and self-governance are on the same side, but liberty by itself is insufficient to carry the day. The individual's interest in speaking cannot, as Justice O'Connor concludes, outweigh the government's need for managerial authority.¹⁰⁵ However, employees are a uniquely valuable source of information about the workings of public agencies, and a societal interest in self-governance does outweigh governmental efficiency.¹⁰⁶ The dilemma posed by *Waters* cannot be resolved within an analytical framework that sees a necessary connection between liberty and self-governance. Within this framework, the two values must rise or fall together, and the inevitable result is overprotection of liberty or underprotection of self-governance.

100. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (overturning restrictions on political advertising by corporations); *Buckley v. Valeo*, 424 U.S. 1 (1976) (overturning restrictions on campaign spending).

101. See J.M. Balkin, *Some Realism About Pluralism. Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 395-97. The related important insight is that the government, by enforcing property and contract rights, produces the existing state of affairs.

102. See FISS, *supra* note 28 *passim*; Balkin, *supra* note 101, at 410-14. The legal realist argument, of which Balkin is probably the most sensitive and insightful expositor, suggests that the current debate over freedom of speech merely repeats the *Lochner*-era debate over freedom of contract, that just as freedom of contract can be enhanced by more equal distribution of bargaining power, freedom of speech can be enhanced by more equal distribution of speech rights. See also David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1749-53 (1991).

103. Consider, for example, the limitation on private campaign expenditures rejected by the Court in *Buckley*. The Court stated: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

104. FISS, *supra* note 28, at 24.

105. See *Waters v. Churchill*, 114 S. Ct. 1878, 1890 (1994).

106. More precisely, I will argue, governmental efficiency includes self-governance. See *infra* Part IV

One way to look at employee speech cases, then, is as a rare opportunity to approach the acceptance of a self-governance theory by recognizing self-governance as a distinct (though not yet competing) interest, one whose demands must be heeded even when liberty speaks in vain.¹⁰⁷ This unique constellation of constitutional values could herald the conception of a new judicial philosophy; from the fact that self-governance may prevail where liberty does not, one might conclude that self-governance likewise prevails in a conflict with liberty.¹⁰⁸

A wholesale embrace of the legal realist critique would lead courts to permit legislative infringements on individual speech rights in the name of self-governance, just as the post-*Lochner* Court allowed infringement on freedom of contract in order to equalize bargaining power.¹⁰⁹ One need not, however, go all the way to the competition model in order to question *Waters*; the essential step is simply to recognize self-governance as a distinct value. The following Part attempts an analysis that disentangles the liberty and self-governance interests at stake in *Waters*. It applies the theory of agency costs to demonstrate that efficiency need not be considered a monolithic value; it can be broken down in a way that shows it contains the self-governance interest. This deeper analysis suggests that from a constitutional perspective, the Court's approach is seriously flawed.

IV. RETHINKING GOVERNMENTAL EFFICIENCY

I have suggested that what is at issue in *Waters* is not so much the government's ability to manage the workplace as the public's ability to manage government, that *Waters* presents us with a challenge not only to individual liberty but also to self-governance. Self-governance may require different

107. Arguably, in crafting the public concern test, the *Connick* Court took a tentative step toward recognizing liberty and self-governance as distinct interests and suggested that self-governance carries more weight. See *Connick v. Myers*, 461 U.S. 138, 145-46 (1983). I do not, however, think that the public concern test is a good way to take this step; in fact, I will argue that it has fatal flaws. See *infra* Part V.

108. This conclusion follows from a naive faith in transitivity of constitutional values. However, serious difficulties accompany the suggestion that speech, like economic power, can be parcelled out by the legislature to serve utilitarian ends. Most notably, speech rights are often construed as serving to protect the political process, see, e.g., ELY, *supra* note 80, at 93-94, and it is obviously problematic to allow a majoritarian legislature control of process-reinforcing values. One explanation of the apparent paradox in asserting both that self-governance is more important than liberty and that liberty defeats self-governance is an understandable judicial reluctance to allow legislatures to decide whose speech needs to be suppressed to promote public debate. This Note does not advocate a self-governance-centered reconception of the First Amendment; its claim is only that self-governance is an interest distinct from liberty, and that disentangling the dual interests at stake in *Waters* will lead to a different analysis of employee speech. Whether a coherent jurisprudence could be fashioned that does allow self-governance to prevail over liberty is a question that is difficult, fascinating, and outside the scope of this Note.

109. See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Whether legal scholarship can prompt such a reconception of the First Amendment remains to be seen; what the product might be is impossible to predict. The Supreme Court shows no present inclination to midwife the second coming of *West Coast Hotel*, see *supra* text accompanying note 100, but as the academics press their suit, the First Amendment as self-governance slouches towards Washington to be born.

treatment than liberty. As discussed above, however, the Court is reluctant to conceive of self-governance as a distinct value, and the demands of managerial discretion make it impractical to promote self-governance by protecting liberty. How, then, is self-governance to be served? This Part argues that the Court's primary value, governmental efficiency, bears within it the seeds of a self-governance-based conception.

A. *Task Efficiency and Democratic Efficiency*

A striking feature of the *Waters* analysis is that the notion of efficiency is taken as a primitive concept: one which cannot be broken down into further components. Part II adopted the Court's understanding of efficiency as simply task efficiency. This Section claims to the contrary that task efficiency is not the whole story, nor even the most important chapter.

Governmental efficiency may be defined as the course of action optimal from the perspective of the people.¹¹⁰ This course of action must have two characteristics. It must pursue the goals the people want, using (to the extent that they care) the techniques they want, and it must use these techniques in the best manner. More simply, government must do the right thing, and it must do it as well as possible. This latter concern, which I have considered under the name of task efficiency, implicates fairly narrow questions of managerial competence. The former, which I will call "democratic efficiency," raises larger questions of accountability and responsiveness to the public will.

Distinguishing between the two is important because task efficiency and democratic efficiency are not values of the same order. Task efficiency is utilitarian in nature and may be balanced with other costs and benefits. Democratic efficiency—and the protection of speech that promotes it—is demanded by the Constitution.¹¹¹ The two components are incommensurable; they cannot be traded off one against the other. Having taken efficiency apart, we cannot put it back together.

B. *Self-Governance and Democratic Efficiency*

The previous Part has discussed the idea that the First Amendment is intended to facilitate self-governance. The evil to be prevented, on this view, is government suppression of information essential to democratic deliberation: The people cannot control the government if they do not know what it is doing. In its extreme version, this could amount to covert government violations of civil rights or domination of government by hidden interest

110. See Jensen & Meckling, *supra* note 59, at 327.

111. See, e.g., *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 . . . is a fundamental principle of our constitutional system.")

groups. Moderated, the issue is simply the inability of the public to monitor the performance of its representatives, to figure out who is doing what it wants and who should be turned out of office. Once we turn away from nightmare fantasies of secret police and sinister cabals, the problem of self-government appears as the problem of agency costs writ large.

The focus is somewhat different, however. From the perspective of self-government, it is not task efficiency but democratic efficiency that is crucial. Because employee speech facilitates monitoring, it promotes both task efficiency and democratic efficiency, but only the latter is a value of constitutional significance. By focusing solely on task efficiency, the *Waters* Court ignored the more important function of employee speech. I have argued already that the relationship of managerial discretion to task efficiency is not as clear as the Court supposes; agency theory suggests that task efficiency is promoted by restricting discretion in some ways, and discretion to control speech is one. Yet even if the Court were right about task efficiency, and even if employee speech reduced task efficiency by more than it increased democratic efficiency, the *Waters* rule would still be a mistake. The government is not a corporation, the Constitution is not a text of law and economics, and all costs are not the same.

In terms of agency theory, the point can be put simply. There are three kinds of agency costs:¹¹² monitoring expenditures by the principal,¹¹³ bonding expenditures by the agent,¹¹⁴ and residual loss.¹¹⁵ In the corporate context, these costs are all of the same order. Shareholders, with some few notable exceptions,¹¹⁶ want the corporations they own to maximize value; they do not care very much about what the corporate policies are. Within the corporate world, democratic efficiency is a subordinate value.

Herein lies the true difference between boardroom and bureaucracy. In the context of democratic society, residual losses, which represent government divergence from the public will, are of another class entirely. Just as speech that threatens disruption in general presents us with the choice between the dangers of expression and suppression, the speech rights of the public employee present us with a choice between the risk of the government's doing

112. See Jensen & Meckling, *supra* note 59, at 308.

113. The loss of governmental task efficiency caused by protecting potentially disruptive speech should be considered the "cost" of the monitoring it provides. See *id.*

114. Bonding costs are resources expended by the agent to guarantee the principal that he will not take certain actions, or that the principal will be compensated if he does. Bonding costs are not crucial to this analysis, but insofar as protecting employee speech enhances monitoring, it reduces bonding costs by making them less necessary. See *id.*

115. Residual loss is the reduction in welfare suffered by the principal due to the agent's divergence from the optimal course of action. See *id.*

116. Shareholders have tried, with mixed results, to influence corporate policy by including a proposal with management's proxy materials pursuant to SEC Rule 14a-8. See 17 C.F.R. § 240.14a-8 (1996); see also *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 425 (D.C. Cir. 1992) (allowing Du Pont to omit proposal to accelerate phasing out of chlorofluorocarbons).

the wrong thing and the risk of doing the right thing less well. Just as the First Amendment makes the first choice for us,¹¹⁷ so too it makes the second, on the basis of democratic principle rather than utilitarian calculus.¹¹⁸

The First Amendment directs us to overinvest in monitoring; democratic efficiency (compliance with the public will) trumps task efficiency (cheap performance). Even if employee speech reduces task efficiency, democratic efficiency requires its protection.¹¹⁹ An examination of the democracy-reinforcing character of employee speech will flesh out this theoretical argument.

C. *Delegation, Deference, and Democratic Efficiency*

1. *Agencies and Agency Costs*

Democracy requires information; the voice of an ignorant electorate is a popular will-o'-the-wisp.¹²⁰ Yet the informational link between the people and the government grows ever more tenuous, at a time when the structure of government makes it ever more essential. The post-New Deal activist state has unprecedented power, vested in agencies that often combine executive, legislative, and judicial functions.¹²¹ Not only do these agencies sidestep the checking device of separation of powers, they also elude direct electoral control—and thus allow legislators to avoid accountability for decisions delegated to agencies.¹²² Oversight by the elected government produces a “double agency” situation where the dominant incentive may be not to ascertain and implement the public will but rather to pass off responsibility for unpopular programs. As one Congressman has stated, “When hard decisions

117. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us”). *supra* text accompanying notes 31–32.

118. The decisional rule of the utilitarian calculus I abjure is the following: Minimize the sum of monitoring expenditures, bonding expenditures, and residual loss. My claim is that the First Amendment is concerned primarily with reducing residual loss alone; although protecting employee speech may reduce the sum of the three categories, the Amendment requires this protection in any case as a means to reduce residual loss.

119. It is true, of course, that citizens will often not care what techniques are being employed. In these situations, they may closely resemble corporate shareholders. But their power to exert control in the instances where they do care is preserved only by providing information about all instances. See generally Blasi, *supra* note 44 (discussing free expression’s checks on official abuse of power).

120. See, e.g., *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.”); MEIKLEJOHN, *supra* note 45, at 16–19; Blasi, *supra* note 44, at 523–24.

121. For an account of the growth of the administrative state, see Yassky, *supra* note 102, at 1734–37.

122. See ELY, *supra* note 80, at 132 (“[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic.”)

have to be made, we pass the buck to the agencies with vaguely worded statutes."¹²³

I do not mean to suggest that the individual citizen lives in the looming shadow of a faceless and entirely unaccountable bureaucracy. Agencies that engage in rulemaking, like the IRS or the SEC, are required by the Administrative Procedure Act to involve the public in the process by providing notice of and permitting comment on their proposed rules.¹²⁴ The Sunshine Act requires that agencies headed by collegial bodies conduct public meetings.¹²⁵ Certainly the elected government exerts considerable control over agencies: The President wields power of appointment and removal of agency heads; both the executive and the legislature exert control over agency funding; and the legislature has significant powers of investigative oversight.¹²⁶

At the same time, the self-sufficiency of these devices should not be overestimated. Many of the governmental entities with which the public interacts do not engage in rulemaking with its concomitant solicitation of public opinion. Oversight by nonappropriating committees is "sporadic" and "unsystematic," usually initiated "not in accordance with any preplanned set of priorities, but rather in response to a newspaper article, a complaint from a constituent or special interest group, or information from a disgruntled agency employee."¹²⁷ Effective oversight requires an informational trigger, which in many cases may be employee speech.

The question, in the end, is not so much how good or bad the situation is as whether a given rule makes it better or worse. The elaborate system of formal and informal oversight that has grown up around the administrative state runs on information. The government may be ready to respond to the voice of the people; all the same, if the people are silent, nothing will happen.¹²⁸ As the *Waters* Court itself noted: "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."¹²⁹ Because the public's control over agencies is indirect and requires greater effort, the importance of readily available information is increased.¹³⁰ One of the most

123. 122 CONG. REC. H10,685 (daily ed. Sept. 21, 1976) (statement of Rep. Levitas).

124. See 5 U.S.C. § 553(b)-(c) (1994).

125. See *id.* § 552(b).

126. Legislative oversight, however, is conducted by committees, which are not necessarily representative of Congress in general nor, a fortiori, of the public will. See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW 154 (3d ed. 1992).

127. U.S. SENATE COMM. ON GOV'T OPERATIONS, 2 STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES 66-67 (1977).

128. See Blasi, *supra* note 44, at 539 (noting that informed citizenry animates and facilitates government self-regulation).

129. *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994).

130. The more difficult it is to exercise control or to obtain information, the greater the problem of rational apathy: Disengagement based on the calculation that the cost of obtaining information exceeds the value of change multiplied by the likelihood that an individual's vote will produce it. Since public control

effective means of producing information about the management of public organizations may be through the speech of employees.¹³¹

It was suggested earlier that traditional First Amendment rationales might apply less forcefully to employee speech because government agencies are overseen by the popularly elected government.¹³² This vision of control flowing from the people to the legislatures and to the agencies (and of accountability running the other direction) turns out to be somewhat optimistic. The machinery of popular accountability may exist, but without an animating flow of information it is dead metal. Thus the structure of modern government, far from supporting restrictions on employee speech, weighs in the opposite direction: The delegation of power to agencies makes employee speech more crucial to democratic legitimacy than the speech of private citizens.

The point can be put more strongly still. If the government created by the delegation of power is to be a democratic government, it must be susceptible to popular control. This means that the people must be able to direct the government, not by second-guessing everyday decisionmaking, but by intervening in exceptional circumstances when the government goes against the public will.¹³³ The performance of this checking function depends on the public's ability to receive information about the ordinary functioning of government—both because this information educates the citizen and because it is the most effective method of revealing governmental divergence from public desires. This information, however, is produced in large part by the employee speech that is now restrained in the name of deference to managerial expertise. The rationale of *Waters* is thus internally incoherent. The model of delegation and deference relies for its democratic legitimacy on the very speech it is invoked to suppress.

2. *Delegation and Distrust*

The post-New Deal Supreme Court has been relatively insensitive to the problematic relation between delegation and democracy; the Court has not invalidated a delegation of power on constitutional grounds since 1935.¹³⁴ But there is good reason to suppose that the American public is significantly more sensitive.

of agencies is indirect, the chances of effecting desired change are reduced, thus monitoring costs are especially significant.

131. The idea that a major purpose of free speech is to allow citizens to monitor the government is very closely related to Blasi's checking value. See Blasi, *supra* note 44, at 63-4 (suggesting that checking value requires greater protection for public employee speech).

132. See *supra* Subsection I.C.4.

133. See Blasi, *supra* note 44, at 542-43.

134. See *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding delegation of legislative power in National Industrial Recovery Act to be unconstitutional)

Public confidence in government is at a low ebb. People distrust the government; they also believe it poses a significant threat to their rights. A recent CNN-*Time* poll found that 62% of respondents agreed that, "the federal government has become so powerful that it poses a threat to the rights and freedoms of ordinary citizens."¹³⁵ Forty years ago, 75% of the population trusted the federal government to "do the right thing most of the time"; now three-quarters do not.¹³⁶ People view the government as an alien entity, a heteronomous authority rather than an instrument of the public will. From a psychological perspective, this alienation is certainly troubling. But its effect is more than psychological; that is, the psychological distance between people and government becomes a real political distance when alienated citizens drop out of the political process.¹³⁷

It is at least plausible to suppose that public disaffection with government—and certainly public fear of government—can be attributed in no small part to the consolidation of immense powers in relatively unaccountable agencies (consider the FBI, the CIA, and the Bureau of Alcohol, Tobacco and Firearms) and the concomitant perception that citizens have lost control of government.¹³⁸ The various mechanisms of oversight and accountability may work well to prevent the government from going against the public interest. Yet it is one thing to say that the government is for the people and quite another to say that it is by the people. Delegation, regardless of its utilitarian impact, takes us further from the democratic ideal of a government directly controlled by the popular voice.¹³⁹

This lack of direct accountability may well be an unavoidable feature of the modern state. Yet inevitability does not mean that the proper response is acquiescence. It is possible to make the government at least relatively more accountable and accessible; modern First Amendment jurisprudence has been interpreted as judicial devotion to just that task.¹⁴⁰ One way to increase public understanding of and involvement in government is to promote the availability of information about its internal workings, and one way to do that is to protect employee speech. A freer flow of information to the public will improve the controls that do exist and, equally important, help citizens to see

135. *Views on the American Scene*, NAT'L J., Mar. 2, 1996, at 502, 502.

136. Joannie M. Schrof et al., *Speak Up! You Can Be Heard!*, U.S. NEWS & WORLD REP., Feb. 19, 1996, at 42.

137. If the public becomes rationally apathetic, agency problems are exacerbated. *See supra* note 130. Increasing the flow of information to the public changes the calculus by making it less costly for citizens to get information; they are thus more likely to be rationally motivated to vote.

138. *See* 122 CONG. REC. H31,633 (daily ed. Sept. 21, 1976) (statement of Rep. Levitas).

139. For relatively recent criticisms of delegation, *see* THEODORE J. LOWI, *THE END OF LIBERALISM* 105-07 (1979); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63-67 (1982); and Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977).

140. *See* Yassky, *supra* note 102, at 1702-03. The Court has, however, employed a liberty-based model of the First Amendment, which makes it less effective than it might otherwise be.

the government as their own creation rather than an alien bureaucracy. The idea that the government is a threat to individual liberty stems from insufficient promotion of self-governance.

V. SOLUTIONS

The Note has argued thus far that the analysis employed by the *Waters* Court is both incorrectly structured and incorrectly applied. Against the employee's liberty interest in speech it sets a monolithic concept of governmental efficiency. Agency theory suggests first that the opposition between employee speech and even a narrow understanding of governmental efficiency (task efficiency) is overstated. More importantly, it reveals that efficiency comprises a self-governance element as well. Employee speech cases do not feature counterpoised liberty and task efficiency; they implicate self-governance (democratic efficiency) also, and while task efficiency arguably may be reduced by employee speech rights, democratic efficiency is surely enhanced.

Seen in this light, the case for reduced protection of employee speech seems much weaker; after all, task efficiency is not even a constitutional value. The model of delegation and deference does not stand up to normative scrutiny. Yet there are real differences between employees and nonemployees, and the government must be allowed to respond to them. The heightened governmental interest in suppressing employee speech provides sound normative grounds for some sort of different treatment; what is needed is a treatment that does not go beyond the descriptive limits suggested by employee-nonemployee differences. This Part first argues that the public concern test, and content-based tests generally, do not provide an adequate means of taking into account the relevant differences and separating the competing values. It then articulates a test that responds sensitively to the values at stake and the distinguishing characteristics of employee speech.

A. *The Failure of Public Concern*

The public concern test, as explained above,¹⁴¹ employs a peculiar conflation of self-governance- and liberty-centered models of the First Amendment. A proper understanding of the interests at stake dictates a much stronger protection of employee speech. While the public concern test does distinguish between liberty and self-governance, it does not promote self-governance in a way that is sensitive to the unique features of employee speech.

141. See *supra* Section III.B.

Employee speech on matters of public concern promotes task efficiency, in some cases,¹⁴² and democratic efficiency more broadly. Yet the distinctive value of employee speech is not solely its ability to reveal management corruption or contribute to existing public debate. As discussed above, significant devices exist to assist the public in monitoring governmental agencies. The unique contribution of employee speech is rather its ability to disclose information about the internal workings of government agencies, on matters that are not necessarily of public concern, but might become so. This speech not only promotes task efficiency by revealing waste that is not the product of corruption; it also promotes democratic efficiency by involving citizens more directly in the workings of government and giving them the opportunity to *become* concerned.¹⁴³ As Cynthia Estlund has stated:

[T]he *Connick* version of the public concern test explicitly discounts the importance, and undermines the claim to constitutional status, of speech grounded in the real, everyday experience of ordinary people. . . . It is primarily through the exchange of information and views that these individual frustrations, losses, and insights coalesce to give rise to collective demands on the political process.

. . . . Such a conception of matters of public concern enforces a truncated vision of public debate and cuts off the roots from the branch of public discourse and democratic governance.¹⁴⁴

A natural response to this criticism might be to expand the scope of public concern, or even to argue that its current scope is sufficient, if properly understood. Yet there are good reasons to think that *any* content-based test will be inappropriate to employee speech. A content-based test works by protecting certain categories of employee speech. There will always be some uncertainty

142. Whether speech on matters of public concern can promote task efficiency depends on how broadly the category is construed. Governmental corruption is usually deemed a matter of public concern, and its revelation increases task efficiency. *See, e.g., Rookard v. Health & Hosp. Corp.*, 710 F.2d 41, 46 (2d Cir. 1983) (stating that exposing corruption in government "obviously involves a matter of public concern"). *But see infra* note 143 (noting that speech that would otherwise be on matters of public concern may lose protection if uttered as part of dispute). Waste or inefficiency that is not a product of corruption is substantially less likely to be found a matter of public concern. *See, e.g., Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984).

143. From the perspective of arousing public concern it is particularly troubling that courts tend to "demote" speech that does address matters of public concern when it arises in the context of a personal dispute. *See, e.g., Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989) (stating that officers' criticism of police chief's administration of emergency response unit is not matter of public concern because officers expressed personal dissatisfaction with chief); *Dwyer v. Smith*, 867 F.2d 184, 193-94 (4th Cir. 1989) (stating that complaint about conditions at city firing range "arguably touches upon matters of public concern," but is less protected because plaintiff was "voicing her personal grievances"); *Berg v. Hunter*, 854 F.2d 238, 242 (7th Cir. 1988) ("Although matters of sexual harassment [and] the misappropriation of college property . . . may relate to [the college's] efficient performance," plaintiff's charges did not raise "broader issues of public school administration unrelated to his personal disputes.") (citations omitted).

144. Estlund, *supra* note 84, at 37-38.

about the scope of these protected categories,¹⁴⁵ and so employees will be unable to be sure in advance whether some speech is protected or not. Uncertainty creates the familiar First Amendment chilling effect: To avoid the risk of punishment, speakers stay well within the bounds of protection. Self-censorship eliminates speech at the margins.

The unusual treatment of employee speech makes the problem of chilling more severe. Where the ordinary citizen enjoys a broad range of presumptively protected speech from which "certain well-defined and narrowly limited classes of speech"¹⁴⁶ are excluded, the employee faces a narrow range of protected speech, with the remainder entirely unprotected. This "defining-in" technique,¹⁴⁷ in contrast to the usual "defining-out," produces chilling at the core of valuable speech rather than at the periphery.¹⁴⁸ A background norm of reduced protection is not a mistake;¹⁴⁹ most employee speech does not reduce agency costs or contribute to societal self-governance. But any content-based protected category will produce accentuated chilling. Effective protection of First Amendment freedoms requires a buffer zone.¹⁵⁰ Additionally, a content-based test that works by identifying "valuable" speech is perilous from the perspective of democracy: Judicial demarcation of a category of legitimate subjects of democratic discourse usurps the public prerogative to set the political agenda.¹⁵¹

Finally, the public concern test, or any content-based test, is simply not sensitive to the differences between employees and nonemployees. Some employee speech, as discussed in Part I, threatens governmental efficiency in ways that nonemployee speech cannot.¹⁵² Some employee speech is indistinguishable from nonemployee speech. If it is true, as the Court says, that taking public employment does not waive First Amendment rights,¹⁵³ then reduced First Amendment protection should be triggered not by the status of

145. The public concern test is a good example of a content-based test whose boundaries are difficult to administer, as both judges and commentators have noted. *See* sources cited *supra* note 84

146. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

147. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 279-82 (1981).

148. *See* Estlund, *supra* note 84, at 48.

149. The public concern test actually provides *no* protection for other speech, which is a mistake. *See infra* text accompanying note 162.

150. *See* NAACP v. Button, 371 U.S. 415, 433 (1963). Another way of putting this point is to say that information is a public good and thus requires subsidies. The overprotection provided by a buffer zone may be considered a legal subsidy. For a more complete analysis of the public good aspects of speech, see Daniel Farber, Comment, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *HARV. L. REV.* 554 (1991).

151. *See, e.g.,* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) ("We doubt the wisdom of committing this task to the conscience of judges."); *POST, supra* note 46, at 165-67; Estlund, *supra* note 84, at 2-4.

152. This is either speech that is disruptive as an activity or speech that damages the speaker's working relationships and makes her a less effective employee.

153. *See* cases cited *supra* note 33.

being an employee but by speech that threatens efficiency in an employment-related way.

Consider the following examples of employee-to-employee speech: "The Yankees were something else last night" (said in the office); "How can you work for someone who doesn't like the Yankees?" (said in a bar); "How can you work for a government that abdicates its responsibility to care for the less fortunate members of society?" (said upon passage of a welfare reform bill). All of these have the potential to be disruptive, in the sense of dampening enthusiasm, but only the first relies for its effect on the fact that the speaker is an employee. The public concern test would extend nominal protection to the last remark, but an employer fearing disruption could fire based on all three.

This result is very hard to justify without resorting to a waiver theory. Where employee speech is no different from the speech of the general public, the source of the elevated government interest in efficiency is mysterious. There are differences between employees and nonemployees, and they do create a heightened government interest in controlling employee speech, but the differences do not exist every time an employee speaks.

For a last example, note that "I don't like the Yankees" provides sufficient grounds for dismissal no matter when or where it is uttered. Speech that is not on a matter of public concern receives no First Amendment protection whatsoever. This result too is hard to justify without invoking waiver. The First Amendment interest at stake, the *Waters* Court says, is the employee's liberty interest in expression. Yet it is a basic fact of First Amendment jurisprudence that the expressive liberty interest extends to "Wittgenstein is a genius" or "Nabokov is divine" (neither of which, unfortunately, is a matter of public concern) as strongly as it does to "Vote Republican."¹⁵⁴ Here the public concern test just looks irrational: The liberty interest as it is traditionally understood is not limited by content, unless the speech constitutes libel, obscenity, or another disfavored category.

It is difficult to formulate a test that neatly tracks the differences between employees and nonemployees and also coherently distinguishes the employee's liberty interest from the societal interest in self-governance. It may be impossible to create one that does so perfectly. It is not, however, hard to do a better job of it than the public concern test.

B. *A New Test*

Employee speech poses a greater danger to governmental efficiency than nonemployee speech in two cases: where the activity of the speech disrupts the workplace, and where the content of the speech damages the speaker's working

154. See *supra* note 93.

relationships.¹⁵⁵ The former condition will never obtain with respect to off-the-job speech. A reasonable first cut for an employee speech test is thus whether speech occurs in the workplace or not. Off-the-job speech should generally receive full First Amendment protection: The government employer can no more fire an employee for such speech than the sovereign government could fine or imprison a nonemployee.¹⁵⁶

This first cut locational test has the additional virtue of impinging only slightly, if at all, on the societal interest in self-governance. If the value of speech is that it informs the public, there is no reason that it has to occur on the job. A locational test creates a safe harbor for valuable speech and at the same time takes the speech away from the area where it can do the most damage. The heightened government power is restricted to the area where it is most natural: the workplace. Rather than bringing the First Amendment into the workplace, a locational test lets the employee take the speech out.

Protection of working relationships, in response to the second difference mentioned above, will create a significant exception. "My boss dresses funny," said outside the workplace by a member of the rank and file, is protected; said by a trusted deputy, it is not. There are two concerns that attend this exception. The first is the danger that employers will allege harm to working relationships where none exists, the second that real relationships will chill disclosure of valuable information.

The first concern is relatively insubstantial, since the existence of such relationships is judicially verifiable. In *Wulf v. City of Wichita*,¹⁵⁷ the plaintiff, a police officer, wrote a letter requesting the Kansas Attorney General to investigate alleged improprieties within the department. LaMunyon, the chief of police, fired Wulf and claimed at trial that the letter damaged working relationships. Rejecting his claim, the court stated: "There was testimony that LaMunyon, the person most directly criticized by the letter, was angry and upset when he learned of the letter, but LaMunyon was not someone with whom Wulf worked closely or regularly."¹⁵⁸

The second concern is somewhat more serious. Chilled sartorial satire is of no great moment; chilled disclosure of impropriety is another issue. "My boss is embezzling taxpayer monies," if true, should be protected even if it comes from a trusted assistant. One response would be to leave the matter up

155. The existing regime seems to focus on damages to any working relationships. *See supra* note 37. I reject this approach because nonemployee speech can also harm working relationships. If the employee's speech is more effective at doing so, this is largely a function of his superior information. Informational asymmetry is a point in favor of increased protection of employee speech; unless the information disclosed is appropriately confidential (e.g., troop transport sailing times), its dissemination is a public good.

156. Of course, a successful prosecution (e.g., for libel) would certainly provide grounds for dismissal, the libelous character of speech could also be asserted as justification for dismissal without a prosecution. A court's task in reviewing a challenged discharge would be to determine whether the speech was punishable under ordinary First Amendment standards.

157. 883 F.2d 842 (10th Cir. 1989).

158. *Id.* at 861.

to the political process; if the impropriety is sufficiently severe, the employer may be the one fired and the employee would be in no danger. This is an unreliable protection, however, and a wiser solution may be to permit the employee to use truth as a defense against termination based on allegations of breach of public trust. The effect of this is partially to constitutionalize the Whistleblower Protection Act.¹⁵⁹ Since whistleblowing is a paradigm of valuable speech, constitutional protection does not seem unwarranted.¹⁶⁰

What the locational test creates, then, is a broad realm of protected off-the-job speech with an exception for speech that is harmful because of the speaker's employment. This tracks the differences between employees and nonemployees, and should have at most a minor impact on the promotion of self-governance. On-the-job speech requires different analysis. This speech typically does not reduce agency costs or serve democratic values in the same way as off-the-job speech, and if it does it can do so as well off-the-job.¹⁶¹ Churchill could have voiced her concerns, or Myers distributed her questionnaire, outside the office. The First Amendment concern raised by regulation of on-the-job speech is one of liberty rather than self-governance, and it is a trivial point that employees surrender much of their ordinary liberty to their employers. The deference the Court grants to employer predictions of disruption is appropriate for on-the-job speech. However, as noted earlier, the employee's liberty interest extends to all speech; thus, the restriction of the liberty-based protection to speech on matters of public concern makes no sense. Decisions to fire employees for on-the-job speech should be subject to deferential review, but the public concern test should be abandoned.¹⁶²

The above discussion draws with a very broad brush and is susceptible to misconstruction. It should not be taken to suggest that protected off-the-job speech can never justify dismissal. In such cases, however, it should be true that dismissal is based on poor job performance rather than on the speech qua speech. For example, some speech may call into question the employee's fitness to perform his job. Racist speech by any government employee whose racial beliefs could affect job performance (for example, a police officer) might suggest that the employee was unable to bring a constitutionally mandated

159. 5 U.S.C. § 1201 (1994).

160. "My boss's policies, though legitimate, are wasteful" (said by the deputy) is still not protected under this proposal. Chilling such speech may reduce task efficiency; on the other hand, reform is probably more easily achieved if the deputy speaks to the boss rather than to the public.

161. A result of the locational test is that some speech that should be protected according to an agency theory analysis will not be if it occurs on the job. This amounts to a content-neutral time, place, and manner restriction, which is acceptable from the perspective of ordinary First Amendment theory; additionally, there is no obvious reason that this restriction would reduce the quantity of valuable employee speech. In effect, the self-governance interest is preserved by relocation; what is left is simply the employee's liberty interest.

162. Deferential review will likely approach no review at all, but this result is appropriate where only a liberty interest is at stake. The managerial interest in task efficiency should outweigh a liberty interest in the workplace.

race-neutrality to his work and thereby justify dismissal. Dismissal in such cases will follow from the general principle that an employee may be fired for doing a bad job; the speech itself provides no independent grounds.

The above example, and the exception for harm to working relationships, suggests that within the protected realm of off-the-job speech there will be unprotected pockets: roughly, speech that affects an employee's fitness to perform her job. Although these will be content-based categories, the fact that they are "defined out" of a protected background (rather than protected pockets being "defined in") eliminates the accentuated chilling effect of the public concern test. Similarly, within the largely unprotected realm of on-the-job speech there must be pockets of protection. For example, speech pursuant to established procedures requires different analysis. Agency policies might require that employees first air grievances to their direct superiors; this should not create a catch-22 where on-the-job speech is unprotected but off-the-job speech violates regulations and justifies dismissal. This defining-in technique may well chill workplace speech, but the premise of the locational test is that valuable workplace speech can be safely transported outside.

VI. CONCLUSION

The arguments for reduced First Amendment protection in the government workplace are obvious and undeniable: Experts to whom specific tasks are delegated must have discretion in their pursuit of task efficiency, and liberty must give way in the managerial domain. But an analysis that casts the issue as liberty versus efficiency is misleadingly simple. Protection of employee speech contributes to task efficiency and might be selected by a competitive market for public agencies; in any case, managers are not the ones who should decide how much speech to tolerate. More significantly, employee speech reinforces democratic efficiency and self-governance. The societal interest in self-governance cannot be defeated by an appeal to managerial discretion because the model of deference and delegation depends for its democratic legitimacy on the availability of information to the public. Thus the one area in which government employers must not be allowed discretion is speech that provides the public with information about the workings of government.

This Note attempts to disentangle the distinct liberty and self-governance interests at stake in regulation of employee speech and to reach an accommodation between the competing demands of managerial government and democratic society. The solution proposed is by no means a complete remedy to the problem of agency costs in public institutions. But by protecting the flow of information to the public, it increases accountability and promotes the democratic deliberative process that is the First Amendment's chief concern.

