

GARCETTI V. CEBALLOS: STIFLING THE FIRST AMENDMENT IN THE PUBLIC WORKPLACE

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INTRODUCTION

On May 30, 2006, more than 19.4 million public employees nationwide¹ lost a battle in the war being waged against free speech. Upon deciding *Garcetti v. Ceballos*, the Supreme Court held that “when public employees make statements 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.”² The subsequent chilling effect this decision will have on the most honest of civil servants has the potential to result in both public and private sector conduct going unreported.³ The First Amendment famously provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴ The Court has repeatedly announced that First Amendment protection includes “the receipt of information and ideas as well as the right of free expression,” because “public debate must not only be unfettered; it must be informed.”⁵ Public employee speech must be considered an essential element of this protection because “[w]hen government employees are silenced, it is the public that is the principal loser.”⁶

This Note advocates a return to the balancing test enunciated in *Pickering v. Board of Education*⁷ as opposed to the per se rule adopted by the Court in *Garcetti*. Part I discusses the factual background and legal argument made by the Court in

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¹ U.S. Census Bureau, Public Employment and Payroll Data, <http://www.census.gov/govs/www/apes.html> (last visited Oct. 18, 2006).

² *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

³ See *What Price Free Speech? Whistleblowers and the Ceballos Decision: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 26 (2006) [hereinafter *Hearings*] (statement of Stephen M. Kohn, Chair, National Whistleblower Center).

⁴ U.S. CONST. amend. I.

⁵ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867–68 n.20 (1982) (plurality opinion) (citation omitted).

⁶ Brief for Respondent at 14, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 U.S. S. Ct. Briefs LEXIS 476, at *33.

⁷ 391 U.S. 563 (1968).

Garcetti.⁸ Part II reviews public employee speech jurisprudence throughout the history of the Court.⁹ Part III discusses the aftermath of the *Garcetti* decision, including the impact the decision will have on government whistleblowers, prosecutors, and public school teachers.¹⁰ Part III also presents and rebuts the policy considerations in favor of the *per se* rule adopted by the Court.¹¹ The Note concludes that the best way to protect the constitutional guarantee of freedom of speech for public employees is to reinstate the *Pickering* balancing test, which weighs the employee's interest in free speech against the employer's interest in operating an efficient workplace.¹²

I. THE CASE

A. *The Facts*

The factual background of *Garcetti* deserves recitation in order to gain an accurate picture of the speech that the Court deemed unprotected and the actions that resulted. In 1998, Richard Ceballos was employed as a deputy district attorney at the Los Angeles County District Attorney's Office.¹³ He served as a calendar deputy which gave him supervisory responsibility over two to three deputy district attorneys.¹⁴ A defense attorney in a case being prosecuted by the District Attorney's Office informed Ceballos that he believed that one of the deputy sheriffs may have lied in an affidavit necessary to gain a critical search warrant.¹⁵ The defense attorney asked Ceballos to investigate.¹⁶ After conducting an investigation, Ceballos determined that the affidavit "at the least, grossly misrepresented the facts."¹⁷ Following this discovery, Ceballos authored a memorandum addressed to the defense attorney, the parties in the case, and his supervisor, District Attorney Gil Garcetti.¹⁸ The memo outlined Ceballos' concern regarding the affidavit and recommended that the District Attorney dismiss the case.¹⁹ After a heated discussion and pressure from the Sheriff's Office, the District Attorney chose to disregard Ceballos' recommendation

⁸ See *infra* Part I.

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

¹¹ See *infra* Part III.

¹² See *infra* Part III.

¹³ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

¹⁴ *Ceballos v. Garcetti*, 361 F.3d 1168, 1170 (9th Cir. 2004), *vacated*, 126 S. Ct. 1951 (2006).

¹⁵ *Id.* at 1170–71.

¹⁶ *Id.* at 1171.

¹⁷ *Id.*

¹⁸ *Garcetti*, 126 S. Ct. at 1955.

¹⁹ *Id.* at 1955–56.

and proceed with the case.²⁰ Ceballos was then called to testify for the defense at a hearing on the defense's motion to traverse regarding the observations Ceballos made in the memorandum about the affidavit and the information uncovered during his investigation.²¹

Following the hearing, a number of retaliatory employment actions occurred, leading Ceballos to file suit.²² Ceballos was reassigned, demoted to a position as a trial deputy, transferred to another courthouse,²³ and denied a promotion.²⁴ Ceballos initiated a grievance, which was denied, and then filed suit²⁵ under 42 U.S.C. § 1983²⁶ claiming that his supervisors "violated the First and Fourteenth Amendments by retaliating against him."²⁷ The district court granted Garcetti's motion for summary judgment based on the conclusion that the memo was not entitled to First Amendment protection.²⁸ The Ninth Circuit reversed, holding that the mere fact that "Ceballos prepared his memorandum in fulfillment of a regular employment responsibility does not serve to deprive him of the First Amendment protection afforded to public employees."²⁹ The Ninth Circuit determined that the allegations of wrongdoing in the memorandum were a form of protected speech under the First Amendment.³⁰ The court applied the balancing test provided by *Pickering v. Board of Education* and developed in *Connick v. Myers*.³¹

Garcetti appealed to the Supreme Court, where the case was initially argued on October 12, 2005.³² The case had not yet been decided when Justice O'Connor retired in January 2006.³³ The case was reargued on March 21, 2006.³⁴ The assumption

²⁰ *Id.* at 1956.

²¹ *Id.*

²² *Id.*

²³ Ceballos was transferred from the Pomona Branch to the El Monte Branch. He referred to this treatment as "an act of 'Freeway Therapy,' a practice of punishing deputy district attorneys by assigning them to a branch requiring a long commute to work." *Ceballos v. Garcetti*, 361 F.3d 1168, 1171–72 n.2 (9th Cir. 2004), *vacated*, 126 S. Ct. 1951 (2006).

²⁴ *Garcetti*, 126 S. Ct. at 1956.

²⁵ *Id.*

²⁶ 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .").

²⁷ *Garcetti*, 126 S. Ct. at 1956.

²⁸ *Id.*

²⁹ *Ceballos v. Garcetti*, 361 F.3d 1169, 1178 (9th Cir 2004), *vacated*, 126 S. Ct. 1951 (2006).

³⁰ *Id.* at 1173.

³¹ *Id.*

³² Transcript of Oral Argument, *Garcetti*, 126 S. Ct. 1951 (No. 04-473), 2005 U.S. TRANS LEXIS 52, at *1.

³³ Linda Greenhouse, *Some Whistle-Blowers Lose Free-Speech Protections*, N.Y. TIMES, May 31, 2006, at A16.

³⁴ *Id.*

of many commentators was that Justice Alito would break the deadlock among the remaining Justices who had originally heard the case.³⁵ In reality the situation was considerably more complex.³⁶ Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined the majority opinion authored by Justice Kennedy.³⁷ Justices Stevens, Souter, Breyer, and Ginsburg dissented.³⁸

B. The Decision

The majority opinion first summarized public employee free speech jurisprudence to set the stage for a new twist on the law.³⁹ Justice Kennedy reasoned that “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”⁴⁰ The opinion laid out the basics of the balancing test established by *Pickering*.⁴¹ Kennedy first described the government’s interest in efficiency and effective function, noting that “[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions.”⁴² Without this control, little chance exists for government to provide public services efficiently.⁴³ When public employees speak out, the views they express have the potential to “contravene governmental policies or impair the proper performance of governmental functions.”⁴⁴ However, the opinion acknowledges that “a citizen who works for the government is nonetheless a citizen.”⁴⁵ Kennedy summarized public employee free speech doctrine by stating that “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”⁴⁶

After reciting the recent case doctrine, however, the Court ignored the former jurisprudence on this subject and established a new rule. The context of Ceballos’ speech was deemed unimportant.⁴⁷ The location of the speech and the subject matter

³⁵ *See id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* Justice Souter wrote the dissenting opinion joined by Justices Stevens and Ginsburg, as well as an individual dissent. Justice Breyer dissented in a separate opinion. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

³⁹ *See Garcetti*, 126 S. Ct. at 1958.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 1959.

were both marked as “nondispositive.”⁴⁸ The Court instead considered only one element of the speech—its content. “The controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy.”⁴⁹ This new development was justified by pointing out that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”⁵⁰ The Court focused only on the role of the individual by stressing that Ceballos’ actions as an employee are entirely separate from his actions as a citizen.⁵¹

Unfortunately, the Court did not clarify the test that it established. Justice Kennedy disclaimed any reason “to articulate a comprehensive framework for defining the scope of an employee’s duties.”⁵² The only guidance the Court gave for determining the scope of employee duties was to describe the proper inquiry as “a practical one.”⁵³ Although formal job descriptions may act as a starting point for this analysis, they cannot solely be relied upon to determine the bounds of First Amendment protection.⁵⁴ The Court noted that formal job descriptions rarely bear much resemblance to the actual duties and expectations of an employee.⁵⁵ Simply including a task in an employee’s written job description is “neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.”⁵⁶

This discussion provided some outer limits to help lower courts determine exactly what constitutes speech within the scope of an employee’s work. This leaves, however, a gaping middle ground for the lower courts to struggle with when resolving future public employee speech cases. And struggle with it they have. To quote the District Court of New Jersey, “I have no doubt that many courts will struggle to define the breadth of *Garcetti* and its impact on First Amendment jurisprudence.”⁵⁷ In the first year after the Court’s decision, the case was distinguished in more than twenty cases by lower courts around the country.⁵⁸

⁴⁸ *Id.* (“That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. . . . The memo concerned the subject matter of Ceballos’ employment, but this, too, is nondispositive.”).

⁴⁹ *Id.* at 1959–60.

⁵⁰ *Id.* at 1960.

⁵¹ *Id.*

⁵² *Id.* at 1961.

⁵³ *Id.*

⁵⁴ *Id.* at 1962.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Hailey v. City of Camden*, Civil No. 01-3967, 2006 U.S. Dist. LEXIS 45267, at *46 (D.N.J. July 5, 2006).

⁵⁸ *See, e.g., Barclay v. Michalsky*, 451 F. Supp. 2d 386, 396 (D. Conn. 2006); *Black v. Columbus Pub. Sch.*, No. 2:96-cv-326, 2006 U.S. Dist. LEXIS 57768, at *2–3 (S.D. Ohio, Aug. 17, 2006).

C. District Court Fallout

District courts have developed very different definitions of the bounds of employee responsibility when deciding cases involving similar forms of speech. One example of opposing views among district courts relates to the responsibility of employees to report wrongdoing or misfeasance by co-workers.

Marie Black, an assistant principal in Columbus, Ohio, reported an affair between a parent volunteer and the principal.⁵⁹ In *Black*, the Southern District of Ohio noted that *Garcetti* did not change the law in the Sixth Circuit and cited *Thompson v. Schied*.⁶⁰ Although the *Black* court refused to apply *Garcetti* or *Thompson* to the defense's motion to dismiss for procedural reasons, the facts of *Thompson* were similar to the facts of *Black*.⁶¹ In *Thompson*, the Sixth Circuit ruled that retaliatory employment actions suffered by a county fraud investigator who investigated actions of a county commissioner (just as Black had to investigate her superior, the principal) were not protected by the First Amendment because "Thompson's investigation and conversations related thereto concerned his duties as an employee of the county and therefore were matters of internal department policy and not matters of public concern."⁶²

This treatment of the duty to report on co-workers is strikingly different from the District Court of Connecticut's treatment of the issue. In Connecticut, Deborah Barclay, a nurse, complained to supervisors that her co-workers were sleeping on the job and using excessive restraints.⁶³ She was placed on administrative leave as a result of this speech because her employer claimed it had disrupted the workplace.⁶⁴ The hospital argued that Barclay made complaints pursuant to her official duties because employees have a duty to report violations of hospital policy.⁶⁵ The court noted during its analysis of the scope of employee job responsibilities that the inquiry required by *Garcetti* is "a practical one."⁶⁶ This practical

⁵⁹ *Black*, 2006 U.S. Dist. LEXIS 57768, at *2.

⁶⁰ *Id.* at *11 (discussing 977 F.2d 1017 (6th Cir. 1992)).

⁶¹ *Id.* at *11–17.

⁶² *Id.* at *11–12.

⁶³ *Barclay*, 451 F. Supp. 2d at 390.

⁶⁴ *Id.* at 391, 399.

⁶⁵ *Id.* at 395. Specifically, the hospital claimed that Work Rule #30 and Work Rule #22 were applicable in this circumstance. Work Rule #30 requires employees to report any violations of "existing work rules, policies, procedures, or regulations" to their supervisors. *Id.* The employees Barclay complained about were in violation of Work Rule #22. Work Rule #22 provides that "[p]hysical violence, verbal abuse, inappropriate or indecent conduct and behavior that endangers the safety and welfare of persons or property is prohibited." *Id.* at 390.

⁶⁶ *Id.* at 395.

inquiry indicated that material issues of fact existed.⁶⁷ The court determined that there was no incontrovertible evidence that the nurse's complaints were "part of the discharge of her duties as a nurse" and held that *Garcetti* was not controlling.⁶⁸

In both *Black* and *Barclay*, the employee was expected to report misbehavior on the part of her peers and was punished for this speech. In *Barclay*, the employee handbook explicitly listed the expectation, but the speech merited protection because it was not within the scope of her job responsibilities.⁶⁹ In *Black*, the expectation was implicit. Although the *Black* court did not reach the question of whether the speech was protected, an analogous scenario in the same circuit concluded such speech did not.⁷⁰ Arbitrary distinctions like these will continue unless the Court enunciates a clear standard of how to determine exactly what constitutes an employee's job responsibilities.

More common among district court decisions than confusion or conflicting holdings is the decision to ignore the *Garcetti* ruling altogether and decide the case based on the public concern test promulgated by the Court in *Connick v. Meyers*.⁷¹ For example, in *Pittman v. Cuyahoga Valley Career Center*, substitute teacher Ricky Pittman complained about the traffic in the parking lot and proposed new ideas for resolving the issue.⁷² He was terminated in part as a result of this speech.⁷³ In its decision on the matter, the Northern District of Ohio first summarized *Garcetti*'s holding and then expressed concern that "some legal analysts appear to be interpreting *Garcetti* as holding that statements made by public employees will *never* be protected if the employee is acting within the scope of his or her employment while making the statements."⁷⁴ The court chose to narrowly interpret *Garcetti* as requiring a "job relatedness" test.⁷⁵ Accordingly, "[i]f the public employee's speech was required by his or her job, then *Garcetti* applies and the statements are not protected speech."⁷⁶ The court went on to say that if the speech is not "specifically job-related," then *Garcetti* is not controlling and a traditional *Connick* public concern test should be applied.⁷⁷ The court found it "arguable" as to whether or not the teacher's speech concerning complaints about his responsibilities and offering new

⁶⁷ *Id.*

⁶⁸ *Id.* at 396.

⁶⁹ *Id.* at 395–96.

⁷⁰ *Black v. Columbus Pub. Sch.*, No. 2:96-cv-326, 2006 U.S. Dist. LEXIS 57768, at *11–17 (S.D. Ohio, Aug. 17, 2006).

⁷¹ 461 U.S. 138 (1983).

⁷² 451 F. Supp. 2d 905, 910–11 (N.D. Ohio, 2006).

⁷³ *Id.* at 913.

⁷⁴ *Id.* at 929.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

ideas for managing traffic in the student parking lot was related to his job.⁷⁸ As a result, the court refused to apply *Garcetti* and ruled that “none of Pittman’s speech in this area was on a matter of public concern” and, as such, the traditional *Connick* analysis governed.⁷⁹

II. THE PRECEDENT

Public employee speech was not always protected. In fact, for a significant portion of the twentieth century, “the thrust of the Supreme Court’s public employee speech jurisprudence was easy to discern: public employee speech received almost no First Amendment protection from adverse employer actions.”⁸⁰ The Court considered government employment a privilege as opposed to a right that justified constitutional protection.⁸¹ The distinction between rights and privileges granted the government incredible latitude to abridge the First Amendment rights of public employees.⁸² Justice Holmes is often quoted as embodying this view of public employee speech.⁸³ Deciding on a police officer’s claim for First Amendment protection in the workplace, Justice Holmes commented that “[t]he [officer] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”⁸⁴ Justice Holmes went on to say that “[t]here are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech . . . by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.”⁸⁵ This implied suspension of constitutional rights allowed the employer to “impose any reasonable condition upon holding offices within its control.”⁸⁶ Although this condition seemed reasonable to Justice Holmes, it is no longer reasonable today, and nearly four decades of public employee speech jurisprudence serve as evidence of that fact.⁸⁷

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U.L. REV. 1007, 1010 (2005).

⁸¹ Edward J. Velazquez, Comment, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055, 1059 (1995).

⁸² *Id.*

⁸³ See *United States v. Am. Library Ass’n*, 539 U.S. 194, 227 (2003); *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716–17 (1996); *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting); *Connick v. Myers*, 461 U.S. 138, 143–44 (1983); *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99 n.34 (1946); Kozel, *supra* note 80, at 1011.

⁸⁴ *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

⁸⁵ *Id.* at 517–18.

⁸⁶ *Id.* at 518.

⁸⁷ See *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Waters v. Churchill*, 511 U.S. 661

Holmes' view of public employee speech controlled the Court's jurisprudence until 1968 with the decision of *Pickering v. Board of Education*.⁸⁸ The importance of *Pickering* results from its general exposition and description of the process for resolving public employee free speech cases.⁸⁹ The facts of the case are fairly straightforward. Marvin Pickering, a public school teacher, was terminated after writing a letter critical of the school board and superintendent, which the local newspaper published shortly after the defeat of a proposed increase to the school tax rate.⁹⁰ The Illinois Supreme Court upheld his termination finding that "the Board could reasonably conclude that [Pickering's] publication of the letter was 'detrimental to the best interests of the schools.'" ⁹¹ The court denied the First Amendment claim on the basis that by accepting a teaching position in the public school, he was obliged to refrain from making disruptive statements about the operation of the school.⁹² The court explicitly noted that had Pickering not held a teaching position, there would have been no doubt of his right to engage in the offending speech.⁹³

The Supreme Court overturned the state court ruling and forever changed public employee free speech jurisprudence. The Court developed a two-part process for analyzing public employee free speech cases. First, the Court recognized that the government has interests as an employer in "regulating the speech of its employees that 'differ significantly' from government interests justifying 'regulation of the speech of the citizenry in general.'" ⁹⁴ After recognizing this interest, the Court required a balancing of the government's interest with that of a citizen's.⁹⁵ The Court articulated the heart of the problem in any case as the difficulty of "arriv[ing] 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."⁹⁶

The next case to significantly alter public employee free speech jurisprudence was *Connick v. Myers*.⁹⁷ Sheila Myers, the Assistant District Attorney for Orleans

(1994); *Rankin*, 483 U.S. at 378; *Connick*, 461 U.S. 138; *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁸⁸ *Pickering*, 391 U.S. 563. For a full analysis of the Court's shift in public employee free speech jurisprudence see William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

⁸⁹ Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5, 8 (1999).

⁹⁰ *Id.* at 7.

⁹¹ *Pickering*, 391 U.S. at 567.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Schoen, *supra* note 89, at 8.

⁹⁵ *Id.*

⁹⁶ *Pickering*, 391 U.S. at 568.

⁹⁷ 461 U.S. 138 (1983).

Parish, Louisiana received a transfer order.⁹⁸ In response to the order, she developed a survey asking for employee opinions on the “office transfer policy, office morale, the need for a grievance committee, the level of confidence in superiors, and whether employees felt pressured to work in political campaigns.”⁹⁹ Myers was terminated following the distribution of the questionnaire.¹⁰⁰ Upon granting certiorari from the Fifth Circuit, the Court reversed the verdict for the plaintiff holding that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”¹⁰¹

In reaching this decision, the Court applied the balancing test laid out years earlier in *Pickering*.¹⁰² However, before reaching the balancing test, the Court first necessitated a determination of whether Myers’ speech related to a matter of public concern.¹⁰³ This decision attempted to clarify what exactly constitutes public concern. “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”¹⁰⁴ The Court determined that only one of the questions on Myers’ survey constituted a matter of public concern—whether assistant district attorneys felt pressured to support the political campaigns of candidates supported by the office.¹⁰⁵ The *Pickering* balancing test was then applied in order to determine the constitutionality of Myers’ dismissal.¹⁰⁶ The Court held that the district court “erred in imposing an unduly onerous burden on the State to justify Myers’ discharge.”¹⁰⁷

Several significant holdings can be extracted from *Connick*. First, no First Amendment violation exists if the offensive speech does not relate to a matter of public concern.¹⁰⁸ Second, whether the speech relates to a matter of public concern is not a question of fact, but one of law.¹⁰⁹ The third holding specifies that speech pertaining to a matter of public concern should be “determined by the content, form, and context of the speech as revealed by the entire record, and possibly, by the employee’s motive for speaking.”¹¹⁰ Fourth, reasonable belief by the government that

⁹⁸ Stevan C. Dittman, Note, *Constitutional Law—Supreme Court Restricts First Amendment Rights of Public Employees—Connick v. Myers*, 58 TUL. L. REV. 831, 831 (1984).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Connick*, 461 U.S. at 146.

¹⁰² Dittman, *supra* note 98, at 836.

¹⁰³ *Id.*

¹⁰⁴ *Connick*, 461 U.S. at 147–48.

¹⁰⁵ *Id.* at 149.

¹⁰⁶ Dittman, *supra* note 98, at 838.

¹⁰⁷ *Connick*, 461 U.S. at 149–50.

¹⁰⁸ Schoen, *supra* note 89, at 17.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the speech will negatively affect agency operations may justify the employee's termination without evidence of actual impact, even if matters of public concern are implicated.¹¹¹

The impact of the *Connick* decision was clear. "What was implicit in *Pickering* and prior cases is now explicit: The First Amendment is not implicated when a public employee is terminated for speech that does not pertain to matters of public concern."¹¹² Furthermore, when the employee's speech does relate to matters of public concern so as to require the balancing of competing employee and employer interests, "the employer's 'reasonable belief' that the speech would cause agency disruption, destroy close working relationships, or undermine managerial authority is sufficient justification to strike the balance in favor of the employer."¹¹³

The implications of the *Connick* decision led some to predict the limitations of public employee speech enunciated in *Garcetti*. One such prediction opined that "*Connick* has undoubtedly worsened the plight of public employees wishing to speak out with the same freedom enjoyed by other members of the public. After *Connick*, a public employee who has spoken on any subject connected with her job has little constitutional protection against employer retaliation."¹¹⁴

The third and final major public employee free speech case decided before *Garcetti* was *Rankin v. McPherson*.¹¹⁵ That case differs somewhat from the other primary public employee cases because the speech in question did not directly criticize a public official. Ardith McPherson was a clerical employee in the Harris County, Texas, Constable's Office.¹¹⁶ McPherson and some fellow employees heard on an office radio of the attempted assassination of then-President Ronald Reagan.¹¹⁷ Upon hearing the report, McPherson spoke to a co-worker, who was also her boyfriend, and said, "[I]f they go for him again, I hope they get him."¹¹⁸ The remark was overheard by a deputy constable, and the constable fired McPherson.¹¹⁹

The Court applied the two-step *Connick* analysis beginning with whether the speech pertained to a matter of public concern.¹²⁰ The employee's remarks pertained to a matter of public concern, and the inappropriate nature of the statement was deemed irrelevant to that determination.¹²¹ The Court emphasized that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include

¹¹¹ *Id.*

¹¹² *Id.* at 24.

¹¹³ *Id.*

¹¹⁴ Andrew C. Alter, Note, *Public Employees' Free Speech Rights: Connick v. Myers Upsets the Delicate Pickering Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173, 198 (1984).

¹¹⁵ *Rankin v. McPherson*, 483 U.S. 378 (1987).

¹¹⁶ *Id.* at 380.

¹¹⁷ *Id.* at 381.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 381–82.

¹²⁰ Schoen, *supra* note 89, at 26.

¹²¹ *Rankin*, 483 U.S. at 387.

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹²²

The finding that McPherson’s speech was a matter of public concern triggered the “fact-intensive balancing of competing employee and employer interests . . . required by *Pickering*.”¹²³ The Court emphasized the importance of the context of the statement.¹²⁴ In fact, the Court explicitly noted that the speech in question “will not be considered in a vacuum; the manner, time, and place of the employee’s expression are relevant, as is the context in which the dispute arose.”¹²⁵ The Court considered several important factors, including “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”¹²⁶ Ultimately, the Court found in the employee’s favor because the statement did not interfere with “the efficient functioning of the office.”¹²⁷ McPherson did not speak in a public area, her statement had no chance to discredit the office, and none of the other employees in the room overheard the remark, so the statement did not affect office operations.¹²⁸ Although the Court’s balancing in this instance favored the employee, it is more important to note that “the balancing was obviously and painfully fact-intensive and fact-sensitive.”¹²⁹

Most clearly demonstrated by the three important public employee free speech cases is the indication that there is plenty of room for reasonable judges to differ in opinion. The *Connick* majority favored the employer with four Justices dissenting, while the *Rankin* majority favored the employee with four Justices dissenting.¹³⁰ The public employee-free speech jurisprudence has been anything but clear. In the thirty years since *Pickering*, each case has developed new factors in addition to the original balancing test.¹³¹ Each of these factors may have significant weight in a court’s resolution of a First Amendment claim.¹³² “Whether the employee’s speech pertains to matters of public concern is a threshold issue that a court must determine by the content, form, and context of the speech.”¹³³ The threshold analysis also involves “the employee’s motive or reason for speaking.”¹³⁴ Although these factors

¹²² *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹²³ Schoen, *supra* note 89, at 26.

¹²⁴ *Rankin*, 483 U.S. at 388.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 389.

¹²⁸ *Id.*

¹²⁹ Schoen, *supra* note 89, at 28.

¹³⁰ *Id.*

¹³¹ *Id.* at 29–30.

¹³² *Id.*

¹³³ *Id.* at 29.

¹³⁴ *Id.*

have clearly been enumerated, the Court has declined to declare which of the many factors should be afforded the most weight.¹³⁵ If the employee's speech meets the threshold requirement and pertains to matters of public concern, "courts must subject the competing interests of public employee and government employer to the fact-intensive balancing that *Pickering* requires."¹³⁶ The *Garcetti* decision clearly adds to this discourse, but what exactly it adds is unclear.

III. THE RESULT

Employees must necessarily compromise some of their rights of free expression. By accepting employment, "[p]art of what the employee agrees to . . . is speaking in a way that promotes [the] employer's mission, as defined by [the] employer."¹³⁷ Continued employment and compensation reward the employee for that sacrifice. The *Garcetti* ruling creates a serious predicament for government employees who "witness corruption, fraud, waste, or mismanagement in the workplace" and wish to speak out about it.¹³⁸ These employees are left with few options. The first option is internal disclosure of their observations in accordance with workplace procedure.¹³⁹ This choice requires employees to accept the risk that their speech may be heard by hostile or unsympathetic supervisors, in which case the First Amendment will not protect them from retaliation.¹⁴⁰ The second, and similarly unpleasant, option is to "hold a press conference on the front steps of the government building."¹⁴¹ This action may help to assure First Amendment protection for the disclosure but will also publicly embarrass government officials, including the employee's supervisor.¹⁴² The third option is the least pleasant—simply requiring that employees "[k]eep quiet and say nothing."¹⁴³

A. The Whistleblower Effects

The *Garcetti* ruling caused concern for the rights of government whistleblowers nationwide.¹⁴⁴ Attorneys representing government whistleblowers denounced the

¹³⁵ *Id.*

¹³⁶ *Id.* at 29–30.

¹³⁷ Kozel, *supra* note 80, at 1033.

¹³⁸ *Hearings, supra* note 3, at 75 (prepared statement of Richard Ceballos, Deputy District Attorney, County of Los Angeles, California).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ "As a result of the Supreme Court's decision in *Garcetti v. Ceballos*, the National Whistleblower Center has fielded hundreds of calls from concerned citizens, public employees and members of the media." National Whistleblower Center, <http://www>

ruling, declaring that it constituted a major setback to the protection of whistleblower rights.¹⁴⁵ Commentators mentioned threats to public health, safety, and national security.¹⁴⁶ Prior to the Court's decision, an editorial co-authored by the famous FBI whistleblower, Colleen Rowley,¹⁴⁷ warned that "[a] ruling against First Amendment rights would muzzle those who know security issues better than any oversight body officials can hope to create."¹⁴⁸ Sole reliance on Congress to oversee everything happening at the various levels of government is foolish because such a task is impossible.¹⁴⁹ Rowley emphasized that "government employees owe their ultimate allegiance not to their supervisor or president but to America: its Constitution, laws and citizens."¹⁵⁰

Government employers highly prize loyalty and severely punish disloyalty. In fact, it is not uncommon for agency heads to attempt to prevent the speech or discredit the employee by firing or demoting employees before they present controversial reports.¹⁵¹ "Neither the public nor the government itself can hold

.whistleblowers.org (last visited Nov. 18, 2007). The National Whistleblower Center considers this ruling "the most significant judicial threat to employee whistleblowers in nearly forty years." *Hearings, supra* note 3, at 29 (prepared statement of Stephen M. Kohn, Chair, National Whistleblower Center).

¹⁴⁵ David G. Savage, *Court Curbs the Speech of Public Employees*, L.A. TIMES, May 31, 2006, at A1. Examples include public hospital workers discouraged from revealing known dangers and police dissuaded from exposing corruption. *Id.*

¹⁴⁶ *Id.*; see also *Hearings, supra* note 3, at 4 (opening statement of Tom Davis, Chairman, Comm. on H. Gov't Reform). "The inability of government workers to express their concerns about the smallest of issues involving their jobs . . . can lead to the greatest of harms: defeat by an enemy." *Id.*

¹⁴⁷ Rowley wrote a thirteen-page letter to the congressional committee that investigated the government's preparedness for the 9/11 attacks; the letter described misrepresentations made by the F.B.I. Director and the mishandling of information leading up to the attacks. See *Excerpts from F.B.I. Agent's Letter to Director Mueller*, N.Y. TIMES, Mar. 6, 2003, at A15; Romesh Ratnesar & Michael Weisskopf, *How the FBI Blew the Case*, TIME, Jun. 3, 2002, available at <http://www.time.com/time/magazine/article/0,9171,1002553,00.html>; James Risen & David Johnston, *Agent Complaints Lead F.B.I. Director to Ask for Inquiry*, N.Y. TIMES, May 24, 2002, at A1.

¹⁴⁸ Coleen Rowley & Dylan Blaylock, Editorial, *Occupational Hazard*, N.Y. TIMES, Oct. 10, 2005, at A19.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* In Rowley's ominous words, "[c]utting off protection is a recipe for disasters of mass proportions." *Id.*

¹⁵¹ Brief for Respondent at 14, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 U.S. S. Ct. Briefs LEXIS 476, at *40 (citing *Campbell v. Ark. Dep't of Corr.*, 155 F.3d 950, 954 (8th Cir. 1998) and *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 830 (3d Cir. 1994), as examples).

officials accountable for abuse unless public employees can disclose government misconduct without fear of reprisals.”¹⁵²

The significance of the decision also roused the attention of Congress. The House Committee on Government Reform held a full committee hearing on June 29, 2006, during the 109th Congress.¹⁵³ The purpose of the hearing was “to understand what this case decided, the grounds on which it was decided, and what it means for the rights and interests of all whistleblowers, Federal and State.”¹⁵⁴ The witnesses before the hearing included representatives from the National Whistleblower Center, Senior Executives Association, National Treasury Employees Union, CATO Institute, National School Boards Association, and the American Federation of Government Employees.¹⁵⁵ The nearly unanimous consensus of those testifying at the hearing was the necessity of legislative action to protect federal employees who choose to report government misconduct.¹⁵⁶ No such legislation is forthcoming, however, and the burden of protecting public employee speech still rests with the courts.

Currently, the Whistleblower Protection Act safeguards federal public employees from retaliation for reporting “(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”¹⁵⁷

¹⁵² *Id.*

¹⁵³ *Hearings, supra* note 3.

¹⁵⁴ *Id.* at 4 (opening statement of Tom Davis, Chairman, Comm. on H. Gov’t Reform).

¹⁵⁵ *Hearings, supra* note 3.

¹⁵⁶ *Id.* The National Whistleblower Center recommended the following action:

- (1) A uniform federal whistleblower protection law providing a consistent safety net to all public and private sector employees who report violations of federal laws and regulations;
- (2) utilization of the procedures recently adopted overwhelmingly by Congress for the protection of corporate whistleblowers under the Sarbanes-Oxley Act. This law both explicitly protects internal/official duty whistleblowers and provides for an efficient and effective administrative review of whistleblower claims.

Id. at 41–42 (prepared statement of Stephen M. Kohn, Chair, National Whistleblower Center). Similarly, the National Treasury Employees Union recommended strengthening the Whistleblower Protection Act, protecting internal policy disagreements, and curbing agency tendencies toward unnecessary secrecy. *Id.* at 102–03 (statement of Barbara Atkin, Deputy General Counsel, National Treasury Employees Union).

¹⁵⁷ Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A) (2000).

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . .

(8) take or fail to take . . . a personnel action with respect to any employee or applicant for employment because of—(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law,

Unfortunately, the Whistleblower Protection Act does not adequately defend federal employees because the current interpretations “do not recognize that whistleblowing activity sometimes occurs in the form of disclosures made directly to the person violating the law or engaging in the wrongdoing.”¹⁵⁸ Another form of disclosure not protected by the Whistleblower Protection Act occurs when the employee is “just doing [his or her] job.”¹⁵⁹ That hole in whistleblower protection was the precise issue before the Court in *Garcetti*.¹⁶⁰ Similarly, state whistleblower laws cannot be relied upon to protect employees who wish to speak out.¹⁶¹

Any reform of the national whistleblower laws or court decisions presents a significant task. The challenge is to strike a balance so that “[f]ederal employees are encouraged to report wrongdoing and are assured protection from reprisal.”¹⁶² Yet, the reform must also ensure that federal workforce managers have the needed tools to manage their workplace effectively.¹⁶³ However, the real goal of any reform

rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs

Id.

¹⁵⁸ *Hearings, supra* note 3, at 80 (prepared statement of William L. Bransford, General Counsel, Senior Executives Association). The Senior Executives Association “represents the interests of career federal executives.” *Id.* at 79.

¹⁵⁹ *Id.* at 76 (statement of William L. Bransford, General Counsel, Senior Executives Association). Stephen Kohn of the National Whistleblower Center noted that an “overwhelming majority of whistleblowers initially (and often exclusively) report misconduct to their managers. For all practical purposes, public employees initiate their whistleblowing within their chain-of-command, based on observations made while performing their official duties.” *Id.* at 34 (prepared statement of Stephen M. Kohn, Chair, National Whistleblower Center). In fact most whistleblowers never have the “gumption to go outside of the system.” *Id.* More persuasively, 86% of all sustained whistleblower claims that were filed under section 1983 (like *Garcetti*’s) were internal complaints. *Id.* at 35. Furthermore, “between 62–78% of all sustained whistleblower cases under 42 U.S.C. § 1983 concerned protected activity directly related to an employee’s job duties.” *Id.*

¹⁶⁰ *Id.* at 76 (statement of William L. Bransford, General Counsel, Senior Executives Association).

¹⁶¹ *Hearings, supra* note 3, at 32–33 (statement of Stephen M. Kohn, Chair, National Whistleblower Center) (noting that 58% of state whistleblower laws do not protect internal whistleblowers and six states require employees to contact their supervisors as a condition of receiving statutory protection). Ninety-five percent of which do provide some protection for internal or official duty whistleblowers, provide a lower level of procedural and/or remedial protection than section 1983. *Id.* at 33.

¹⁶² *Id.* at 76 (statement of William L. Bransford, General Counsel, Senior Executives Association).

¹⁶³ *Id.*

effort must be “the creation of a workplace environment where employees feel free to discuss waste, fraud and abuse with employers, and employers feel more comfortable fixing the problem than covering it up.”¹⁶⁴

Creating incentives for public employees to go to the press before speaking with their superiors leads to a perverse result—employees should be allowed to discuss those items of public concern with their superiors rather than run to the press. As Representative Tom Davis observed, “We need better government, not more headlines.”¹⁶⁵ The incentive must be for public employees to tell the truth without fear of reprisal. The consequences of employee silence may be far-reaching and disastrous.¹⁶⁶ Threats of termination from public employment are powerful instruments for inhibiting speech.¹⁶⁷ For this reason, “courts should employ a higher standard than mere ‘reasonable belief’ in order to ensure that public employers do not abuse their authority over employees and silence speech simply because it displeases a supervisor.”¹⁶⁸

One of the great concerns surrounding a *per se* rule is the potential it has to create the acceptance of so-called “viewpoint discrimination.”¹⁶⁹ Viewpoint discrimination is a particularly harmful form of content discrimination.¹⁷⁰ Typically, “[a]bsent the most compelling circumstances, discrimination against disfavored ideas or viewpoints is almost never tolerated under the First Amendment.”¹⁷¹ The *per se* rule allows government employers to suppress only the viewpoints they disfavor by reprimanding employees who disagree with them.¹⁷² “Government employers could engage in this type of viewpoint discrimination without fear of

¹⁶⁴ *Id.* at 4 (opening statement of Tom Davis, Chairman, Comm. on H. Gov’t Reform).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 36 (prepared statement of Stephen M. Kohn, Chair, National Whistleblower Center). The consequences of public employee silence were listed poignantly by Kohn when expressing the credo of the National Whistleblower Center—“Freedom to Tell the Truth.” *Id.* at 28. Kohn listed examples including “the safety of the Space Shuttle before it is scheduled to launch, . . . the financial condition of a corporation where Americans have invested their life savings, . . . [and] the need for a FISA search warrant when a suspected terrorist is identified.” *Id.*

¹⁶⁷ 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, 146 (1996).

¹⁶⁸ *Id.*

¹⁶⁹ 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, 912 (2005).

¹⁷⁰ Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 542 (1998).

¹⁷¹ *Id.*

¹⁷² Zack, *supra* note 169, at 913.

repercussion” because the rule established in *Garcetti* gives public employees no legal recourse if the speech is job-related.¹⁷³

B. Two Groups Particularly Affected: Lawyers and Teachers

This ruling uniquely affects the legal profession. “One of the most important unanswered questions in legal ethics is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys acting in their official capacity.”¹⁷⁴ The heightened standard of ethical obligations placed on lawyers requires speech in many settings. Police misconduct is among the specific types of information that government prosecutors must reveal, but *Garcetti* denies them First Amendment protection for any resultant retaliation.¹⁷⁵ A criminal prosecutor has the responsibility “not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible.”¹⁷⁶ The prosecutor fulfills this responsibility when he or she determines that a case lacks merit and should be dismissed after careful evaluation and informs his or her superiors of this conclusion.¹⁷⁷ The elimination of First Amendment protection for job-related speech of public employees does little to encourage a prosecutor to recommend that a case should not proceed, even though this may be the just course of action.¹⁷⁸

Any law that serves to silence a “lawyer[’s] criticism of the law and those who administer it interferes with the long-established ‘rebellious’ dimension of the lawyer’s social function.”¹⁷⁹ Lawyers, especially those who serve in the public sector, are supposed to “give voice to dissenters, outsiders, and unpopular clients and challenge the exercise of state power.”¹⁸⁰ Tightening free speech protections in the public workplace does not serve these interests, and *Garcetti* certainly “does little” to assist government attorneys to balance professional responsibilities and free

¹⁷³ *Id.* at 914.

¹⁷⁴ W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 305 (2001).

¹⁷⁵ Krystal LoPilato, Case Comment, *Garcetti v. Ceballos: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 544 (2006) (citing professional canons and *Brady v. Maryland*, 373 U.S. 83 (1963), as the sources of the disclosure requirement).

¹⁷⁶ *United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1988).

¹⁷⁷ Brief of National Ass’n of Criminal Defense Lawyers et al., as Amici Curiae Supporting Respondent at 21, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 U.S. S. Ct. Briefs LEXIS 481, at *32.

¹⁷⁸ *Id.*

¹⁷⁹ Wendel, *supra* note 174, at 333.

¹⁸⁰ *Id.*

speech.¹⁸¹ We should not leave prosecutors unprotected and “forced to choose between the Constitution and career prospects.”¹⁸²

One alternative course of action proposed is the adoption of the *per se* rule in a majority of circumstances but preserving traditional balancing in situations in which professional codes of ethics or constitutional canons require speech.¹⁸³ “Recognizing that an individual may be compelled to speak in such situations would establish appropriate boundaries for judicial inquiry, protect significant speech, and promote efficient administration.”¹⁸⁴ Although certainly preferable to the complete elimination of protection for job-related speech, a rule preserving protection only in cases in which a professional code or constitutional canon requires speech is not enough. Whistleblowers must be allowed and encouraged to speak out, even when not required to do so, and First Amendment protection is one of the few tools to encourage this speech.

Another professional area understandably concerned by the new restrictions on public employee free speech is the education arena. The Court recognizes that freedom of expression related to academic scholarship may give cause for worry.¹⁸⁵ However, the majority opinion glossed over this concern, stating simply: “We need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”¹⁸⁶ Justice Souter’s dissent recognized the concern with considerable trepidation.¹⁸⁷ Application of the *per se* rule adopted by the Court to professors at public educational institutions as state employees is a frightening prospect. Professors who frequently publish articles and books, make presentations, participate in speaking engagements, and have scholarly debates all speak as employees within the scope of their job responsibilities.¹⁸⁸ University professors who have a unique knowledge of a specialty can, and often do, contribute significantly to the debate in any number of fields, including areas of intellectual discourse that lead to the critique of various

¹⁸¹ LoPilato, *supra* note 175, at 544.

¹⁸² Leading Cases, 120 HARV. L. REV. 125, 279 (2006).

¹⁸³ *Id.* at 273.

¹⁸⁴ *Id.* at 273–74.

¹⁸⁵ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006) (“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1969 (Souter, J., dissenting). Souter commented that the breadth of the new rule “is spacious enough to include even the teaching of a public university professor” and expressed the hope that the majority did not intend to “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’” *Id.* (citation omitted).

¹⁸⁸ Zack, *supra* note 169, at 911–12.

governmental operations.¹⁸⁹ The adoption of the per se rule has the unfortunate effect of diminishing open debate and is the first step toward eradicating free speech protections in public universities, “one of the places where it is most important to protect them.”¹⁹⁰ Another important area of teacher speech occurs when teachers speak up to report instances of harm to students.¹⁹¹ This form of speech “often does (and sometimes must) occur in the course of the teacher’s performance of his or her regular job functions.”¹⁹² The per se rule adopted by the Court does not protect speech made as part of the employee’s duties, and as a result many instances of important public speech are not protected.¹⁹³

C. *Balancing Test*

In order to find the proper equilibrium between the government’s interest in an efficient and effective workplace and the constitutional protections guaranteed to public employees, the Court must revert to the direct balancing that *Pickering* initially developed. A direct balancing test “will provide the highest degree of protection for employee speech” and also “promote public debate concerning how the government should operate.”¹⁹⁴ More importantly, “this approach will lead to a balanced public employment relationship which serves to prevent personal abuse of authority and gives adequate consideration to the conflicting interests involved.”¹⁹⁵ Legal scholar Pengtian Ma advocates a return to the direct balancing test to focus on whether speech actually causes disruption in the workplace, as opposed to the current focus on the content of the speech.¹⁹⁶ Achieving a proper balance between the government’s interest in efficiency and the employee’s interest in free speech requires acknowledgement that “neither interest is absolute.”¹⁹⁷ Choosing between the two can only be accomplished fairly by striking a balance that keeps both interests in mind.

The *Pickering* and *Connick* decisions are not perfect. Both have created controversy, and scholars have called for changes in the law for quite some time.¹⁹⁸

¹⁸⁹ *Id.* at 912.

¹⁹⁰ *Id.*

¹⁹¹ Brief of the National Education Ass’n as Amicus Curiae in Support of Respondent at 8, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 U.S. S. Ct. Briefs LEXIS 472, at *12.

¹⁹² *Id.*

¹⁹³ Some scholars advocate the creation of a new zone of speech labeled “academic speech.” For a full discussion, see Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 3 (2003).

¹⁹⁴ Ma, *supra* note 167, at 147.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 144.

¹⁹⁷ *Id.* at 139.

¹⁹⁸ See Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on*

The per se rule adopted by the Court is not, however, the answer. A public employee's choice to speak publicly in connection with his or her employment may be of great public significance although it may cause disruption in the workplace.¹⁹⁹ Criticism of a public employer or disclosure of public official's wrongdoing must not be precluded from First Amendment protection simply because of the potential for disruption.²⁰⁰ Freedom of speech is often considered a "delicate and vulnerable" constitutional right, and public employee speech is especially vulnerable.²⁰¹ Often, anyone who chooses to speak makes a deliberate choice to do so after considering the potential benefits and costs or risks associated with the speech.²⁰² The public employee bears all the risks of the speaking out, but the public at large captures the benefits of the speech in the form of a "better understanding of public policy and the operation of government."²⁰³ The public employee's incentives are already "skewed in favor of silence," and further tipping the balance against speech is inadvisable.²⁰⁴

Furthermore, the promotion of free speech should be considered a policy goal not to be undervalued. Free speech should be considered "an end in itself," and an important one at that.²⁰⁵ Four traditional justifications for free speech as a policy goal include the discovery of truth, promotion of democratic self-government, the protection of dissenters, and self-fulfillment of the speaker.²⁰⁶ The intrinsic value of free speech comes from the "sense of satisfaction" a speaker receives from striving to be heard, resulting in the realization or fulfillment of the inner self.²⁰⁷ Freedom of speech is a laudable goal and a constitutional guarantee.

D. The Policy Considerations

Several policy considerations do support the per se rule adopted by the Court in *Garcetti*. Three concerns present the most influential arguments on behalf of the rule.²⁰⁸ First, public employees often speak on behalf of the state, and as a result

Matters of Public Concern, 64 IND. L.J. 43 (1988); Ma, *supra* note 167; Rosenthal, *supra* note 170; Velazquez, *supra* note 81.

¹⁹⁹ Ma, *supra* note 167, at 140–41.

²⁰⁰ *Id.*

²⁰¹ Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 960 (2001).

²⁰² *See id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Ma, *supra* note 167, at 127. "Free speech is not only a means of enlightening the public, but also an end in itself." *Id.*

²⁰⁶ *See, e.g.,* Wendel, *supra* note 174, at 406–23.

²⁰⁷ Ma, *supra* note 167, at 139–40.

²⁰⁸ *See* Zack, *supra* note 169, at 904. The policy considerations are derived from a Fourth Circuit case which developed a per se rule in 2000, before the decision in *Garcetti*. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). In *Urofsky*, six professors in Virginia challenged the constitutionality of a Virginia law that prohibits state

their words may be construed as statements of official government policy.²⁰⁹ Second, federal whistleblower statutes developed because of the lack of an express constitutional right in this area provide enough protection already.²¹⁰ The third policy argument in favor of a per se rule is the worry of creating a constitutional claim for every public workplace dispute.²¹¹

Public employees often speak on the behalf of the state during fulfillment of their employment responsibilities. However, this is not always the case. This is the reason for the multi-factored test set out by *Connick*, instructing courts to analyze the “content, form, and context” of the speech to determine whether the employee was speaking as a citizen on a matter of public concern or as an employee.²¹² The state’s burden to justify allegedly discriminatory treatment of an employee depends upon the nature of the employee’s speech.²¹³ Factual circumstances differ, necessitating a balancing test.

The per se rule adopted by the Court in this case inadequately addresses the broad array of factual situations in which a claim may be brought. The *Pickering* Court understood the “enormous variety of fact situations” which might result in public employee litigation and found it neither “appropriate [nor] feasible to attempt to lay down a general standard against which all such statements may be judged.”²¹⁴ Unfortunately, “this territory is simply too complex to be drawing such distinct lines in the sand.”²¹⁵

Although the federal Whistleblower Protection Act provides some protection to employees who wish to speak out about wrongdoing in their workplace, this protection inadequately protects the free speech rights that public employees deserve. Current case law interpreting the federal Whistleblower Protection Act “requires an employee complaining of retaliation to show ‘irrefragable proof’ that the person criticized was not acting in good faith and in compliance with the law.”²¹⁶ Even more significantly, “federal employees have been held to be unprotected for statements made in connection with normal employment duties.”²¹⁷ State whistleblower

employees from accessing sexually explicit material on state-owned computers unless the employee is given special permission from a state agency head for access in connection with a bona fide research project. *Id.* at 404–05. The court held that because the materials were accessed “for the purpose of carrying out employment duties,” it was not a regulation of the speech of a citizen and was necessary to pursue the legitimate goals of the employer. *Id.* at 408–09.

²⁰⁹ Zack, *supra* note 169, at 904.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 915–16 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

²¹³ *Connick*, 461 U.S. at 150.

²¹⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968).

²¹⁵ LoPilato, *supra* note 175, at 537.

²¹⁶ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1971 (2006) (Souter, J., dissenting) (quoting *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000)).

²¹⁷ *Id.* at 1971 (Souter, J., dissenting) (citing *Huffman v. Office of Personnel Mgmt.*, 263

statutes have been interpreted similarly to prevent protection for employees in the regular course of business.²¹⁸ Thus, reliance on whistleblower statutes for the protection of the constitutional right of free speech granted to public employees is unwise.

Disruption in the workplace is the rallying cry for lower First Amendment protection. “[T]he primary function of a government agency is to provide efficient services to the public, and if a government employer were second-guessed every time it disciplined a public employee, services could grind to a halt.”²¹⁹ This fear is expressed through the notion that instituting a balancing test may result in a dramatic increase in the volume of First Amendment cases.²²⁰ Increased litigation will “substantial[ly] impact the operation and efficiency of government employers” because “civil rights actions brought by public employees are burdensome to defend, disruptive to the working environment and often associated with large jury awards.”²²¹ Because of fear that the balancing standard would “impair government offices’ ability to function ‘if every employment decision became a constitutional matter,’ the Supreme Court has refused to employ a balancing test when addressing public employee speech issues that involve matters only of personal concern.”²²²

It is true that “the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”²²³ However, this snowball argument does not carry much weight and can be countered in three respects. First, it expounds a restricted perception of efficiency; viewing efficiency in such a narrow manner undermines the interests and analysis.²²⁴ A more thorough analysis of government efficiency considers the purpose and goals of the organization.²²⁵ As opposed to hampering office operations, free speech may actually have the effect of enhancing efficiency “by facilitating the flow of information and improving decision-making.”²²⁶

Secondly, the likelihood that *Garcetti* will prevent further litigation is low because it leaves so much room for discretion in determining the scope of what speech

F.3d 1341, 1352 (Fed. Cir. 2001).

²¹⁸ See *supra* note 161 and accompanying text.

²¹⁹ David L. Hudson, Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST REPS. 1, 2 (Dec. 2002).

²²⁰ Petitioners’ Reply Brief at 16, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 U.S. S. Ct. Briefs LEXIS 565, at *26.

²²¹ *Id.* at 16; *26–27. One journalist proffered the scenario that it would be necessary to “block out 23 hours a day on every court docket in the country to litigate these claims.” Dahlia Lithwick, *Whistle Blowhards*, SLATE, Oct. 12, 2005, available at <http://www.slate.com/id/2127922/>.

²²² Ma, *supra* note 167, at 142 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

²²³ *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)).

²²⁴ Leading Cases, *supra* note 182, at 280.

²²⁵ *Id.*

²²⁶ *Id.* (discussing democratic theory and organizational studies as evidence of the efficiency of free speech).

is part of an employee's job responsibility.²²⁷ District court decisions in the first six months following the *Garcetti* decision clearly indicate that it does "not provide sufficient clarity to preempt such actions."²²⁸ Furthermore, the claim that protecting First Amendment rights will require public entities and judges "to expend resources [defending and] deciding those cases has rarely been thought dispositive."²²⁹ The *Pickering* and *Connick* rulings have been in place for more than twenty years, and the efficiency of the government workplace has yet to fall to shambles because of the burden of litigating free speech concerns in work tasks.²³⁰ There is no reason to believe that litigation over whether speech was within the scope of an employee's job responsibility will be any less burdensome than litigation intended to balance an employee's free speech interests against the public employer's interests in efficiency.

The establishment of a per se rule helps to clearly define what constitutes public speech in the workplace context by eliminating job-related speech from First Amendment coverage. This definition is important because "[w]hen the courts fail to use reliable definitions to determine what counts as legally protected 'public' speech for public employees, those persons suffer as employees and as citizens, because the basis of their constitutional liberties is significantly compromised."²³¹ Courts are obligated to give a clear demarcation of what type of speech and under what conditions that speech is permissible, protected, and free.²³² However, the supposed necessity of a clear definition is not justification to develop a per se rule that eliminates First Amendment protection for such a large and important body of public employee speech.

CONCLUSION

Employer reactions to this decision are obvious. Any "smart employer[]" [will] now be sure to encourage the use of internal complaint mechanisms to deter employees from taking their complaints public and thus enjoying the prospect of

²²⁷ See *supra* notes 52–56 and accompanying text.

²²⁸ Leading Cases, *supra* note 182, at 281.

²²⁹ Rosenthal, *supra* note 170, at 546. For instance, the Court rejected the suggestion that public contractors should not be given the First Amendment right not to be discharged as a result of their political beliefs because of the potential burden on public bodies to defend the ensuing litigation. *Id.* (citing *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724 (1996), and *Bd. of County Comm'rs v. Unbeh*, 518 U.S. 668, 681 (1996)).

²³⁰ Justice Souter pointed out during oral argument that there has been no deluge of claims based on the Ninth Circuit's interpretation of the *Pickering* balance since it was clarified in 1988. Transcript of Oral Argument at 9, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 U.S. TRANS LEXIS 52, at *5.

²³¹ Jeffrey St. John, *Matters of Public Concern: Reconceptualizing Public Employee Free Speech Through Definitional Argument*, 6 RHETORIC & PUB. AFF. 261, 279 (2003).

²³² *Id.* at 279–80 (requiring a "lucid and argumentatively consistent" definition of speech that is a matter of public concern).

greater constitutional protection.”²³³ Resolving the remaining deficiencies in public employee-free speech jurisprudence is not a task for amateurs. The problem is finding the middle between two extremes. A bright-line rule is impractical. “An extreme version of either rule will either destroy employer authority or chill important speech from whistle-blowers.”²³⁴ We must not forget that “the fundamental purpose of the First Amendment is to ensure that ‘debate on public issues . . . be uninhibited, robust and wide-open.’”²³⁵

The federal government employs 2,720,462 individuals.²³⁶ State and local government agencies have an additional 5,078,268 and 11,715,128 individuals on the payroll respectively.²³⁷ This evidence of “[t]he sheer number of public employees shows the importance of ensuring that First Amendment rights are a living reality rather than abstract theory for government workers.” The Supreme Court long ago dismissed “the notion that employees forfeit their constitutional protections when they enter the public workplace was long ago dismissed by the Supreme Court.”²³⁸ Unfortunately, the *Garcetti* decision severely limits the First Amendment protections of public employees in the workplace by refusing to protect speech that occurs as a part of job responsibilities. Simply because an employee enters the doors of a government employer, to serve the people of this country, does not mean that the employee relinquishes his or her rights as a citizen.²³⁹ The true loss resulting from this decision is the loss to the public.²⁴⁰ Americans have lost their right to know “what is happening in their own government . . . what their elected and non-elected public officials are doing . . . if their taxpayer money is being spent properly or being wasted and . . . if their public officials are engaged in corrupt or fraudulent conduct.”²⁴¹

A return to the *Pickering* balance does not cure all the ills of public employee speech jurisprudence. However, the per se rule adopted by the Court in *Garcetti* does more harm than good in its aim to clarify what speech is protected and what

²³³ Greenhouse, *supra* note 33 (citing an interview with Daniel P. Westman, a lawyer with the firm of Morrison & Foerster who advises employers on whistleblower issues). Prior to the *Garcetti* decision, public employers were cautioned to identify a “nonspeech related rationale for the action” prior to taking action against an employee and to rely solely on that reason when terminating the employee. John F. Fatino, *Public Employers and E-mail: A Primer for the Practitioner and the Public Professional*, 23 N. ILL. U. L. REV. 131, 168 (2003).

²³⁴ Lithwick, *supra* note 221.

²³⁵ Hudson, *supra* note 219, at 37 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

²³⁶ United States Census Bureau, Public Employment and Payroll Data, <http://www.census.gov/govs/www/apes.html> (last visited Oct. 18, 2006).

²³⁷ *Id.*

²³⁸ Hudson, *supra* note 219, at 37.

²³⁹ *Hearings*, *supra* note 3, at 73 (prepared statement of Richard Ceballos, Deputy District Attorney, County of Los Angeles, California).

²⁴⁰ *Id.*

²⁴¹ *Id.*

speech leaves government employers free to retaliate against employees.²⁴² The *Garcetti* decision leaves a vast amount of important public employee speech unprotected. The only cure is a return to balancing the interests of the public employee in free speech against the government employer's interest in managing an effective and efficient workplace.

²⁴² Other scholars have indicated that this decision not only harms the public employee speech arena, but also denotes a coming era of constitutional formalism. *See, e.g.*, Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173 (2007).