

**CASE NOTE: SILENCING THE NOISE OF DEMOCRACY—
THE SUPREME COURT DENIES FIRST AMENDMENT
PROTECTION FOR PUBLIC EMPLOYEES’ JOB-RELATED
STATEMENTS IN *GARCETTI V. CEBALLOS***

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I. INTRODUCTION

There are more than eighteen million public employees in the United States.¹ In a recent decision, the Supreme Court characterized public employees into dual roles—citizen and employee.² When public employees speak within the context of their employment, their speech is not constitutionally protected, even in cases where the expression addresses a critical issue relevant to the public. Only when public employees speak as private citizens is their speech entitled to full First Amendment protection. Though many public employees enter the public sector with the sole intention of serving their country, the latest Supreme Court decision on this issue conveys a slightly contrary message: public employees do not serve the public, they serve the United States government.

In *Garcetti v. Ceballos*,³ the Court ruled that public employees are not entitled to First Amendment protection for statements they make relating to their jobs.⁴ The impact of the *Garcetti* ruling forces public employees who expose government misconduct to rely on the federal and state statutory protections offered to government whistleblowers. Yet the inadequacy of these protections is illustrated clearly by the facts in *Garcetti*: a county prosecutor who informed his supervisor that a high-level public official may have lied in an ongoing police investigation faced retaliation for exposing this conduct, and he had no legal redress.⁵ Sound strange? It is true.

While in recent years Congress and the American public have

1. The actual figure is 18,644,112 according to the December, 2005, U.S. CENSUS REPORT. U.S. CENSUS BUREAU, FEDERAL GOVERNMENT EMPLOYMENT AND PAYROLL, <http://ftp2.census.gov/govs/apes/05fedfun.pdf>; U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT EMPLOYMENT AND PAYROLL, <http://ftp2.census.gov/govs/apes/05stlus.txt>.

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

3. *Id.*

4. *Id.* at 1962.

5. *Id.* at 1955–56.

been calling for increased protections for employees who speak out about government wrongdoing,⁶ the *Garcetti* Court made a marked move in the opposite direction. First, this note traces the evolution of public-employee free speech rights, including a discussion of the most salient cases preceding *Garcetti*.⁷ Second, it reviews the facts, holding, and reasoning of the Appellate Court decision in *Garcetti*, and moves to the majority and dissenting viewpoints of the Supreme Court on review.⁸ Next, it maintains that the reasoning employed by the majority in *Garcetti* departs from the Court's analysis in previous modern public-employee free speech cases.⁹ The note then argues that the *Garcetti* ruling runs contrary to the interests of all relevant stakeholders—the employer, the employee, and the public.¹⁰ The note concludes by arguing that federal and state whistleblower protections must be enhanced to provide adequate protections to public employees.¹¹

II. HISTORY

A. *Rights of Public Employees Prior to 1967*

For much of the twentieth century, it was well-settled that the government, as an employer, could restrict the free speech rights of its employees.¹² The constitutional analysis of public-employee free speech was known as the rights-privilege doctrine: government employment was a privilege and those fortunate enough to receive such employment had to tolerate certain limitations on their rights

6. Press Release, Carl Levin, United States Senator, The Federal Employees Protection of Disclosures Act (June 10, 2003), available at <http://levin.senate.gov/newsroom/release.cfm?id=216635> (“Whistleblowers play a crucial role in ensuring that Congress and the public are aware of serious cases of waste, fraud, and mismanagement in government. Whistleblowing is never more important than when our national security is at stake.”).

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part IV.

11. See *infra* Part V.

12. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220–21, 29 N.E. 517, 518 (1892) (holding that the government could impose reasonable restrictions on its employees as a condition of employment); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 Nw. U. L. REV. 1007, 1010–11 (2005) (“[T]he thrust of the Supreme Court’s public employee speech jurisprudence was easy to discern If you wanted to make sure you kept your job, your best bet was to button your lip.”).

to speak freely.¹³

The United States Supreme Court recognized the government's responsibility for maintaining an efficient public service and, to that end, deferred to a government officer's judgment to impose restrictions on public employees' freedoms.¹⁴ In 1947, the Supreme Court cited with approval the reasoning of Justice (then Judge) Oliver Wendell Holmes, that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"¹⁵ making it clear that the government can discipline a public employee for statements that, had they been spoken by a private citizen, would have enjoyed constitutional protection. In so doing, the Court accepted the argument that public employment was not a right or entitlement, but rather, a privilege that could be subject to restrictions.¹⁶

In 1952, in *Adler v. Board of Education of New York*,¹⁷ the United States Supreme Court again affirmed its ruling that public employees were subject to reasonable restrictions.¹⁸ In *Adler*, several public school teachers brought suit to challenge the constitutionality of New York's Feinberg law, a sedition law enacted to implement and enforce two earlier laws that made the utterance of certain statements or membership in subversive organizations adequate grounds for dismissal.¹⁹ The *Adler* Court declined to overturn the law and held that the authorities had not only the right, but also the duty, to maintain the integrity of the public

13. See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (discrediting the rights-privilege doctrine as gratuitously dividing between right and non-right).

14. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99 (1947).

15. *Id.* (quoting *McAuliffe*, 29 N.E. at 517).

16. See *id.* at 99–104; Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 8 (1987).

17. 342 U.S. 485 (1952).

18. *Id.* at 492.

19. *Id.* at 486–90. The pertinent parts of the laws are as follows: "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position." N.Y. EDUC. LAW § 3021 (McKinney 2001). The second law makes persons seeking public employment ineligible for such employment if they themselves advocate the overthrow of the government by force or illicit means or are in any way related to an organization that advocates a government takeover by force or illegal means. N.Y. CIV. SERV. LAW § 105(1) (McKinney 1999). The statute made clear that membership in the Communist party constituted prima facie evidence of ineligibility. *Id.* § 105(1)(c).

schools. The Court also said that no constitutional principles were violated by inquiring into the reputation and the associations of current and prospective employees to determine their fitness for employment and loyalty to the State.²⁰ The Court opined that it was “clear that . . . persons have the right under our law to assemble, speak, think and believe as they will,” but that they do not retain these same rights when they work for the State.²¹ By this, the Court reaffirmed its previous holding that public employment was a privilege,²² and that First Amendment rights of public employees were not absolute.

Yet Justice Douglas’s dissenting opinion in *Adler*²³ expressed dissatisfaction with the Court’s handling of public-employee jurisprudence, and in the late 1950s and early 1960s, the Court’s opinion on the issue began to change. In a series of opinions,²⁴ the Court foreshadowed its pivotal 1967 decision in *Keyishian v. Board of Regents*,²⁵ where it rejected the rights-privilege doctrine and overruled *Adler* entirely.²⁶ In *Keyishian*, several university professors

20. *Adler*, 342 U.S. at 493.

21. *Id.* at 492.

22. *Id.*

23. I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

Id. at 508 (Douglas, J., dissenting).

24. See *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963) (holding that the state cannot withhold government benefits because an employee refused to comply with an employment regulation that conflicted with her religious beliefs). “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Id.* at 404. See also *Cafeteria Workers v. McElroy*, 367 U.S. 886, 897 (1961) (acknowledging constitutional restraints on the government in dealing with its employees and recognizing that the federal and state government could not deny employment for “arbitrary or discriminatory” reasons such as membership in a particular political party); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (pronouncing unconstitutional a state’s requirement that its officers proclaim a belief in the existence of God); *Wiemann v. Updegraff*, 344 U.S. 183, 190–91 (1952) (declaring unconstitutional a state statute that required employees to swear oaths of loyalty to the state as a condition of employment).

25. 385 U.S. 589 (1967).

26. *Id.* at 605–06 (stating that “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected” (adopting the lower court’s language) and “constitutional doctrine which has emerged since [the *Adler*] decision has

again challenged the constitutionality of New York's Feinberg law after being terminated for refusing to sign the Feinberg certificate saying that each was not a Communist.²⁷ The Court stated that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" and held that public employment could not be conditioned on the surrender of constitutional rights.²⁸ The Court also recognized that placing unreasonable restrictions on public employees was not compatible with the First Amendment guarantees of free speech.²⁹ Yet the Supreme Court's abolition of the rights-privilege doctrine left a void in First Amendment jurisprudence:³⁰ what exactly was the extent of public employees' First Amendment rights? The Court answered this question just one year later when it decided *Pickering v. Board of Education*.³¹

B. *The Pickering Doctrine*

With the landmark ruling in *Pickering v. Board of Education*, the Supreme Court began to draw substantive boundaries on the free speech rights of public employees.³² Public school teacher Marvin Pickering was terminated after sending a letter to the local newspaper criticizing the school board and the district superintendent for their handling of a bond issue proposal.³³ At Pickering's dismissal hearing, the Board alleged that Pickering's statements were inaccurate, harmful to the reputation of the Board, and controversial within the school district.³⁴

The lower courts rejected Pickering's claim on grounds that it had already been rebuffed by the United States Supreme Court.³⁵

rejected its major premise. That premise was that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." See generally Van Alstyne, *supra* note 13.

27. *Keyishian*, 385 U.S. at 592.

28. *Id.* at 604–06.

29. See *id.*; Stephen Allred, Note, *Connick v. Myers: Narrowing the Free Speech Rights of Public Employees*, 33 CATH. U. L. REV. 429, 434 (1984).

30. See Massaro, *supra* note 16, at 11.

31. 391 U.S. 563 (1968).

32. See generally *id.* at 573–75 (examining the respective interests before setting forth the balancing test).

33. *Id.* at 565–66.

34. *Id.* at 566–67.

35. *Pickering v. Bd. of Educ.*, 225 N.E.2d 1 (Ill. 1967). The lower courts essentially reverted back to the rights-privilege doctrine and asserted that "[b]y choosing to teach in the public schools, [Pickering] undertook the obligation to

But on review, the Supreme Court again made clear that it was unconstitutional to compel public employees to completely relinquish their free speech rights as a condition of employment.³⁶ The Court recognized the competing interests: on the one hand sat the intrusion upon public employees' constitutional guarantee of free speech, and on the other hand sat the State's interest in limiting its employees' free speech rights to effectively serve the citizenry.³⁷

The decision resulted in what became known as the "*Pickering* balancing test"—an approach designed to weigh the relative employee and employer interests.³⁸ The Court recognized the "enormous variety of fact situations" in which teachers or other public employees might speak critically of their employers, resulting in their termination.³⁹ As a result, it declined to articulate a "general standard" that could be used to judge the employees' statements.⁴⁰ But the Court did provide some guidelines for lower courts to consider in determining whether a public employee's speech was constitutionally protected.⁴¹ The guidelines included the following factors: the parties' working relationship, the potential for creating disharmony among co-workers, the likelihood for disrupting normal work operations, and the need for confidence and loyalty.⁴²

The Court also considered the value to the general public of robust and uninhibited debate on matters of public concern, particularly the value of *Pickering's* opinion, given his position as a teacher in the district.⁴³

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to

refrain from conduct which in the absence of such position he would have an undoubted right to engage in." *Id.* at 6. The lower court went so far as to liken the termination of a public employee for exercising his or her free speech right to the termination on the basis of incompetence, malice, negligence, immorality, or other illicit conduct. *Id.*

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

37. "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." *Id.*

38. *Id.* at 563.

39. *Id.* at 569.

40. *Id.* at 568.

41. *Id.* at 569–73.

42. *Id.* at 571, 573.

43. *Id.* at 571–72.

how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.⁴⁴

The Court concluded that Pickering's right to speak out and contribute to public discourse as any other member of the community might do outweighed the school administration's interests in restricting its teachers' speech.⁴⁵ The Court in *Pickering* thus created a new doctrine whereby an individual employed in the public sector did not sacrifice his or her First Amendment rights merely by virtue of public employment. Rather, the Court held that proper approach was to strike a balance between the interests of all the parties—employer, employee, and the public.⁴⁶

C. *Post-Pickering to Connick v. Myers*⁴⁷

Over the next fifteen years, the Supreme Court heard several cases regarding the rights of public employees;⁴⁸ its decisions in these cases also marked an expansion of their First Amendment rights. In 1972, the Court heard *Perry v. Sindermann*,⁴⁹ in which a junior college professor alleged retaliation for speaking critically of the Board of Regents' stance on a particular school policy.⁵⁰ Citing *Pickering*, the Court concluded that Perry's public criticism of the

44. *Id.* at 572.

45. *Id.* at 573.

46. *The Constitutional Rights of Public Employees*, 97 HARV. L. REV. 1738, 1739 (1984) (stating the Supreme Court has recognized that the interests of at least three parties—the employer, the employee, and the public—are relevant to the process of determining the constitutional rights of public employees.).

47. 461 U.S. 139 (1983).

48. This note does not include an examination of the Supreme Court's rulings in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Arnett v. Kennedy*, 416 U.S. 134 (1974). In *Roth*, the court did not address the employee's First Amendment right, but rather framed the issue as whether Roth had a constitutional right to receive a hearing and statement of reasons regarding the college's decision not to re-hire him. In *Arnett*, the sole issue was whether the plaintiff was denied due process upon termination under the standards established by the Lloyd-La Follette Act. But to the extent that these opinions include statements which are helpful in understanding the Court's attitude toward public-employee free speech rights, the cases may be cited.

49. 408 U.S. 593 (1972).

50. *Sindermann* was elected President of the Texas Junior College Teacher's Association. *Id.* at 594. In this role, he spoke publicly against the Board's opposition to a proposal that would elevate the college to four-year status. *Id.* at 595. The Board refused to renew his employment contract on the basis that he had acted insubordinately. *Id.* at 594–96.

Board was constitutionally protected, and it precluded his termination on that basis.⁵¹

In 1977, a teacher brought suit against his school district employer, alleging that the district violated his free speech rights when it denied his tenure in retaliation for certain untoward actions.⁵² The Court ruled that if the teacher was successful in proving his speech was principally responsible for the employer's decision, then the burden shifted to the employer to prove it would have taken the same action, the employee's speech notwithstanding.⁵³

Finally, in 1979 in yet another case involving a teacher's termination, Bessie Givhan brought suit against the school district that fired her after she complained to the principal about the school's racially discriminatory policies.⁵⁴ The Supreme Court, again citing *Pickering*, reversed the Fifth Circuit Court of Appeals decision⁵⁵ and held that public employees do not forfeit their First Amendment rights if they choose to convey their concerns in private, rather than in public.⁵⁶

D. Connick v. Myers: *The Two-Tiered Test*

For more than a decade, the *Pickering* balancing test remained relatively unaltered. But in 1983, the Supreme Court issued a ruling that significantly narrowed the rights of public employees, tipping the "balance" in favor of public employers.⁵⁷ Sheila Myers,

51. *Id.* at 598 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

52. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The events preceding the adverse employment action against Doyle included getting into a fight with another teacher, and with the school's cafeteria workers, referring to students as "sons of bitches," making an obscene gesture towards other students, and sending an internal memorandum with information on teacher dress and appearance to a local radio station. *Id.* at 281-82.

53. *Id.* at 287.

54. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411-13 (1979). The school district argued that Givhan was terminated, in part, for being "arrogant" and "unreasonable" in conversations with the principal, for being disruptive, and for giving white students' papers lower grades. *Id.* at 412 n.2. But the district court concluded that the main reason the school did not renew Ms. Givhan's employment was because of her criticism of the school's policies and practices. *Id.* at 412.

55. *Id.* at 413-14.

56. *Id.* at 414-16.

57. See *Connick v. Myers*, 461 U.S. 139 (1983); 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, 122-23 (1996) (explaining

an Assistant District County Attorney in New Orleans, drafted and circulated a questionnaire to her colleagues which sought information about the work environment, including one question pertaining to whether employees felt pressured to participate in political campaigns.⁵⁸ In response, Myers was terminated for insubordination.⁵⁹ She brought suit alleging that the termination violated her First Amendment rights.⁶⁰

The *Connick* Court acknowledged the danger in thwarting public employees' free speech rights,⁶¹ but asserted that the *Pickering* Court's emphasis on "the right[s] of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental"⁶² and reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter."⁶³

In arriving at its conclusion, the Court reasoned that the historical development of public employees' First Amendment rights, coupled with the government's interest in promoting an efficient public service, compelled the conclusion that if the employee's speech does not constitute speech on a matter of public concern, judicial review is unnecessary.⁶⁴ By so stating, the Court erected an initial threshold inquiry regarding the public employee's speech in question before proceeding to *Pickering* balancing test.⁶⁵ To determine whether a statement constituted a matter of public concern, the Court explained that the "content, form, and context" should be considered.⁶⁶ Citing with approval a

that the law has recently evolved to ensure free speech by public employees only when the speech touches upon a matter of public concern); see also Clifford P. Hooker, Commentary, *Balancing Free Expression and Government Interests: Connick v. Myers*, 15 W. EDUC. L. REP. 633, 633-34 (1984) (stating that "*Connick* is the only recent Supreme Court opinion to uphold a government employer's act of terminating an employee because of her criticism of her supervisors").

58. *Connick*, 461 U.S. at 140-41.

59. *Id.* at 141.

60. *Id.*

61. *Id.* at 144-45 ("[T]he precedents in which *Pickering* is rooted . . . sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.'").

62. *Id.* at 143.

63. *Id.*

64. *Id.* at 146.

65. *See id.*

66. *Id.* at 147.

previous opinion by Justice Powell, the majority reiterated:

[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.⁶⁷

Accordingly, the Court afforded “a wide degree of deference to the employer’s judgment” to assist the government in effectively carrying out its responsibilities.⁶⁸ In light of this, the Court concluded that Myers’ survey constituted an employee grievance, even though one of the survey questions addressed a matter of public concern.⁶⁹ Thus, her termination did not infringe upon her First Amendment rights.⁷⁰

While the dissent sharply criticized the majority’s ultimate holding,⁷¹ it did not expressly reject the majority’s ruling on the threshold inquiry.⁷² Thus, *Connick* refined the *Pickering* balancing test by concluding that, as an initial inquiry, it must be determined whether the public employee’s speech is related to a matter of public concern.⁷³ If not, the employee’s speech is not constitutionally protected.⁷⁴ If so, only then should the *Pickering* balancing test of competing interests become relevant.⁷⁵

67. *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

68. *Id.* at 150–52.

69. *Id.* at 149.

70. *Id.* at 154.

71. Justice Brennan authored the dissenting opinion in which Justices Marshall, Blackmun, and Stevens joined. *Id.* at 156. He differed with the majority in three respects. First, he argued that by using the context factor to determine whether the employee’s statement relates to a matter of public concern and then using it again to establish whether the speech negatively impacted the employer, the majority alters the balancing by weighing that factor twice, rather than once. *Id.* at 159 (Brennan, J., dissenting). Next, he asserted that Myers’ survey *was* on a matter of public concern. *Id.* at 163. Finally, he argued that extreme deference to the government employer is not desirable when assessing the impact of a public employee’s critical speech. *Id.* at 168.

72. *See id.* at 156 (majority opinion).

73. *Id.* at 146.

74. *See id.*

75. *See id.*

E. Post-Connick

Since *Connick*, the Supreme Court has remained faithful to the framework of *Pickering* and *Connick*.⁷⁶ In *Rankin v. McPherson*,⁷⁷ the Court had its first opportunity to apply the *Pickering/Connick* combination. In that case, McPherson was fired for making a statement unrelated to any aspect of her job.⁷⁸ The Court held that statements unrelated to an employee's job duties warranted the *Pickering* balancing test, so long as the statement addressed a matter of public concern.⁷⁹ The *Rankin* Court's reasoning closely followed the analysis set forth in *Connick*; that is, it examined the "content, form, and context" factors of McPherson's speech to answer the threshold public concern question.⁸⁰ It concluded that her statement did, in fact, address a matter of public concern, and proceeded to weigh the relevant factors, whether McPherson's speech: impaired the government's ability to effectively perform its necessary functions, interfered with the normal operations of the agency, created disharmony in the work environment, negatively impacted McPherson's work performance or job responsibilities, or made it difficult for her superiors to effectively discipline her.⁸¹ The Court resolved the balancing test in McPherson's favor and held that her First Amendment rights prevailed over the government's interests.⁸²

In *Waters v. Churchill*,⁸³ the Court framed the issue as whether it should apply the *Connick* test to what it believed a public employee's speech to be, or whether the trier of fact should discern what the speech actually was before proceeding to the *Connick* threshold inquiry followed by *Pickering* balancing test.⁸⁴ In a plurality opinion, Justice O'Connor stated that a public employer

76. Kozel, *supra* note 12, at 1017.

77. 483 U.S. 378 (1987).

78. *Id.* at 381–82. McPherson held an administrative position in a law enforcement office. *Id.* at 380–81. After hearing on the radio that an assassination attempt had been made on President Reagan, she offhandedly told her colleague and boyfriend, "[I]f they go for him again, I hope they get him." *Id.* at 381.

79. *Id.* at 386–87.

80. *Id.* at 384–85.

81. *Id.* at 388.

82. *Id.* at 392.

83. 511 U.S. 661 (1994).

84. *Id.* at 664, 668. In *Waters*, a public hospital terminated Churchill after hearing that she made critical comments about her supervisor. *Id.* at 666. Churchill disputed that the conversation took place as the hospital alleged. *Id.* at 666–67.

could terminate an employee based on what the employee supposedly said, so long as the employer's belief was reasonable.⁸⁵ By so ruling, the Court precluded the factfinder from hearing evidence and deciding for itself what was said, thus again narrowing public employees' free speech rights.

And in *United States v. National Treasury Employees Union*,⁸⁶ the Court ruled on the constitutionality of a congressional enactment that prohibited federal employees from accepting honoraria for making an appearance, giving a speech, or writing an article.⁸⁷ The government argued the ban should be upheld because of the possibility of workplace disruption and because of the potential decline in its operational efficiency.⁸⁸ But citing the valuable contributions made by public employees, coupled with the public's right to be informed of such views,⁸⁹ the Court imposed a heavier burden on the government to prove the ban was necessary.⁹⁰ The government could meet that burden,⁹¹ and as a result, the Court ruled that the ban was unenforceable.⁹²

Before *Garcetti v. Ceballos*, the Court's most recent decision involving public-employee free speech came in *City of San Diego v. John Roe*.⁹³ In that case, Roe, a police officer, sold videotapes over the Internet which portrayed him engaging in sexually explicit acts while wearing his police uniform.⁹⁴ After being fired, he sued, alleging the termination violated his free speech rights.⁹⁵ The Supreme Court employed the conventional *Pickering/Connick* analysis and considered its holdings in two previous invasion of

85. *Id.* at 677–80.

86. 513 U.S. 454 (1995).

87. *Id.* at 458.

88. *Id.* at 470.

89. *Id.* “The large-scale disincentive to Government employees’ expression also imposes a significant burden on the public’s right to read and hear what the employees would otherwise have written and said.” *Id.* (referencing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976)). “We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne.” *Id.*

90. The Court justified this additional burden by reasoning that its previous decisions in public-employee free speech cases involved just one employee, whereas the statute in question applied to thousands of public employees’ expressions. *Id.* at 466–68.

91. *Id.* at 479.

92. *Id.* at 480.

93. 543 U.S. 77 (2004).

94. *Id.* at 78.

95. *Id.* at 79.

privacy cases⁹⁶ to establish whether Roe's speech regarded a matter of public concern.⁹⁷ Without difficulty, the Court resolved the threshold public concern inquiry against Roe, and did not even reach the *Pickering* balancing test; as a result, the case was dismissed.⁹⁸

F. *Summary of Legal History*

The Court's early jurisprudence regarding the free speech rights of public employees underwent a dramatic change beginning in the 1950s and 1960s. The Court's landmark ruling in *Pickering v. Board of Education* laid the groundwork for the expansion of public employees' free speech rights, subject to a balancing test that accommodated the government's dual roles of sovereign and employer.⁹⁹ These roles impose conflicting responsibilities: on the one hand, the government, as sovereign, is obliged to its constituents to uphold their ability to engage in free and open debate, the essence of the First Amendment; on the other hand, the government, as employer, must provide its citizens with public services, and the practical realities associated with carrying out these functions justify some boundaries on public employees' free speech rights.¹⁰⁰

This balancing test remained in place until the early 1980s, when *Connick v. Myers* refined the test to eliminate First Amendment protection for speech of a purely personal nature.¹⁰¹ The *Connick* decision narrowed the instances in which public employees' speech would be protected and perhaps marked a new pro-employer era characterized by affording great deference to the government's role as employer and its corresponding duties.

The Court's rulings in *Rankin*, *National Treasury Employees Union*, *Waters*, and *Roe* did not disturb the *Pickering/Connick* line of reasoning. But the Supreme Court had not yet decided whether a public employee's speech within the scope of his or her

96. *Id.* at 83–84 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) and *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (stating that “public concern is something that is . . . of legitimate news interest [or] of general interest . . . to the public”).

97. *Id.*

98. *Id.* at 84–85.

99. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

100. *See Waters v. Churchill*, 511 U.S. 661, 672 (1994); *Lewis v. Cohen*, 165 F.3d 154, 161 (2d. Cir. 1999).

101. *See generally Connick v. Myers*, 461 U.S. 139 (1983).

employment received First Amendment protection. Would the Court preserve the *Pickering* calculus, or would the Court opt for another rule? The circuit courts were split on this issue, but the Supreme Court resolved the disagreement in *Garcetti v. Ceballos*.

III. *GARCETTI V. CEBALLOS*

A. *Facts of the Case*

Richard Ceballos was employed as a Deputy District Attorney in the Los Angeles County District Attorney's office.¹⁰² In 2000, he was contacted by a defense attorney regarding *People v. Cuskey*, a case being prosecuted by the District Attorney's office.¹⁰³ The defense attorney believed there were inaccuracies in the affidavit of a deputy sheriff who obtained a search warrant crucial to the prosecution's case.¹⁰⁴ The defense attorney notified Ceballos that he planned to challenge the warrant, and asked Ceballos to review the case, a customary aspect of Ceballos's job.¹⁰⁵

Ceballos visited the location described in the affidavit and determined there were serious discrepancies between what Ceballos had seen and the statements the deputy sheriff made in order to obtain the search warrant.¹⁰⁶ Particularly alarming to Ceballos was the fact that the deputy sheriff had called a "long driveway" what Ceballos deemed to be an entirely separate roadway, and the fact that the deputy sheriff had described tire tracks at the crime scene, but Ceballos concluded that the street's composition made it nearly impossible for tire tracks to have remained visible.¹⁰⁷

Ceballos spoke with his immediate supervisors, Carol Najera and Frank Sundstedt, about his investigation and all agreed that the search warrant may have been improperly obtained.¹⁰⁸ Ceballos wrote a memorandum to his supervisors outlining his findings and recommended that the case be dismissed.¹⁰⁹ On March 9, 2000,

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

103. *Ceballos v. Garcetti*, 361 F.3d 1168, 1170–71 (9th Cir. 2004), *overruled by* *Garcetti v. Ceballos*, 126 S. Ct. 1951.

104. *Garcetti*, 126 S. Ct. at 1955.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Ceballos*, 361 F.3d at 1171.

109. *Garcetti*, 126 S. Ct. at 1955–56.

Ceballos, Najera, Sundstedt, representatives from the Sheriff's office, and another deputy district attorney met to discuss the situation.¹¹⁰ The meeting was apparently quite intense, and one lieutenant criticized Ceballos about the way he had handled the matter.¹¹¹

Instead of heeding Ceballos's recommendation to dismiss the case, Sundstedt believed it prudent to wait until the court ruled on the motion challenging the warrant.¹¹² After informing the defense attorney that Ceballos believed the deputy sheriff had lied to obtain the warrant, Ceballos was subpoenaed to testify for the defense.¹¹³ Ceballos informed Najera that, pursuant to his obligation under *Brady v. Maryland*,¹¹⁴ he had no choice but to provide the defense with a copy of his memo regarding the investigation.¹¹⁵ At the hearing, the prosecution objected to numerous questions by the defense attorney.¹¹⁶ The judge sustained these objections, and therefore, Ceballos was not allowed to reveal his opinion on the legality of the warrant.¹¹⁷ The judge denied the defendant's motion and the prosecution continued with its case.¹¹⁸ Because he testified on behalf of the defense, Ceballos was not permitted to remain a part of the prosecution's team for this particular case.¹¹⁹

After these events, Ceballos maintained that Garcetti, the Los Angeles County District Attorney, Najera, and Sundstedt retaliated against him for writing the memo regarding the deputy sheriff's ostensible misconduct, for notifying the defense counsel about his investigation, and for testifying at the motion hearing.¹²⁰ Ceballos asserted that the retaliatory actions included a demotion, a transfer to a less desirable office,¹²¹ and hostile treatment from his

110. *Ceballos*, 361 F.3d at 1171.

111. *Garcetti*, 126 S. Ct. at 1956.

112. *Ceballos*, 361 F.3d at 1171.

113. *Id.*

114. 373 U.S. 83 (1963).

115. The duties to which Ceballos referred were delineated in *Brady*. *See id.* (holding that the prosecution's suppression of evidence favoring the accused is a violation of due process where the evidence may be relevant in determining either guilt or punishment).

116. *Ceballos*, 361 F.3d at 1171.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. In 2001, Professor Erwin Chemerinsky conducted an independent study of the Los Angeles Police Department, specifically regarding the Rampart scandal, in which police officers attempted to convict innocent civilians on criminal

immediate supervisors.¹²²

Ceballos filed an employment grievance, but this was denied for lack of evidence that he had experienced any retaliation.¹²³ He then brought suit in the district court, asserting that the adverse employment action constituted a violation of his First Amendment rights.¹²⁴ The county moved for summary judgment, arguing that its decisions regarding Ceballos's employment were made to accommodate its staffing demands, and, moreover, Ceballos's memo did not necessitate First Amendment protection because it was made in the normal course of his employment.¹²⁵ The district court ruled in favor of the county on the basis of qualified immunity and Ceballos appealed.¹²⁶

B. The Appellate Court's Decision

The majority opinion of the Court of Appeals followed closely the reasoning set forth in the *Pickering/Connick* line of cases: "To determine whether Ceballos's speech is protected by the First Amendment, we apply a two-step test that stems from the Supreme Court's holdings in *Connick v. Myers* and *Pickering v. Board of Education . . .*"¹²⁷ The test is, of course, to first determine whether Ceballos's speech was related to a matter of public concern, and, if it was, to weigh the relative interests required by the *Pickering* balancing test.

In determining whether Ceballos's speech addressed a matter of public concern, the majority viewed the crucial factor as whether the employee's intent in speaking was to draw attention to wrongdoing, or rather to gain ammunition on a wholly personal matter.¹²⁸ If the former, then the next step was to engage in the

charges by planting evidence and committing perjury. His report observed that transferring police officers to other assignments, typically far away from where the officers lived, was a relatively common practice to punish disloyal police officers. The officers referred to this practice as "freeway therapy." Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 549 (2001) (analyzing the Board of Inquiry's report and setting forth conclusions and recommendations). Ceballos describes his transfer as such an act. *Ceballos*, 361 F.3d at 1172, 1172 n.2.

122. *Ceballos*, 361 F.3d at 1171–72.

123. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956 (2006).

124. *Id.*

125. *Id.*

126. *Id.*

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

128. *Id.* at 1174 (quoting *Roth v. Veteran's Admin. of United States*, 856 F.2d

Pickering calculus, and if the latter, then the speech was not worthy of First Amendment protection. The majority easily resolved this issue in Ceballos's favor for two reasons: first, it stated that when public employees make statements relating to "corruption, wrongdoing, misconduct, wastefulness, or inefficiency . . . their speech is inherently a matter of public concern;"¹²⁹ and second, the county itself did not contend that Ceballos's statements related to a purely personal matter.¹³⁰

The defendants argued that Ceballos should not receive First Amendment protection because his statements were made pursuant to his employment responsibilities.¹³¹ In his concurring opinion, Judge O'Scannlain said that the pertinent consideration under *Connick* was not whether the speech in question addressed a matter of public concern, but whether the person spoke as a citizen or as an employee.¹³² Under this reasoning, the speaker's role is dispositive in the analysis of whether the speech is protected. To support his argument, Judge O'Scannlain cited numerous federal circuit court cases in which the citizen-employee distinction was discussed,¹³³ but he conceded that *Connick* did not explicitly mention this point.¹³⁴

Judge O'Scannlain offered three reasons for adopting a broad rule excepting all job-related speech from First Amendment protection. First, he believed that public employees' speech while on the job belonged to the State with no corresponding interest in

1401, 1406 (9th Cir. 1988)).

129. *Id.*

130. *Id.*

131. *Id.* at 1174, 1193 (O'Scannlain, J., specially concurring).

132. *Id.* at 1187.

133. *Id.* at 1187-88 (citing *Gonzalez v. City of Chi.*, 239 F.3d 939, 942 (7th Cir. 2001) (declining to establish a broad rule exempting job-related speech from First Amendment protection but holding that, absent "a unique set of facts[,] public employees' speech while performing routine job-related duties lack First Amendment protection); *Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000) (en banc) (adopting a per se rule that public employees' speech related to their employment does not receive First Amendment protection); *Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999) (holding that a public employees' "purely job-related" speech does not receive First Amendment protection)).

134. *See id.* at 1187.

Connick did not fully rationalize the distinction it drew between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import.

Id.

the speech itself by the public employee, except in doing a good job.¹³⁵ Second, he reiterated *Connick's* concern that the judiciary is not the proper forum to resolve each and every employee grievance lamenting that “with . . . Ceballos on the books, what federal or state employment-based decision can possibly evade intrusive federal constitutional review?”¹³⁶ Finally, he noted that legislatures had enacted whistleblower statutes to afford legal protections to public employees who expose government wrongdoing, and thus judicial protections were both misguided and redundant.¹³⁷

The majority expressly rejected Judge O'Scannlain's proposal to fashion a per se rule that would exempt job-related speech of public employees from First Amendment protection.¹³⁸ First, the court reasoned that public employees are well-positioned to speak on matters of public concern and, as a result, declining to offer them First Amendment protection for reporting government misconduct would diminish the public's ability to maintain the integrity of government operations.¹³⁹ Second, the majority attacked the claim that public employees have no personal stake in their speech and recognized that for many public servants, their jobs mean much more than just a paycheck, but also reflect a desire to advance the public good.¹⁴⁰ Next, they noted the absurdity of denying public employees protection for exposing wrongdoing to their supervisors, but granting them protection if they choose to circumvent the established channels and go directly to the public.¹⁴¹ Finally, the majority surveyed the other circuit court rulings on the matter and found ample support for its view that public employee job-related speech remains subject to the two-tiered *Pickering/Connick* test.¹⁴²

135. *Id.* at 1189.

136. *Id.* at 1190.

137. “This case [exemplifies] the too-common tendency of well-intentioned jurists to squeeze a policy-oriented square peg into a round constitutional hole With such Platonic Guardians, who needs elected representatives at all?” *Id.* at 1192–93.

138. *Id.* at 1175.

139. *Id.*

140. *See id.* at 1175 n.5.

141. *Id.* at 1176.

142. *Id.* at 1176–77 (citing *Rodgers v. Banks*, 344 F.3d 587, 599 (6th Cir. 2003) (holding that a hospital employee's memo on patient care is protected speech despite the employee's role as director of quality management and stating as “incorrect” the proposition that an employee's statement in the course of his or her job duties is never protected); *Taylor v. Keith*, 338 F.3d 639, 644–45 (6th Cir. 2003) (holding that a police officer's report on police brutality addresses a matter

Having resolved that issue in Ceballos's favor, the majority moved on to perform the *Pickering* balancing test.¹⁴³ It found no significant interest on the part of the county worthy of protection,¹⁴⁴ and therefore held Ceballos's speech to be protected under the First Amendment.¹⁴⁵

C. *The Supreme Court's Decision*

The issue before the Court was whether public employees' job-related statements were entitled to First Amendment protection.¹⁴⁶ In a 5–4 ruling, the majority promulgated Judge O'Scannlain's view that when public employees make statements pursuant to their official employment responsibilities, their speech is not protected by the First Amendment.¹⁴⁷

1. *The Majority Opinion*

Justice Kennedy began the opinion by asserting that for many years, the "unchallenged dogma"¹⁴⁸ was the rights/privilege doctrine, but that this doctrine had been qualified by the *Pickering* Court to provide protection of certain statements for two reasons. First, the majority acknowledged that public employees should not forfeit all their First Amendment rights simply because they accepted government employment.¹⁴⁹ And second, the majority recognized the societal benefits of hearing the well-informed

of public concern and stating that the notion that an employee spoke pursuant to his or her job responsibilities is a relevant factor, but not the determinative factor); *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002) (permitting constitutional protection for a police officer's statements in a memo to his supervisors and expressly rejecting a per se rule that would exempt statements made pursuant to job-related duties from First Amendment protection); *Baldassare v. New Jersey*, 250 F.3d 188 (3d Cir. 2001) (concluding that an investigator's speech about the potential misconduct of other employees constituted protected speech notwithstanding that his role as an investigator involved disclosing such behavior)).

143. *Id.* at 1180.

144. "[B]ecause the defendants have failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office, there is little for us to weigh in favor of the individual defendants under *Pickering*." *Id.*

145. *Id.*

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

147. *Id.* at 1960. Justices Stevens, Souter, Ginsburg, and Breyer filed dissenting opinions. *Id.* at 1962–76.

148. *Id.* at 1957 (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

149. *Id.* at 1957, 1958.

opinions of public employees regarding public issues.¹⁵⁰ But the majority downplayed *Pickering's* importance in employee-speech jurisprudence and referred to that Court's decision as a "starting point" in the analysis.¹⁵¹ The majority understood its predecessor's primary purpose as affording public employers the necessary control over their employees so as not to impair its public service mission.¹⁵² The majority also believed that the premise underscoring its decisions in previous public-employee free speech cases was to allow public employees free speech rights with respect to public debate rather than to job-related activities.¹⁵³ It asserted that "[r]efusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse."¹⁵⁴

Relying on these principles, the majority stated that the dispositive factor was that Ceballos's statements were made pursuant to his job duties.¹⁵⁵ They argued that Ceballos was not speaking as a citizen when he complained about the deputy sheriff's conduct, but rather as an employee of the government.¹⁵⁶ The majority reasoned that, because Ceballos was a government employee, it was irrelevant whether he had some personal interest in speaking out against the deputy sheriff; the crucial point was that the government has the right to limit what its employees say while they are serving in their official government capacity.¹⁵⁷ The majority drew a sharp distinction between Ceballos as citizen and Ceballos as government employee. As a citizen, Ceballos had the same First Amendment rights as a member of the general public. But as a government employee, Ceballos did not have the right to

150. *Id.* at 1958–59.

151. *Id.* at 1957.

152. *See id.* at 1958. "The Court's overarching objectives, though, are evident. . . . 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." *Id.*

153. *Id.*

154. *Id.* at 1960.

155. *Id.* at 1959–60. "The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy." *Id.* The Court later says, "The significant point is that the memo was written pursuant to Ceballos' official duties." *Id.* at 1960.

156. *Id.* at 1959–60.

157. *Id.* at 1960.

do as he pleased; rather, the majority held that the government, as employer, can control its employees' job-related expressions without infringing on their right to free speech.¹⁵⁸ The majority believed that its ruling sufficiently preserved public employees' First Amendment rights while also accommodating the government's interest in effectively managing its work environment in order to perform critical government functions.¹⁵⁹

The majority also appeared quite concerned with the prospect of every disgruntled employee seeking judicial review of an adverse employment decision.¹⁶⁰ To eliminate this potential problem, it held that the *Pickering* balancing test is activated only when the speech in question is uttered by the public employee, as a citizen, and not when the speech falls within the scope of the employee's job responsibilities.¹⁶¹

While the majority recognized the need to expose governmental ineffectiveness and transgressions by its officers, it seemed content to leave that task to the sensible judgment of the government itself and the whistleblower statutes available to government employees who report misconduct.¹⁶²

2. *The Dissenting Opinions*

Justice Souter's dissent began by concurring with the majority's stated interest in effectively serving the citizenry, thus disallowing public employees from making inflammatory or inciting statements about their employers.¹⁶³ But he asserted that on balance, the employee's interest in expressing his or her opinion about the government's misconduct, and the public's interest in hearing his views, overshadowed the government's

158. *Id.*

159. *Id.*

160. *See id.* at 1961 ("Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts 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." *Id.* at 1962. "Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." *Id.*).

161. *Id.*

162. *Id.* at 1962.

163. *See id.* at 1963-64 (Souter, J., dissenting). "The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy . . ." *Id.* at 1964.

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efficiency interests.¹⁶⁴

Justice Souter noted that in two previous cases, the statements that led to the employees' termination were related to the employees' job duties, and the *Pickering* balancing test was deemed appropriate.¹⁶⁵ He observed that in *Givhan* and *Madison*, the Court did not draw a distinction between the individual as citizen and the individual as employee; quite the reverse, the Court recognized that the two are often united.¹⁶⁶

Justice Souter identified several incongruities in the majority's ruling. First, contrary to the majority's opinion, he contended that the need to engage in the *Pickering* balancing test of interests was arguably more important when employees made statements related to their job duties because of the benefits to both the individual and the public from that speech, and also because the employees are speaking on matters that they understand best.¹⁶⁷ Next, he called it "odd" that the majority's ruling would deny protection to a school human resources officer who criticized a principal's unwillingness to hire minorities, whereas a teacher or secretary would be protected when making the same complaint.¹⁶⁸ Second, he argued it was even "stranger" to refuse to protect an employee who utilized the chain of command to voice his or her concerns about potential violations, but afford protection to that same employee if he chose to take the matter directly to the public.¹⁶⁹ Finally, he believed that the majority incorrectly differentiated between the individual as a citizen and the individual as an employee, and observed that the best public servants are those who do not make a distinction between their civic lives and their professional lives, but rather, merge the two together.¹⁷⁰

Justice Souter reiterated his concurrence with the majority on an important point: that the government requires "civility . . .

164. *Id.* at 1963–64.

165. *Id.* at 1964 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (following *Pickering* when the district fired a teacher for complaining about employee racial composition) and *Madison Joint Sch. Dist. No. 8, v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976) (stating that *Pickering* should be followed when a teacher spoke out on his on behalf at a school board meeting)).

166. *Id.* "[A] public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job" *Id.* at 1964.

167. *Id.* at 1965.

168. *Id.*

169. *Id.* at 1965 n.1.

170. *Id.* at 1965–66.

consistency . . . honesty and competence” in its workforce.¹⁷¹ But he criticized the majority’s response to the government’s needs as a “winner-take-all” approach, and argued that this tactic was not justified.¹⁷² He believed the better approach would be to adopt an even higher threshold for evaluating whether expressions made pursuant to job responsibilities are protected.¹⁷³ He outlined a new threshold inquiry: a public employee who speaks pursuant to his job responsibilities would only receive First Amendment protection when “he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.”¹⁷⁴

Justice Souter then attacked the majority’s rationale that whistleblower statutes would sufficiently shield employees from retaliatory action.¹⁷⁵ He argued that the whistleblower laws provide varying degrees of protection based on locality, and that the Federal Circuit has interpreted the legislative enactments with respect to federal employees as denying protection for statements made in the course of one’s job responsibilities.¹⁷⁶ Therefore, he contended, the laws relied on by the majority to protect employees like Ceballos would not offer sufficient protection.¹⁷⁷

Finally, Justice Souter conveyed his dismay that the breadth of the majority’s ruling could imperil academic freedom by threatening college professors who inexorably make statements and write articles as part and parcel of their employment.¹⁷⁸ In response to this concern, Justice Kennedy asserted that academic freedom issues raised additional constitutional considerations that do not fall within the purview of the Court’s public-employee free speech cases; thus the Court passed on deciding whether the *Garcetti* ruling applied to such cases.¹⁷⁹

Justices Stevens and Breyer each wrote separate dissenting opinions. Both disagreed with the majority’s categorical rule. Justice Stevens pointed out that the majority’s rule instructs public employees who wish to receive First Amendment protection to go

171. *Id.* at 1967.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1970.

176. *Id.* at 1970–71.

177. *Id.* at 1971.

178. *Id.* at 1969–70.

179. *Id.* at 1962.

directly to the public rather than to their supervisors.¹⁸⁰ He believed this to be an unacceptable implication.¹⁸¹ Justice Breyer further added that lawyers' professional obligations require them to speak out under certain circumstances, and where that is the case, the government's interest in prohibiting that speech is weakened.¹⁸²

IV. THE PROBLEM

The Supreme Court's decision in *Garcetti* provided guidance to the lower courts that when a public employee brings a suit alleging that an adverse employment action violated his or her First Amendment rights, the claim should be automatically discarded if the speech for which the employee was terminated was made in the course of the employee's duties, notwithstanding the importance of the statement to the general public.¹⁸³ *Garcetti* effectively eliminated the public concern threshold test and the *Pickering* balancing test for employment-related speech, a significant doctrinal development. In laying down this absolute rule, the majority offered three principal reasons. First, the government has the right to control its employees' speech;¹⁸⁴ second, public employees have no personal stake in their job-related expressions;¹⁸⁵ and third, the fact that employees receive whistleblower protection for exposing government misconduct renders further judicial protection unnecessary.¹⁸⁶ Finally, while not explicitly stated in the majority's opinion, the rhetoric of the majority appears to evince a latent concern with the potential for increased litigation.¹⁸⁷ The ramifications of the Court's decision are alarming for several reasons.

A. *The Government's Interest*

Throughout its history, the Court has ascribed different values to different kinds of expression. Speech concerning public issues has historically received the strongest constitutional protection,

180. *Id.* at 1963 (Stevens, J., dissenting).

181. *Id.*

182. *Id.* at 1974–75 (Breyer, J., dissenting).

183. *Id.* at 1960.

184. *Id.* at 1959–60.

185. *Id.* at 1960.

186. *Id.* at 1962.

187. *See id.* at 1961.

while speech relating to personal matters has not received such expansive safeguards.¹⁸⁸ In *Garcetti*, the government argued, and the majority agreed, that First Amendment protection for public employees' job-related expressions is unwarranted, and to conclude otherwise would undermine the government's ability to effectively manage its workforce and operate efficiently.¹⁸⁹ The ability of the government to exert greater control over its employees' speech than over the speech of its citizenry has not been thoroughly examined by the courts, but it has been generally accepted as necessary in order for the government to perform its multitudinous tasks.¹⁹⁰

To assess the cogency of this argument, one must recall the historical rationale behind the ruling that certain restrictions on public employees' speech were permissible. These limitations had their roots in the notion that the government must have full authority to carry out its mandate to effectively serve the citizenry. In order to fulfill this mandate, the Court has permitted the government, as employer, to impose qualified limitations on the free speech rights of public employees.¹⁹¹

In many respects, this makes sense. A public employee who brazenly speaks out against his colleagues or supervisors can undermine the government's effectiveness. The government employer should be able to discipline or even terminate a troublesome employee without fearing the consequences. Few would argue that the government cannot take action against an employee for offensive, indecent, or treacherous behavior. To

188. Compare *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[E]xpression on public issues has ‘always rested on the highest rung of the hierarchy of First Amendment values.’”) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) (“The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating “debate on public issues should be uninhibited, robust, and wide-open”); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (noting “speech concerning public affairs is more than self-expression; it is the essence of self-government”), with *Connick v. Myers*, 461 U.S. 138, 146 (1984) (stating “if [the expression] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”). See also R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 28–29 (1987).

189. *Garcetti*, 126 S. Ct. at 1960.

190. See *Waters v. Churchill*, 511 U.S. 661, 671–72 (1994).

191. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–69 (1968).

hold otherwise might undermine government efficiency due to resources that would necessarily be consumed in managing an unruly employee and the diversion this would create from carrying out the government's important duties. Moreover, the separation of powers between the executive and judicial branches requires that the judiciary not micro-manage the government's affairs.¹⁹²

But efficiency is not the sole objective of a governmental system, and the value of protecting constitutionally guaranteed freedoms should not be underestimated. The law should work to provide an environment in which the government can function effectively, while simultaneously guaranteeing the protection of individual and collective liberties and rights. As recognized in *Pickering* and its progeny, the interest in efficiency must at times give way to the interest in preserving a fundamental liberty.

Indeed, a strong argument exists that providing public employees First Amendment protection will enhance the government's effectiveness. The Supreme Court long ago recognized that "informed public opinion is the most potent of all restraints upon misgovernment"¹⁹³ Human experience teaches that those who expect their actions to be subject to subsequent examination may well proceed with greater caution. Under this supposition, when government workers are aware that their actions may be subject to public scrutiny, they will labor more effectively. When public employees are functioning at their best, the government, in turn, will benefit. Permitting government agencies to shield themselves from scrutiny by allowing them to clamp down on the free speech rights of their employees deprives the citizenry of a useful mechanism of monitoring the government and can lead to an unchecked and mismanaged system of public service. Providing the public with information on the government's affairs sends a clear message that the actions of government employees are not beyond public scrutiny.

Without such information, the public is denied the opportunity to assess whether its government is operating effectively. Unlike private companies, the government does not

192. *Connick*, 461 U.S. at 146 (stating that when public employees' speech is unrelated to a matter of public concern, the judiciary should not intrude on the government's duties in the name of the First Amendment, and also asserting that ordinary dismissals from government service, while perhaps unfair, are not subject to judicial review even in those situations where the dismissal may be improper or unreasonable).

193. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

have indicia such as stock prices, dividends, or rankings to gauge its performance, or specific shareholders to whom it is accountable—the government’s shareholders are the members of the public. Encouraging public employees to speak out against improper behavior can drive out inefficiencies that might otherwise plague an unmonitored government. Discouraging public employees from commenting on unethical practices will make it more difficult for government officers to understand where the problems lie, thereby impeding progress towards a better-functioning government.

As Justice Stevens commented in his dissent, the majority’s ruling creates a perverse incentive for employees who notice wrongdoing to take these concerns to the media or directly to the public.¹⁹⁴ Such a disclosure might subsequently create a public relations havoc for the government, forcing it to consume far more resources than if it had been initially responsive to the employee’s allegation.

As previously alluded to, there is a direct correlation between the public’s perception of information disclosure and the public’s trust in its government. A government shrouded in secrecy will confirm suspicions that the government cannot be trusted,¹⁹⁵ and undermine the notion that government exists for the people’s benefit. A transparent government, on the other hand, conveys legitimacy and helps to maintain public confidence in the system.¹⁹⁶ Insofar as the government promotes policies that foster transparency, the result will yield an increase in the public’s faith in the system. The upshot of a confident body politic is increased participation, robust economic development, and an orderly society that complies with the rule of law.¹⁹⁷

B. *The Public’s Interest*

Central to the Court’s rulings in *Pickering* and *Connick* was the

194. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1963 (2006) (Stevens, J., dissenting).

195. William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1069, 1091 (1999) (“Many people do not trust governments, in general, or their own governments, in particular. Whatever they hear from governments is suspect . . .”).

196. *See id.* at 1091–92 (discussing transparency in government as being essential for the public’s trust).

197. *See id.* at 1096–99.

interest of the public; specifically, the value to society of hearing the government employee's views.¹⁹⁸ The Court asserted that "speech concerning public affairs is more than self-expression; it is the essence of self-government."¹⁹⁹

In fact, the Court's decision to permit certain free speech rights was grounded in the belief that public employees may be in the best position to have informed opinions about government operations, to understand how the government can operate more effectively, and to observe and report misconduct.²⁰⁰ Public reception of such information leads to a more informed citizenry that is better equipped to make knowledgeable decisions about its government.²⁰¹ Yet *Garcetti* instructs that government employees receive the least protection when they are speaking on subjects that they know best. The *Garcetti* holding, then, compared with that in *Rankin*, creates a contradiction. It is debatable whether the average person would be concerned about a given public employee's attitude toward the president.²⁰² It seems more likely that the public would be interested in hearing the public employee's views on abusive practices in the system.

This public benefit factor is virtually ignored by the *Garcetti* majority.²⁰³ A review of the lower court decisions in public-employee free speech cases reveals that the content of the speaker's expression has been the determinative factor in deciding whether the speech is protected. Recall the *Connick* court's formulation:

198. *The Constitutional Rights of Public Employees*, *supra* note 46, at 1739.

199. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

200. *See* *Waters v. Churchill*, 511 U.S. 661, 674 (1994); *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–72 (1968).

201. *See* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1016 (2005) ("[T]he First Amendment allows open discussion and criticism of governmental policies and practices and thereby creates the conditions enabling an informed and critical electorate. In other words, coupled with the right to vote, the First Amendment provides a means by which the citizenry can 'check' and ultimately direct governmental power.").

202. *See supra* text accompanying notes 77–81. *See also* Cynthia K. Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1126 (1988).

203. While the majority did make mention of the benefits to the public from hearing the opinions of government employees, it essentially discounted this factor by ruling that the speaker's role, citizen or employee, was dispositive. If the speaker's expressions were made pursuant to his or her employment, the majority apparently believed the value to the public of that expression to be irrelevant; rather, the majority concluded that a public employer has complete "control over what the employer itself has commissioned or created." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

where the employee's speech addresses a matter of public concern, and more specifically, where the expression "bring[s] to light actual or potential wrongdoing or breach of public trust on the part of [a government official],"²⁰⁴ that speech should be protected, in large part because of its benefit to the public.²⁰⁵ But according to *Garcetti*, even speech on crucial public issues is not protected; rather, the role of the speaker is the determinative factor. Retroactively applying the *Garcetti* rule to earlier lower court cases illustrates the certain loss of valuable information, such as reports regarding police brutality and misconduct in public schools.²⁰⁶

To understand why such information is virtually guaranteed to be suppressed, consider the importance of employment to individuals and families. Post-*Garcetti*, public employees who choose to speak critically will likely suffer reprisal, thereby jeopardizing their well-being and the well-being of their families. Rather than risk these consequences, many employees will simply keep quiet in the face of wrongdoing. The eventual result could be a culture of silence in the government workplace where misconduct goes unreported. Public employees may turn a blind eye to wrongdoing and those employees responsible for monitoring and reporting workplace concerns may refrain from making critical

204. 461 U.S. 138, 148 (1983).

205. *See id.* The *Connick* Court decided that Myers's survey did not constitute a matter of public concern, and based this decision on the fact that if it were released to the public, it would not convey any information of value to the public; *see also Lee, supra* note 201, at 1134 ("[F]ree expression and specifically public employee speech are so valuable to society that courts should ensure their protection . . .").

206. In *Taylor v. Keith*, two police officers, pursuant to an internal investigation and within the scope of their employment duties, were retaliated against after expressing concern over the brutal conduct of a fellow police officer toward a citizen. 338 F.3d 639 (6th Cir. 2003). The Sixth Circuit held the officers' statements were entitled to First Amendment protection. *Id.* at 641. In *Canary v. Osborn*, the Appellate Court rejected a public employer's summary judgment motion where an assistant principal was demoted for revealing a conspiracy among school administrators to cheat on student achievement tests. 211 F.3d 324 (6th Cir. 2000). In another case involving the statements of a police officer, the plaintiff was reassigned to a lower position after refusing to comply with a directive to include statements which he knew to be false in an official police report and subsequently attempting to bring to light exculpatory evidence in a case that the district attorney was prosecuting. *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998). In each of these cases, the protected speech was made in the course of the speaker's employment. But under the new *Garcetti* ruling, such statements would not receive protection. Therefore, police officers who report brutality or rogue behavior, or teachers or school administrators who report misconduct on the job, will not receive protection for speaking out.

comments, even though this is exactly what their job requires.

Public employees, whose salaries are paid with taxpayer dollars, should be accountable primarily to the citizens they serve, and only secondarily to their employer. As such, public employees should have not only the right, but also the duty to report fraud, waste, and abusive behavior, because unless an employee discloses wrongdoing, these practices may go undetected. Encouraging public employees to make early disclosures of misconduct can help to curb abuse before it becomes unmanageable, thereby providing a tangible benefit to taxpayers.

Thus, there are two reasons favoring policies that protect the free speech rights of public employees. First, a reduction in these rights corresponds to a decrease in information that would otherwise be available to citizens. Second, maintaining free speech rights provides the possibility of early detection of government wrongdoing which serves the public interest by minimizing the detrimental impact. Threatening public employees with retaliatory employment action is contrary to both of these interests.

C. *The Individual's Interests*

The government's argument, with which the majority agrees—that the individual's interest is irrelevant—is highly problematic. Its distinction between an actor as a citizen and an actor as an employee²⁰⁷ is unfounded. To begin with, the underlying values of the First Amendment—“self-fulfillment, the advancement of knowledge and the discovery of truth, and preservation of an informed electorate”²⁰⁸—are the same irrespective of whether the actor is speaking as an employee or as a citizen.²⁰⁹ Even the government acknowledges the dual benefits of serving as a public employee: an exciting career coupled with the opportunity to make a difference for the nation.²¹⁰

207. *Garcetti*, 126 S. Ct. at 1959–61.

208. Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 709–10 (1984).

209. *Id.*

210. USAJobs is the official site of federal employee job listings for the U.S. Government. The site includes the following phrases: “Make a difference in the lives of the American public” and “Being a civil servant is a demanding, yet rewarding, job.” USAJobs, Working for America, <http://www.usajobs.gov/firsttimers.asp> (last visited Sept. 28, 2006).

For the Federal Government to be efficient and effective, it needs the

Assume for a moment that the majority's argument is correct and that Ceballos "did not act as a citizen" when he performed his job, but rather merely as a disinterested employee who was simply carrying out orders. This creates the impression that public employees are essentially puppets under the control of their employers. Yet the numerous examples of government employees refusing to obey the inappropriate directives of their superiors proves that government employees play more than just the role of "employee" as public servants.²¹¹

Another factor—the pay differential between employees in the public and private sectors—rebutts the presumption that there is no aspect of self-gratification that commands First Amendment protection.²¹² "Individuals do not shed their personal identities on the job"²¹³ nor should we promote a rule that encourages them to do so. It is in society's best interest to unite the actor as citizen and as employee so that the upstanding values the citizen brings to his or her job are not stifled.

D. Are Whistleblower Protections Adequate?

The majority justified its holding by stating that the "powerful

best and the brightest employees who want to serve their fellow countrymen and who are willing to share their knowledge, their skills, and their energy for the betterment of our nation. The contributions Federal employees make today, tomorrow, and in the future guarantee that America will remain the world leader and can successfully respond to the foreign and domestic challenges of the 21st century. . . . And then there's the satisfaction that comes from knowing that you are making a difference.

USAJobs, Working for America, <http://www.usajobs.gov/working.asp> (last visited Sept. 28, 2006).

211. Consider the following examples: David Hackworth was a decorated Vietnam War veteran who returned to the United States after four tours of duty. He spoke out against the Vietnam War, alerting the public that the war could not be won. His superiors moved to court-martial him, but he eventually resigned with an honorable discharge. Douglas Martin, *David H. Hackworth—Colonel in Vietnam, Columnist*, S. F. CHRON., May 7, 2005, at B5, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/05/07/BAG78CLMMH1.DTL>. Coleen Rowley, a career FBI agent, wrote a memo to the head of the FBI that criticized the FBI's culture and asserted that the FBI missed a crucial opportunity to discover the September 11, 2001 terrorist attacks before they took place. James Kuhnhenh, *FBI 'Careerists' Stalled Terror Case*, ST. PAUL PIONEER PRESS (Minn.), June 7, 2002, at A1.

212. Press Release, Am. Fed'n of Teachers, State Employee Pay Growth Below Inflation Rate for Third Straight Year (Sept. 4, 2006), <http://www.aft.org/presscenter/releases/2006/090406.htm>.

213. Cheh, *supra* note 208, at 710.

network of legislative enactments” at the local, state, and federal levels provides sufficient protection to whistleblowers.²¹⁴ There are certain statutory protections for government whistleblowers, such as the Civil Service Reform Act, enacted by Congress in 1978 to protect federal employees.²¹⁵ Then in 1989, Congress passed the Whistleblower Protection Act, which intended to augment the previous legislation and afford protection for federal employees who assist in the elimination of fraud, waste, abuse, illegality, and corruption.²¹⁶ But a recent report by the Congressional Research Service admits that “[e]nacting statutory rights for whistleblowers . . . have not produced the protections that some expected. . . . [T]he agencies created by Congress to safeguard the rights of whistleblowers [] have not in many cases provided the anticipated protections to federal employees.”²¹⁷

Current case law creates an extremely high bar for employees to overcome before they can succeed on a whistleblower claim. The courts have placed the burden squarely on the employee by asserting that there is a “presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations”²¹⁸ and that this presumption can only be contradicted with “irrefragable proof.”²¹⁹ Furthermore, the Federal Circuit’s²²⁰ recent decisions have denied whistleblower protections to employees who complained directly to their supervisors.²²¹ In *Huffman v. Office of Personnel Management*,²²² the Federal Circuit already ruled that whistleblower protections do not protect public employees whose disclosures of potential

214. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

215. Cong. Research Serv. Report for Cong., National Security Whistleblowers 2, <http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf> (Dec. 30, 2005) [hereinafter CRS Report].

216. *Id.* at 20.

217. *Id.* at 2.

218. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

219. *Id.*

220. The Federal Circuit is one of the three agencies responsible for adjudicating whistleblower claims. The other two are the Merit Systems Protection Board and the Office of Special Counsel. CRS Report, *supra* note 215, at 2.

221. *Willis v. Dep’t of Agric.*, 141 F.3d 1139 (Fed. Cir. 1998) (holding that an employee’s disclosure of potential unethical practices to his supervisors is not protected by whistleblower statutes); *Horton v. Dep’t of the Navy*, 66 F.3d 279 (Fed. Cir. 1995) (denying whistleblower protection to a public employee who complained directly to the alleged wrongdoer).

222. 263 F.3d 1341 (Fed. Cir. 2001).

misconduct are made in the course of their employment duties.²²³

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.²²⁴ Ceballos instead sought First Amendment protection that was subsequently denied by the Court, in part because it erroneously believed he could still avail himself of the state's whistleblower protection.²²⁵ The *Garcetti* case, thus, makes federal and state whistleblower protections even more important, since the employee is no longer entitled to First Amendment protection—particularly for communications made internally and in the course and scope of an employee's authority.

But the statutory protections are not uniform,²²⁶ and public employees may receive different treatment depending on their place of residence and their level of government employment. The current statutory enactments are inadequate and superficial, and the judicial protections are no better. Thus, while the majority may believe that whistleblower statutes afford public employees ample protection, the reality belies this argument. This begs the question: prior to *Garcetti*, public employees have spoken critically in the course of their employment responsibilities with nothing other than whistleblower protections (which clearly are limited and arguably arbitrary)—will *Garcetti* even have an impact then?

The answer to this is twofold. First, any abridgment on an individual's free speech rights must be adequately justified. The Constitution guarantees free speech protections, but the courts have imposed certain reasonable restrictions on the First Amendment rights of public employees to promote government efficiency. That much seems to be reasonable. Regardless of its actual impact, the ruling sends a message that the government, as

223. *Id.* at 1353–54.

224. CAL. LAB. CODE § 1102.5 (2003).

225. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

226. *What Price Free Speech: Whistleblowers and the Garcetti v. Ceballos Decision Before the H. Comm. on Government Reform*, 109th Cong. 261 (2006) (statement of Stephen M. Kohn, Chair, National Whistleblowers Center), available at <http://whistleblowers.org/Ceballos.final.testimony.pdf> (examining the whistleblower statutes in all fifty states and concluding that the “powerful network” referred to by the *Garcetti* majority simply does not exist). *Id.* at 5–6.

an employer, can retaliate against its employees who do not agree with its message. Surely, this contention is not consistent with the principles of democracy upon which this country was founded.

Second, it is likely that public employees are aware of whistleblower protections generally, but perhaps not aware of their specific characteristics. Public employees, confronted with a grave situation and desiring to act honorably, may make a disclosure presuming that they will somehow be protected, either constitutionally or by statute. Before *Garcetti*, if the whistleblower did not realize that he or she did not qualify for statutory protection, the employee could always file suit alleging a constitutional violation. Others might have been aware of the vagaries in the laws, but may not have been willing to test their boundaries. But the *Garcetti* ruling leaves no room for ambiguity: absent statutory protections, public employees' job-related statements receive no protection. Public employees who may have previously come forward will no longer be likely to do so.

E. An Issue Left Unanswered: The Impact on Academics

In his dissent, Justice Souter expressed concern over the breadth of the *Garcetti* ruling, particularly the potential impact on college professors.²²⁷ He observed that the Court has invariably held that the writings and speeches of academics occupy a unique position in the constitutional landscape and as such, have enjoyed expansive First Amendment freedoms.²²⁸ The majority responded that the Court's jurisprudence regarding the First Amendment rights of university professors involved considerations beyond that of cases related to public employees.²²⁹

Nevertheless, the relationship between the free speech doctrine and academics has not been clearly defined by the Supreme Court.²³⁰ Add to this uncertainty the fact that the *Garcetti* appellate court's special concurrence by Judge O'Scannlain (adopted by the *Garcetti* Supreme Court majority)²³¹ relied heavily

227. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1969–70 (2006) (Souter, J., dissenting).

228. *Id.*

229. *Id.* at 1962 (majority opinion).

230. Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 17, 18 (2005) (“Courts need an effective doctrinal framework for adjudicating [academic freedom] disputes. They do not have one.”).

231. *Ceballos v. Garcetti*, 361 F.3d 1168, 1187-88, 1191 (9th Cir. 2004)

on the Fourth Circuit's reasoning in *Urofsky v. Gilmore*,²³² in which the plaintiffs were six professors employed by various collegiate-level schools throughout Virginia.²³³ That case involved a challenge to the constitutionality of a Virginia statute restricting all state employees from accessing sexually explicit materials on the state's computers.²³⁴ The professors objected to the statute on grounds that their compliance with it necessarily infringed their academic freedom rights and thus their ability to perform their employment duties.²³⁵ While the Fourth Circuit recognized the importance of academic freedom to the American democracy, it maintained that the distinction between the individual's First Amendment rights as a citizen as compared to that of an employee was nonetheless relevant.²³⁶

Now that the *Garcetti* Court has validated this distinction with regard to public-employee speech, the next step may well be to extend this analysis to the speech of academics. With regard to university professors, this distinction is again problematic because the scope of what constitutes employee speech versus citizen speech is not clear. Teachers' in-class statements might be considered within the scope of their employment, but the line is not so clear with regard to other aspects of many professors' jobs, such as delivering lectures, publishing articles, and writing books.²³⁷

Given the *Garcetti* majority's deft ability to limit the application of the *Pickering* and *Connick* tests, the Court may be able to do it again. Using *Garcetti* as its backdrop, the Court might begin such an inquiry at a similar starting point: whether college professors' job-related statements are made pursuant to their roles as professors or their role as citizens. The dichotomy drawn by the majority in *Garcetti* has potentially detrimental implications for academics. As a result, this issue is worthy of close monitoring.

(O'Scannlain, J., specially concurring), *overruled by* *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

232. 216 F.3d 401 (4th Cir. 2000).

233. *Id.* at 404.

234. *Id.*

235. *Id.* at 406, 410 n.9. The plaintiffs maintained that the statute inhibited their ability to teach and research. *Id.* The complaint alleged numerous restrictions on the plaintiff's job duties, including validating student research on teacher-assigned tasks, and conducting independent research. *Id.*

236. *See generally id.* at 414 (rejecting academic freedom as a "right" and discussing the notion that, insofar as such rights are recognized, they are institutional rights as opposed to individual rights).

237. *See* Amar & Brownstein, *supra* note 230.

F. *What Is Fair?*

Undoubtedly, a critical aspect of our legal system should be to promote fairness,²³⁸ both to serve the societal good, but also to preserve the public's confidence in the judiciary.²³⁹ To that end, the legal system should advocate rules that are consistent with the public's notions of fairness, particularly where there is likely some public consensus about what the rules should be.

Given the choice between an open and accountable government on the one hand, and an opaque and sealed government on the other, most people would certainly choose the former.²⁴⁰ As one scholar noted:

By any commonsense estimation, governmental transparency, defined broadly as a governing institution's openness to the gaze of others, is clearly among the pantheon of great political virtues. A fundamental attribute of democracy, a norm of human rights, a tool to promote political and economic prosperity and to curb corruption, and a means to enable effective relations between nation states, transparency appears to provide such a remarkable array of benefits that no right-thinking politician, administrator, policy wonk, or academic could

238. For a detailed discussion on the notion of fairness in the legal system, see generally Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992 (2002) (rejecting the suggestion that analysts of legal policy should rely exclusively on economic considerations in making decisions and must bear in mind societal notions of fairness).

239. The judicial branch has few means to execute its judgments. As a result, the public's opinion of judicial decisions, particularly with respect to whether the decisions are fair, is integral to the judiciary's effective disposition. As Justice Frankfurter once noted, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (asserting that the Court should not decide a racial gerrymandering case because it was a political question); see also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 59 n.171 (2002) ("An essential condition for an independent judiciary is public confidence. . . . Without public confidence the judiciary cannot operate [P]ublic confidence in the judiciary is the most precious asset that this branch of government has. It is also one of the most precious assets of the nation.").

240. Consider the alternative to an open and transparent government: "a government riddled with autocracy, corruption, or incompetence [in which] an open information policy would be unwelcome." Mock, *supra* note 195, at 1091; see also Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 898–99 (2006) ("[O]pen government produces an informed and interested public, and by implication . . . secrecy caused by opaque or closed government produces suspicious and/or ignorant masses.").

be against it.²⁴¹

Indeed, the Framers' aversion toward an abusive government was the driving force behind the Constitution as written. Policies that encourage transparency in government would therefore be favored over policies that promote silence on the part of public servants.

The *Garcetti* ruling cannot be squared with the principles underlying an open, accountable, and transparent government. By sanctioning the termination of employees who speak out, the ruling discourages employees from being candid in the workplace, thereby promoting silence and secrecy, ultimately creating a more centralized power structure. Government secrecy diminishes its accountability to the public²⁴² and an increased centralization of government power can lead to corruption and irresponsibility.²⁴³ As one federal circuit judge eloquently noted, “[d]emocracies die behind closed doors When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”²⁴⁴ Thus an open government is instrumental to maintaining a strong democracy, particularly with respect to unelected public officials, who are insulated from voter referendums; openness is essential in order to ensure accountability by government decision makers.

After *Garcetti*, the picture is clear: the government is substantially insulated from liability for misconduct. By permitting retaliation against employees who attempt to expose government wrongdoing and denying the public access to that information, the government has isolated itself from public inquiry. Since the public would surely be in favor of rules that exposed corruption or immoral behavior in their government, it follows that a rule which tolerates retaliatory action against a civic-minded employee who speaks out for the public's benefit does not comport with societal expectations of fairness. Therefore, *Garcetti* is inconsistent with the

241. Mock, *supra* note 195 at 888–89. The article also discusses the manifold benefits of transparency including as a predicate for effective representative government, permitting the free flow of information thereby allowing input, and examination and evaluation by the citizenry resulting in an increase in the quality of government. *Id.* at 898–900.

242. Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1125 (2002).

243. Malcolm Wallop, *The Centralization of Power and Governmental Unaccountability*, 4 CORNELL J.L. & PUB. POL'Y 487, 487 (1995).

244. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

public's welfare.

G. Should the Court Have Used a Heightened Standard?

Less than ten years ago, the Court in *United States v. National Treasury Employees Union (NTEU)* was deeply concerned about the impact of its ruling because of the thousands of employees that would be affected.²⁴⁵ The *NTEU* Court also featured prominently in its decision the public's rights to receive the employee's views.²⁴⁶ In that case, the Court maintained that the government would prevail only if it could demonstrate that its interests in operating an effective public service system outweighed the interests of both the prospective audiences and the current and future public employees' interest in that expression.²⁴⁷ That much is familiar,²⁴⁸ but the Court noted two additional considerations that gave rise to a modified standard favoring public employees: first, it asserted that because the ban had an impact on vast numbers of employees, the concerns were much more serious than the impact of a single employment decision; second, the Court observed that in contrast to a single employment action made in response to an employee's statements, the ban was damaging because it had the potential to discourage employees from speaking in the future.²⁴⁹ It stated that prospective limitations on the speech of public employees weighed heavily "on the public's right to read and hear what the employees would otherwise have written and said."²⁵⁰ As a result, the Court imposed a much heavier burden on the government to prove the salutary nature of the ban.²⁵¹

While the *NTEU* court made it clear that its modified standard was not applicable in post hoc *Pickering* analysis cases,²⁵² its positioning of the societal advantages of employees' opinions suggests that additional weight should be afforded to the public interest factor when the employee's speech provides information from which the public will benefit.²⁵³ Here, Ceballos's statements

245. See 513 U.S. 454, 466–68, (1995).

246. *Id.* at 470. See *supra* notes 86–92 and accompanying text.

247. 513 U.S. 454 at 468.

248. The test set forth in *NTEU* was essentially the *Pickering* balancing test.

249. *Id.* at 467–68.

250. *Id.* at 470.

251. *Id.* at 468.

252. *Id.* at 467.

253. See *id.* at 467–68.

had the potential to supply the public with valuable information. Therefore, the Court should have considered the enormous potential loss of valuable information as well as the far-reaching consequences of an unqualified ruling. Had the Court contemplated these implications, it might have reached a different result.

But the *Garcetti* Court never publicly considered applying a heightened standard. Surely the majority realized that its ruling was more than simply a judgment against Ceballos, but regarding all public employees. Recognition of this factor would have at least assuaged the concerns of the millions of public employees affected and those of free speech advocates, that the Court appreciated the extent of its ruling, nevertheless, it reached the conclusion that the speech should not be protected. But the breadth of its ruling is not contemplated in the majority's opinion, and as such, the opinion lacks legitimacy.

H. The Majority's Concern Regarding Excessive Litigation Is Unjustified

The majority appeared concerned that the uncertainty created by the balancing test would generate a large volume of claims by disgruntled employees.²⁵⁴ This concern is neither well-founded nor persuasive. For almost forty years, the federal courts have operated under the *Pickering* constructs. There is no evidence that the courts have been debilitated with such litigation.²⁵⁵ Furthermore, the Supreme Court itself has rejected this same argument advanced by a notable defendant.²⁵⁶ "Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant Moreover, the availability of sanctions provides a significant deterrent to litigation"²⁵⁷

In applying the new *Garcetti* rule, the lower courts must still determine whether the speech is a part of the speaker's job or is

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

255. Justice Souter's response to the majority included a count of such claims: each year, there were approximately one hundred cases in the federal district courts, and seventy in the federal courts of appeal. *Id.* at 1968 (Souter, J., dissenting).

256. *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (dismissing the President's argument that disallowing him absolute immunity from civil liability would lead to an aggrandizement in the number of private lawsuits filed against the President).

257. *Id.* (citing FED. R. CIV. P. 12, 56).

outside the scope of his or her duties.²⁵⁸ This inquiry requires fact determinations and is no less onerous than the pre-*Garcetti* standard; therefore, this issue is likely to be a battleground in future cases.

Additionally, the shame and embarrassment public employees confront after revealing misconduct is another factor that discourages them from stepping forward.²⁵⁹ As one legal scholar noted: “There is something in our culture that holds most of us back from blowing whistles and also from pursuing legal remedies even when we feel we are abused in an employment situation.”²⁶⁰ For the aforementioned reasons, the majority’s concern that the judiciary will be deluged with litigation of public employees’ claims is unconvincing.

Even Justice Souter argues that the standard in such disputes should be more stringent allowing only “matter[s] of unusual importance” to proceed.²⁶¹ But in order to justify the adoption of a new standard after more than twenty-five years, the Court should ensure that the standard provides sufficient additional clarity. Generally, matters of public concern are inherently important. Whether they are unusually important would likely be difficult to ascertain at the initial stage; and in any case, the *Pickering* calculus dictates that the competing interests be measured, thus providing the opportunity for judicious balancing. Foreclosing the employee’s right to seek a legal remedy due to concerns that overly litigious employees will cripple government effectiveness is tenuous at best.

I. The Pickering/Connick Standard Should Not Have Been Abandoned

It is beyond doubt that the government should be afforded a certain degree of discretion to manage its workforce. Yet this need

258. *Garcetti*, 126 S. Ct. at 1968 (Souter, J., dissenting).

259. In Professor Chemerinsky’s analysis of the Los Angeles Police Department, he observed that officers are discouraged from speaking out, but if an officer gets so frustrated that he or she decides to step forward, that officer is marked as a traitor and is subjected to retaliatory actions that are often overlooked by supervisors and colleagues. Chemerinsky, *supra* note 121, at 561–62; *see also* Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 359 (1991) (“[T]he world has not been kind to whistleblowers. In fact, whistleblowers are hated, harassed and vilified.”).

260. John D. Feerick, *Toward a Model Whistleblowing Law*, 19 FORDHAM URB. L. J. 585, 589 (1992).

261. *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

is not so compelling that it requires all future claims of workplace retaliation (for statements made pursuant to an employee's job) to be barred, because on the other side of the scale lie substantial interests as well. Every individual has a personal stake in his or her government and community. Individuals who choose public sector employment often do so in order to make a positive impact on society. After *Garcetti*, an employee who discovers wrongdoing in the workplace has two options: keep quiet or speak out and risk retaliation.

The Court could have reached the same result in *Garcetti* by employing the *Pickering* balancing test. Recall the factors that the Court considers on the employer's side of the scale: the likelihood that the speech will undermine the agency's operations, foster controversy among co-workers, or disrupt the workplace.²⁶² The defendants need not prove that Ceballos's memo actually disrupted the workplace, but merely that such potential existed.²⁶³ If this were the case, the Court could have upheld the county's disciplinary action against Ceballos without laying down a categorical rule.

Recognition of the government's important interests is embodied in the *Pickering* and *Connick* tests; and the Court has erected other obstacles that proscribe many employer-employee disputes.²⁶⁴ Because these tests adequately accommodated the county's needs, the *Garcetti* Court's radical departure on a constitutional question of such paramount importance was not warranted.

The Court's judgment in *Garcetti* is a policy choice about the value of public-employee speech, but even more importantly, about the government's inherent powers. By portraying the absolute control over public-employee speech as necessary to operate

262. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571, 573 (1968).

263. *See Connick v. Myers*, 461 U.S. 138, 152 (1983).

264. Under the *Pickering/Connick* test, the public employee must first prove that his or her speech is on a matter of public concern before the Court will perform the balancing of interests. *Id.* at 146. Even where the speech is deemed to address a matter of public concern, the court may determine that the statement is so disruptive of the government's ability to operate that it cannot be protected. *Id.* at 151-52. Moreover, lack of a causal connection may warrant the case's dismissal. *Id.* at 153-54. And if the employer can prove it would have taken the adverse employment action despite the employee's speech, then the speech is technically protected, but the case is dismissed because the status of the speech is no longer relevant. *Id.* In short, a public employee bringing a lawsuit alleging a violation of his or her First Amendment right must surmount numerous obstacles.

effectively, the *Garcetti* court and the government have, for the moment anyway, side-stepped the serious questions about whether this ruling serves the best interests of the individual employee, the public at large, and even the government itself.

With the *Garcetti* decision, absent sufficient statutory protections, the government has virtually unlimited powers to terminate or demote employees for speaking critically in the workplace. By the breadth of its scope, this ruling creates a chilling effect on employees and makes them less likely to expose government fraud, waste, or abuse, because of the risk of dismissal. As Justice Marshall once wrote, this danger “hangs over [public employees’] heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the ‘efficiency of the service’ [F]or the value of a sword of Damocles is that it hangs—not that it drops.”²⁶⁵

V. CONCLUSION

The tension between the interests of the individual, the government, and the public has been the subject of a succession of public-employee free speech cases heard by the Supreme Court over the past forty years. The *Garcetti* decision is not within the contemplation of existing precedent on such cases.

The Court’s holding upsets a relatively sound balance and is imposed at the expense of not just Ceballos alone, but also future public employees who will be dissuaded from reporting misconduct. While many public employees should be lauded for their courageous efforts to step forward and inform the public about their government’s affairs, these employees will now either refrain from doing so or be punished.

To correct the majority’s ruling, Congress should introduce and pass legislation to close the loophole created by *Garcetti* and to provide statutory protections that the majority apparently believes already exist.²⁶⁶

265. *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

266. *Garcetti*, 126 S. Ct. at 1962.