# GOVERNMENT EMPLOYEE, ARE YOU A "CITIZEN"?: *GARCETTI v. CEBALLOS* AND THE "CITIZENSHIP" PRONG TO THE *PICKERING/CONNICK* PROTECTED SPEECH TEST

## INTRODUCTION

"[T]he right of freely examining public characters and measures, and of free communication among the people thereon . . . has ever been justly deemed . . . the only effectual guardian of every other right."[1] James Madison's famous words of protest to the Alien and Sedition Acts demonstrate the vital importance that the right to free speech holds in a democracy.[2] This bedrock principle is recognized in the First Amendment to the United States Constitution.[3] The core value of the First Amendment is to allow for "unhindered debate on matters of public importance."[4] As such, a democracy requires that those with well-informed knowledge of the inner workings of the government be able to engage in a meaningful civil dialogue.[5] However, the right to free speech has never been held to be absolute.[6]

1. JAMES MADISON, VIRGINIA RESOLUTIONS OF 1798, PRONOUNCING THE ALIEN & SEDITION LAWS TO BE UNCONSTITUTIONAL, AND DEFINING THE RIGHTS OF THE STATES (Washington, Jonathan Elliot 1839) (1798).

2. *See* Melissa Lierly, Note, *"Say What?!?:" Defining Free Speech Protection for Public Employees:* Garcetti v. Ceballos, 7 FLA. COASTAL L. REV. SPECIAL SUPP. 53, 61 (2006) ("[T]he First Amendment was fashioned for the exchange of 'ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

3. *See* U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . . .").

4. Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

5. *See* Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1958–59 (2006) ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion . . . . The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society.").

6. *E.g.*, Breard v. Alexandria, 341 U.S. 622, 642 (1951); *see also* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that child pornography receives no First Amendment protection if the applicable statute banning child pornography explicitly restricts works that visually portray children in a sexually explicit manner); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (permitting a state to "forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

One such limitation is the government's ability, acting as employer, to limit the free speech rights of its employees.[7] For many years, "the unchallenged dogma was that a public employee," like employees of private companies, "had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."[8] While this dogma has been qualified in many important respects,[9] a state or federal governmental agency as an employer is still afforded a greater ability to restrict the free speech rights of its employees than it is permitted as a sovereign in restricting the speech of the citizenry as a whole.[10] The government, as a sovereign, cannot restrict the free speech rights of the citizenry in the name of efficiency.[11] However, the government, as employer, may be able to confine the free speech rights of its employees in order to function effectually.[12] Although a government employee is best situated to comment on governmental actions, such a limitation is justified by the need to reconcile the rights of the government, as employer, to provide public services with the free speech rights of the employee.[13]

The issue thus becomes where and how best to strike the balance between these competing concerns.[14] As such, the Court has conventionally granted First Amendment protection to public employees only where they speak on a matter of public concern and their interest in promulgating the speech outweighs the disruption it causes the government in operating effectively.[15] The Supreme Court recently revised this analysis in *Garcetti v. Ceballos* by adopting a threshold per se rule that "when public employees make statements

7. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1957.

8. Connick v. Myers, 461 U.S. 138, 143 (1983).

9. *See, e.g.*, *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1957 ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

10. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion) (recognizing that "the government as employer . . . has far broader powers than does the government as sovereign"); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

11. *Waters*, 511 U.S. at 675.

12. *Id*.

13. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1959 ("The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.").

14. *See Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

15. *Waters*, 511 U.S. at 668.

pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[16] In other words, a government employee is not entitled to this balancing test where they are speaking pursuant to their job function.

This new bright line rule, attempting to simplify the inherent controversy between these competing policy concerns, tries to promote government efficiency by attempting to limit litigation of personnel grievances as constitutional claims.[17] However, in the first year and half since its promulgation, the *Garcetti* rule has proven itself to be largely ineffective in achieving this goal. This ineffectiveness demonstrates that any perceived benefit to the per se rule is substantially outweighed by adverse policy concerns. First, *Garcetti* is not supported by the Court's precedent, and the concern for government efficiency was adequately protected by the existing balancing test. Second, the test will have a profound litigious effect on the courts by placing them in the new, permanent, and intrusive position of trying to apply this per se rule that has little history or direction to a wide variety of fact situations in determining what is part of an employee's job function. *Garcetti* also places public employees in the unreasonable position of trying to determine when they are allowed to speak out on instances of government misconduct, thus limiting their willingness to do so and restricting the flow of information to the electorate. Finally, the Court created a dangerous precedent in attempting to quell these concerns by justifying the limitation of a constitutional protection by saying that it is not needed because it is duplicative of state and federal procedural protection provided in whistleblower statutes.[18]

This Note begins by discussing the history of the free speech protection afforded to government employees, namely the *Pickering*/*Connick* balancing test and the variety of ways the circuit courts of appeals have attempted to address this issue in the context of employees speaking pursuant to their job function. After summarizing the Court's holding and dissents, this Note discusses how *Garcetti* adds a new prong to the prima facie case for public employee First Amendment protection. It then explains how the Court's concerns for employer efficiency could have been adequately addressed by the pre-*Garcetti* balancing test. The Note next discusses how any marginal benefit to government efficiency generated by this rule is substantially outweighed by the litigious effect this rule will have on the lower courts and the public policy

16. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1960.

17. *See id*. at 1958 (noting that the *Pickering* inquiry has proven difficult to apply given the "enormous variety of fact situations" it has to tackle). *But see infra* notes 200–04 and accompanying text (showing how the bright line rule merely shifts the focus of First Amendment retaliation litigation).

18. *See infra* Part VII.

concerns associated with limiting government employee free speech. It concludes with a discussion of the inadequacy of whistleblower laws as a substitute for First Amendment protection.

## I. THE ROAD TO *GARCETTI*: HISTORY OF PUBLIC EMPLOYEE FREE SPEECH RIGHTS

### *A. Early History: Holmesian Logic*

The struggle to balance the speech rights of government employees with the rights of the government as employer is almost as old as the notion of free speech itself. Immanuel Kant said that "[t]he public use of one's reason must always be free, and it alone can bring about enlightenment among men."[19] However Kant realized that speech had a public use, namely the "use which a person makes of it as a scholar before the reading public," and a private use, namely "that which one may make of it in a particular civil post or office which is entrusted to him."[20] Such private use of speech necessitates some limitations.[21]

Early American case law was even more draconian toward the employee. In 1892, then-Judge Oliver Wendell Holmes held that employees could be required to relinquish their right to free speech by virtue of their employment.[22] In a famous quote, Holmes stated that a citizen "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[23] This unchallenged dogma survived well into the middle of the twentieth century in that courts still viewed public employment as a privilege that might necessitate limiting the employee's right to free speech and assembly.[24]

---

19. IMMANUAL KANT, FOUNDATION OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT 87 (Lewis White Beck trans., The Bobbs-Merrill Co. 1959) (1785).

20. *Id*.

21. *See id*. Kant explains:

> Many affairs which are conducted in the interest of the community require a certain mechanism through which some members of the community must passively conduct themselves with an artificial unanimity, so that the government may direct them to public ends, or at least prevent them from destroying those ends. Here argument is certainly not allowed—one must obey.

*Id.*

22. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892) ("There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.").

23. *Id*. at 517.

24. See, e.g., Adler v. Bd. of Educ. of New York, 342 U.S. 485, 493 (1952):

> If . . . a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the

However in the 1960s, courts started to limit this Holmesian logic.[25] The Supreme Court began to accept the premise that individuals should not be forced to relinquish all of their First Amendment rights by virtue of accepting public employment.[26]

### *B. Pickering: A Balancing of Interests*

In 1968, the Supreme Court first articulated its balancing test for determining when employee speech is protected from retaliation under the First Amendment.[27] In *Pickering v. Board of Education*, a teacher wrote a letter to a local newspaper criticizing the way in which the board of education and the superintendent of schools had handled past proposals to raise new revenue for the schools.[28] After a hearing, the board of education determined that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and that the interests of the school required the teacher's dismissal.[29] The Supreme Court reversed the decision of the Illinois Supreme Court and held that the teacher's dismissal was a violation of his First Amendment rights.[30] The Court noted that "[t]he problem [here] is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[31]

---

> organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

25. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1185 (9th Cir. 2004) (O'Scannlain, J., specially concurring) (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (invalidating state statutes denying public employment on the basis of membership in the Communist Party or other subversive political organizations); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278 (1961) (invalidating state loyalty oath requiring state employees to deny membership in the Communist Party and to refuse to "lend aid, support, advice, counsel or influence to the Communist Party")), *rev'd*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

26. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995) ("Even though respondents work for the Government, they have not relinquished 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.'" (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968))).

27. *See* Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 123 (1996).

28. 391 U.S. 563, 564 (1968).

29. *Id.* at 564–65.

30. *Id.* at 565.

31. *Id.* at 568.

Thus, when a government employee challenges an adverse employment action on the basis of First Amendment retaliation, the employee is protected where they can show their interest in speech outweighs the disruption it causes the government in efficiently operating its offices.[32] Upon applying these concerns to the facts of the case, the Court struck a balance in favor of the teacher, noting that there was an absence of proof of false statements knowingly or recklessly made by the teacher, and the speech did not interrupt the operations of the school.[33] Since the disruption to the government was minimal, the teacher's right to speak on issues of public importance could not lawfully furnish the basis for his dismissal from public employment.[34]

A decade later, a unanimous Court held that the *Pickering* balancing rule applied to the "private expression" of a public employee as well as public expressions.[35] In *Givhan v. Western Line Consolidated School District*, a schoolteacher was dismissed at the end of an academic year primarily because she criticized the racist policies and practices of her school and the school district.[36] The Court found this to be a First Amendment violation despite the fact that the majority of her complaining was done in the form of "private encounters" with the school principal.[37] The Supreme Court overruled the Fifth Circuit's decision that such private expressions were not protected by the First Amendment.[38] The Court explained that *Pickering* does not "support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly."[39]

### *C. Connick: The Public Concern Threshold*

In *Connick v. Myers*, the Supreme Court revisited the situation of a public employee terminated for "speaking" out against her employer.[40] Myers, an assistant district attorney responsible for trying criminal cases, was informed that she would be transferred to a different section of criminal court, which she strongly opposed.[41] In response to a supervisor's comments that her concerns about office morale "were not shared by others in the office," Myers distributed a questionnaire "soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance

32. *See* Ma, *supra* note 27.
33. *Pickering*, 391 U.S. at 574.
34. *Id*.
35. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979).
36. *Id*. at 411–13.
37. *Id*. at 412, 415–16.
38. *Id*. at 413.
39. *Id*. at 414.
40. 461 U.S. 138, 140 (1983).
41. *Id*.

committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[42] She was fired for insubordination and brought suit alleging that she was "wrongfully terminated because she had exercised her constitutionally protected right of free speech."[43] The Court held her termination did not violate her First Amendment rights since, with one exception, the survey did not address matters of public concern but rather addressed matters of private interest.[44] As such, her questionnaire "touched upon matters of public concern in only a most limited sense" and was better categorized as an employee grievance.[45]

Some commentators have argued that this decision restricts access to free speech protection by adding a new threshold hurdle public employees must cross even before reaching the *Pickering* balancing test.[46] Whether this is a new hurdle or just a clarification of *Pickering*, the Supreme Court made it clear in *Connick* that an employee is only entitled to the balancing test after they can demonstrate they spoke on a matter of public concern.[47] If the employee is speaking solely on a matter of private interest, the employee is not entitled to the balancing test.[48] The determination of whether speech is a matter of public concern or a matter of private interest requires courts to analyze its "content, form, and context."[49] Thus *Pickering* and *Connick*, read together, require a trial court presented with a public employee's First Amendment retaliation claim to first "consider whether a public employee's statement touches on a matter of public concern, and then the court must weigh the interests of the government, including preventing workplace disruption, against the employee's interest in the speech."[50]

---

42. *Id*. at 141.

43. *Id*.

44. *Id*. at 148.

45. *Connick*, 461 U.S. at 154.

46. *See, e.g.*, Stephen Allred, Note, Connick v. Myers: *Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429, 432 (1984); Ma, *supra* note 27, at 122.

47. *See Connick*, 461 U.S. at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

48. *See id.*

49. *Id*. at 147–48.

50. Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 898–99 (2005) (citing *Connick*, 461 U.S. at 146; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)); *see also* Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality) ("To be protected, [an employee's] speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (quoting *Connick*, 461 U.S. at 142)).

### *D. The Pre-*Garcetti *Circuit Court Decisions: A "Speaking As a Citizen" Threshold*?

Prior to the Supreme Court's decision in *Garcetti*, the circuit courts of appeals differed significantly on how much protection to afford public employees when they spoke out on matters of public concern related to their job function. At least one circuit court of appeals, the Fourth Circuit, moved toward a rigid threshold analysis and per se rule that employee speech in the course of carrying out a job function is not protected speech.[51] In *Urofsky v. Gilmore*, the Fourth Circuit held that a Virginia law limiting public employees' access to sexually explicit material on computers owned or leased by the state was consistent with the First Amendment.[52] In conducting its analysis, the court concluded that, prior to applying the *Pickering* balancing test, the court must address the threshold inquiry of whether the law in question "regulates speech by state employees in their capacity *as citizens* upon matters of public concern."[53] In other words, the court must begin by deciding if the employee was speaking as a "private citizen" or as a "public employee."[54] If the speech regulated is that of state employees in their capacity as employees and not the citizenry in general, no First Amendment protection is available.[55] The court thus concluded that since the university professors who challenged the act were not affected in their capacity as private citizens speaking on matters of public concern, there was no infringement of their First Amendment rights.[56] While the facts of *Urofsky* bear significant differences from those in *Garcetti*,[57] what is interesting about the *Urofsky* decision is that the Fourth Circuit perceives a "threshold" inquiry prior to the balancing test being applied. Most other

51. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1177 n.7 (9th Cir. 2004) ("Only the Fourth Circuit seems to be moving toward a rule that public employees' speech in the course of carrying out employment obligations is not protected under the First Amendment.").

52. 216 F.3d 401, 404 (4th Cir. 2000) (en banc).

53. *Id*. at 406 (emphasis added).

54. *See id.* at 407 ("Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is made primarily in the [employee's] role as citizen or primarily in his role as employee." (internal quotation omitted)). See also Zack, *supra* note 50, at 902, stating:

> In 2000, in *Urofsky v. Gilmore*, the Fourth Circuit held that in determining whether public employee speech receives First Amendment protection, a court first must consider whether the employee spoke as a private citizen or as a public employee; only after this consideration can a court determine whether the speech was of public concern under *Connick* and then move on to perform the *Pickering v. Board of Education* balancing test.

55. *Urofsky*, 216 F.3d at 409; *see also* Zack, *supra* note 50, at 895 ("In 2000, in *Urofsky v. Gilmore*, the Fourth Circuit Court of Appeals decided that if a public employee is performing regular workplace duties and thus acting as a representative of the state, the employee's speech should not receive First Amendment protection.").

56. *Urofsky*, 216 F.3d at 409.

57. *See infra* Part II.A.

circuits have not hinged their analysis on such a threshold inquiry.[58] Other circuits that have held public employees' speech pursuant to job-related duties did not involve matters of public concern ordinarily have done so not on such a threshold analysis, but rather "because the speech at issue primarily involved either personal grievances or the 'routine discharge of assigned functions, where there is no suggestion of public motivation.'"[59] As seen above in *Connick*, if the speech in question is related solely to a particular individual and is better categorized as a personal grievance, it is not protected.[60] Some circuits applied this logic to speech that was likewise made in the course of a job duty, granting protection only where the employee had some public concern motive.[61] For example, in *Morris v. Crow*, the Eleventh Circuit refused to grant First Amendment protection to a sheriff's investigator who reported that a fellow officer violated department protocol in causing a fatal accident on the grounds that the report "was generated pursuant to his official and customary duties as an accident investigator."[62] In so ruling, the court looked at the purpose of the speech to determine if it was made as a citizen on a matter of public concern.[63] The court concluded the sheriff deputy's purpose

58. *See Ceballos*, 361 F.3d at 1176–77 (citing Lewis v. Cowen, 165 F.3d 154, 161–64 (2d Cir. 1999) (holding that a public employee did not forgo First Amendment protection when he refused to present proposed policy changes in a positive light to the Connecticut Gaming Policy Board); Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 367–76 (5th Cir. 2000) (refusing to deny First Amendment protection to a library branch manager who wrote a letter to her supervisors suggesting security measures to be taken at library branches); Rodgers v. Banks, 344 F.3d 587, 597–02 (6th Cir. 2003) (refusing to deny protection to a director of quality management who sent a memorandum stating that the reconfiguration of a patient area would have an adverse effect on patient care); Taylor v. Keith, 338 F.3d 639, 643–46 (6th Cir. 2003) (holding that police reports raising allegations of brutality against fellow officer touched upon a matter of public concern); Delgado v. Jones, 282 F.3d 511, 519 (7th Cir. 2002) (refusing to deny protection to an officer's allegations of criminal activities involving a relative of an elected official simply because he included them in a memorandum to his supervisors); Dill v. City of Edmond, 155 F.3d 1193, 1202–03 (10th Cir. 1998) (holding that an officer's statements and reports to his supervisors regarding his belief that exculpatory evidence existed and was being withheld in a murder case involved a matter of public concern)); *see also* Zack, *supra* note 50, at 906–08 (showing how, like the Ninth Circuit in *Ceballos*, most other circuits have either expressly or implicitly rejected a per se rule).

59. *Ceballos*, 361 F.3d at 1177 n.7 (quoting *Delgado*, 282 F.3d at 519).

60. *See supra* text accompanying note 48.

61. *See* Zack, *supra* note 50, at 908–09 (explaining the distinctions adopted by the Fifth and Seventh Circuits).

62. 142 F.3d 1379, 1382–83 (11th Cir. 1998) (per curiam).

63. *See id*. at 1382.

> Not only must the speech be related to matters of public interest, but the purpose of the expression must be to present such issues as matters of "public" concern. In essence, we must determine the purpose of the employee's speech, that is, "whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee."

was not to bring to light a matter of public concern.[64] The court compared a Tenth Circuit decision, *Koch v. City of Hutchinson*,[65] where a fire marshal was required to write a report, with its own decision in *Fikes v. City of Daphne*,[66] where a report was written by a police officer voluntarily and under no obligation.[67] While in both cases the plaintiffs' responsibilities involved investigations, the fire marshal's report "was simply one of many routine official reports which are processed through the city's local governmental agencies on a daily basis"[68] while the police officer "sought to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials."[69] Thus, the Eleventh Circuit hinged the analysis on the subjective intent or purpose of the employee, not his position in the organization.

The Third Circuit squarely addressed the issue of public employees terminated for speech made pursuant to their job function in *Baldassare v. New Jersey*.[70] In this case, a supervising investigator in the Bergen County Prosecutors Office was asked to investigate alleged criminal activity by two of his employees and was later allegedly retaliated against for exposing wrongdoing.[71] It was undisputed that the investigator was required to conduct such an investigation.[72] As such, the defense tried to rely on *Morris*[73] to argue that since he preformed such action in the normal course of his job duties and his purpose was not to bring to light wrongdoing, it did not satisfy the matter of public concern threshold.[74] In rejecting this argument, the Third Circuit relied on its own precedent,[75] as well as *Givhan*,[76] to "decline . . . to distinguish

*Id.* (quoting Morgan v. Ford, 6 F.3d 750, 755 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994)).

64. *Id.*

65. 847 F.2d 1436, 1447 (10th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988) (holding that while no per se rule exists removing constitutional protection from public employee speech that is an integral part of the employee's job, the fire marshal's lack of motive to expose wrongdoing by other government officials in writing a report on a fire was merely part of performing his employment duties and thus not protected by the First Amendment).

66. 79 F.3d 1079, 1081, 1084 (11th Cir.1996) (holding that a police officer's report of misconduct by fellow officers in a high speed chase addressed a matter of public concern).

67. *Morris*, 142 F.3d at 1382.

68. *Id*. (quoting *Koch*, 847 F.2d at 1447) (internal quotation omitted).

69. *Id*. (quoting *Fikes*, 79 F.3d at 1084) (internal quotation omitted).

70. 250 F.3d 188, 192 (3d Cir. 2001).

71. *Id*. at 192–93.

72. *Id*. at 196.

73. *See supra* notes 62–69 and accompanying text.

74. *Baldassare*, 250 F.3d at 196.

75. *Id*. (citing Feldman v. Phila. Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1995). An auditor's report to the agency's executive director and board of directors satisfied the matter of public concern requirement because "[t]he very purpose of his auditing reports was to ferret out and highlight any improprieties that he found at [the Pennsylvania Housing Authority]. Disclosing

between a public employee's expression 'as an employee' and a public employee's expression 'as a citizen.'"[77] The court reasoned that "the internal character of the investigation is not necessarily significant, because our inquiry focuses on the nature of the information, not its audience."[78] In other words, the value of the speech was dispositive in deciding if something was a matter of public concern.[79]

## II. GARCETTI V. CEBALLOS

### *A. Factual Background*

In *Garcetti*, the plaintiff, Richard Ceballos, worked as a calendar deputy district attorney employed by the Los Angeles County District Attorney's Office.[80] In this role he was responsible for supervising two to three other deputy district attorneys.[81] In late February of 2000, Ceballos was told by a defense attorney that there were inaccuracies in an affidavit used to obtain a search warrant in one of the cases being prosecuted by the district attorney's office.[82] Although the defense attorney had filed a motion to challenge the warrant, he asked Ceballos to review the case as well.[83] After examining the affidavit, visiting the location it described,[84] and speaking with the warrant affiant, Ceballos determined that the affidavit contained "serious misrepresentations"[85] and wrote his supervisors, Carol Najera and Frank

corruption, fraud and illegality in a government agency is a matter of significant public concern." *Id.* (quoting *Feldman*, 43 F.3d at 829) (alteration in original).

76. *See supra* notes 35–39 and accompanying text.

77. *Baldassare*, 250 F.3d at 197 (citing Azzaro v. County of Allegheny, 110 F.3d 968, 979 (3d Cir. 1997)).

78. *Id.*

79. *Id.*

80. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1955 (2006).

81. *Id.*; Ceballos v. Garcetti, 361 F.3d 1168, 1170 (9th Cir. 2004).

82. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1955; *see also Ceballos*, 361 F.3d at 1170–71 (noting that the defense attorney suspected that one of the arresting deputy sheriff's lied in order to get the search warrant).

83. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1955. According to Ceballos, this was not an uncommon request. *Id.*

84. *Id.*

> The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks."

*Id.*

85. *Id.*

Sundstedt, a disposition memorandum recommending dismissal of the case.[86] Ceballos did not dispute that he prepared the memorandum pursuant to his duties as a prosecutor.[87] After a "heated" meeting between Ceballos, Najera, Sundstedt, and the affiant, Sundstedt nevertheless proceeded with the prosecution, pending the outcome of a motion hearing on the validity of the affidavit.[88] Ceballos was subpoenaed to testify by the defense counsel for this hearing.[89] Ceballos alleged that, as a result of the memorandum and his testimony, he had been subjected to a series of retaliatory employment actions by his employers, including being demoted, transferred to another courthouse, and denied a promotion.[90] After his employment grievance was denied, Ceballos sued in the United States District Court for the Central District of California, claiming that the alleged retaliation was in violation of his First Amendment rights.[91]

### *B. Procedural History*

The district court granted the employer's motion for summary judgment on the grounds that Ceballos was not entitled to First Amendment protection because he had written the memo pursuant to his employment duties.[92] In reversing, the Ninth Circuit concluded that, at least for summary judgment purposes, the First Amendment protected Ceballos's speech.[93] The court

86. *Id.* at 1955–56; *see also Ceballos*, 361 F.3d at 1171 (Ceballos was also asked to revise the memorandum to make it less accusatory of the sheriff.).

87. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1960.

88. *Id*. at 1956; *see also Ceballos*, 361 F.3d at 1171 (Ceballos's supervisors agreed that the affidavit's validity was questionable.).

89. *Ceballos*, 361 F.3d at 1171. When Ceballos testified at the hearing, the court "sustained the prosecution's objections to several questions defense counsel asked him. Ceballos maintains that, as a result, he was unable to tell the court certain of his conclusions (and the reasons therefor) regarding the accuracy of the warrant. The defendant's motion was denied, and the prosecution proceeded." *Id.*

90. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1956; *see also Ceballos*, 361 F.3d at 1171–72.

> [Ceballos] alleges that the defendants took a number of retaliatory actions against him: (1) they demoted him from his position of calendar deputy to that of trial deputy; (2) Najera "threatened" him when he told her that he would testify truthfully at the hearing; (3) at the hearing itself Najera was "rude and hostile" to him; (4) Sundstedt "gave [him] the silent treatment"; (5) Najera informed him that he could either transfer to the El Monte Branch, or, if he wanted to remain in the Pomona Branch, he would be re-assigned to filing misdemeanors, a position usually assigned to junior deputy district attorneys; (6) the one murder case he was handling at the time was reassigned to a deputy district attorney with no experience trying murder cases; (7) he was barred from handling any further murder cases; and (8) he was denied a promotion.

*Id.* (footnote omitted).

91. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1956.

92. *Id.*

93. *Ceballos*, 361 F.3d at 1173.

reached this determination by using the *Pickering*/*Connick* balancing test to determine that the memo, which had recited alleged governmental misconduct, was a matter of public concern, and Ceballos's interest in this speech outweighed the supervisors' interest in responding to such speech because there had been no suggestion of disruption or inefficiency in the workings of the district attorney's office as a result of the memorandum.[94] With respect to the "matter of public concern" threshold, the court specifically rejected the defense's argument that the speech was not protected because it was "prepared in fulfillment of an employment responsibility."[95] The court reasoned that such a holding would not be in line with *Connick* or its own precedent.[96] Specifically, the court found *Roth v. Veteran's Administration of the United States*,[97] which held that a "troubleshooter" in defendant agency could not be denied free speech protection for preparing reports exposing wrongdoing pursuant to his job function, controlling here.[98] Furthermore, the court was concerned that since public employees are uniquely positioned to expose abuse,[99] limiting their free speech rights "would seriously undermine our ability to maintain the integrity of our governmental operations."[100] Also, a per se rule limiting speech would be "detrimental to whistleblowers . . . who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware."[101]

In a concurring opinion, Judge O'Scannlain agreed that *Roth* was controlling but felt the Ninth Circuit should hear Ceballos's claim en banc and overrule *Roth*.[102] He asserted that *Roth*'s emphasis on the employee's point in bringing wrongdoing to light missed the mark in that it deems irrelevant the role of the speaker.[103] Generally speaking, as support, Judge O'Scannlain argued that *Roth* was inconsistent with the premises of *Connick* and that other

94. *Id*. at 1178–80.

95. *Id*. at 1174.

96. *Id*. at 1174–75.

97. 856 F.2d 1401, 1406 (9th Cir. 1988).

98. *Ceballos*, 361 F.3d at 1174.

99. *Id*. at 1175 ("The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, are positioned uniquely to contribute to the debate on matters of public concern." (internal quotation omitted)).

100. *Id*. (footnote omitted).

101. *Id.* at 1176 ("To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.").

102. *Id.* at 1185 (O'Scannlain, J., specially concurring).

103. *Ceballos*, 361 F.3d at 1187.

circuits have recognized a distinction between employee speech and citizen speech.[104]

### *C. Justice Kennedy's Majority Opinion*

In a five to four decision,[105] the Supreme Court reversed and remanded, holding that Ceballos's claim that he was unconstitutionally retaliated against failed because the First Amendment did not protect his speech.[106] Justice Kennedy, writing for the majority, held that when state or federal employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and thus government employees are not insulated from discipline based on their official communications.[107]

Justice Kennedy began his opinion by tracing the rights and limits placed on employee speech by the *Pickering* and *Connick* decisions.[108] He recognized that the First Amendment "protects a public employee's right, in certain circumstances, to speak *as a citizen* addressing matters of public concern."[109] In clarifying in which instances speech is protected, Justice Kennedy interpreted the *Pickering*/*Connick* test to require a court to

> [first determine] whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[110]

He commented that this test has proved somewhat "difficult" in that it requires the courts to deal with an "enormous variety of fact situations" when trying to strike a balance.[111]

---

104. *Id.* at 1186–88 (citing Urofsky v. Gilmore, 216 F.3d 401, 407 (4th Cir. 2000) (en banc)).

105. *Garcetti* was originally argued before the Supreme Court on October 12, 2005. It has been speculated that the reason the case was reargued on March 21, 2006 was to allow Justice Alito, who was confirmed in January 2006, to break the four to four deadlock. *See* Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOC'Y 45, 61 (2007); Krystal LoPilato, Note, *Recent Cases:* Garcetti v. Ceballos*: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 541 n.24 (2006).

106. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1962 (2006).

107. *Id.* at 1960.

108. *Id.* at 1957–59.

109. *Id.* at 1957 (emphasis added).

110. *Id.* at 1958 (citations omitted).

111. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1958.

However, this test reflects the "Court's overarching objectives," namely that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[112] The Court cited *Waters* v. *Churchill* as support for its position that, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[113] The Court additionally saw as a public policy concern that since public employees often hold trusted positions in society, "[w]hen they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions."[114]

Despite this need for government control and efficiency, Justice Kennedy acknowledged that the Court's precedent reflected the view that "a citizen who works for the government is nonetheless a citizen"[115] and the Court is thus charged with ensuring that "citizens are not deprived of fundamental rights by virtue of working for the government."[116] In addition, well-informed views of government employees provide an overall benefit to society by perpetuating civil discourse, a necessity in a democratic society.[117] "The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."[118]

Applying these somewhat contradictory principles to the facts of this case, Justice Kennedy acknowledged that the fact Ceballos's speech occurred inside the office is non-dispositive.[119] He also said that because "[t]he First Amendment protects some expressions related to the speaker's job," the fact that the memo "concerned the *subject matter* of Ceballos's employment" is also not dispositive.[120] What was controlling was that Ceballos's "expressions were made *pursuant to his duties* as a calendar deputy."[121] He concluded that since this was the dispositive issue, it gave rise to the rule that "when public employees make statements pursuant to their official duties, the employees are

112. *Id.*

113. *Id.* (citing Waters v. Churchill, 511 U.S. 661, 667 (1994) (plurality) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.")).

114. *Id*.

115. *Id*.

116. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1958 (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

117. *See supra* note 5.

118. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1959.

119. *Id.*; *see also supra* note 39 and accompanying text.

120. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1959 (emphasis added).

121. *Id.* at 1959–60 (emphasis added).

not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[122]

Under this rule, it is "immaterial whether [Ceballos] experienced some personal gratification from writing the memo . . . . The significant point is that the memo was written pursuant to Ceballos' official duties."[123] Specifically, the Court concluded that "Ceballos did not act as a citizen when he went about conducting his daily professional activities . . . . In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."[124] The Court concluded that this rule was consistent with precedent in that government employees can still participate in public discourse, the rule simply "does not invest them with a right to perform their jobs however they see fit."[125] The Court also concluded that this holding was also consistent with its precedent of "affording government employers sufficient discretion to manage their operations."[126] Here, "[i]f Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."[127]

Finally, the Court reasoned that the rule proposed by Ceballos and adopted by the Ninth Circuit "would commit state and federal court to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[128] The Court was worried that to hold contrary to the rule it adopted "would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."[129]

The Court made two final points that are pertinent here. First, the Court addressed the Ninth Circuit's concern of a perceived doctrinal anomaly in that "it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties."[130] The Court concluded that if a government employer is "troubled by the perceived anomaly," it retains "the option of instituting internal policies and procedures that are receptive to employee

122. *Id.* at 1960.
123. *Id.*
124. *Id.*
125. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1960.
126. *Id.*
127. *Id.* at 1960–61.
128. *Id.* at 1961.
129. *Id.*
130. *Garcetti*, 547 U.S. at _____, 126 S. Ct. 1961.

criticism."[131] Second, since Ceballos did not dispute the fact that he wrote his memo pursuant to job duties, the court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties . . . ."[132] However, Justice Kennedy noted that such an inquiry must be a "practical one," thus rejecting Justice Souter's suggestion that "employers can restrict employees' rights by creating excessively broad job descriptions."[133]

### *D. The Dissents*

#### 1. Justice Stevens

In his dissenting opinion, Justice Stevens argued that the majority had improperly answered the question of when the First Amendment protected a public employee from discipline based on speech made pursuant to his employment duties.[134] While the Court held that the answer to this question is a cut and dried "Never," Justice Stevens believed that the answer should be "Sometimes."[135] He argued that the rule should allow a government employee's supervisor to take corrective action when the employee's speech was "inflammatory or misguided," but not when such speech was merely "unwelcome."[136] In supporting this position, Justice Stevens pointed out that the Court was silent on the issue of whether or not the teacher in *Givhan* spoke pursuant to her job duties.[137] He said such silence on the issue in the past means that the distinction is "immaterial."[138] He felt that constitutional protections should not hinge on job descriptions and to fashion a rule enticing employees to voice concerns publicly rather then privately seemed "perverse."[139]

#### 2. Justice Souter

Justice Souter, joined by Justices Stevens and Ginsberg, expanded on this same idea of a "sometimes" rather then a "never" answer to this question. Justice Souter would have held that

131. *Id.* Justice Kennedy went on to say that "[g]iving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." *Id.*

132. *Id.*

133. *Id*.

134. *Id.* at 1962 (Stevens, J., dissenting).

135. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1962.

136. *Id.* In a footnote, he also noted a plethora of cases in which employee discipline might have been attempts to conceal corruption or "managerial ineptitude." *Id*. at 1962–63 n.*.

137. *Id*. at 1963.

138. *Id*.

139. *Id*.

> private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[140]

In other words, as long as the well-informed speech in question is not overly damaging to the government's ability to conduct the public's business, it should be protected.[141] He questioned why the majority's concerns about government efficiency required a fully categorical restriction on First Amendment rights.[142] He believed these concerns could adequately be addressed by holding that "an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."[143] Justice Souter went on to point out a few of the public policy concerns associated with applying the strict rule that the majority applied, namely that the Court has previously recognized that public employees are uniquely situated to inform the public on important issues.[144] He further criticized the whistleblower remedy that the majority proposed to deal with this public policy concern.[145] A final important concern of Justice Souter was that public employers could unreasonably expand employees' job descriptions in an effort to diminish the availability of First Amendment protection.[146]

3. Justice Breyer

In his separate dissent, Justice Breyer also took issue with the Court answering the issue with a cut and dried "never."[147] Justice Breyer suggested that the majority did not recognize that "there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards

---

140. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1963 (Souter, J., dissenting).

141. LoPilato, *supra* note 105 (citing *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1964 (Souter, J., dissenting)).

142. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1967 (Souter, J., dissenting).

143. *Id*.

144. *Id*. at 1966.

> Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

*Id.* (quoting San Diego v. Roe, 543 U.S. 77, 82 (2004)).

145. *Id*. at 1970; *see also infra* Part VII.

146. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting).

147. *Id.* at 1974 (Breyer, J., dissenting).

seem readily available . . . ."[148] As such, he thought that the First Amendment allows for judicial action in such cases where there is an "augmented need for constitutional protection, and diminished risk of undue judicial interference with governmental management of the public's affairs."[149] He thought such an augmented need for special constitutional protection existed here because the speech at issue was more "professional speech" than government speech.[150] As an attorney, Ceballos's speech was "subject to independent regulation by canons of the profession."[151] Where those canons obligate certain speech, the government's ability to restrict it is diminished.[152] Second, there is an independent constitutional obligation on a prosecutor to "communicate with the defense about exculpatory and impeachment evidence in the government's possession."[153] However, Justice Breyer also believed that Justice Souter's position provided too much coverage and thus "fail[ed] to give sufficient weight to the serious managerial and administrative concerns that the majority describes."[154]

## III. THE NEW "CITIZENSHIP" PRONG TO THE *PICKERING*/*CONNICK* TEST

The de facto result of the *Garcetti* decision is to add a new prong to the *Pickering*/*Connick* test defining when the First Amendment protects a public employee's speech. As shown above, *Connick* makes clear that a public employee must, as a threshold matter, demonstrate that they are speaking on a matter of public concern, rather then out of private significance, before their interest in the speech is balanced against the harm to the government as an employer.[155] The *Garcetti* decision adds a second threshold inquiry that must be dealt with before striking the *Pickering* balance.[156] This *Garcetti* threshold requires an employee to demonstrate that they are in fact speaking as a "citizen."[157] As defined, speaking "as a citizen" means that the speech is not made pursuant to the employee's "official duties."[158] Therefore, the Supreme Court's decision makes clear that the proper inquiry for a court confronting an employee First Amendment claim is that the employee must demonstrate (1) they are a speaking as a citizen and not as an official employee on a matter

148. *Id*.
149. *Id*. at 1976.
150. *Id*. at 1974.
151. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1974.
152. *Id.*
153. *Id*.
154. *Id*. at 1975 ("The underlying problem with this breadth of coverage is that the standard . . . does not avoid the judicial need to *undertake the balance* in the first place.").
155. *See supra* notes 46–50 and accompanying text.
156. Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007).
157. *See* Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1960 (2006).
158. *Id.*

pursuant to their job function, (2) they are speaking on a matter of public concern rather then on a matter of private interest, and (3) their interest in the speech outweighs the interest of the government in promoting efficient operation of their offices.[159]

In promulgating this new prong, Justice Kennedy applied an emphasis to the phrase "as a citizen" in the *Pickering* and *Connick* decisions.[160] In *Garcetti*, Justice Kennedy used this phrase as a limitation, restricting the rights of employees by making a distinction between government employees acting within the course of their job function and other citizens, while reserving the rights of free speech to citizens.[161] However, the phrase "as a citizen" found in the precedent on which Justice Kennedy relied has not carried the connotations of being a limiting phrase. For instance, in *Pickering*, the Court cited numerous cases rejecting the notion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy *as citizens* to comment on matters of public interest in connection with the operation of the public schools in which they work . . . ."[162] The *Pickering* Court cited these cases in rejecting the ruling of the Illinois Supreme Court which held "[a] teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school . . . ."[163] In effect, the Supreme Court took issue with the fact that the Illinois Supreme Court did not even address the *citizenship* rights that the teacher had.[164] The Illinois Supreme Court focused solely on the rights of the

159. *See id.* at 1958.

160. *Id.* at 1957.

161. *See id.* at 1960.

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.

*Id.*

162. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952)) (emphasis added).

163. *Compare* Pickering v. Bd. of Educ., 225 N.E.2d 1, 6 (Ill. 1967), *with Pickering*, 391 U.S. at 568. The Supreme Court held in *Pickering* that

> [t]o the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens . . . it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

391 U.S. at 568.

164. *See Pickering*, 391 U.S. at 568 ("'[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'") (quoting *Keyishian*, 385 U.S. at 605–06).

school district as an employer and ignored the citizenship rights of the teacher.[165] The use of the term "*as a citizen*" in the Supreme Court's decision was meant to show that public employees do not relinquish their basic citizenship speech rights by virtue of accepting public employment. It was meant to be an enabling term protecting the rights that government employees have compared with the rights of their employers.[166] By using such language, the Court permanently repudiated the old Holmesian doctrine that employees could be forced to relinquish the rights they hold "as citizens" in exchange for a paycheck.[167]

More evidence that the term "as a citizen" was meant to be an enabling term rather then a limit on public employees, is the fact that, despite the litany of public employee free speech cases that have reached the Supreme Court, none prior to *Garcetti* have hinged the inquiry on whether the employee spoke "as a citizen" or as an employee. Justice Kennedy referred to the fact that Ceballos's expressions were made pursuant to his job as a calendar deputy as "the controlling factor."[168] However, whether or not the expressions were made pursuant to a job duty was not dispositive in *Pickering*, *Connick*, or *Givhan*.[169] It is the Supreme Court's silence on this issue that "speaks the loudest."[170] As such, there was little support for why the fact that Ceballos's expressions were made pursuant to his job was the controlling factor.[171] In

165. *See Pickering*, 225 N.E.2d at 7.

> There is nothing in the record before us to indicate malice on the part of the board members toward the plaintiff, nor does it appear that the board's action was impulsive or capricious. The administration of the schools is within the domain of the school board, and courts do not interfere with the exercise of its powers unless it is shown to be capricious or arbitrary.

*Id.*

166. *See Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

167. *See supra* notes 22–26 and accompanying text.

168. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1959–60 (2006).

169. *See* Connick v. Myers, 461 U.S. 138, 146–48 (1983) (hinging the inquiry on the fact that the employee's comments were of private rather than public concern); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979) (applying the *Pickering* balance to private expressions of employees in the same manner as public expressions); *Pickering*, 391 U.S. at 568 (hinging the inquiry on a balance between "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

170. Kathryn B. Cooper, Garcetti v. Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 90 (2006).

171. The Court did not explain why it felt this was the controlling factor other than pointing to the "as a citizen" language in *Pickering*, nor did it provide any precedent for articulating this as the dispositive issue. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1959–60.

fact, Justice Stevens went so far as to suggest that the Supreme Court's silence on this issue in prior cases, such as *Givhan*, demonstrated that it was "immaterial."[172] The immateriality of the "as a citizen" requirement is further bolstered by the fact that the Court has not consistently used the phrase "as a citizen" when summarizing the *Pickering*/*Connick* test. Justice O'Connor, for instance, omitted the term entirely when summarizing this basic test in *Waters v. Churchill*.[173] While this clearly could have just been an oversight, the ability to overlook the term when quoting *Pickering* does not lend much credence to the degree of importance Justice Kennedy attached to it. However, if its exclusion was intentional, thus signaling Justice O'Connor's apparent understanding of its immateriality to the *Pickering*/*Connick* test, one can only speculate whether this five to four decision would have swung in Ceballos's favor had Justice Alito (who joined the majority) not recently replaced her.[174]

From this perspective, it appears that the term "as a citizen" in the original *Pickering* decision was not meant to be a threshold requirement in the same way that the *Connick* Court saw the phrase "on a matter of public concern." Rather, it seems more likely that in the original language of *Pickering*, namely, "[t]he problem in any case is to arrive at a balance between the interests of the teacher, *as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,"[175] "as a citizen" was meant to be analogous to "as an employer." These two terms seemingly were meant to be shorthand for the free speech rights of a citizen as compared to the employer's rights in promoting efficiency. In other words, *Pickering*'s use of the term "as a citizen" recognized that American citizens, whether they are government employees or not, should not be forced to categorically give up their free speech rights simply by virtue of their employment.[176] Similarly, the use of the term "as an employer" recognized that employers, whether an arm of the government or not, should not have to categorically relinquish their right to

172. *Id.* at 1963 (Stevens, J., dissenting) ("Our silence as to whether or not [Givhan's] speech was made pursuant to her job duties demonstrates that the point was immaterial.").

173. 511 U.S. 661, 668 (1994).

> There is no dispute in this case about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

*Id.* (internal quotation omitted).

174. *See supra* note 105.

175. Pickering v. Bd. of Educ., 391 U.S. 563, 568–69 (1968) (emphasis added).

176. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1957.

conduct their business in an orderly fashion.[177] Thus as *Pickering* held, by virtue of the collision of these two important constitutional rights, a balancing is necessary.[178]

Reading *Pickering* in the light explained here would thus not treat the fact that an individual's speech was made pursuant to his job function as a threshold bar. Rather, it would incorporate this fact into the traditional balancing test as strong evidence of an adverse effect on the employer's right to promote efficiency. Obviously, the fact that the employee was speaking within the course of his job function should be taken into account. However, as Justice Souter points out in his dissent, there is no indication that these concerns cannot adequately be addressed by using the *Pickering* balancing test as it was understood by the Ninth Circuit.[179] This strict balancing approach would hold that "an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."[180] This approach would be effective in limiting an employee from speaking out about petty concerns in the course of his or her job duties but would also protect employees who speak with the intent or purpose of exposing "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."[181]

The result of such an interpretation of the phrase "as a citizen" would change the answer to the question of "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties" to "Sometimes" rather than "Never."[182] Using this strict balancing test rather than creating a threshold bar would require a higher degree of scrutiny where the employee speaks pursuant to a job duty as opposed to merely on a subject of employment but would not have the drawbacks of a "winner-take-all" blanket restriction on First Amendment rights.[183] Without twisting the emphasis on the term "as a citizen," thereby creating a threshold inquiry, the Court can still achieve its goal of protecting the government's interest in carrying out its public duties.[184] Yet, the government would not be allowed to suppress job duty speech where the disruption is very limited and both the employee's and the public's interest in

177. *See supra* notes 11–13 and accompanying text.

178. *Pickering*, 391 U.S. at 568.

179. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1967 (Souter, J., dissenting).

180. *Id*.

181. *Id*.

182. *Id*. at 1962 (Stevens, J., dissenting) (internal quotation omitted).

183. *See id*. at 1967 (Souter, J., dissenting) (noting that the lesson of *Pickering* is that when competing constitutionally significant interest clash, the Court should "try to make adjustments that serve all of the values at stake").

184. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1967 (Souter, J., dissenting).

the speech is extremely high. Given that a heightened balancing standard can adequately quell the Court's concerns, the manner in which it emphasizes or re-defines the meaning of the term "as a citizen" almost forty years after *Pickering* and thus in effect hinges constitutional protection on a job description by creating a new prong to an old test seems at the very least "misguided."[185]

A final point worth noting is that the Court's opinion does not address Ceballos's testimony at the hearing on the affidavit's validity.[186] In fact, in setting out the facts of the case, the Court does not mention that Ceballos was in fact subpoenaed to testify about his findings.[187] The defense in this case only contended that the memo was not protected speech.[188] However, one could imagine that if Ceballos was subjected to retaliation the motive for such action would have been more a consequence of the testimony than the memo in that the testimony was a public expression of wrongdoing, presumably drawing more outside attention. However, without this issue being adjudicated, we are left to wonder just how far the application of the per se *Garcetti* rule is meant to go. Surely the Court cannot mean that *Garcetti* stands for the proposition that an employee can be disciplined for obeying a statutory duty, such as responding to a subpoena. To hold otherwise would allow an employer to condition the retention of employment on forcing an employee to violate the law.[189] The Court must permit a public policy exception here so employees are not faced with a decision between obeying the law and protecting their livelihood.[190] As Justice Breyer pointed out, there must at a minimum be an exception to the *Garcetti* threshold rule for such special circumstances that require independent constitutional protection.[191] However, as currently written, *Garcetti* seemingly does not allow for such exceptions.[192]

185. *See id*. at 1963 (Stevens, J., dissenting) (arguing that while the majority decision may not be "inflammatory," it surely is "misguided" (internal quotation omitted)).

186. *See id*. at 1959–60 (discussing what was dispositive about the nature in which the memo was prepared, but not mentioning the testimony).

187. *Compare Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1956 *with* Ceballos v. Garcetti, 361 F.3d 1168, 1171 (9th Cir. 2004).

188. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1956.

189. *See* Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985) (holding that there is a "public policy exception" to the employment-at-will doctrine where an employee was told she would be fired for obeying a subpoena to appear before the state equal employment commission).

190. *See id*.

191. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1974 (Breyer, J., dissenting).

192. *See id.* (arguing that the *Pickering* balancing test should be applied in these situations requiring special constitutional protection even if the speech is made pursuant to a job duty).

## IV. APPLYING *GARCETTI*: FORMALISM AND THE "PRACTICAL INQUIRY"

One of the main justifications for the Supreme Court adopting this per se threshold rule was that it would avoid placing courts in a "new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[193] The "need" for a per se threshold rule restricting free speech in a whole category of situations is justified by its appeal to those Justices "who seek bright line rules, rather than the ad hoc balancing which currently prevails under *Pickering*."[194] This argument stems from the fear that without limits on the pure *Pickering* balancing of interests every employee grievance would rise to the level of a First Amendment claim and that "government offices could not function if every employment decision became a constitutional matter."[195] "Such a result would be an undue intrusion by the courts into the management of public agencies . . . ."[196] This line of reasoning is stressed by the Court's "formalist" Justices who prefer drawing bright line rules across all aspects of the Court's constitutional doctrine.[197] "A per se rule is a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason—the normal mode of analysis—can be dispensed with."[198] The perceived advantages of such an approach are "ensuring predictability, uniformity, and transparency, as well as in limiting future judicial discretion."[199]

Yet as the first two years of post-*Garcetti* decisions demonstrate, the per se rule has not had any of these effects. This new rule has not had the effect of removing courts from the loathed position of reviewing employment decisions.[200] The irony of the *Garcetti* rule, however, is that while the Court justifies the per se rule by claiming that they are trying to avoid placing the courts into a "new, permanent, and intrusive role, mandating judicial oversight

193. *Id.* at 1961 (majority opinion).

194. Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N. U. L. REV. 17, 18 n.3 (1996) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)).

195. Connick v. Myers, 461 U.S. 138, 143 (1983) (footnote omitted).

196. Allred, *supra* note 46, at 454 n.187 (citing *Connick*, 461 U.S. at 146).

197. Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1202 (2007). Professor Rhodes concludes that Justices Scalia and Thomas are "committed formalists," Justices Roberts and Alito are "attracted to formalism," and that Justice Kennedy is "particularly enamored of formalism in the free speech context." *Id.* at 1202–03.

198. Smith v. Pro Football, Inc., 593 F.2d 1173, 1181 (D.C. Cir. 1978).

199. Rhodes, *supra* note 197, at 1175.

200. *Connick*, 461 U.S. at 147 ("[A] federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

of communications between and among government employees and their superiors,"[201] they instead place courts in the new, permanent, and intrusive role of mandating judicial oversight of job descriptions and duties of employment.[202] As the Fifth Circuit notes, *Garcetti* merely "shift[s] [the court's] focus from the content of the speech to the role the speaker occupied when he said it."[203] As such, the application of the *Garcetti* rule proves to be far less "formalistic" than was intended. Rather than achieving its intended effect, the rule has only confused courts and litigants. As Justice Scalia is quick to point out, such confusion breeds further litigation.[204]

Applying the Court's new per se rule to the facts of *Garcetti* was fairly straightforward. Ceballos did not dispute that the memo was written pursuant to his job function.[205] This, however, is the exception rather than the rule. Particularly in the wake of *Garcetti*, most public employees bringing a First Amendment retaliation claim will dispute whether or not their speech was made pursuant to a job function.[206] In order to ensure that most employee speech is made pursuant to a job function, Justice Souter worried that government employers would move to unreasonably expand employee job descriptions in order to limit the little First Amendment protection that employees have left.[207] In other words, employers could attempt to create excessively large job descriptions in an effort to minimize the ability of employees to speak out about perceived misconduct. The majority briefly rejected this concern.[208] The majority stated that employers cannot create excessively large job descriptions because what is or is not done pursuant to a

201. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1961 (2006).

202. *Id.* at 1965 n.2 (Souter, J., dissenting) ("The majority's response, that the enquiry to determine duties is a 'practical one,' does not alleviate this concern. It sets out a standard that will not discourage government employers from setting duties expansively, but will engender litigation to decide which stated duties were actual and which were merely formal.").

203. Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007).

204. Bd. of County Comm'r v. Umbehr, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting).

205. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1960.

206. Bice, *supra* note 105, at 73.

207. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting). Justice Souter stated:

> I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.

*Id.*

208. *Id.* at 1961 (majority opinion).

job duty is not determined by a written job description, but rather is determined by a practical inquiry.[209] However, the majority gives little guidance as to how lower courts should undertake this practical inquiry other than to note that formal job descriptions and the fact that the employee spoke on the subject matter of her employment are not dispositive.[210] The majority did not feel the need to expand further since Ceballos did not contest that his memo was written pursuant to a job function; thus, they did not have occasion to discuss a "comprehensive framework for defining the scope of employment duties."[211]

A lack of a "comprehensive framework" for engaging in a "practical inquiry" leaves a number of major questions unanswered for lower courts confronted with a *Garcetti* argument. Moreover, the Court provides little guidance as to which factors should be taken into consideration in actually conducting an inquiry into a specific job description, opening a Pandora's box by encouraging litigating the specifics of the practical inquiry. In practical terms, the inquiry really involves the applicability of *Garcetti* to speech that is not necessarily required by a government employee's "job duties but nevertheless is *related* to his job duties."[212]

Justice Kennedy, in the majority opinion, drew a distinction between speech that is "the subject matter" of an employee's job and speech "pursuant to job duties."[213] An employee's speech can be protected if it is the "subject matter" of employment, but not if it is "pursuant to job duties."[214] While Justice Kennedy provided little explicit guidance on how this distinction should play out, other than that it requires a practical inquiry, he did focus on the distinction between the affirmative duty Ceballos's position placed on him to investigate and report on inaccuracies in affidavits and the fact that the plaintiff in *Pickering* had no obligation to comment on school budgets.[215] Thus, it appears that if the employee is absolutely required to speak as a result of the essence of his job, then it is "pursuant to job duties." However, if the employee has a choice of whether or not to speak up then the speech is merely the "subject matter" of his employment. In wrestling with this issue, the Fifth Circuit held that *Garcetti* applies to speech made in the "course of performing"

209. *Id*. ("The proper inquiry is a practical one."). In performing this practical inquiry, the Court recognized that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform." *Id*. at 1962.

210. *Id.* at 1960.

211. *Id.* at 1961.

212. Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 693 (5th Cir. 2007) (emphasis added).

213. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1959–60.

214. *See id*.

215. *See id.* at 1961.

job duties.[216] However, this course of performance language does little to clear up the ambiguity surrounding when a court should apply the *Garcetti* rule.

As such, in the first two years of post-*Garcetti* decisions, courts have "struggle[d] to define the breadth of *Garcetti* and its impact on *First Amendment* jurisprudence."[217] In the immediate aftermath of the case being handed down, courts were reluctant to apply *Garcetti* where the plaintiff had not admitted the speech was made pursuant to his job function. Some of the earliest post-*Garcetti* scholarship noted that "there is reason to believe *Garcetti* is less pro-employer then it would initially appear."[218] One reason for this sentiment was that courts were reluctant to simply take an employer's word as to what an employee's official duties were.[219] Plaintiffs used this line of argument in effectively resisting summary judgment.[220] Courts were only applying the *Garcetti* rule in situations where the speech was truly the essence of the employer's job. In this way, the "elastic[ity]" of the per se rule could be used to "mitigate [the] potential harshness" of the *Garcetti* rule.[221] However, as time has progressed, some courts have become increasingly liberal in their application of the per se rule.[222] Specifically, they have become increasingly willing to apply *Garcetti* where the speech is made pursuant to a more peripheral or general "job duty."[223] The confusion surrounding the practical inquiry lead some lower courts to expand the scope of the *Garcetti* rule, and correspondingly, limit the speech protection afforded public employees.[224] Others have held firm in strictly construing the *Garcetti* rule.[225]

One of the most frequently recurring examples of the various applications of this rule is differing jurisdictions' treatment of peripheral or general job duties such as employee work rules that apply to an entire department or office. Initially, courts were reluctant to use general work rules as justification to invoke the *Garcetti* rule.[226] The Northern District of California read *Garcetti* as requiring an employer to do more then simply articulate a "duty"

216. *Williams*, 480 F.3d at 693.

217. Hailey v. City of Camden, No. 01-3967, 2006 U.S. Dist. LEXIS 45267, at *46 (D.N.J. July 5, 2006).

218. Bice, *supra* note 105, at 76.

219. *Id*.

220. *Id*.; *see also* Kodrea v. City of Kokomo, 458 F. Supp. 2d 857, 867 (S.D. Ind. 2006); Barclay v. Michalsky, 451 F. Supp. 2d 386, 396 (D. Conn. 2006); Batt v. City of Oakland, No. C02-04975 (MHP), 2006 U.S. Dist. LEXIS 47889, at *11–12 (N.D. Cal. July 12, 2006).

221. Bice, *supra* note 105, at 51.

222. *See infra* notes 242–46 and accompanying text (discussing the *Barclay* court superseding itself).

223. *See generally infra* notes 230–48 and accompanying text.

224. *Id.*

225. *E.g.*, Taylor v. Town of Freetown, 479 F. Supp. 2d 227, 237 (D. Mass. 2007).

226. *See, e.g.*, Batt v. City of Oakland, No. C02-04975 (MHP), 2006 U.S. Dist. LEXIS 47889, at *11–12 (N.D. Cal. July 12, 2006).

imposed on an employee, but rather required the employer to show that the employee was "'actually expected to perform' the potentially protected act."[227] A more recent District of Massachusetts decision refusing to apply *Garcetti* to general work rules recognized that applying *Garcetti* in such a fashion would "eliminate First Amendment protection whenever an employee speaks out regarding widespread matters of public concern because he had an obligation under the rules to tell his superior of any rule infractions."[228] The court refused to read *Garcetti* as "meant to strip an employee of First Amendment protection when speaking out regarding issues of serious and widespread public concern, like corruption, just because a garden-variety rule requires him to tell a supervisor."[229]

Despite the obvious concerns about applying *Garcetti* to more tangential job duties, some courts have increasingly done so. Perhaps the most exemplary case of this is *Barclay v. Michalsky* and the pedagogy in the District of Connecticut that followed.[230] In *Barclay*, a nurse claimed she was retaliated against for complaining about other nurses sleeping on the job and mistreatment of patients.[231] The defense argued that under *Garcetti* the speech at issue was not protected by the First Amendment because the plaintiff had an affirmative duty as part of her job responsibilities to report such violations.[232] A nurse, much like a lawyer, has independent professional obligations in addition to those placed on her by her job.[233] As a nurse employed by the Connecticut Department of Mental Health and Addictive Services, she was under a general obligation to report instances of patient abuse.[234] Despite this contention, in the first few months after *Garcetti* came down, the district court held that there was a material issue of fact because "the record does not establish incontrovertibly that plaintiff made her complaints . . . as part of the discharge of her duties as a nurse."[235] In other words, reporting such instances

227. *Id.* at *11.

228. Taylor, 479 F. Supp. 2d at 237 (rejecting defendant's argument that work rules impose a general obligation on all police officers to report violations of department rules).

229. *Id.*

230. 451 F. Supp. 2d 386 (D. Conn. 2006).

231. *Id.* at 390–92.

232. *Id.* at 395.

> Defendants argue that *Garcetti* is controlling in this case on the basis that the complaints plaintiff allegedly made to her supervisors regarding employees sleeping on the job and the use of excessive restraints were made pursuant to her official duties because behavior that endangers the safety and welfare of persons is specifically prohibited by Work Rule # 22 and employees have an affirmative duty pursuant to Work Rule # 30 to report violations of existing work rules, policies, procedures, or regulations.

*Id.*

233. *See id.*

234. *See id.*

235. *Barclay*, 451 F. Supp. 2d at 396.

of alleged abuse was not pursuant to her job function.[236] The District of Connecticut decided that general job duties common to each employee in the department or agency are not sufficient, even if they had an affirmative duty to speak up.[237]

Subsequently, the *Barclay* rule was followed by a handful of District of Connecticut cases.[238] For example, in *Drolett v. Demarco*, the court examined the defense's argument that a police officer had a duty as part of the chain of command to make the speech in question.[239] The court found the speech to be protected because it did not find the applicable police department rules to require the plaintiff to make the speech, but rather only *permitted* him to do so.[240] The court quoted *Barclay* in holding that the defense did not prove that the plaintiff's speech was "particularly within the province of the plaintiff's professional duties, more so then that of other [police department] employees."[241]

However, less then a year later and with the "benefit of *Garcetti* progeny from the past year," the *Barclay* court superseded its initial decision.[242] In *Barclay II*, the court found *Garcetti* to be controlling, reversed its earlier decision, and granted defendant's motion for summary judgment.[243] The court held "that its previous interpretation of the scope of *Garcetti* was too restrictive."[244] The court thus found that the professional responsibilities and work rules created an obligation on the plaintiff to speak out on the matters she did.[245] "The fact that other . . . employees may have shared this professional obligation does not change the outcome of *Garcetti*."[246] Many other courts have since agreed.[247]

236. *See id*. The court held that the defendant had "not demonstrated that reporting potential work rule violations relating to patient care was particularly within the province of plaintiff's professional duties, more so than that of other DMHAS employees." *Id.*

237. *See* Lisa Siegel, *State Can't Squash Suit*, CONN. L. TRIB., Sept. 27, 2006, at 1, 4.

238. *See* Paola v. Spada, 498 F. Supp. 2d 502, 508 (D. Conn. 2007); Drolett v. Demarco, No. 3-05CV1335 (JCH), 2007 U.S. Dist. LEXIS 46044, at *14–*15 (D. Conn. June 22, 2007); Gordon v. Marquis, No. 3:03CV01244 (AWT), 2007 U.S. Dist. LEXIS 27811, at *24–25 (D. Conn. Mar. 31, 2007).

239. *Drolett*, 2007 U.S. Dist. LEXIS 46044, at *12.

240. *Id.* at *15.

241. *Id.* (quoting Barclay v. Michalsky, 451 F. Supp. 2d 386, 396 (D. Conn. 2006)).

242. Barclay v. Michalsky, 493 F. Supp. 2d 269, 274 (D. Conn. 2007).

243. *Id*. at 271, 277–78.

244. *Id.* at 274.

245. *Id.* at 277.

246. *Id.*

247. *E.g.*, Pagani v. Meriden Bd. of Educ., No. 3:05-CV-01115 (JCH), 2006 U.S. Dist. LEXIS 92267 (D. Conn. Dec. 19, 2006); Price v. MacLeish, No. 04-956 (GMS), 2006 U.S. Dist. LEXIS 57026 (D. Del. Aug. 14, 2006).

The Barclay reversal demonstrates the confusion that exists over how to handle general professional or departmental obligations under the *Garcetti* rule. This confusion led the defense in *Drolett* to appeal the district court's decisions to the Second Court of Appeals.[248] The defense's contention is that the police department was entitled to qualified immunity because at the time it disciplined Drolett the law was uncertain.[249] The defense notes that the "*Garcetti* Court failed to articulate a test for determining when an employee is speaking pursuant to his or her official duties, and the Circuit courts are struggling to find one."[250] Since the *Garcetti* principle is "difficult to apply" the defense contends that "under these circumstances, the individual Defendants could not reasonably have known that *Drolett* actually had the right he claimed or that their conduct violated this right."[251] As of the publication of this article the Second Circuit had not heard oral arguments on or ruled on this case.

The evolution of how to handle general professional or departmental obligations is only one illustration of the litigious issues lower courts are struggling with in deciding if something rises to level of "pursuant to job duties" or is merely a "subject matter of employment." Similar issues have arisen in contexts such as non-written, ad hoc or de facto job duties[252] and situations where the employee was specifically asked to comment.[253] The plethora of unanswered questions under the "practical inquiry" demonstrates that the lack of a "comprehensive framework" invites a flood of litigation to decipher this "practical inquiry,"[254] creating a situation ripe for unjust and inequitable results. Aside from the extensive inquiry this rule will require into employees' job functions, each government employee is in a slightly different position from every other government employee. Even two employees with the same job title might have widely varying day-to-day activities. For example, employees who work as a team on projects, such as in the

248. Brief of Defendant-Appellant at 5, Drolett v. DeMarco, No. 07-3221-CV (2d Cir. Nov. 19, 2007).

249. *Id.* at 5.

250. *Id.*

251. *Id.* at 5-6.

252. *E.g.*, Weisbarth v. Geauga Park Dist., 499 F.3d 538, 544 (6th Cir. 2007) ("*Garcetti* . . . implicitly recognized that . . . ad hoc or de facto duties can fall within the scope of an employee's official responsibilities despite not appearing in any written job description.").

253. *E.g.*, *id.* at 545; Jaworski v. N.J. Turnpike Auth., No. 05-4485 (AET), 2007 U.S. Dist. LEXIS 6063, at *15 (D.N.J. Jan. 29, 2007).

254. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1968 (2006) (Souter, J., dissenting).

construction or maintenance industries, are often given the same title but significantly different day-to-day activities and responsibilities.[255]

While arguably achieving its intended effect of limiting judicial oversight of communications between and among government employees and their superiors, the *Garcetti* rule has also invited a plethora of other litigious issues for the lower courts related to this "practical inquiry."[256] Rather than overseeing communications, courts have found themselves piercing the job descriptions of all government employees. In doing so, courts have to engage in the uncomfortable "practical inquiry" of differentiating between general agency regulations, codes of professional conduct, job descriptions, and daily activities, which they are ill prepared for, while we await a "comprehensive framework" to deal with these issues from the Supreme Court. This task seems "no less onerous then the pre-*Garcetti*" *Pickering*/*Connick* balance.[257] As previously noted, the rationale for *Garcetti*'s cut and dried threshold rule, as opposed to simply incorporating the fact that the employee was speaking pursuant to a job duty into the *Pickering* balance, seems to be undercut by this increase in litigation.[258] On the other hand, the strict balancing approach advocated in this Note would not invite such litigation. Justice Souter points out that the Ninth Circuit, which for seventeen years provided more protection than he would, or as argued for in this Note, has not created a flood of litigation.[259] Rather, the claims would be dispensed with through a straight forward balancing of competing interests.

## V. WHO IS A "PUBLIC EMPLOYEE"?

Another litigious issue courts are increasingly going to have to decide, as a threshold matter, is whether the individual in question is really a "public employee." While in many, if not most, situations this will admittedly not be an issue. In some instances courts will be forced to determine whether individuals are "public employees" within the meaning of *Garcetti*. For example, the Court gave no indication as to whether *Garcetti* is applicable to different levels of management. As such, courts have been or will be forced to

255. *See generally* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006) (holding that a retaliatory adverse employment action occurred where the only woman working in a maintenance department was reassigned from her responsibilities of operating a form lift to standard laborer task, even though the former and present duties fell within the same job description that all employee's in the department had).

256. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1968 (Souter, J., dissenting).

257. Shubha Harris, Note, *Silencing the Noise of Democracy—The Supreme Court Denies First Amendment Protection for Public Employees' Job-Related Statements in* Garcetti v. Ceballos, 33 WM. MITCHELL L. REV. 1143, 1183 (2007).

258. *See supra* notes 200–04 and accompanying text.

259. *Id.*

determine if the *Garcetti* rule is applicable to "quasi-government employees" such as elected officials, political appointees, and independent contractors.

Ceballos himself served in a limited supervisory capacity.[260] As such, lower courts have generally indiscriminately applied the *Garcetti* rule to public employees, even if they serve in relatively high-ranking capacities within the government bureaucracy. For example, the chief of police of Fayette, Mississippi was held not to be speaking as a citizen for First Amendment purposes where he admitted the speech in question was made in his capacity as chief.[261] The fact that the chief was a supervisor and ran his own department was never considered by the court.[262] However, some courts have shown a willingness to consider the rank of an employee when applying the *Garcetti* rule. The Fifth Circuit dealt with this issue in *Jenevein v. Willing*.[263] In *Jenevein*, an elected state judge argued that he was censured in violation of the First Amendment.[264] The Court held that although the judge is an employee of the state, his relationship with his employer differs from that of an "ordinary state employee" based on the manner in which he is "hired and fired," namely through the democratic process.[265] As such, the court held that the *Pickering-Garcetti* line of cases is not applicable to the free speech rights of elected state officials.[266] While from a practical standpoint the Fifth Circuit's holding seems rational for a purely elected official, it has yet to be seen what effect *Garcetti* will have on the numerous positions somewhere between the typical "ordinary state employee" and the purely elected official.

A related issue is how to apply the *Garcetti* rule to government contractors. A February 2007 *New York Times* article notes that the government is hiring contractors not only for their traditional purpose of building "ships and satellites" but also to staff positions traditionally held by civil servants.[267] For example, the federal government recently hired a contractor to fill positions in the General Services Administration processing cases of incompetence and fraud by federal contractors.[268] The people sent by the contractors to fill these positions work along side and perform indistinguishable functions as their civil

260. Ceballos v. Garcetti, 361 F.3d 1168, 1170 (9th Cir. 2004).

261. Williams v. City of Fayette, No. 5:05-cv-34 (DCB) (JMR), 2006 U.S. Dist. LEXIS 65235, at *7 (S.D. Miss. Sept. 11, 2006).

262. *Id.*

263. 493 F.3d 551 (5th Cir. 2007).

264. *Id.* at 555.

265. *Id.* at 557.

266. *Id.* at 558.

267. *See* Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, at 1.

268. *Id.*

service counterparts.[269] In fact, such widespread use of contractors has nearly doubled the federal government's annual contractor spending since George W. Bush took office.[270] Accordingly, courts will increasingly be forced to define how this new class of workers will be treated.

Precedent seems to suggest that contractors can be subjected to the *Garcetti* threshold test if they speak on matters of governmental misconduct. In *Board of County Commissioners v. Umbehr*, the Supreme Court applied the *Pickering*/*Connick* test to independent contractors.[271] The rationale was that, like government employees, contractors working for the government are needed for a well-informed debate on matters of public concern because they are uniquely positioned to analyze specific issues within their particular government agency.[272] At least one lower court used *Umbehr* as justification for applying *Garcetti* to a government contractor.[273] The effect on the ever-expanding class of pseudo-government employees from *Garcetti* is that they are going to be forced to accept the same free speech limitations related to their job function as civil servants, despite the fact that they did not accept actual government employment. Instead, they accepted employment with a contractor who entered into a business relationship with the government. For courts, this places them in the ironic, new, permanent, and intrusive position of having to pierce the veil not only of the government bureaucracy but also the contractor's corporate structure to determine if and when these individuals are speaking pursuant to job duties or merely on a subject matter of employment.

## VI. *GARCETTI* PLACES PUBLIC EMPLOYEE'S IN AN UNREASONABLE POSITION OF TRYING TO DETERMINE WHEN THEIR SPEECH IS PROTECTED

For decades, the Supreme Court has recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and

269. *See id.* at 24. One woman noted the only thing that distinguishes her from the traditional government employees is that the name of the contractor is printed on her ID badge. *Id.*

270. *See id.* at 1 ("Spending on federal contracts has soared during the Bush administration, to about $400 billion last year from $207 billion in 2000, fueled by the war in Iraq, domestic security and Hurricane Katrina, but also by a philosophy that encourages outsourcing almost everything government does.").

271. 518 U.S. 668, 673 (1996) ("[I]ndependent contractors are protected, and . . . the Pickering balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection.").

272. *See id.* at 674.

273. *See* Duran v. City of Corpus Christi, No. C-04-500, 2006 U.S. Dist. LEXIS 46917 (S.D. Tex. July 11, 2006). While *Duran* demonstrates how a combined reading of *Umbehr* and *Garcetti* can be used to deprive an independent contractor of speech made pursuant to a job function, this case was subsequently vacated by the Fifth Circuit on alternative grounds. Duran v. City of Corpus Christi, 240 Fed. App'x 639 (5th Cir. 2007).

sometimes unpleasantly sharp attacks on government and public officials."[274] Nothing is more fundamentally important to the principles of democratic self-government than for the electorate to be well informed on the inner workings of its government.[275] For that reason, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."[276] Not coincidently, government employees are in a "unique position to uncover improprieties within the government due to their first hand knowledge of governmental operations."[277] For this reason, the Ninth Circuit in its ruling on *Garcetti* recognized that

> [t]he right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, are positioned uniquely to contribute to the debate on matters of public concern.[278]

The Supreme Court, too, has appreciated the major concern with restricting public employee speech rights is that their voices will be lost on issues of government mismanagement, thus undermining the ability to maintain government integrity.[279]

Clearly, the most well informed are those individuals that comment on issues directly related to their job duties. The Department of Defense auditor is clearly in a better position to comment on misappropriations to a defense contractor than the average soldier is. However, the effect of the new rule is to silence these critical voices and undercut the public's ability to hold the government accountable.[280] In practical terms, Justice Souter points out that the Court's new rule places beyond First Amendment protection "a public auditor [speaking] on his discovery of embezzlement of public funds, . . . a building inspector [making] an obligatory report of an attempt to bribe him, or . . . a law enforcement officer [who] expressly balks at a superior's order to

274. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

275. *See* Levinson, *supra* note 194, at 25.

276. Lierly, *supra* note 2 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

277. Zack, *supra* note 50, at 895.

278. Ceballos v. Garcetti, 361 F.3d 1168, 1175 (9th Cir. 2004) (internal quotations omitted).

279. *See* City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam).

> Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

*Id.* (internal citations omitted).

280. Lierly, *supra* note 2.

violate constitutional rights he is sworn to protect."[281] The majority should have recognized that the best way to enhance government efficiency is to encourage these individuals with the most well-informed views on mismanagement and ineffective leadership to come forward and present the public with an opportunity to vote out of office those officials who fail to carry out their duties effectively.[282] Where a government employee can show such a compelling interest in their speech, why should that not, on balance, trump the interest of his boss in keeping the electorate in the dark about ineffective leadership?

Beyond those that are actually placed outside of First Amendment protection because they are speaking pursuant to a job duty, the perception generated by this rule will discourage other employees, even those who would be protected, from speaking up. It has been argued that *Pickering* and *Connick* themselves have already made it difficult for a public employee to understand when his speech is protected.[283] *Garcetti* only compounds this bewilderment. The Court's new prong places government employees in the unreasonable position of having to determine whether or not their speech will be protected if they speak out on matters of governmental mismanagement. While the Court is attempting to promulgate a speech rule for public employees that is the same standard as the rule for private employees,[284] the de facto effect is to place an increased and undue burden on public employees. While non-government employees do have greater restrictions placed on their speech than public employees,[285] it is also very clear when their speech is employment speech and when it is civic speech. A public employee will have to engage in the same "practical inquiry" into their own job description that courts will have to undertake in order to determine if they are speaking pursuant to a job duty or merely on a subject matter of their employment.[286] An employee of a private company is not forced to engage in this inquiry.

While the Court attempts to distinguish the situation faced by the teacher in *Pickering* from the situation faced by Ceballos, government employees

281. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1966–67 (2006) (Souter, J., dissenting).

282. *See* Levinson, *supra* note 194, at 25.

283. *See* Allred, *supra* note 46, at 456 (arguing that employees' lack of understanding of *Connick* will spur litigation).

284. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1958 (majority opinion) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

285. Only public employees are entitled to the *Pickering* balancing of their interest in the speech versus the government's interest in efficiency. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

286. *See supra* Part IV.

themselves will not be able to do so. Most employees will at best be bewildered by *Garcetti* and at worse see *Garcetti* as a general restriction on free speech and will not be able to judge for themselves whether their situation is more closely related to *Ceballos* or *Pickering*. While the inquiry is a practical one, nothing precludes a government employer from unreasonably expanding a job description to generate the perception that all speech is not protected because it is pursuant to a job duty.[287] The only way to challenge an expansive job description is through yet more litigation.[288] As a consequence, public employees will be less willing to speak out for fear of reprisal, even in situations that they might still have legal protection. Thus, while public employees are the ones most affected by mismanagement or corruption and are in a unique position to expose government abuse, they are the people least willing or able to discuss these issues. This unwillingness of public employees to speak, even where legally protected, will have a chilling effect on the public as a whole. The general public loses out entirely on the benefit of hearing from government employees, presumably the most well-informed members of society when it comes to government function, on important issues.

The other possible consequence from an employee trying to determine if they are protected or not in the wake of *Garcetti* is that they could perceive the "doctrinal anomaly" that the Ninth Circuit cites, namely that employees retain more protection by going directly to the newspaper than they do going to their boss.[289] While the Supreme Court agreed that it would be "inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties," the Court thought this anomaly to be limited in scope.[290] The Court also felt this perceived anomaly could encourage government employers to give employees an internal forum to discuss concerns.[291] However, until employers do this, the Ninth Circuit might be correct: a government employee who is worried he or she does not have the constitutional protection from retaliation to bring instances of misconduct to their supervisor might be better off to "bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor."[292]

287. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting).
288. *See id.*
289. *Id.* at 1961 (majority opinion).
290. *Id.*
291. *Id.*
292. Ceballos v. Garcetti, 361 F.3d 1168, 1176 (9th Cir. 2004).

## VII. THE SUPREME COURT CREATES A DANGEROUS PRECEDENT BY ARGUING THAT WHISTLEBLOWER STATUTES ARE SUFFICIENT PROTECTION TO QUELL THE POLICY CONCERNS OF LIMITING FIRST AMENDMENT PROTECTION

The Court in *Garcetti* attempted to quell some of the public policy concerns with limiting a government employee's ability to raise issues of misconduct by saying that government employees have a "powerful network of legislative enactments—such as whistle-blower protection laws and labor codes" to protect them.[293] Whistleblowing occurs when an employee, employed in any position, notifies a supervisor or governmental agency of illegal activity being conducted by his employer, the government agency.[294] Whistleblower statutes have been enacted in some form by the federal government and by all fifty states.[295] These statutes are intended to allow employees to bring forward allegations of government wrongdoing without the fear of reprisal.[296] However, these statutes sometimes carve out exceptions for certain agencies or acts. For example, the Federal Whistleblower Protection Act does not provide protection for employees of the FBI, CIA, Defense Intelligence Agency, National Security Agency, or General Accounting Office.[297]

Since the 1980s, state law, as opposed to federal regulation, has taken the lead in the arena of whistleblower protection.[298] As such, while each of the states has some type of anti-retaliation provisions on its books, the coverage available to whistleblowers varies greatly.[299] For example, some states only provide whistleblower protection to state employees,[300] while others extend the

293. *See Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1962; *see also id.* at 1970 (Souter, J., dissenting) ("The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses.").

294. Laura Simoff, Comment, *Confusion and Deterrence: The Problems That Arise From a Deficiency in Uniform Laws and Procedures for Environmental "Whistleblowers,"* 8 DICK. J. ENVTL. L. & POL'Y 325, 325 (1999).

295. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 132–75 app. 1 (2000).

296. Simoff, *supra* note 294, at 326.

297. David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 121 (1995).

298. Callahan & Dworkin, *supra* note 295, at 105.

299. *See id.* at 107–08 ("Important points of divergence include the type of whistleblower protected, the appropriate recipient of the report of wrongdoing, the subject of protected whistleblowing, the motive of the whistleblower, the quality of evidence of wrongdoing required, and the remedies provided to the employee suffering retaliation.").

300. *See* Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1970–71 n.9 (2006) (Souter, J., dissenting) (citing ALA. CODE § 36-26A-1 *et seq.* (2001); COLO. REV. STAT. § 24-50.5-101 *et seq.* (2004); IOWA CODE ANN. § 70A.28 *et seq.* (1999); KAN. STAT. ANN. § 75-2973

protection to municipal employees as well.[301] Furthermore, some states require employees to notify their supervisor before they speak,[302] while others forbid imposing such a requirement.[303] Obviously this can cause uneven results to the point that an act of whistleblowing that is covered in one jurisdiction might not be covered in a neighboring jurisdiction.[304] Furthermore, there often is little judicial consistency in construing these multiple statutes as they can be read to varying degree, either very expansively or narrowly.[305] As Justice Souter recognized, "the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief."[306] Ceballos himself was not eligible for whistleblower protection under this patchwork.[307]

The Supreme Court's reliance on such legislative whistleblower laws seems to be a dangerous precedent. "[T]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law."[308] In effect, the Court is justifying the limitation of a basic Bill of Rights protection because it is duplicative of a procedural protection given by the states. This

(Cum. Supp. 2003); MO. REV. STAT. § 105.055 (Cum. Supp. 2004); N.C. GEN. STAT. ANN. § 126-84 (Lexis 2003); 2 OKLA. STAT., tit. 74, § 840-2.5 *et seq.* (2005 Supp. 2005); WASH. REV. CODE § 42.40.010 (2000); WYO. STAT. ANN. § 9-11-102 (2003)).

301. *Id.* at 1970 n.8 (Souter, J., dissenting) (citing DEL. CODE ANN., tit. 29, § 5115 (2003); FLA. STAT. § 112.3187 (2003); HAW. REV. STAT. § 378-61 (1993); KY. REV. STAT. ANN. § 61.101 (West 2005); MASS. GEN. LAWS ANN., ch. 149, § 185 (West 2004); NEV. REV. STAT. § 281.611 (2003); N.H. REV. STAT. ANN. § 275-E:1 (Supp. 2005); OHIO REV. CODE ANN. § 4113.51 (Lexis 2001); TENN. CODE ANN. § 50-1-304 (Cum. Supp. 2006)).

302. *Id.* at n.10 (Souter, J., dissenting) (citing IDAHO CODE ANN § 6-2104(1)(a) (Lexis 2004); ME. REV. STAT. ANN., tit. 26, § 833(2) (1988); MASS. GEN. LAWS ANN., ch. 149, § 185(c)(1) (West 2004); N.H. REV. STAT. ANN. § 275-E:2(II) (1999); N.J. STAT. ANN. § 34:19-4 (West 2000); N.Y. CIV. SERV. LAW § 75-b(2)(b) (West 1999); WYO. STAT. ANN. § 9-11-103(b) (2003)).

303. *Id.* at 1971 n.11 (Souter, J., dissenting) (citing KAN. STAT. ANN. § 75-2973(d)(2) (Cum. Supp. 2003); KY. REV. STAT. ANN. § 61.102(1) (West 2005); MO. REV. STAT. § 105.055(2) (Cum. Supp. 2004); 2 OKLA. STAT., tit. 74, § 840-2.5(B)(4) (West Supp. 2005); ORE. REV. STAT. § 659A.203(1)(c) (2003)).

304. *Id.* at 1971 (Souter, J., dissenting) ("[I]ndividuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them"); *see also* Callahan & Dworkin, *supra* note 295, at 130; Culp, *supra* note 297, at 131.

305. Callahan & Dworkin, *supra* note 295, at 114–15.

306. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1970 (Souter, J., dissenting).

307. Harris, *supra* note 257, at 1176:

> As a county employee, Ceballos was not eligible for federal whistleblower protection, but he may have relied on California's whistleblower statute to shield him from retaliation. But Ceballos was not eligible for whistleblower protection under the state statute because, at the time of his actions, the state law required that the disclosure be made to an external public body such as the media.

308. *Garcetti*, 547 U.S. at _____, 126 S. Ct. at 1970 (Souter, J., dissenting) (quoting Bd. of County Comm'rs, Wabaunsee County v. Umbehr, 518 U.S. 668, 680 (1996)).

seems backwards. Whistleblower laws are supposed to provide procedural protection for the First Amendment rights that are guaranteed in the Bill of Rights.[309] "Whistleblower statutes do not create a new right to speak about governmental wrongdoing; rather, they provide employees who exercised their right with additional guarantees against the consequences of doing so."[310] Thus, legislatures should use whistleblower laws to supplement First Amendment protection and encourage more disclosure of government abuse.[311]

The First Amendment should provide a floor for the minimum amount of protection due to whistleblowers. Refusing to recognize this and allowing states to enact their own statutory scheme provides no assurance that states will meet the minimum requirements of the Bill of Rights. In short, "the mere existence of whistleblowing statutes does not negate the need for First Amendment protection for public employees carrying out job duties."[312] By so concluding that whistleblower statutes are sufficient, the Court is neglecting its "responsibility . . . to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."[313] Justice Cardozo called freedom of speech "the matrix, the indispensable condition, of nearly every other form of freedom."[314] If the Supreme Court is so willing to restrict this fundamental freedom, what is next?

Finally, there are adverse human effects that relying solely on whistleblower statutes can have. Many employees are afraid to be labeled a "whistleblower" out of fear of being "[r]eviled by management and shunned by co-workers."[315] Worse, whistleblowers have traditionally had to deal with "blackballing" and may have to incur the substantial legal expenses of pursuing a retaliation claim, often against a large government agency.[316] By all practical accounts, such legal action will at minimum require a hearing before the Equal Employment Opportunity Commission and defending a summary judgment motion. As a result, it is not surprising that "[m]any whistleblowers have lost their homes and marriages as a direct result of their concern for the public health and welfare."[317] In fact, one commentator points to a study of eighty-four whistleblowers which revealed that "82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide."[318] If nothing else, it seems

309. Zack, *supra* note 50, at 917.
310. *Id.*
311. *See id.*
312. *Id.*
313. Connick v. Myers, 461 U.S. 138, 147 (1983).
314. Palko v. Connecticut, 302 U.S. 319, 327 (1937).
315. Culp, *supra* note 297, at 112–13.
316. *See id.* at 113.
317. *Id.*
318. *Id.*

inconsistent with general notions of fairness not to extend basic constitutional protection to those individuals who are willing to risk such adverse effects for a greater societal benefit.

## CONCLUSION

The Court must secure the basic liberties guaranteed in the Bill of Rights by ensuring "that citizens are not deprived of fundamental rights by virtue of working for the government."[319] Justice Marshall's decision in *Pickering* recognized this need and was a major victory for those concerned with the vitality of lively debate in a democracy. It ended the era of Holmesian rejection of free speech and created a cause of action for government employees, providing an opportunity to be heard on issues of public concern free from the threat of reprisal. The Supreme Court's decision in *Garcetti* undermines this advancement and places significant and drastic limits on the individual. While the Court's desire to maintain the ability of the government to function is justifiable, this goal is not effectively achieved with the *Garcetti* rule. Justice Kennedy's rule, that when state or federal employees make statements pursuant to their official duties, these employees are not speaking as citizens for First Amendment purposes and, as such, government employees are not insulated from discipline based on their official communications,[320] will not be effective in limiting the number of personal grievances brought as constitutional cases. Rather, the rule breeds confusion because it necessitates a "practical inquiry" into every government employees' job description to determine if speech was made pursuant to a job duty or was merely the subject matter of her employment. Any limited benefit that might flow from this rule is significantly outweighed by its adverse effects. The need to engage in this "practical inquiry" in each and every employee retaliation claim creates a situation ripe for inequities in the courts. It also undercuts the ability of the citizen employee to speak and is detrimental to society as a whole by depriving it of these important voices. Silencing those who are willing to expose government abuse is a dangerous precedent that cannot be fixed simply by a reliance on the "patchwork" system of state whistleblower laws.

As such, the Court should move quickly to limit the application of its *Garcetti* decisions. As Justice Stevens said, the answer to the question of when government employee speech should be protected needs to be "Sometimes" not "Never."[321] If a court determines that speech was made pursuant to an official duty, then this should be strong, but not dispositive evidence, that the speech is not protected. However, rather than this being a threshold issue, a

319. Connick v. Myers, 461 U.S. 138, 147 (1983).

320. *See supra* note 105 and accompanying text.

321. Garcetti v. Ceballos, 547 U.S. 410, _____, 126 S. Ct. 1951, 1962 (2006) (Stevens, J., dissenting).

court should still weigh the individual's interest in the speech against the disruption caused to the government. Where such speech is inflammatory or misguided surely the individual should not be provided protection. However, when a civil servant, even in the course of his or her job, uncovers information of misconduct by the government we must allow him or her to bring it to light. The interests of democracy are served by such open and honest assessment. Government efficiency in the long run is improved by such honest assessment leading to a change in leadership. Similarly, the interest of justice is served by states' attorneys who work, not for achieving a high conviction rate, but for ensuring that only the guilty are convicted. Mr. Ceballos exposed a police officer who lied on an affidavit and a boss who was determined to get a conviction nonetheless. Such courageous action should not lawfully be punished with retaliation but rather should be afforded the constitutional protection it deserves.

*STEVEN J. STAFSTROM, JR.

322. * J.D. Candidate, Saint Louis University School of Law, 2008; B.A., Fairfield University, 2005. I would like to thank Nancy Brouillet and the Employment Rights Division of the Connecticut Attorney General's Office for sparking my interest in this topic. A special thank you to the editors and staff of the Saint Louis University Law Journal for their meticulous editorial work and to Professor Susan FitzGibbon for her insightful comments. Finally, I gratefully recognize the support of my parents and Christine Dinardi.