

# WHAT DID THE SUPREME COURT HOLD IN *HEFFERNAN V. CITY OF PATERSON*?

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## I. INTRODUCTION

Reasoned opinions count as much or more than outcomes, partly because “reasoned response to reasoned argument is an essential aspect of [the judicial] process,”<sup>1</sup> and partly because “the opinion has as one if not its major office to show how like cases are properly to be decided in the future.”<sup>2</sup> Scrutiny of the Supreme Court’s reasons is called for not only when the result seems doubtful, but also when the result is intuitively appealing. Weak reasons may in the long run undermine a holding that deserves a better foundation than the Court has built for it, or at least distort and delay the elaboration of doctrine. When the intuition behind the holding deserves broader application than the Court’s reasons can support, an effort to identify more convincing reasons is an especially worthwhile project.

*Heffernan v. City of Paterson*,<sup>3</sup> illustrates the good result/weak reasons problem. Under settled First Amendment principles, a public employee may not be fired or demoted for speech on a matter of public concern, unless the speech threatens to disrupt the workplace and the disruption outweighs the value of the speech.<sup>4</sup> In *Heffernan* the Supreme Court dealt with an odd variation on regulation of public employee speech. Jeffrey Heffernan, a police officer, was demoted by the City of Paterson because his supervisors mistakenly believed he had engaged in protected speech.<sup>5</sup> On the facts stipulated by the Court, Heffernan’s mother had asked him to pick up a yard sign that showed support for Spagnola, a mayoral candidate.<sup>6</sup> Spagnola’s opponent, the incumbent, had appointed the current police chief, James Wittig.<sup>7</sup> Other officers spotted Heffernan at the Spagnola

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<sup>1</sup> David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

<sup>2</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

<sup>3</sup> 136 S. Ct. 1412 (2016).

<sup>4</sup> See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that a government employee’s distribution of an inter-office questionnaire about her employer warranted termination because it disrupted the workplace); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (“[A] teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”).

<sup>5</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

yard-sign distribution site and told his supervisors, who wrongly inferred that Heffernan was involved in Spagnola's campaign.<sup>8</sup> As punishment for his supposed advocacy against the current mayor, Wittig demoted Heffernan from detective to patrol officer.<sup>9</sup> Citing the First Amendment's protection of public employee speech, Heffernan sued the city for damages under 42 U.S.C. § 1983.<sup>10</sup> He lost in the lower courts.<sup>11</sup> They reasoned that, by his own admission, Heffernan had not engaged in protected speech by picking up the sign.<sup>12</sup> Although Wittig acted with a constitutionally impermissible motive, his mistake of fact saved him from liability.<sup>13</sup>

The Supreme Court granted certiorari on the question of “[w]hether the First Amendment bars the government from demoting a public employee based on a supervisor’s perception that the employee supports a political candidate.”<sup>14</sup> The dilemma presented by the case is that the act of picking up a yard sign, if done merely as a favor for someone, is not protected speech.<sup>15</sup> However unfair it may seem, so far as the Constitution is concerned, Wittig could have fired Heffernan for that act.<sup>16</sup> At the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Justice Thomas dissented, in an opinion joined by Justice Alito. *Id.* at 1420. Section 1983 is widely used to bring challenges to state government practices for violating federal constitutional and statutory norms. It authorizes a cause of action against “[e]very person who, under color of [state law] subjects, or cause to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . .” 42 U.S.C. § 1983 (2012). A local government is a “person” subject to suit under § 1983. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). As a result a local government could be held liable for the “single decision[s] of municipal policymakers.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). This could include the decision of the police chief to demote Jeffrey Heffernan. For more information regarding § 1983 actions brought against local governments, see generally SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 294–313 (4th ed. 2015).

<sup>11</sup> *Heffernan v. City of Paterson*, 2 F. Supp. 3d 563, 584 (D.N.J. 2014), *aff’d*, *Heffernan v. City of Paterson*, 777 F.3d 147, 154 (3d Cir. 2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Petition for Writ of Certiorari, *Heffernan*, 136 S. Ct. 1412 (No. 14-1280).

<sup>15</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>16</sup> *Id.* Some public employees are entitled to a due process hearing before or shortly after dismissal. On account of the contracts under which they hold their posts, they have a “property” interest under the Fourteenth Amendment. See *Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997) (stating that “public employees who can be discharged only for cause have a

same time, Heffernan was actually fired not because he did a favor for his mother, but because his supervisors mistakenly thought he had engaged in protected speech.<sup>17</sup> That is a constitutionally impermissible motive. On the one hand, the case did not involve a straightforward violation of First Amendment rights. On the other hand, Chief Wittig ignored basic First Amendment norms.

The Court ruled in Heffernan's favor, over a dissent authored by Justice Thomas joined by Justice Alito.<sup>18</sup> Yet Justice Breyer's majority opinion is quite puzzling. It contains elements of at least two rationales, but does not adequately support either of them. First, the Court might have held, as the petition for certiorari suggested,<sup>19</sup> that the city violated Heffernan's First Amendment rights. Yet the opinion contains no statement to that effect, the dissent denies that the Court so held, and Justice Breyer does not refute that assertion.<sup>20</sup> Second, it might have held that the City of Paterson acted under an unconstitutional policy, since Wittig acted for a constitutionally impermissible motive. This theory of the case applies the general rule that local governments can be held liable under § 1983 for the actions of government policy

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constitutionally protected property interest in their tenure and cannot be fired without due process"). The requirement of "cause" amounts to showing that there is good reason for the employment decision. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985) (a contract that guaranteed employment during "good behavior and efficient service" created a property right). The requirement of cause would probably not be satisfied on these facts. *See* Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by Engquist v. Oregon Dep't of Agriculture*, 44 GA. L. REV. 161, 166 (2009) (listing "incompetence, insubordination, criminal misconduct . . . [as] grounds that would justify dismissal"). But it appears that Heffernan had no such due process protection. State law may also provide some protection for the employee. *See* Brief of New Jersey State League of Municipalities as Amicus Curiae in Support of Respondents, at 5, 136 S. Ct. 1412 (2016) (No. 14-1280) (stating "New Jersey has afforded protections to public employees and shielded them from adverse employment decisions rooted in political influences . . .").

<sup>17</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>18</sup> *Id.* at 1419. The Court remanded the case for consideration of another ground on which the city may prevail. *Id.* It noted "some evidence in the record . . . suggesting that Heffernan's employers may have dismissed him pursuant to a different and neutral policy prohibiting police officers from overt involvement in any political campaign," and directed the lower courts to look into "[w]hether that policy existed, whether Heffernan's supervisors were indeed following it, and whether it complies with constitutional standards." *Id.*

<sup>19</sup> Petition for Writ of Certiorari, *Heffernan*, 136 S. Ct. 1412 (No. 14-1280).

<sup>20</sup> *Heffernan*, 136 S. Ct. at 1420 (Thomas, J., dissenting).

makers, a category that probably includes Chief Wittig.<sup>21</sup> This ground was not briefed, did not figure in the lower courts' resolution of the case, and would entail the overruling of a Supreme Court precedent.<sup>22</sup> The Court devotes no more than three opaque sentences to it.<sup>23</sup> Nonetheless the dissent asserts that it is the majority's rationale, and Justice Breyer does not dispute that claim.<sup>24</sup>

In this Article, I examine both of these grounds and show that neither of them is viable, unless the Court is to be understood as having revised First Amendment or § 1983 doctrine without any explicit articulation of the changes. I propose two alternate rationales that avoid the objections to those theories and may provide a stable foundation for the outcome. One is to shift the source of the liability rule away from the First Amendment. Instead, it could be located in federal common law, and more particularly constitutional common law.<sup>25</sup> Viewed in this way, *Heffernan* may be understood and defended as a judge-made principle aimed at enforcement of the constitutional values behind the public employee speech doctrine. Another strategy is to put aside the First Amendment aspect of the case in favor of a focus on Wittig's arbitrary treatment of Heffernan. Under the Equal Protection Clause, a "class of one" can recover for an injury by showing that an official made an irrational distinction, singling him out for bad treatment.<sup>26</sup> The problem with this theory is that

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<sup>21</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978) (overruling precedent that gave immunity to local governments from suit under § 1983).

<sup>22</sup> See generally Brief for Petitioner, *Heffernan*, 123 S. Ct. 1412 (2016) (No. 14-1280); *Heffernan v. City of Paterson*, 2 F. Supp. 3d 563 (D.N.J. 2014), *aff'd*, *Heffernan v. City of Paterson*, 777 F.3d 147 (3d Cir. 2015).

<sup>23</sup> *Heffernan*, 136 S. Ct. at 1417.

<sup>24</sup> *Id.* at 1421–22 (Thomas, J., dissenting).

<sup>25</sup> The leading and still authoritative article on this topic is Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

<sup>26</sup> See *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008) (explaining "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one").

the current doctrine may exclude public employees like Jeffrey Heffernan from its coverage.<sup>27</sup>

Part II distinguishes between the “violation of First Amendment rights” and “§ 1983 local government liability” themes. Parts III and IV discuss each of the two in turn and explain why neither is adequately supported by the opinion. Part V suggests that Jeffrey Heffernan’s victory can be justified more convincingly as an exercise in constitutional common law making or “class of one” Equal Protection.

## II. TWO STRANDS OF REASONING

Justice Breyer’s majority opinion contains elements of two distinct, though related, rationales for ruling in the plaintiff’s favor. One of these would be a simple constitutional holding: Paterson, acting through Wittig, violated Heffernan’s First Amendment rights by demoting him, and therefore is liable for the resulting injury. The second would be a bit more complex, because it brings in a special § 1983 doctrine as well as the First Amendment: Paterson would be liable under § 1983 for Wittig’s actions, because Wittig acted for a constitutionally impermissible motive. We can call the first a “constitutional” ground and the other a “statutory” ground. It is useful to keep the two separate, even though they are related in an important sense. At least under the § 1983 doctrine as it stood before *Heffernan*, the plaintiff has been required to prove a violation of his constitutional rights in order to win on the second theory as well as the first. The Court so held in *Los Angeles v. Heller*.<sup>28</sup> But the two are conceptually distinct, in that the § 1983 rationale does not ineluctably entail showing a violation of the plaintiff’s constitutional rights, only unconstitutional motivation. Thus, one way to read the opinion is that the Court implicitly overruled *Heller* and opened the door to broader municipal liability across the board.

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<sup>27</sup> See *id.* at 594 (holding that the “class of one” theory “has no place in the public employment context”).

<sup>28</sup> 475 U.S. 796, 799 (1986) (per curiam). The possibility that *Heffernan* has implicitly overruled *Heller* is discussed in Part III below.

## A. THE CONSTITUTIONAL GROUND

The Court might have, but did not, answer the First Amendment question presented in Jeffrey Heffernan's petition for certiorari with a simple "yes." Instead of responding to the question in such a straightforward fashion, Justice Breyer invites the reader to connect the dots. Near the beginning of the opinion, Justice Breyer frames the issue by stating, "The question is whether the official's factual mistake makes a critical legal difference. Even though the employee had not in fact engaged in protected political activity, did his demotion deprive him of a right . . . secured by the Constitution? 42 U.S.C. § 1983. We hold that it did."<sup>29</sup>

This passage may be understood as an oblique "yes" in response to the question presented by the petition for certiorari. Yet the dissent claims that the Court found no violation of Heffernan's constitutional rights.<sup>30</sup> The majority opinion does not ever directly state that Paterson violated Heffernan's constitutional rights. Nor does it take issue with the dissent's assertion to the contrary. Nor does the majority take advantage of the ample resources provided by Heffernan's brief and the amicus brief filed on his behalf by the Solicitor General to construct a theory of First Amendment public employee speech that would support such a right. On the other hand, the possibility that the Court indeed intended to make a rule of constitutional law cannot be dismissed out of hand.

## B. THE STATUTORY GROUND

The Court's reference to § 1983, along with a passage that refers to Paterson's "policy," suggests a different rationale.<sup>31</sup> This one depends on the presence of the City of Paterson as a defendant. *Monell v. Department of Social Services* held that

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<sup>29</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>30</sup> *Id.* at 1420 (Thomas, J., dissenting) ("As in most § 1983 suits, [Heffernan's] claim could be that the City interfered with his freedom to speak and assemble. But because Heffernan has conceded that he was not engaged in protected speech or assembly when he picked up the sign, the majority must resort to a second, more novel framing. It concludes that Heffernan states a § 1983 claim because the City unconstitutionally regulated employees' political speech and Heffernan was injured because that policy resulted in his demotion.").

<sup>31</sup> *Id.* at 1417 (majority opinion).

municipalities can be held liable under § 1983 for the acts of their officials.<sup>32</sup> But *Monell* also held that they are not vicariously liable for all official acts.<sup>33</sup> The plaintiff must show that the injury was caused by an “official policy.”<sup>34</sup> As applied to *Heffernan*, the theory is that Wittig’s unconstitutional motive is a municipal policy, and that the faulty policy caused the demotion. Support for this theory of the case may be found in Justice Breyer’s statement that “[t]he Government acted upon a constitutionally harmful policy whether Heffernan did or did not in fact engage in political activity.”<sup>35</sup> Moreover, “Heffernan was directly harmed, namely, demoted, through application of that policy.”<sup>36</sup> In this line of reasoning, the municipal “policy” and the constitutional violation are one and the same. The crucial element is Wittig’s unconstitutional motivation, coupled with resulting harm in the form of a demotion.

These two potential rationales may seem on a quick reading to be alternate ways of saying the same thing. But they are not. The difference between them is this: The first would hold that the city violated Heffernan’s First Amendment rights, while the second would not necessarily do so. Rather, the second rationale would establish liability under § 1983 by proof that a constitutionally harmful policy has caused harm, such as Heffernan’s demotion. In principle, if not in pre-*Heffernan* practice under *Los Angeles v. Heller*, no violation of Heffernan’s constitutional rights would be required for governmental liability.<sup>37</sup> But the distinction between the two grounds collapses unless we stipulate that the Court has implicitly overruled or distinguished *Heller*.

### III. HEFFERNAN AND THE FIRST AMENDMENT

The opinion contains no declarative sentence to the effect that Paterson violated Heffernan’s First Amendment rights, nor even a rebuttal to the dissent’s charge that the Court did not so hold. That absence is not due to a failure of advocacy. In support of such

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<sup>32</sup> 436 U.S. 658, 694 (1978).

<sup>33</sup> *Id.*

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

<sup>35</sup> 136 S. Ct. at 1418.

<sup>36</sup> *Id.* at 1419.

<sup>37</sup> *See generally* 475 U.S. 796 (1986).



a right, Jeffrey Heffernan’s lawyers asserted that “[r]espondents violated the First Amendment by demoting Heffernan because they perceived that he supported the mayor’s opponent in the upcoming election.”<sup>38</sup> Similarly, the United States filed an amicus brief in support of Heffernan, in which it maintained that “[a] public employer violates the First Amendment when, absent justification, it acts against an employee with the purpose of suppressing disfavored political beliefs, even if the employer’s perception of those beliefs is mistaken.”<sup>39</sup> Both briefs put forward reasoned arguments in support of that position. Yet the Court’s opinion omits any statement that the claimed First Amendment right exists.

#### A. THE COURT’S “CONSTITUTIONAL RIGHTS” REASONING

The Court’s rhetorical strategy is to invoke the First Amendment, but without any explicit statement that Heffernan’s constitutional rights were violated. For example, Justice Breyer frames the holding by stating, “When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983 . . . .”<sup>40</sup>

This passage seems to invite the reader to construct a syllogism: (1) § 1983 is available for constitutional violations; (2) § 1983 is available to Heffernan; (3) therefore, the City violated Heffernan’s constitutional right.

One problem with the syllogism is that the availability of § 1983 does not necessarily mean that the right of which the plaintiff has been deprived is a constitutional right. That statute authorizes suits to recover for violations of federal “laws” as well as the

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<sup>38</sup> Brief for Petitioner at 12, *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016) (No. 14-1280).

<sup>39</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 7, *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016) (No. 14-1280).

<sup>40</sup> *Heffernan*, 136 S. Ct. at 1418.

Constitution,<sup>41</sup> and “laws” arguably includes federal common law as well as statutory rights.<sup>42</sup> In addition, the proposition that Heffernan may successfully “challenge . . . unlawful action under the First Amendment” is not precisely equivalent to the proposition that Paterson violated Heffernan’s First Amendment right.<sup>43</sup> The Court’s careful language leaves open the possibility that the specific source of the right being recognized is not the First Amendment, even though that right promotes First Amendment values.

Besides the quoted language, the opinion treats the case as one that raises a public employee speech issue under the First Amendment and cites the principal cases in the development of that doctrine, including *Pickering v. Board of Education*,<sup>44</sup> *Connick v. Myers*,<sup>45</sup> and *Garcetti v. Ceballos*.<sup>46</sup> This “*Pickering/Connick*” doctrine, as it is often called, protects employees from adverse employment actions taken against them for speech on matters of public concern, unless the potential disruptive impact outweighs the “public concern” value of the speech.<sup>47</sup> *Garcetti* holds that the doctrine does not protect speech that is part of the employee’s job.<sup>48</sup> After describing these cases, the Court sets them aside. The cases “did not present the kind of question at issue here,” because

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<sup>41</sup> See, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (noting that while some statutes preclude § 1983 claims, the Court looks to Congressional intent and the remedial schemes of a statute to determine if a § 1983 claim is available).

<sup>42</sup> See Michael L. Wells, Constitutional Common Law, Section 193, and *Heffernan v. City of Paterson* (Aug. 11, 2016) (unpublished manuscript on file with the author) (arguing that *Heffernan*’s holding allows courts to make common law rules in order to implement the First Amendment).

<sup>43</sup> *Heffernan*, 136 S. Ct. at 1418.

<sup>44</sup> 391 U.S. 563 (1968) (finding a teacher’s letter to a local newspaper regarding a proposed tax increase was speech from a member of the community about a topic of public concern).

<sup>45</sup> 461 U.S. 138 (1983) (finding the discharge of a former assistant district attorney did not violate the right to free speech).

<sup>46</sup> 547 U.S. 410 (2006) (finding a district attorney’s speech was not protected under the First Amendment because he was not speaking as a citizen when he wrote a memo).

<sup>47</sup> See NAHMOD ET AL., *supra* note 10, at 205–14 (discussing situations in which a public employee is fired or penalized on account of the employee’s speech).

<sup>48</sup> 547 U.S. at 421 (stating “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. . .”).

“no factual mistake was at issue.”<sup>49</sup> The Court turns instead to *Waters v. Churchill*,<sup>50</sup> which is “more to the point,” since the *Churchill* Court “did consider the consequences of an employer mistake.”<sup>51</sup>

In *Waters*, a nurse at a public hospital was fired after she spoke with coworkers.<sup>52</sup> The supervisors who dismissed her had investigated the incident but evidently made a mistake of fact, because they believed that she had discussed only internal issues that would not trigger *Pickering/Connick* protection.<sup>53</sup> In fact, she had discussed matters of public concern that met the *Pickering/Connick* test.<sup>54</sup> Although there was no majority opinion, the Court upheld the hospital’s decision, and the case is generally cited for the proposition that a public employee who engages in protected speech may nonetheless be fired if the dismissal is based on a supervisor’s reasonable belief that the speech was not protected.<sup>55</sup> Justice Breyer describes it as a case in which

The Court held that, as long as the employer (1) had reasonably believed that the employee’s conversation had involved personal matters, not matters of public concern, and (2) had dismissed the employee because of that mistaken belief, the dismissal did not violate the First Amendment. In a word, it was the employer’s motive, and in particular the facts as the employer reasonably understood them, that mattered.

In *Waters*; the employer reasonably but mistakenly thought that the employee *had not* engaged in protected speech. Here the employer mistakenly thought that the employee *had* engaged in protected speech. If the employer’s motive (and in particular the

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<sup>49</sup> Heffernan v. City of Paterson, 136 S. Ct. 1412, 1417 (2016).

<sup>50</sup> 511 U.S. 661 (1994).

<sup>51</sup> *Heffernan*, 136 S. Ct. at 1418.

<sup>52</sup> 511 U.S. at 664–65.

<sup>53</sup> *Id.* at 664–66.

<sup>54</sup> *Id.* at 680.

<sup>55</sup> Edward J. Valaquez, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055, 1057–58 (1995) (discussing the implications of *Waters v. Churchill*).

facts as the employer reasonably understood them) is what mattered in *Waters*, why is the same not true here? After all, in the law, what is sauce for the goose is normally sauce for the gander.

We conclude that, as in *Waters*, the government's reason for demoting Heffernan is what counts here.<sup>56</sup>

This analogy to *Waters*, and its rejection of *Pickering*, *Connick*, and *Garcetti*, is the full extent of the Court's treatment of public employee speech doctrine.

#### B. REASONS TO REJECT THE "CONSTITUTIONAL RIGHTS" READING OF *HEFFERNAN*

The core principle of the First Amendment public employee speech doctrine is that the employee should be protected because he has engaged in speech on a matter of public concern, which Jeffrey Heffernan did not do.<sup>57</sup> Unless the doctrine is reworked to focus on the employer's perceptions, as Heffernan and the United States proposed, it does not support the claimed right. Rather than adopting a version of the theory offered by Heffernan and the United States, the Court meets this objection by citing *Waters*, another case in which the supervisor acted under a mistake of fact.<sup>58</sup> But the Court's analogy to *Waters* does not succeed in linking the two cases, because the two mistakes are not *relevantly* similar.

Moreover, to treat the right recognized in *Heffernan* as a constitutional right would have implications beyond the narrow facts of that case. It would add a level of complexity to the First Amendment doctrine, by introducing into the matrix of First Amendment principles a new theme—unconstitutional motivation, even if the government's act does not touch protected speech—with unforeseeable and perhaps ungovernable consequences. This

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<sup>56</sup> *Heffernan*, 136 S. Ct. at 1418 (citation omitted).

<sup>57</sup> See *Picking v. Bd. of Educ.*, 391 U.S. 563, 573–74 (1968) (indicating that a public official's statements on matters of public concern are protected under the First Amendment because of the public interest in "free and unhindered debate on matters of public importance").

<sup>58</sup> *Heffernan*, 136 S. Ct. at 1418.

hypothesized new doctrine was never clearly articulated in the Court's opinion and escaped detection by the dissent. The following are reasons to question not only the viability of the purported rule, but also its existence.

1. *Public Employee Speech Doctrine.* Public employees do not have an unconditional right to speak as they please and remain employed by the government.<sup>59</sup> This does not mean that they risk their jobs whenever they speak. In *Pickering v. Board of Education*, the Supreme Court held that when the employee has spoken on a matter of public concern, he has some First Amendment protection against dismissal or demotion.<sup>60</sup> *Pickering* is a speech-protective case, but its rationale limits its scope. In *Connick v. Myers*,<sup>61</sup> the Court reiterated and refined the *Pickering* framework. It ruled that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”<sup>62</sup> Under *Pickering/Connick*, the *rationale* for First Amendment protection of public employee speech is that the employee has spoken on a matter of public concern.<sup>63</sup> Even if the employee *has* spoken on a matter of public concern, the government may have adequate grounds for disciplining him.<sup>64</sup> *Pickering/Connick* requires that the value of the protected speech be balanced against its actual and potential costs in disrupting the work of the office.<sup>65</sup>

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<sup>59</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (discussing both the interests of the government in limiting the speech of public employees as well as the public employee's own right to speech).

<sup>60</sup> *Id.* at 570.

<sup>61</sup> 461 U.S. 138 (1983).

<sup>62</sup> *Id.* at 146; see also *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) (discussing the “special value” of public employee speech related to the employment); Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 1 301, 336 (“Judicial review in the work product context can and should be designed not to second-guess supervisor assessments of work product quality, but to smoke out retaliation against work product speech for reasons other than quality.”).

<sup>63</sup> *Connick*, 461 U.S. at 146; *Pickering*, 391 U.S. at 571–72.

<sup>64</sup> *Connick*, 461 U.S. at 150–51.

<sup>65</sup> *Id.*

If the latter outweighs the former, the employee can be disciplined.<sup>66</sup>

Justice Breyer sets these cases aside, since they do not involve mistake of fact and thus “did not present the kind of question at issue here.”<sup>67</sup> But that is not so. On the contrary, they are directly relevant to the question presented in *Heffernan*, because in these cases the basis for the employee’s First Amendment right is that the employee has spoken on a matter of public concern.<sup>68</sup> Absent public concern speech, the public employee speech doctrine, as it has been understood since *Pickering*, does not apply to the interaction between the employer and the employee.<sup>69</sup> The crucial fact, which Justice Breyer never directly addresses, is that *Heffernan* was *not* speaking on a matter of public concern.

A cogent argument can be made in support of a different approach to public employee speech. It involves shifting attention away from what the employee did or did not do, and turns instead to the purpose behind the doctrine.<sup>70</sup> The purpose of First Amendment protection of public employee speech on matters of public concern is to encourage that speech.<sup>71</sup> When the supervisor acts with a bad motive, he often suppresses protected speech. His motive depends on his perception of the facts. Reasoning along these lines, *Heffernan*’s lawyers, as well as the United States as *amici curiae*, advanced the view that “[a] First Amendment retaliation claim is predicated on the employer’s perception of the employee’s speech or association, and the employer’s decision to fire or demote the employee because of that perception.”<sup>72</sup> Circuit

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<sup>66</sup> *Id.*

<sup>67</sup> *Heffernan*, 136 S. Ct. at 1417.

<sup>68</sup> *Connick*, 461 U.S. at 146; *Pickering*, 391 U.S. at 571–72.

<sup>69</sup> *Connick*, 461 U.S. at 146.

<sup>70</sup> See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198 (1988) (arguing that “the most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment”).

<sup>71</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2005) (“[T]he First Amendment protects a public employee’s political affiliation which caused the dismissal.”).

<sup>72</sup> Brief for Petitioner, *supra* note 38, at 14; see also Brief for the United States, *supra* note 39, at 11 (“When the government acts with the purpose of suppressing disfavored political association . . . it violates the First Amendment.”).

court precedent was available to support such a holding.<sup>73</sup> Whatever the merit of that approach, the key point is that that the Court did not adopt the “perception” theory of First Amendment rights, at least not explicitly. It turned instead to the supervisors’ mistake of fact and drew an analogy to the mistake made in *Waters*.<sup>74</sup>

2. *The Waters Analogy.* In order to rely on *Waters*, the Court compares the mistake made in that case to the mistake made in *Heffernan*.<sup>75</sup> Justice Breyer then asserts that mistake should function in the same way in the two contexts, since, as he puts it, “what is sauce for the goose is normally sauce for the gander.”<sup>76</sup> But analogies are treacherous, because their force depends on relevant similarity between the items that are analogized.<sup>77</sup> It is all too easy to focus on a similarity that is not relevant. That is the problem here. Since supervisors made mistakes in both, the two cases are superficially similar.<sup>78</sup> But the mistakes relate to entirely different issues and do not provide the *relevant* similarity needed for a powerful argument from analogy.

In *Waters*, the Court did not have to decide whether or not the plaintiff’s speech was a matter of public concern.<sup>79</sup> The supervisor’s mistake was relevant to an issue that comes *after* that one: the *Connick* constraint on liability. A majority of the Justices endorsed the view that the employer’s interests in an efficient workplace sufficed to justify the firing, even if it was based on a mistake as to what the employee said.<sup>80</sup> The holding in *Waters* is that, despite the public concern content of the speech, the employer’s mistake may be excused, so long as the employer

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<sup>73</sup> See *Dye v. Office of the Racing Comm’n*, 702 F.3d 286, 299–300 (6th Cir. 2012) (agreeing with the First and Tenth Circuits’ holdings that a retaliation claim can be based on an employee’s political affiliation which caused the dismissal).

<sup>74</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

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

<sup>76</sup> *Id.*

<sup>77</sup> See Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) (stating arguments from analogy succeed only if “A and B are ‘relevantly’ similar, and . . . there are not ‘relevant’ differences between them”).

<sup>78</sup> Compare *Heffernan*, 136 S. Ct. at 1416, with *Waters v. Churchill*, 511 U.S. 661, 663 (1994).

<sup>79</sup> 511 U.S. at 680.

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

undertook a reasonable investigation.<sup>81</sup> By contrast, the supervisor's mistake in *Heffernan* relates to an entirely different issue, one that is *anterior* to the *Waters* employer-interest issue. It was a mistake as to whether Jeffrey Heffernan engaged in protected speech in the first place.<sup>82</sup> If he did not, the speech-protective *Pickering/Connick* doctrine is not triggered.<sup>83</sup> There is no relation between the two issues on which the employers made mistakes, and no basis for an argument by analogy from the holding with regard to the *Waters* mistake to the proper treatment of the *Heffernan* mistake. To put this point in a different way, suppose the Court had adopted the "perception" theory of First Amendment rights proposed by Heffernan's lawyer.<sup>84</sup> The viability of that theory neither needs nor benefits from *Waters*, because *Waters* does not address the content of First Amendment rights. It addresses the content of a good excuse for firing someone who has already exercised First Amendment rights.<sup>85</sup>

3. *Consequences of a Constitutional Holding.* Unless it is cabined, the "constitutional rights" reading of *Heffernan* could morph into a principle, or at least an argument, that misperception of the facts coupled with unconstitutional motivation can give rise to a First Amendment violation. That principle, in turn, may have impact beyond the public employee speech context. Suppose the police take steps to close down a movie theater, mistakenly believing that the movies are constitutionally protected, when in fact they are not. Suppose officials regulate advertising that they mistakenly believe is constitutionally protected. Suppose they mistakenly believe that a planned demonstration on public property is protected, though it is not. They attempt to suppress it, but fail only because bad weather keeps the protesters at home. Have they committed violations of First Amendment rights? While all of these hypotheticals could be distinguished from *Heffernan*, if only on the

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<sup>81</sup> *Id.* at 679–80.

<sup>82</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016).

<sup>83</sup> *See id.* at 1423 (Thomas, J., dissenting) (noting that "to state a First Amendment retaliation claim, the public employee must allege that she spoke on a matter of public concern").

<sup>84</sup> Brief for Petitioner, *supra* note 38, at 12–14.

<sup>85</sup> *Waters v. Churchill*, 511 U.S. 661, 667 (1994).



ground that none of them are public employee speech cases, the “constitutionally impermissible motive” principle would add a new and potentially troublesome dimension to adjudication of First Amendment issues. But my point is not that the principle is unsound. I maintain only that it is implausible to read *Heffernan* as having introduced such a potentially broad doctrine into First Amendment law without laying a foundation for it, articulating it clearly, exploring its implications and limits, or even responding to the dissent’s assertion that the Court has done no such thing.

One might avoid these consequences by framing the putative constitutional right in a somewhat different way. The employee’s right to speak on a matter of public concern has a corollary: a right not to speak. Jeffrey Heffernan chose not to speak and was demoted.<sup>86</sup> Therefore, the argument goes, the demotion deprived him of a constitutional right. As Justice Thomas points out in dissent, the problem with this line of reasoning is that the plaintiff in a retaliation claim is obliged to show a causal connection between the right and the adverse action.<sup>87</sup> In the public employee speech context, causation is determined by identifying the reason for the adverse employment action.<sup>88</sup> Heffernan was not fired because he exercised his constitutional right *not* to speak. He was fired because his supervisor mistakenly believed he had exercised his constitutional right *to* speak.<sup>89</sup>

#### IV. THE “MUNICIPAL POLICY” GROUND

The First Amendment issue was the sole focus of the lower courts, the petition for certiorari, and the briefs filed by the parties and *amici*.<sup>90</sup> But parts of Justice Breyer’s opinion suggest that the Court treats the case in a rather different way. Under § 1983, a local government is liable for some, but not all, constitutional

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<sup>86</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>87</sup> *Id.* at 1421 (Thomas, J., dissenting).

<sup>88</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1976).

<sup>89</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>90</sup> See generally *Heffernan v. City of Paterson*, 2 F. Supp. 3d 563 (D.N.J. 2014), *aff’d*, *Heffernan v. City of Paterson*, 777 F.3d 147 (3d Cir. 2015); Petition for Writ of Certiorari, *supra* note 14; Brief for Petitioner, *supra* note 38.

violations committed by its officers.<sup>91</sup> While there is no *respondeat superior* liability, municipalities are liable for acts by officials that meet the Court's test for "official policy."<sup>92</sup> The Court may have intended to base liability on this ground. The dissent so asserts,<sup>93</sup> and Justice Breyer does not repudiate that assertion. The distinctive feature of this theory is that, in principle, it could succeed without showing a violation of Heffernan's First Amendment rights. The problem for this theory is that pre-*Heffernan* doctrine *does* require a violation of the plaintiff's constitutional rights.<sup>94</sup> Thus, this reading differs from the first only if the Court has changed the municipality doctrine without saying so.

#### A. PATERSON'S UNLAWFUL POLICY

The Court's discussion of municipal policy is brief, oblique, and buried deep within the opinion.<sup>95</sup> A reader unfamiliar with § 1983 doctrine could easily overlook the significance of certain code words. The relevant passage follows a brief discussion of the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech."<sup>96</sup> Turning to the municipal liability issue, the Court said, in full:

The Government acted upon a constitutionally harmful policy whether Heffernan did or did not in fact engage in political activity. That which stands for a "law" of "Congress," namely, the police department's reason for

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<sup>91</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>92</sup> *Id.* at 690. Municipal "custom" is another basis for liability, *id.* at 690–91, but the facts do not suggest grounds for finding a custom here and the Court does not rely at all on that ground.

<sup>93</sup> *Heffernan*, 136 S. Ct. at 1420 (Thomas, J., dissenting).

<sup>94</sup> *See, e.g., Waters v. Churchill*, 511 U.S. 661, 668 (1994) (discussing the plaintiff's constitutional rights).

<sup>95</sup> *Heffernan*, 136 S. Ct. at 1418. In addition, neither the Third Circuit, *see* 777 F.3d 147 (3d Cir. 2015), nor the District Court, *see* 2 F. Supp. 3d 563 (D.N.J. 2014), nor any of the briefs address this local government liability issue. The only issue presented in the Petition for Certiorari was "[w]hether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate." Petition for Writ of Certiorari, *supra* note 14, at i.

<sup>96</sup> U.S. CONST. amend. I.

taking action, “abridge[s] the freedom of speech” of employees aware of the policy. *And Heffernan was directly harmed, namely, demoted, through application of that policy.*<sup>97</sup>

This passage states a conclusion—that Heffernan was demoted due to a constitutionally harmful policy—but it leaves out the doctrinal background of local government liability and the steps leading to a § 1983 municipal liability holding. While one might have expected the opinion to include that framework,<sup>98</sup> most of those steps can be discerned, at least in a tentative and approximate way, by applying settled § 1983 doctrine to the circumstances of the case. Under that doctrine, municipal “policy” consists not only of rules of general application, but also includes the single act of a municipal policymaker.<sup>99</sup> The demotion was the act of Heffernan’s “supervisors,” which included Wittig, the police chief.<sup>100</sup> A plausible reading of the case is that the Court views Chief Wittig as the policymaker for police department employee discipline, and that the city’s policy is embodied in the act of demoting Heffernan. Since the dismissal was based on a constitutionally impermissible motive of a final policymaker, it was based on a constitutionally impermissible policy.

This line of reasoning spells out what the Court must have in mind in referring to Paterson’s “constitutionally harmful policy” and the injury to Heffernan “through application of that policy.”<sup>101</sup> Spelling it out, however, exposes an ambiguity in the Court’s rationale: Does the Court mean to hold that the City of Paterson, through the act of its police chief, violated Heffernan’s constitutional rights? Or does it mean to hold that the

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<sup>97</sup> *Heffernan*, 136 S. Ct. at 1418–19.

<sup>98</sup> *See, e.g., Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) (“A municipality or other local government may be liable under this section if the governmental body itself ‘subjects’ a person to a deprivation of rights or ‘causes’ a person ‘to be subjected’ to such a deprivation.”).

<sup>99</sup> *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). In *Pembaur*, the Court rejected the view taken by Justice Powell in a dissenting opinion joined by Chief Justice Burger and Justice Rehnquist, that “policy” consists only of rules of general applicability. *See id.* at 499 (Powell, J., dissenting).

<sup>100</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>101</sup> *Id.* at 1418–19.

constitutionally suspect motivation of the police chief—the “constitutionally harmful policy”—caused an injury, the demotion, that is not itself a violation of a constitutional right? Both of these possible answers are dubious under current doctrine. Problems with the former are discussed in Part III. The next section shows why the latter falls short, unless the Court means to make new law on local government liability, without an acknowledgement of the change.

#### B. OBSTACLES TO THE “§ 1983 MUNICIPAL LIABILITY” THEORY

The City of Paterson might be liable under § 1983 on the ground that the demotion was caused by an unconstitutional official policy, or even, in the Court’s terminology, a “constitutionally harmful” official policy.<sup>102</sup> Starting from the black letter rule that the single act of a municipality’s final policymaker is the city’s policy,<sup>103</sup> the theory is that the police chief “acted upon a constitutionally harmful policy.”<sup>104</sup> A resulting injury is also required.<sup>105</sup> Despite the First Amendment rhetoric elsewhere in the opinion, the Court does not meet this prong by an assertion that Heffernan’s constitutional rights were violated. Rather, “Heffernan was directly harmed, namely, demoted, through application of that policy.”<sup>106</sup> This statement of the holding provides yet another reason to doubt the “constitutional rights” version of the case.

What is more, the municipal liability theory does not, under settled doctrine, sidestep the need to establish (a) a violation of the plaintiff’s constitutional rights, and (b) a causal link between the policy and the violation of his constitutional rights. Here the problem is that (a) is missing, unless the discussion in Part II is mistaken. Thus, the Court’s reluctance to make a forthright statement that Heffernan’s constitutional rights were violated is

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<sup>102</sup> *Id.* at 1418.

<sup>103</sup> *See Miller v. Compton*, 122 F.3d 1094, 1100 (8th Cir. 1997) (explaining that municipal liability may arise from a single act of a policymaker, but “the act must come from one in an authoritative policy making position and represent the official policy of the municipality”).

<sup>104</sup> *Heffernan*, 136 S. Ct. at 1418.

<sup>105</sup> *Miller*, 122 F.3d at 1099.

<sup>106</sup> *Heffernan*, 136 S. Ct. at 1419.

also a problem for the “official policy” rationale. The doctrinal objection to the § 1983 rationale comes from *City of Los Angeles v. Heller*, a case in which the plaintiff was injured by police officers in the course of an arrest.<sup>107</sup> In his § 1983 suit against the officers and the city, he raised two Fourth Amendment claims: that the arrest was without probable cause and that the officers used excessive force.<sup>108</sup> As grounds for recovery against Los Angeles, he “contended that the city and the Police Department had adopted a policy of condoning excessive force in making arrests,” and introduced evidence at the trial in support of that assertion.<sup>109</sup> The District Court bifurcated the trial.<sup>110</sup> In the first trial against one of the officers, the jury was instructed solely on the constitutional issues and returned a verdict for the officer.<sup>111</sup> The Supreme Court held that the district judge correctly dismissed the case against Los Angeles: “If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.”<sup>112</sup>

Justice Thomas’s *Heffernan* dissent identifies the problem with the Court’s effort to elide this objection. He points out that an attempt to violate constitutional rights is not by itself a violation of those rights.<sup>113</sup> Here the attempt to violate a right did result in some injury, the demotion.<sup>114</sup> But proof that the plaintiff was harmed by the demotion does not amount to proof that his constitutional right was violated. Since the demotion did not violate a constitutional right, it was not “the right kind of

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<sup>107</sup> 475 U.S. 796 (1986) (per curiam).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 801–02 (Stevens, J., dissenting).

<sup>110</sup> *Id.* at 797.

<sup>111</sup> *Id.* at 798.

<sup>112</sup> *Id.* at 799. The issue here is whether the case can proceed against Los Angeles, given the finding of no constitutional violation. Whether the district court’s ruling on the constitutional issue is correct is a distinct issue, which can be raised on appeal.

<sup>113</sup> See *Heffernan*, 136 S. Ct. at 1422 (Thomas, J., dissenting) (“The mere fact that the government has acted unconstitutionally does not necessarily result in the violation of an individual’s constitutional rights, even when that individual has been injured.”).

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

injury,”<sup>115</sup> but was instead a non-constitutional consequence of the failed attempt.

Perhaps the Court meant to overrule or in some way distinguish *Heller* without discussion of the earlier case, much less an explanation of why it should be repudiated or distinguished. Indeed, this “municipal liability based on a policymaker’s bad motive” rationale is in some respects a more plausible account of the case than the “constitutional rights” thesis. The dissent describes the majority opinion as a municipal liability ruling, and the majority does not dispute that description.<sup>116</sup> Although Justice Thomas protests that Heffernan did not suffer the right kind of injury, he does not cite *Heller*. That omission may be significant. As precedent, *Heller* is a candidate for reconsideration, if only because it was a summary disposition by a per curiam opinion without briefing or argument.<sup>117</sup> The *Heller* holding drew a dissent from Justice Stevens, joined by Justice Marshall.<sup>118</sup>

On the other hand, the “municipal policy” reading of *Heffernan* is based on just three sentences in the opinion, none of which actually refer to the § 1983 local government liability doctrine they purportedly apply. Neither the lower courts nor the parties nor the *amici* addressed either local government liability or *Heller*.<sup>119</sup> If the Court did overrule or distinguish *Heller*, it did so *sub silentio*, which is neither the usual practice nor a recommended one.<sup>120</sup> A more likely explanation for the structure and content of the *Heffernan* opinion is that the majority set out to find in favor of Jeffrey Heffernan, but it wanted to make as little law as possible in reaching that result. It did not intend to overrule or distinguish *Heller*, and it did not intend to recognize a novel First Amendment

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

<sup>116</sup> Compare *id.* (discussing municipal liability), with *id.* at 1416–19 (majority opinion) (failing to refute the dissent’s characterization).

<sup>117</sup> *Heller*, 475 U.S. at 797.

<sup>118</sup> *Id.* at 800–01 (Stevens, J., dissenting). Justice Marshall also dissented separately to object to the summary disposition. *Id.* at 800 (Marshall, J., dissenting).

<sup>119</sup> See generally *Heffernan v. City of Paterson*, 2 F. Supp. 3d 563 (D.N.J. 2014), *aff’d*, *Heffernan v. City of Paterson*, 777 F.3d 147 (3d Cir. 2015); Brief for Petitioner, *supra* note 38; Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 39.

<sup>120</sup> See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987) (arguing judges should give reasons for their decisions so that they “can be debated, attacked, or undefended”).

principle either. With this set of goals and constraints in mind, Justice Breyer cobbled together an opinion that consists largely of rhetorical sleight of hand, gaps in reasoning on the § 1983 issue, subtle evasions of the constitutional issue, and the *Waters* red herring.

#### V. TWO ALTERNATE PATHS TO THE RESULT

The disconnect between the intuition that Jeffrey Heffernan ought to win and the weakness of the Court's opinion may simply mean that the Justices were divided on the merits of the "perception" theory of the First Amendment advanced by Heffernan and the United States. Another possibility is that the Court could not find a way to bridge the gap between the intuition that Jeffrey Heffernan should win and the absence of means at hand to achieve that goal without creating more problems later. For either of these reasons, the Court may have chosen to cope with its dilemma by issuing a vague and fragmentary opinion that, by design, would have little impact on future litigation.

But the Court's kernel of insight—that Jeffrey Heffernan was treated unfairly and ought to win—deserves further development for the benefit of others who find themselves in a similar predicament. The disconnect should prompt efforts to construct a more convincing rationale. One possibility is to sidestep the objections to the "First Amendment right" ground by shifting the source of the right from constitutional law to federal common law, more specifically, to "constitutional common law." Another is to focus on a different aspect of the case. Even if free speech values were not at issue, Wittig's demotion of Heffernan would be objectionable, simply because it was arbitrary and unjustified. In principle, Heffernan may have a good Equal Protection claim, though certain features of current Equal Protection doctrine may foreclose it. If Jeffrey Heffernan had chosen to pursue that route, his case would have presented an opportunity for modifying those limits on the Equal Protection theory.

## A. CONSTITUTIONAL COMMON LAW

By “constitutional common law,” I mean the “substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.”<sup>121</sup> Viewed in this way, *Heffernan* may be understood and defended as a judge-made principle aimed at enforcement of the constitutional values behind the public employee speech doctrine. But the holding that *Heffernan* is entitled to sue under § 1983 does not have the status of a constitutional holding, which would carry with it further implications for other areas of First Amendment doctrine. Nor is such a federal common law right vulnerable to the “counter-majoritarian difficulty,” which charges that judicial intervention by means of rulings on constitutional law is anti-democratic because the legislature and the executive cannot revise constitutional rulings.<sup>122</sup> As a common law rule, *Heffernan*’s right to sue would be subject to both legislative and judicial modification.

Constitutional common law is a variant of federal common law. *Erie Railroad Co. v. Tompkins* held that “[t]here is no federal general common law.”<sup>123</sup> But on the same day, in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, the Court held that “whether the water of an interstate stream must be apportioned between . . . two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.”<sup>124</sup> In the decades since *Hinderlider*, the Court has made federal common law in an array of situations in which federal interests were at stake, including admiralty,<sup>125</sup> foreign

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<sup>121</sup> Monaghan, *supra* note 25, at 2–3.

<sup>122</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962) (stating “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people”).

<sup>123</sup> 304 U.S. 64, 78 (1938).

<sup>124</sup> 304 U.S. 92, 110 (1938).

<sup>125</sup> *E.g.*, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970) (holding that a wrongful death action under federal maritime law is maintainable for breach of maritime duties in order to “assure uniform vindication of federal policies”).



affairs,<sup>126</sup> U.S. government contracts,<sup>127</sup> and filling in gaps in federal statutes.<sup>128</sup> In each of these contexts, some national interest justifies the creation of a federal common law rule.

In constitutional common law, the national interest is the enforcement of constitutional values. For example, the Fourth Amendment exclusionary rule is aimed at deterring constitutional violations.<sup>129</sup> But there is no constitutional right on the part of a criminal defendant to have illegally obtained evidence excluded from consideration.<sup>130</sup> Whether to apply it in a given situation depends on a weighing of costs and benefits.<sup>131</sup> In *Stone v. Powell*, for example, the issue was whether to allow a state prisoner to assert violation of Fourth Amendment rights in a federal habeas corpus proceeding.<sup>132</sup> In his criminal trial in state court, the prisoner had asserted the illegality of a search that produced evidence leading to his conviction, and had thus sought to have the evidence excluded from the jury's consideration.<sup>133</sup> The state court denied the Fourth Amendment claim and he was convicted.<sup>134</sup> He then brought a federal habeas corpus action to challenge the constitutional validity of his conviction, on the ground that the evidence was obtained by a search that violated his Fourth Amendment rights.<sup>135</sup> The Court said that the aim of the exclusionary rule is "the deterrence of police conduct that violates Fourth Amendment rights," that "the application of the rule has

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<sup>126</sup> *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436–37 (1964) (holding that the act of state doctrine applies to a foreign expropriation because it serves "both the national interest and progress toward the goal of establishing the rule of law among nations").

<sup>127</sup> *E.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (holding federal law can shield contractors from liability for design defects in military equipment because state laws can present "significant conflict" with federal policy and must be displaced").

<sup>128</sup> *E.g.*, *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 688 (1978) (interpreting the Sherman Antitrust Act, stating Congress "expected the Courts to give shape to the statute's broad mandate by drawing on common-law tradition").

<sup>129</sup> *See, e.g.*, *Davis v. United States*, 564 U.S. 222, 236 (2011) (discussing deterrence and the Fourth Amendment).

<sup>130</sup> *Monaghan, supra* note 25, at 4 (citing *United States v. Calandra*, 414 U.S. 338 (1974)).

<sup>131</sup> *See id.* at 3–6.

<sup>132</sup> 428 U.S. 465, 465 (1976).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

been restricted to those areas where its remedial objectives are thought most efficaciously served,” and that its application to any “particular context” depends on balancing its costs against its deterrent value.<sup>136</sup> Turning to the habeas context, the Court stated that the cost of the application of the rule was great, because it “deflects the truthfinding process and often frees the guilty.”<sup>137</sup> On the other side of the balance, the additional deterrent effect of applying the rule on habeas would be small, because the police already face the risk that evidence will be excluded at trial.<sup>138</sup> Thus, “the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs.”<sup>139</sup>

Another prominent example is the doctrine stemming from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>140</sup> in which the Court created a cause of action to recover damages for Fourth Amendment violations committed by federal officials.<sup>141</sup> Yet today the limits on that cause of action make it clear that access to that cause of action rule is not a matter of constitutional right. It may be denied if some other roughly similar remedy is available, or if “special factors counseling hesitation” weigh heavily against it.<sup>142</sup> The most recent cases are *Wilkie v. Robbins*<sup>143</sup> and *Minneeci v. Pollard*.<sup>144</sup> *Wilkie* denied a *Bivens* remedy to a landowner who complained about federal officials who, in an effort to induce him to grant the government an easement, interfered with his property rights by various acts of petty harassment.<sup>145</sup> The special factors counseling hesitation included “the difficulty of defining limits to legitimate zeal on the public’s behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private

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<sup>136</sup> *Id.* at 486–88 (citation omitted) (internal quotation marks omitted).

<sup>137</sup> *Id.* at 490.

<sup>138</sup> *Id.* at 493.

<sup>139</sup> *Id.*

<sup>140</sup> 403 U.S. 388 (1971).

<sup>141</sup> See Monaghan, *supra* note 25, at 23–24.

<sup>142</sup> *Bivens*, 403 U.S. at 396.

<sup>143</sup> 551 U.S. 537 (2007).

<sup>144</sup> 132 S. Ct. 617 (2012).

<sup>145</sup> 555 U.S. at 537.

interests that the Government’s employees engage in every day.”<sup>146</sup> In *Minnecci* a federal inmate held in a private prison was denied a *Bivens* remedy because, in the Court’s view, state tort law provided an adequate remedy for an inmate at a privately-managed federal prison who complained about his medical treatment.<sup>147</sup>

1. *A Constitutional Common Law Rationale for Heffernan.* Both *Bivens* and the exclusionary rule are concerned with constitutional remedies.<sup>148</sup> Justice Breyer’s majority opinion in *Heffernan* evokes a remedial theme as well, though in the context of recognizing a substantive right. After the *Waters* analogy and the shadowy references of municipal policy, Justice Breyer turns to “the constitutional implications of a rule that imposes liability.”<sup>149</sup> Justice Breyer points out that

The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. . . . The upshot is that a discharge or demotion based upon an employer’s belief that the employee has engaged in protected activity can cause the same kind and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.<sup>150</sup>

The imposition of liability will deter these impermissibly motivated employment actions and thus further First Amendment values, just as the exclusionary rule deters illegal searches and the *Bivens* doctrine deters federal officers from violating a range of constitutional rights.

In support of its “constitutional harm” reasoning, the Court cites *Gooding v. Wilson*,<sup>151</sup> a case decided under the First

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<sup>146</sup> *Id.* at 554.

<sup>147</sup> 132 S. Ct. at 624–25.

<sup>148</sup> See *Bivens*, 403 U.S. at 396 (discussing the exclusionary rule).

<sup>149</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016).

<sup>150</sup> *Id.* at 1419.

<sup>151</sup> 405 U.S. 518, 521 (1972).

Amendment overbreadth doctrine.<sup>152</sup> That doctrine deals with a danger presented by regulatory statutes that sweep too broadly, in a way that goes beyond the permissible scope of the government's police power.<sup>153</sup> Overbroad statutes are problematic because they cover not only matters the government is empowered to regulate but protected speech as well.<sup>154</sup> In such a case, a litigant whose acts are regulated by the statute may challenge the provision on First Amendment grounds, even if his own conduct is not protected by the First Amendment.<sup>155</sup> In *Gooding*, an anti-war demonstrator threatened to kill a police officer and was convicted under a state law that broadly prohibited "opprobrious words or abusive language, tending to cause a breach of the peace."<sup>156</sup> The Court did not discuss the facts and did not decide whether the defendant's words were or were not constitutionally protected. Instead it focused on the breadth of the statute, found it faulty on free speech grounds, and affirmed the overruling of the conviction.<sup>157</sup> In his majority opinion, Justice Brennan explained that, when states regulate speech, litigants may attack "overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."<sup>158</sup> The underlying policy is that the overbroad statute will have a chilling effect on protected speech, so much so that even someone whose words are not protected should be allowed to object to it, in order to eliminate the chilling effect sooner rather than later.<sup>159</sup>

Justice Breyer cites *Gooding* in order to stress a similarity between the overbreadth context and *Heffernan's* mistake of fact

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<sup>152</sup> *Heffernan*, 136 S. Ct. at 1419.

<sup>153</sup> See *Gooding*, 405 U.S. at 530–31 (Burger, C.J., dissenting) (recognizing that the overbreadth doctrine allows courts to invalidate statutes with language resulting in "application . . . beyond constitutional bounds").

<sup>154</sup> See *id.* (discussing the potential for overly broad statutes to deter First Amendment speech).

<sup>155</sup> See KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1347 (19th ed. 2016) (explaining that "overbreadth is an exception to the usual rules of standing").

<sup>156</sup> 405 U.S. at 519.

<sup>157</sup> *Id.* at 521–22, 528.

<sup>158</sup> *Id.* at 521 (citation and quotation marks omitted).

<sup>159</sup> See SULLIVAN & FELDMAN, *supra* note 155, at 1347 (indicating that concern for the chilling effect motivates courts to use the overbreadth analysis).

problem.<sup>160</sup> In both, someone challenges official action taken against him, and a ruling for or against the challenge would enhance or diminish the protection of speech. Because the two are not precisely parallel, the Court uses a “*cf.*” signal for the *Gooding* citation.<sup>161</sup> According to *The Bluebook*, the “*cf.*” signal stands for the proposition that “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.”<sup>162</sup> The evident point of the signal in this context is to indicate that the two situations—overbreadth and the *Heffernan* rule—differ in the way a chilling effect is produced. Just as someone may challenge an overbroad statute in order to protect speech, even though his own conduct is not constitutionally protected, so also someone who is demoted on account of a supervisor’s impermissible motive should be allowed to challenge the demotion in order to dissuade governments from acting on such motives, even though he did not engage in protected speech at all. The ultimate aim of both rules is to encourage the *system* of free speech.

The overbreadth doctrine illustrates a more general theme. The First Amendment is more than a source of individual rights. Freedom of speech, of assembly, and of the press are necessary to proper functioning of our system of government, which is based in part on popular sovereignty.<sup>163</sup> In order to participate effectively in public affairs, citizens need access to information.<sup>164</sup> They also need to be able to discuss issues freely and share information with others, and to do so without fear of punishment.<sup>165</sup> This “self-government” rationale is among the strongest justifications for protecting rights of speech, press, and assembly. It is the driving force behind the watershed ruling in *New York Times v.*

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<sup>160</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016).

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

<sup>162</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a) (Columbia Law Review Ass’n et al. eds., 20th ed. 2015). Law review editors typically force authors to include an explanatory parenthetical after a “*cf.*” cite. Justice Breyer is not subject to that sort of oversight.

<sup>163</sup> See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 323–25 (1816) (noting the Constitution of the United States was not established by the states, but by the people).

<sup>164</sup> See SULLIVAN & FELDMAN, *supra* note 155, at 936–38 (noting the importance of free speech in self government).

<sup>165</sup> *Id.*

*Sullivan*<sup>166</sup> that public officials may not recover for defamation unless they show that the defamatory statement was made with knowledge of falsity or reckless disregard of truth or falsity.<sup>167</sup>

Four years after *New York Times*, the Court relied on that theme in *Pickering v. Board of Education*,<sup>168</sup> the leading public employee speech case. Writing for the Court in *Pickering*, Justice Marshall cited *New York Times* and reiterated “[t]he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment.”<sup>169</sup> He then noted that “dismissal from public employment is . . . a potent means of inhibiting speech.”<sup>170</sup> On this basis, *Pickering* held that “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment,” unless the teacher makes knowingly or recklessly false statements.<sup>171</sup> The *Heffernan* opinion touches on the systemic role of freedom of speech. Though Justice Breyer does not discuss First Amendment theory, he takes pains to point out that the phrasing of the First Amendment does not simply articulate individual rights against government. Instead, the language targets Congress and, by extension, all of government, which “shall make no law . . . abridging the freedom of speech.”<sup>172</sup>

Federal common law always runs the risk of giving federal judges too much leeway to make rules on topics that are best left

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<sup>166</sup> 376 U.S. 254, 280–83 (1964).

<sup>167</sup> See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18 (1965) (noting knowledge of falsity as an important qualification to “the *New York Times* principle”); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191 (commenting that “[t]he touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy”).

<sup>168</sup> 391 U.S. 563 (1968).

<sup>169</sup> *Id.* at 573.

<sup>170</sup> *Id.* at 574.

<sup>171</sup> *Id.* In *Connick v. Myers*, 461 U.S. 138, 154 (1983), the Court qualified this rule, holding that the government can fire the employee for sufficiently disruptive speech, even if the speech is on a matter of public concern and not at all defamatory.

<sup>172</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (quoting U.S. CONST. amend. I).

to Congress or the states.<sup>173</sup> The systemic value of public employee speech furnishes a response to that critique. Whatever the appropriate scope of constitutional common law rights may be in other constitutional domains, the self-government rationale for protecting speech supports *Heffernan*, which reaches official acts that do not themselves violate constitutional rights but nonetheless threaten speech on matters of public concern. Thus, the systemic value of the First Amendment not only helps to justify the recognition of a common law right in *Heffernan* but also provides a rationale for limits on the extension of substantive constitutional common law rights beyond the category of “speech of matters of public concern.” Other constitutional doctrines may not warrant the creation of common law rights. Consider, for example, the First Amendment protection of commercial speech, or the protection of sexually oriented speech that is neither obscene nor child pornography. Arguably, these norms do not relate to self-government or any other systemic value, but are strictly individual rights. If that characterization is correct, it could be argued that the Constitution both defines those rights and sets their outer limits. On that view, judicial creation of constitutional common law rights in those contexts would exceed the legitimate authority of the judiciary.<sup>174</sup> But that objection to constitutional common law rights does not apply to judge-made rules that limit regulation of public employee speech on matters of public concern.

2. *Constitutional Common Law and § 1983*. Heffernan sued under 42 U.S.C. § 1983.<sup>175</sup> Both the majority and the dissent seem to take the position that he had to assert a violation of a constitutional right in order to use that statute.<sup>176</sup> The Court

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<sup>173</sup> Monaghan, *supra* note 25, at 11.

<sup>174</sup> Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118 (1978) (questioning the authority of the Court to protect constitutional liberties beyond constitutional minima by imposing rules on “state courts and state officials . . . grounded not in the constitutional rights . . . but rather in a subconstitutional calculation of costs and benefits”).

<sup>175</sup> *Heffernan* 136 U.S. at 1416.

<sup>176</sup> *Id.* at 1417, 1422. While some federal statutory rights can also be vindicated in § 1983 suits, see *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (finding the plain language of the phrase “and laws” in § 1983 includes violations of the Social Security Act), Heffernan did not seek recovery for a statutory violation and there seems to be no applicable federal statutory

frames the issue in a way that suggests that Heffernan either wins on constitutional grounds or not at all by saying “the question is whether the official’s factual mistake makes a critical legal difference. Even though the employee had not in fact engaged in protected political activity, did his demotion ‘deprive’ him of a ‘right . . . secured by the Constitution’? 42 U.S.C. § 1983. We hold that it did.”<sup>177</sup>

This way of putting the question invites the reader to infer that Heffernan could win only if he proved a violation of his constitutional rights. Since he did win, it seems to follow that he did prove a violation of his constitutional rights. The dissent starts from the same premise, that “§ 1983 does not provide a cause of action for unauthorized government acts that do not infringe the constitutional rights of the § 1983 plaintiff.”<sup>178</sup> The dissent finds no constitutional violation and concludes that Heffernan should lose.<sup>179</sup>

Both the majority and the dissent ignore a third alternative. The Court’s quotation from § 1983 is incomplete and does not state the full scope of the statute’s reach. After “Constitution,” it continues on, to include “laws.”<sup>180</sup> That term denotes that the § 1983 cause of action is not limited to litigation that alleges constitutional violations. *Maine v. Thiboutot* held that § 1983 can be used to enforce federal statutes.<sup>181</sup> The viability of a constitutional common law reading of *Heffernan* depends on whether the “laws” doctrine can be extended to cover a common law right.<sup>182</sup> This is an open question, as the Court does not often engage in the kind of constitutional common law making that *Heffernan* may illustrate. In a somewhat analogous context, however, the Court has accorded federal common law the same

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right. 136 U.S. at 1416. Nonetheless, the doctrine on these suits for violation of federal “laws” is relevant to *Heffernan*, as will become apparent in the ensuing paragraphs.

<sup>177</sup> *Heffernan*, 136 S. Ct. at 1416.

<sup>178</sup> *Id.* at 1422 (Thomas, J., dissenting).

<sup>179</sup> *See id.*

<sup>180</sup> 42 U.S.C. § 1982 (2012).

<sup>181</sup> 448 U.S. 1, 4 (1980).

<sup>182</sup> The dissent shows that the Court’s “constitutional right” reasoning is dubious, points out that there is no statute granting the right plaintiff asserts, and declares victory. But, like the majority, it ignores this possibility. *Heffernan*, 136 S. Ct. at 1422 (Thomas, J., dissenting).



status as federal statutes. Federal statutory causes of action can be brought in federal court under the “federal question” jurisdiction of those courts, which authorizes federal district court jurisdiction over “all civil actions arising under the . . . laws . . . of the United States.”<sup>183</sup> In *Illinois v. Milwaukee* the issue was whether federal common law causes of action are also covered by the federal courts’ jurisdiction over federal questions.<sup>184</sup> The Court rejected a distinction between statutory law and common law. It saw “no reason not to give ‘laws’ its natural meaning, and therefore conclude[d] that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.”<sup>185</sup>

In light of *Illinois v. Milwaukee* and the “laws” language in § 1983, the Court probably would not distinguish between federal common law rights and federal statutory rights for the purpose of § 1983 either. But another step is required in order to justify access to § 1983 for constitutional common law claims. That statute cannot be used to assert *all* federal statutory violations. *Middlesex County Sewerage Authority v. National Sea Clammers Association* ruled that two requirements must be satisfied.<sup>186</sup> The § 1983 remedy is not available if “the statute at issue [is not] the kind that created enforceable ‘rights’ under § 1983,” or if “Congress had foreclosed private enforcement” of the statute.<sup>187</sup> No doubt these requirements would also apply to constitutional common law. After all, the rationale for allowing access to § 1983 is that constitutional common law should get the same treatment as federal statutes.

Both prongs favor access to § 1983 on the facts of *Heffernan*. In order to show why, a bit of background information is needed. The “enforceable right” prong typically trips up plaintiffs who try to rely on federal programs that grant money to state governments and impose restrictions on how it is used. For example, the Family Educational and Privacy Rights Act of 1974 (FERPA)

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<sup>183</sup> 28 U.S.C. § 1331 (2012).

<sup>184</sup> 406 U.S. at 98–101 (1972).

<sup>185</sup> *Id.* at 100.

<sup>186</sup> 453 U.S. 1, 19 (1981).

<sup>187</sup> *Id.*

requires schools that receive federal funding to keep student records confidential.<sup>188</sup> In *Gonzaga University v. Doe*, a student charged that the university violated FERPA by disclosing charges that he had sexually assaulted another student.<sup>189</sup> FERPA contains no authorization of private enforcement.<sup>190</sup> The student brought a § 1983 “laws” suit, seeking damages under a provision of the statute that provided “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization . . . .”<sup>191</sup>

The Court held that this language did not create enforceable rights. It noted, among other things, that the provision was directed at the Secretary of Education, so that the focus was “two steps removed from the interests of individual students . . . and clearly does not confer the sort of *individual* entitlement that is actionable under § 1983.”<sup>192</sup> By contrast, a provision in the Medicaid Act, which provided that “[a] State Plan for medical assistance must provide for making medical assistance available”<sup>193</sup> to certain persons, was “precisely the sort of ‘rights-creating’ language identified in *Gonzaga* as critical to demonstrating a congressional intent to establish a new right.”<sup>194</sup> On its face, *Heffernan*’s recognition of a constitutional common law right to recover damages for a demotion would satisfy this “enforceable right” requirement.

The second prong is generally treated as a default rule in favor of access to § 1983 unless a given statute provides a remedy that is meant to be exclusive. For example, the plaintiff in *City of Rancho Palos Verdes v. Abrams* sought to sue under § 1983 for a violation of the Telecommunications Act, which limits local zoning authority

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<sup>188</sup> *Id.* at 280, 292.

<sup>189</sup> 536 U.S. 273, 277 (2002).

<sup>190</sup> *Id.* at 289.

<sup>191</sup> *Id.* at 277–79 (quoting 20 U.S.C. § 1232g(b)(1) (2012)).

<sup>192</sup> *Id.* at 274–75.

<sup>193</sup> 42 U.S.C. § 1396a(a)(10)(A) (2016).

<sup>194</sup> *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004).

over cellphone towers.<sup>195</sup> Since the Telecommunications Act itself provided a remedy, albeit a more restrictive one than § 1983, the Court confined him to that remedy.<sup>196</sup> The constitutional common law reading of *Heffernan* does not raise this issue, simply because the plaintiff seeks to enforce a judge-made right rather than a statute.<sup>197</sup> Therefore, *Heffernan* does not encounter any statutory remedial scheme that might displace § 1983. In short, a conception of *Heffernan* liability as a constitutional common law right would require a novel holding that § 1983 authorizes litigation to enforce such rights, but there is ample authority to support such a holding.

#### B. EQUAL PROTECTION

The intuition that Jeffrey Heffernan ought to have a remedy has two sources—not only free speech values but also arbitrary treatment by supervisors. Throughout the *Heffernan* litigation, the parties and the courts centered their attention on the First Amendment.<sup>198</sup> But the injustice of the demotion results at least as much from the lack of any good reason for it, especially after Heffernan told his supervisors that they were mistaken, as he claimed to have done in his testimony at trial.<sup>199</sup> Putting the public employee speech issue aside, the case suggests that Chief Wittig acted arbitrarily and capriciously toward Heffernan. In *Village of Willowbrook v. Olech* the Court said that its doctrine on Equal Protection includes a “class of one” theory, which applies to situations “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and

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<sup>195</sup> 544 U.S. 113, 115–18 (2005). *See also* *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) (allowing use of § 1983 to enforce rights under Title IX, and distinguishing *Rancho Palos Verdes* on the ground that the Title IX remedial scheme was far less elaborate than that of the Telecommunications Act).

<sup>196</sup> *Id.* at 127.

<sup>197</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016).

<sup>198</sup> *Heffernan v. City of Paterson*, 2 F. Supp. 3d 563, 567–69 (D.N.J. 2014) (highlighting that through the procedural history of the case, freedom of association and freedom of speech were major issues).

<sup>199</sup> *See id.* at 573. Heffernan had evidently persuaded the jury of his version of the facts, as it awarded him \$105,000 in damages. *Id.* at 567–68.

that there is no rational basis for the difference in treatment.”<sup>200</sup> In *Willowbrook* the plaintiffs claimed that the village had demanded a 33-foot easement to connect their property to the municipal water supply, though it had sought only an 18-foot easement from other property owners.<sup>201</sup> The Court ruled that an Equal Protection violation could be established by proof that there was no good reason for the difference.<sup>202</sup> The underlying principle is that “the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”<sup>203</sup>

If Heffernan could show that Chief Wittig had no other reason for the demotion other than the Chief’s own mistaken impression, he might well be able to prove that he had been treated differently from others without a rational basis. The theory is plausible because it seems unlikely that Wittig could have become chief of police or remained in that position if he routinely engaged in this approach to personnel management. The circumstances of the case reinforce the argument. Chief Wittig had been appointed by the current mayor.<sup>204</sup> Spagnola was the current mayor’s opponent in the upcoming election.<sup>205</sup> Heffernan’s mother asked for a Spagnola yard sign. Heffernan acknowledged his own friendly relations with Spagnola.<sup>206</sup> These facts support Heffernan’s “no rational basis” charge, for a jury may well be persuaded that Wittig acted out of animus toward him, not because of speech but merely because Heffernan was a friend of Wittig’s political enemy.<sup>207</sup>

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<sup>200</sup> 528 U.S. 562, 564 (2000) (per curiam).

<sup>201</sup> *Id.* at 563.

<sup>202</sup> *Id.* at 564.

<sup>203</sup> *Id.* (quoting *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441 (1923)).

<sup>204</sup> *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016).

<sup>205</sup> *Id.*

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

<sup>207</sup> *Cf. Village of Willowbrook*, 528 U.S. at 565–66 (Breyer, J., concurring in the result) (arguing that the presence of vindictiveness, animus, or ill will “is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right”).

Despite the attractions of the “class of one” approach, Heffernan’s lawyer did not pursue it. The problem is the holding in *Engquist v. Oregon Department of Agriculture*.<sup>208</sup> In *Engquist* a supervisor eliminated the plaintiff’s position in the Department of Agriculture and promoted her rival.<sup>209</sup> The plaintiff sued on a “class of one” theory, on the ground that she was fired for “arbitrary, vindictive, and malicious reasons.”<sup>210</sup> The Court did not reject her claim on its facts. It issued a sweeping rule that the “class of one” theory “has no place in the public employment context.”<sup>211</sup> Writing for the Court, Chief Justice Roberts explained that some areas of state action, including public employment, “involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.”<sup>212</sup> Since “employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify,” the “class of one” theory “is simply a poor fit in the public employment context.”<sup>213</sup>

This language raises a big hurdle to the Equal Protection cause of action in a case like *Heffernan*. But the language is more general than it needed to be to resolve cases like *Engquist*. The problem in *Engquist* was that “class of one” suits interfere with government supervisors’ need for discretion in choosing among employees for promotion or dismissal.<sup>214</sup> That is a recurring situation in every government office. It is one that is guaranteed to produce friction and hurt feelings. A rule that allows a disgruntled employee or former employee to sue would significantly hinder the efficient operation of government offices because employees who are passed over will often feel that supervisors have treated them unfairly. Constitutional litigation in the federal courts may not be the optimal way of resolving such disputes.

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<sup>208</sup> 553 U.S. 591 (2008).

<sup>209</sup> *Id.* at 594–95.

<sup>210</sup> *Id.* at 595.

<sup>211</sup> *Id.* at 594.

<sup>212</sup> *Id.* at 603.

<sup>213</sup> *Id.* at 604–05.

<sup>214</sup> *Id.* at 607.

By contrast, the “mistake of fact” issue in *Heffernan* does not involve the exercise of discretion when choosing among employees. It will probably arise much less often. In particular, it seems unlikely that many supervisors would decline to reverse a demotion upon learning of their mistaken premise. Jeffrey Heffernan may have been able to show that he was targeted for unfair treatment, not because he expressed his political beliefs, but because he was a friend of Wittig’s political adversary, or merely because his mother supported that adversary. Heffernan’s case might be distinguished from *Engquist* on this ground, though doing so would require the Court to walk back the broad language of the *Engquist* opinion.

## VI. CONCLUSION

Some legal scholarship criticizes judicial reasoning in order to undermine the rule a court has imposed or the result a court has reached. This Article takes a different approach. It finds fault with the reasons offered by the Court in *Heffernan*, but does not take issue with Jeffrey Heffernan’s victory. For the sake of the development of doctrine over time, it is essential to raise questions about the Court’s reasoning, and all the more so when the result is warranted. Our collective ambition should be to come up with “[i]deas which will stand the test of time as instruments for the solution of hard problems . . . .”<sup>215</sup> If the rationale for the *Heffernan* holding is weak, the case may have little impact outside of its narrow facts. Yet the rule announced in *Heffernan* seems worthy of extension to similar fact patterns. The task is to build a more solid foundation for it than is provided by the Court’s makeshift opinion. For this reason, it seems worthwhile to attempt to justify the outcome by looking outside the opinion for more persuasive alternatives.

In my view, the holding might be extended in either of two directions, depending on which of two alternate rationales is adopted. I have suggested that the difficulties with the “constitutional right” and “local government liability” theories

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<sup>215</sup> Henry M. Hart, Jr., *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

could be overcome by locating the right in federal common law instead of either the First Amendment or § 1983. Another approach is to de-emphasize the free speech dimension of the case and come to the problem from a different angle. Thus, Jeffrey Heffernan might have won under the “class of one” theory of recovery under the Equal Protection clause, had he persuaded the Court to limit the unduly broad language of *Engquist*.