A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights [*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)]

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> *I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?*[1]

I. INTRODUCTION

More than twenty million Americans are publicly employed.[2] Public employees, however, do not have the same First Amendment free speech protection as ordinary citizens.[3] Addressing public employee

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1. Pickering v. Bd. of Educ., 391 U.S. 563, 578 (1968) (quoting Marvin L. Pickering). Marvin Pickering was a public school teacher who wrote a letter to the editor of a local newspaper criticizing the manner in which the board of education handled past proposals to raise money for the school several days after local voters defeated a proposal to increase school taxes. *Id.* at 564. The school fired Pickering when his letter was published and he sued for reinstatement, claiming that his speech was protected under the First Amendment. *Id.* at 564-65. The United States Supreme Court held that Pickering's speech could not be the basis for his dismissal and he was reinstated at the school, where he worked until his retirement in 1997. *Id.* at 574-75; *see also* David Hudson, Teacher Looks Back on Letter that Led to Firing—and Supreme Court Victory (July 20, 2001), http://www.freedomforum.org/templates/document.asp?documentID=14445.

2. Brief for United States as Amicus Curiae Supporting Petitioners at 1, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473) (acknowledging that, as the nation's largest public employer, the United States had a substantial interest in the outcome of *Garcetti v. Ceballos*). The 2005 and 2006 Census Bureau statistics reveal that there are almost nineteen million *full-time* public employees in the United States. *See* U.S. Census Bureau, 2006 Public Employment Data, State and Local Governments, United States Total (2006), http://ftp2.census.gov/govs/apes/06stlus.txt (last visited Apr. 5, 2007); U.S. Census Bureau, Federal Government Civilian Employment By Function: December 2005, http://ftp2.census.gov/govs/apes/05fedfun.pdf (last visited Apr. 5, 2007).

3. *See* Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893 (2005). The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. Freedom of speech under the First Amendment is a fundamental right which is applicable to the States through, and safeguarded by, the due process clause of the Fourteenth Amendment. *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937). The First Amendment right to free speech is highly revered and is often held to be the most fundamental privilege guaranteed to Americans. For example, Justice Cardozo described the freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937).

speech rights, the Supreme Court has stated that "[t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting on 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."[4] This problem is solved by the Supreme Court's public employee speech analysis, which includes a threshold test to determine whether the employee speech involves a matter of public concern, and if so, a balancing test to weigh the employee's interest in protecting the speech with the employer's interest in suppressing the speech.[5] If the employee's interest outweighs the employer's interest, then the speech is protected by the First Amendment,[6] if not, then the speech will be subject to employer regulation. Over the past four decades, the courts have found these tests difficult to apply.[7]

Recently, in *Garcetti v. Ceballos*,[8] the Supreme Court added yet another test to the public employee speech analysis, distinguishing between speech as a citizen regarding a matter of public concern[9] and speech as an employee pursuant to official duties.[10] The *Garcetti* decision, however, continues to make public employee speech decisions irreconcilable, even within the Supreme Court itself. As a result of *Gar-*

"Although the First Amendment generally protects employees' free speech rights, the rights of those employed by the government are more limited." *See* Zack, *supra*. Actions by public employees claiming infringement of constitutional rights are generally brought under section 1983 of the United State code, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity or other proper preceding for redress. . . .

42 U.S.C. § 1983 (1994). Section 1983 allows individuals to sue state actors in federal courts for civil rights violations. *See* Answers.com, http://www.answers.com/topic/section-1983-1 (last visited Mar. 22, 2007). Section 1983 is one of the most powerful protectors of individual rights like the First and Fourteenth Amendments. *Id.*

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

5. Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006).

6. *See, e.g.*, *Pickering*, 391 U.S. at 570; *see also* discussion *infra* Part III.B.1.

7. "These [tests] present substantive, procedural, and evidentiary issues that have divided the Court and have created uncertainty for litigants and lower courts." Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5, 5 (1999). The courts encounter a wide array of factual scenarios in which a public employee raises a First Amendment claim. Those scenarios tend to fall in one of three general categories:

> (1) A public employee is fired because of speech or expressive conduct that the employer claims is disruptive to the efficient operation of the workplace; (2) A public employee contends that he or she has suffered an adverse employment action (dismissal, demotion, etc.) in retaliation for First Amendment-protected conduct; (3) A public employee is fired because of political patronage—that is, for not belonging to his or her boss's political party.

DAVID L. HUDSON, JR., BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH 4-5 (2002), *available at* http://www.fac.org/PDF/FirstReport.PublicEmployees.PDF.

8. 126 S. Ct. 1951 (2006).

9. For purposes of this comment, "matters of public concern" are matters which the public as a whole would place value upon knowing, or matters which would serve to stimulate "informed, vibrant dialogue in a democratic society." *Garcetti*, 126 S. Ct. at 1959.

10. *Id.* at 1960. For purposes of this comment, "official duties" and "employment duties" are those responsibilities or obligations an employee has to his employer, or when the employee is "conducting his daily professional activities." *Id.*

cetti, future public employees who speak as citizens about a matter of public concern, but concurrently speak pursuant to their official duties as employees will be beyond the protection of the First Amendment. This comment attempts to decipher the purpose and intent of the threshold public concern test within the public employee speech analysis. Furthermore, this comment contends that the Court's decision in *Garcetti* unwisely limits the scope of public concern and therefore unduly restricts the public employee's right to speak on public issues.

II. CASE DESCRIPTION

Richard Ceballos, a deputy district attorney, began working for the Los Angeles County District Attorney's Office in 1989.[11] During the relevant period, Ceballos was working as a calendar deputy, supervising other lawyers.[12] In 2000, a defense attorney under Ceballos's supervision contacted him to examine an affidavit used to obtain a critical search warrant in a pending criminal case (the Cuskey case).[13] Upon examination of the affidavit used in the Cuskey investigation, Ceballos determined that it contained serious misrepresentations.[14] Ceballos contacted the warrant affiant, who could not explain the inaccuracies.[15] Thereafter, Ceballos wrote a disposition memorandum recommending dismissal of the case because it was based on the faulty affidavit.[16] Ceballos submitted the memo to his supervisors, but they disregarded his concerns and proceeded with the prosecution.[17] As a result of writing

11. *Id.* at 1955.

12. *Id.* Ceballos's supervisor "rated Ceballos 'outstanding' in his performance evaluation, intending that he be seriously considered for further promotion." Brief of Respondent at 1, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473). In general, positive employee evaluations provide the employee with a cause of action if the employee is discharged or retaliated against based on mistaken facts, even if the employer exercised good faith in reaching its decision. *See* Marcy v. Delta Airlines, 166 F.3d 1279, 1280 (9th Cir. 1999).

13. *Garcetti*, 126 S. Ct. at 1955. The defense attorney was representing one of the defendants in *People v. Cuskey*, in which the defendants were being charged with narcotics and weapons offenses. Brief of Respondent, *supra* note 12, at 2. The Cuskey warrant sought evidence relating to a stolen pickup truck found some distance from the defendant's property. *Id.* According to the deputies' affidavit, the pickup truck was on a "long driveway" leading to the defendant's property. *Id.* The deputies searched the pickup truck, but found nothing. *Id.* The deputies then allegedly noticed tire tracks that appeared to match the tires of a truck on the defendant's property. *Id.* The tire tracks led the deputies to search the defendant's property. *Id.* And, with the aid of a drug-sniffing dog, they uncovered the critical evidence—methamphetamine and firearms. *Id.*

14. *Id.* Ceballos reviewed the case file and discovered some discrepancies. *Id.* His suspicions aroused, Ceballos visited the crime scene and realized that the photographs and description in the deputies' affidavit did not at all match the defendant's property. *Id.* For example, Ceballos observed that the "long driveway" described in the deputies' affidavit was actually a road, several hundred feet long, with residences on both sides. *Id.* He determined that it was very unlikely that the deputies could have followed tire tracks the entire length of the road to the defendant's property. *Id.*

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

16. *Id.* at 1955-56. Ceballos claimed that the scope of his obligations as an attorney required him to write the memo relaying his concerns of governmental misconduct. *Id.* at 1974 (Breyer, J., dissenting). *See* Brady v. Maryland, 373 U.S. 83, 86 (1963) (suppressing evidence favorable to a criminal defendant violates his rights under the Due Process Clause).

17. *Garcetti*, 126 S. Ct. at 1956. Several days after submitting the first memo, Ceballos submitted a second memo to his supervisors that further explained his concerns. *Id.* When the supervisors

the memo, Ceballos alleged that he was retaliated against,[18] and he initiated a grievance, which was denied.[19] Ceballos then brought suit against the government under section 1983, asserting that his supervisors' alleged retaliation violated his free speech rights under the First Amendment.[20] The district court granted the supervisors' motion for summary judgment.[21]

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision.[22] To assess Ceballos's First Amendment claim, the appellate court relied on two Supreme Court tests that serve as the foundation for the public employee speech analysis.[23] First, the court evaluated the speech by applying the public concern test set forth in *Connick v. Myers*.[24] The *Connick* test was established as a threshold to determine whether the employee's speech involves a matter of public concern.[25] Applying the *Connick* public con-

proceeded with the prosecution, the defendants filed a motion to traverse their complaint. A "traverse" is a "formal denial of a factual allegation made in the opposing party's pleading." BLACK'S LAW DICTIONARY 719 (2nd Pocket ed. 2001). At a hearing on the motion to traverse, the defense challenged the warrant. *Garcetti*, 126 S. Ct. at 1956. The defense called Ceballos to recount "his observations about the affidavit, but the trial court rejected the challenge to the warrant." *Id.*

18. *Id.* For purposes of this comment, an employer's "retaliatory" or "disciplinary" actions include: demotion, discharge, transfers, or any other adverse action taken against a public employee for speech related activity. Over the next six months, the following unexplained events occurred: Ceballos was demoted from calendar deputy to trial deputy; one of his murder cases was reassigned to a junior colleague with no murder case experience; he received no further murder case assignments; Ceballos was denied a promotion; and, he was transferred to a different courthouse, which significantly lengthened his commute. Brief of Respondent, *supra* note 12, at 8.

19. *Garcetti*, 126 S. Ct. at 1956. The court denied the grievance and ruled that Ceballos did not suffer retaliation. *Id.*

20. *Id.* Additionally, Ceballos asserted a state-law claim for intentional infliction of emotional distress against his supervisors. Brief of Respondent, *supra* note 12, at 8-9. The district court did not extend supplemental jurisdiction over that claim when it granted summary judgment to the individual defendants. *Id.* at 9 n.3.

21. *Garcetti*, 126 S. Ct. at 1956. The district court concluded that Ceballos was not entitled to First Amendment protection for the memo's contents because he wrote it pursuant to his employment duties. *Id.* Furthermore, the district court concluded that even if Ceballos's speech was constitutionally protected, the supervisors had qualified immunity under the Eleventh Amendment. *Id.*; *see also* Ceballos v. Garcetti, 361 F.3d 1168, 1172 (9th Cir. 2004). Eleventh Amendment "qualified immunity" provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. CONST. amend. XI.

The courts often confuse qualified immunity protection, especially when it is questioned in public employee speech cases. *Compare* Sexton v. Martin, 210 F.3d 905, 913-14 (8th Cir. 2000) (applying a *Pickering* balancing of interests to determine whether the employee's asserted First Amendment right was clearly established, but not to determine whether the right was violated), *with* Grantham v. Trickey, 21 F.3d 289, 295 (1994) (concluding, without a *Pickering* balancing of interests, that because there was evidence of employment disruption, the employer should have qualified immunity, and employee's free speech rights should not be protected). For a more detailed discussion on these discrepancies, see Anne Gasperini DeMarco, *The Qualified Immunity Quagmire in Public Employees' Section 1983 Free Speech Cases*, 25 REV. LITIG. 349, 366-70 (2006).

22. *Ceballos*, 361 F.3d at 1168. First, the court held that Ceballos's speech addressed a matter of public concern and that his interest in the speech outweighed his supervisors' interests in suppressing the speech. *Id.* at 1180. Second, the court held that qualified immunity was not available to the supervisors "because the Eleventh Amendment does not apply to political subdivisions of the state." *Id.* at 1170.

23. *See Garcetti*, 126 S. Ct. at 1956.

24. 461 U.S. 138 (1983).

25. *See Ceballos*, 361 F.3d at 1173-74; discussion *infra* Part III.B.2.

cern test to Ceballos's speech, the court concluded that his memo, which had recited alleged governmental misconduct, was a matter of public concern.[26] Second, because the speech involved a matter of public concern, the court next evaluated the speech by applying the balancing test set forth in *Pickering v. Board of Education*.[27] The *Pickering* test was created to balance the interest of the employee in protecting the speech with the interest of the employer in suppressing the speech.[28] Applying the *Pickering* balancing test to Ceballos's speech, the court concluded that the supervisors "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office," and therefore, Ceballos's interest "in the exposure of corrupt or unlawful practices" outweighed the supervisors' interest in responding to his speech.[29] Thus, because Ceballos's speech involved "a matter of public concern and his interest in the speech outweighed the" supervisors' interest, the court determined that the First Amendment protected his speech.[30]

The United States Supreme Court granted certiorari to consider whether a public employee's First Amendment free speech rights protect him from retaliation based on speech made pursuant to his official duties.[31] The Court defined his rights narrowly and held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[32] Therefore, the Court concluded that even if Ceballos's speech would have otherwise been protected under the First Amendment, his speech was not protected because he had spoken pursuant to his official duties as a prosecutor.[33]

26. *Ceballos*, 361 F.3d at 1178. The appellate court arguably arrived at the correct decision in Ceballos's case and this comment acknowledges some of the problems the appellate court identified. The appellate court specifically recognized that a per se rule denying speech protection to employees who speak about matters of public concern merely because they speak as part of their work duties would violate the *Connick* principles. *Id.* at 1176. The court further found that "[o]ther circuits have also rejected any per se rule that a public employee does not receive any First Amendment protection for speech that occurs within the scope of his employment duties." *Id.* Ironically, that is exactly what the Supreme Court ended up doing. *See Garcetti*, 126 S. Ct. at 1960.

27. 391 U.S. 563 (1968).

28. *See Ceballos*, 361 F.3d at 1178; discussion *infra* Part III.B.1.

29. *Ceballos*, 361 F.3d at 1180. Furthermore, Ceballos submitted the memo "to bring wrongdoing to light" and there was "no evidence that [he spoke] recklessly or in bad faith." Brief of Respondent, *supra* note 12, at 11.

30. *Ceballos*, 361 F.3d at 1180.

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

32. *Id.* at 1960.

33. *Id.* The Court determined Ceballos wrote the memos because that is part of what he was employed to do. *Id.* Specifically, the Court recognized that Ceballos was not acting as a citizen when he wrote the memos; rather, he was fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case. *Id.*

III. BACKGROUND

A. First Amendment Jurisprudence

The Supreme Court has decided numerous First Amendment cases dealing with a wide range of factual and legal issues.[34] The Court has created categories for the type of speech involved.[35] Different categories receive varying levels of scrutiny—strict, intermediate, and rational basis—depending on the societal value of the speech and its corresponding need for First Amendment protection.[36] The most valuable speech,

34. The First Amendment is an "intricate" doctrine with an "enormous, complex body of case law . . . ." DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 613 (West Group 3d ed. 2003). However, the First Amendment's "seemingly absolute proscription, at the very least, describes a powerful constitutional commitment to the freedoms of speech and press." ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 293 (Aspen Publishers, Inc. 2d ed. 2001). *See also* Adam Winkler, *Fundamentally Wrong about Fundamental Rights*, 23 CONST. COMMENT. 227, 229, 232 (2006); The First Amendment Library, http://www.firstamendmentcenter.org/faclibrary/index.aspx (last visited Mar. 23, 2007).

The text of the First Amendment reads in deceptively simple terms about freedom of expression: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The First Amendment mentions that "Congress" shall make no law, but also protects freedom of speech against the states. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (concluding that Ohio's criminal syndicalism statute was unconstitutional because it made it unlawful to advocate crimes or methods of terrorism or to voluntarily assemble with any group to teach doctrines of syndicalism, but did not draw a distinction between teaching and preparing a group for violent action, and thus violated rights guaranteed under the First Amendment); Thomas v. Collins, 323 U.S. 516, 518 (1945) (finding that Texas's requirement that a union official first obtain an organizer's card before addressing a meeting held to solicit new union members was an impermissible prior restraint on the official's First Amendment rights).

The First Amendment language "of speech, or of the press" has been used to protect other forms of communication as well. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (determining that overnight sleeping in a park as part of a demonstration of the homeless was speech); Spence v. Washington, 418 U.S. 405, 405-06 (1974) (finding that a student's display of a peace symbol over a United States flag in protest to the then-recent invasion of Cambodia was speech). "The simplicity of the [First Amendment's] text does not translate into a paucity of doctrine, and the doctrines rarely, if ever, speak in terms of absolutes." IDES & MAY, *supra*.

35. The "valuation of speech is purely a creation of the Court." Amber K. Spencer, *The FDA Knows Best . . . Or Does It? First Amendment Protection of Health Claims on Dietary Supplements: Pearson v. Shalala*, 15 BYU J. PUB. L. 87, 89 (2000). "The Court believed a case-by-case approach to freedom of speech issues would 'lead to unpredictable results and uncertain expectations, and it could render [the Court's] duty to supervise the lower courts unmanageable,'" and in effort "[t]o avoid these pitfalls, the Court determined that it should lay down broad rules of general application." Scott E. Michael, *"Lie or Lose Your Job!" Protecting a Public Employee's First Amendment Right to Testify Truthfully*, 29 HAMLINE L. REV. 413, 413 (2006) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974)). *See generally* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757-58, 770-71 (1976) (discussing classifications of speech which are given varying levels of First Amendment protection); *see also* FARBER, *supra* note 34, at 615-16; Spencer, *supra*, at 87-88 (discussing the development of the Court's "hierarchy" of First Amendment speech protection); Winkler, *supra* note 34 (recognizing that while "[l]aws invading on First Amendment rights of speech, association, and religious liberty are often subject to strict scrutiny" and granted a higher degree of protection, some First Amendment rights are afforded a lesser degree of scrutiny).

36. The Court has been home to much dispute regarding the amount of control the government should have over speech. For example, Judge Posner stated that "the state must be allowed to restrain speech if necessary in order to avert lesser catastrophes." Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 7 (1986). In contrast, Justices Holmes and Brandeis have "warned against the evils of an over-censoring, patronistic government." Spencer, *supra* note 35. Justice Holmes also argued against a high degree of government control over speech which keeps citizens in ignorance:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is

such as political speech, is protected by strict scrutiny, which requires the state to have a compelling interest to suppress the speech by the least restrictive means.[37] Less valuable speech, such as commercial speech, is protected by intermediate scrutiny, which requires the state to have a substantial interest in suppressing the speech and that the restriction be narrowly tailored to serve that interest.[38] The least valuable speech, such as public employee speech, is protected by rational basis scrutiny, which requires the government to merely have a legitimate interest in suppressing the speech and that the restriction be reasonably related to that interest.[39] The Court has found that government employers have a legitimate interest in controlling the speech of their employees, and therefore, public employee speech is deemed by the Court to earn a lesser degree of protection.[40]

B. Public Employee Speech Rights

Public employee speech rights have evolved through three distinct phases.[41] First, until the early 1950s, the Supreme Court followed the theory that government employment was not a right, but a privilege; thus, government employers had broad discretion to discipline their employees.[42] With that in mind, the Court favored government em-

to open the channels of communication rather than to close them.

Va. Bd. of Pharmacy, 425 U.S. at 770.

37. *See, e.g.*, Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 194-97 (1999) (invalidating restrictions on a signature-gathering process because the restrictions unconstitutionally limited the campaign supporters' ability to convey their message); Meyer v. Grant, 486 U.S. 414, 421-24 (1988) (concluding that a ban on the use of paid petition circulators unconstitutionally restricted political speech by limiting the campaign supporters' communication of their message).

38. *Compare Va. Bd. of Pharmacy*, 425 U.S. at 748 (establishing commercial speech as a constitutionally protected form of speech, but not determining the level of scrutiny to which the speech should be subjected), *with* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 557 (1980) (developing an intermediate scrutiny test for commercial speech under the law from *Va. Bd. of Pharmacy*).

39. Many First Amendment rights are protected by rational basis scrutiny. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (applying a rational basis test and upholding Oregon's law outlawing the use of the drug peyote, even when the drug use was for religious purposes); Hernandez v. Comm'r, 490 U.S. 680, 688-89 (1989) (applying a rational basis test and rejecting an Amish man's First Amendment challenge to payment of income taxes alleged to make religious activities more difficult).

40. The Supreme Court once held that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), *modified by*, R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992) (modifying the *Chaplinsky* categories to deal with hate speech). Since *Chaplinsky*, the Court has been increasingly careful when dealing with content-based restrictions on speech. The government may use a higher degree of control if it has a "legitimate" interest in controlling the speech, but on the other hand, if the government has no such interest and is merely controlling the content of speech, then a lesser degree of control should be used. "This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need." R.A.V. v. St. Paul, 505 U.S. 377, 400 (1992) (White, J., concurring). *See also* FARBER, *supra* note 34, at 614.

41. *See* Cynthia K. Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1112 (1988).

42. Justice Holmes once stated that, "[t]he petitioner may have a constitutional right to talk

ployers, even when disciplinary actions threatened an employee's First Amendment free speech rights.[43] Second, from the early 1950s to the late 1960s, employees began to receive greater First Amendment protection.[44] The Court still favored government employers in public employee speech cases but realized that workers retained their constitutional rights when employed by the government.[45] In the third and current phase, the Court established its public employee speech analysis which consists of two tests for deciding public employee First Amendment speech rights cases.[46] In 1968, the Court created the first test in the two-tiered analysis: the *Pickering* balancing test.[47] Fifteen years later, in 1983, the Court added the second test to the two-tiered analysis: the *Connick* public concern test.[48]

1. The *Pickering* Balancing Test

Pickering was a public school teacher fired for writing a letter to the editor of a local newspaper in which he criticized the school board for its handling of school funds.[49] Pickering brought suit against the government, asserting that the school's retaliation based on his letter

politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892).

43. Lee, *supra* note 41; *see also* Adler v. Bd. of Educ., 342 U.S. 485 (1952), *overruled in part*, Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967) (overruling *Adler* insofar that it upheld law unconstitutionally disqualifying otherwise eligible employees from employment in public schools). A New York law prohibited teachers from belonging to subversive groups that advocated the overthrow of the U.S. government. *Adler*, 342 U.S. at 489-90. The Court found this law valid because the employee had a choice between free speech and organization or employment with the school—if the employee did not like the law, he could retain his beliefs and resign. *Id.* at 492.

44. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952). An Oklahoma statute required all state employees to deny affiliation with subversive organizations in a loyalty oath. *Id.* at 184-86. The Court found this statute violated the due process clause of the Fourteenth Amendment, and "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

45. Lee, *supra* note 41. For example, in *Keyishian v. Bd. of Regents*, 385 U.S. 589, 595 (1967), the Supreme Court had another chance to evaluate New York's law prohibiting teachers from particular associations—a law the Court had upheld fifteen years earlier in *Adler*, 342 U.S. at 489-90. *See supra* note 43. This time the Court found the law unconstitutional, overruling *Adler*. *Keyishian*, 385 U.S. at 605-06. "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.*

46. *See* Connick v. Myers, 461 U.S. 138, 147-48 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Lee, *supra* note 41; *see also* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 679-80 (2005) (critiquing the difficulty for public employees to bring First Amendment actions under the Court's two-tiered analysis); 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, 121-22 (1996) (examining the justification for, and inaccuracies in, the two-tiered analysis); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee,* 25 HASTINGS CONST. L.Q. 529, 532-40 (1998) (providing a detailed discussion of the Court's development of the two-tiered analysis); Schoen, *supra* note 7, at 16-24 (discussing the application of the Court's two-tiered analysis).

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

48. *Connick*, 461 U.S. at 143.

49. *Pickering*, 391 U.S. at 564.

violated his First Amendment free speech rights.[50] The Court recognized that public employees should not be forced to relinquish their First Amendment rights to comment on matters of public concern.[51] The Court further recognized, however, that the state has an interest in regulating their employees' speech.[52] The Court determined that a balance should be reached between the interest of the public employee, as a citizen, to comment on matters of public concern, and the interest of the state, as an employer, to promote the efficient performance of public service.[53]

In determining the validity of the state's interest in suppressing the employee's speech, the Court adopted a broad definition of disruption in the workplace:

> An employee's speech disrupts the efficiency of a public employer when it: (1) adversely affects the employee's own performance; (2) disturbs harmony and discipline in the workplace; (3) interferes with the regular operation of the government office or agency; or (4) undermines public trust in the office or agency by disseminating false information in such a way that renders the government employer unable to effectively counter the employee's speech.[54]

Applying that definition of workplace disruption, the Court determined that Pickering's speech did not disrupt the school in any way, and thus the school did not have a valid interest in suppressing his speech.[55] Although *Pickering* established a balancing test, the facts in *Pickering* did not require the Court to apply its test because the school did not have an interest to balance against Pickering's interest.[56] The Court left it up to future Supreme Court cases to decide how the balancing test would actually be applied.[57]

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50. *Id.* at 565.

51. *See id.*

52. *See id.*

53. *See id.* at 568. The Court placed more value on the employee speech if it involved a matter of public concern, noting that Pickering's letter addressed a matter of public concern because it discussed how the school's tax dollars were spent. *Id.* at 571-72. Interpreting matters of public concern, the Court found that an employee's speech regarding the "preferable manner of operating" a government institution or which is "vital to informed decision-making" should be considered matters of public concern. *Id.* Under *Pickering*, however, "[p]ublic employee speech is not protected if the speech interest is less valuable in comparison to the disruption it causes to the efficient functioning of government offices." Ma, *supra* note 46, at 123 (analyzing the *Pickering* balancing test).

54. D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 252 (1990) (examining the *Pickering* balancing test). This broad definition of disruption includes: interrupting the normal office routine; distracting government workers; or speech that reveals the employee's incompetence, creates disharmony among other workers, or demonstrates disloyalty. *Id.* (analyzing appellate court decisions interpreting *Pickering*).

55. *Pickering*, 391 U.S. at 572-73.

56. *Id.*; *see also* Karin B. Hoppmann, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 1000-03 (1997).

57. In fact, the Court did not need to apply the *Pickering* balancing test until fifteen years later, in *Connick v. Myers*. Before *Connick*—but without needing to apply the balancing test—the Court decided three more cases safeguarding speech on matters of public concern. In *Perry v. Sinderman*, 408 U.S. 593, 596 (1972), the Court determined that an employee has protected speech rights even absent a tenure or contract. In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977), the Court determined that a public employer may discipline an employee if the employer

2. The *Connick* Public Concern Test

In *Connick*, an assistant district attorney (Myers) was fired for circulating to fellow employees a questionnaire which asked them for their views on matters such as office transfer policy, office morale, the need for a grievance committee, confidence in superiors, and whether they felt pressure to work on political campaigns.[58] Myers brought suit against the government under section 1983, asserting that her employer's retaliation based on her questionnaire violated her First Amendment free speech rights.[59] The Court determined that a public employee's free speech rights only extend to speech regarding matters of public concern, and thus created a threshold public concern test to identify what speech will then be subjected to the *Pickering* balancing test.[60] Under the public concern test, if the employee's speech does not constitute a matter of public concern, it will not have First Amendment protection and the employer will have authority to restrict the speech.[61]

Applying the public concern test to Myers's speech, the Court determined that one question on her handout touched on a matter of public concern: whether employees felt pressure to work on political campaigns.[62] Once Myers's speech passed the Court's public concern threshold, the Court proceeded to apply the *Pickering* balancing test.[63] The Court found that the questionnaire "touched upon matters of public concern only in a most limited sense," and while it did not impair Myers's ability to perform her responsibilities, the questionnaire may have impaired the efficiency of the office.[64] Because Myers's questionnaire involved such a limited speech interest and caused workplace disruption, the Court determined that her speech was not protected under

can show the disciplinary action would have occurred even without the protected speech. And in *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979), the Court determined that an employee's speech is protected if the employee chooses to meet privately with the employer rather than express the speech publicly.

58. Connick v. Myers, 461 U.S. 138, 140-41 (1983). Office transfer policy was the plaintiff's particular objection. She created the questionnaire because she opposed her transfer to another branch of the office. *Id.* Myers was fired for insubordination because she distributed the questionnaire. *Id.*

59. *Id.* at 141.

60. *Id.* at 147. If speech is a matter of public concern, then it will be subjected to the *Pickering* balancing tests. *See* Smith, *supra* note 54, at 254. If the speech is not a matter of public concern, however, then it "will be treated as if the government were a private employer and not subject to First Amendment restrictions at all." *Id.*

61. *Connick*, 461 U.S. at 151-54.

62. *Id.* at 149. "[T]he issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak freely without fear of retaliatory dismissal." *Id.*; *see also* Rutan v. Republican Party, 497 U.S. 62, 75-76 (1990) (holding that the First Amendment forbids government officials from promoting, transferring, recalling, or hiring public employees solely on the basis of their political affiliation or support, unless such party affiliation is an appropriate requirement for the position involved).

63. *Connick*, 461 U.S. at 142.

64. *Id.* at 151-52, 154. "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150.

the First Amendment.[65]

3. The *Pickering/Connick* Two-Tiered Analysis

The *Connick* public concern test was established as a threshold in an effort to "reduce the number of employment decisions generating constitutional challenges."[66] Only when the employee's speech *does* involve a matter of public concern will the speech be subject to the *Pickering* balancing test.[67] In that case, a balancing of interests will occur and the employee's interest in protecting the speech will be weighed against the employer's interest in controlling the speech.[68] When the employee's speech *does not* involve a matter of public concern, however, the speech fails the *Connick* public concern test and will be categorically discounted and automatically disqualified from the speech protection analysis.[69] If that occurs, no *Pickering* balancing will take place and the employee's interest in protecting the speech will not be recognized.[70]

For over twenty years, the *Pickering/Connick* two-tiered analysis has formed the basis for deciding public employee speech cases. In that time, the Court has fluctuated between deference to the state as an employer, and recognition of the public employee's right to speak on public issues.[71] As a result, the two-tiered analysis for deciding public employee speech cases permits courts to arbitrarily restrict the free speech rights of public employees.[72] By adding another test to its public em-

65. *Id.* at 154.

66. Smith, *supra* note 54, at 254; *see also, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004); Rankin v. McPherson, 483 U.S. 378, 387-88 (1987).

67. *Connick*, 461 U.S. at 149-50. "[I]n order to merit *Pickering* balancing, a public employee's speech must touch on a matter of public concern." *City of San Diego*, 543 U.S. at 82-83. Furthermore, *Connick* reveals that the degree of public concern the speech involves will be part of the balancing test. *See Connick*, 461 U.S. at 154.

68. *Id.*

69. *See id.* at 149-50. In *City of San Diego v. Roe*, a police officer made a video of himself stripping off his police uniform and masturbating, an act the Court recognized as a speech expression. *City of San Diego*, 543 U.S. at 78. The Court determined that his speech expression did not qualify as a matter of public concern. *Id.* at 84. Failing the *Connick* threshold public concern test, his speech was not subjected to a *Pickering* balancing of interests, and thus not given a chance to receive First Amendment protection. *Id.*

70. *See Connick*, 461 U.S. at 149-50. The lower courts struggle to consistently determine what constitutes a matter of public concern, and without a definitive explanation, the balancing of interests has varied results. Rosenthal, *supra* note 46, at 551.

71. *See, e.g.*, *Rankin*, 483 U.S. at 383-84 (1987). The courts are often faced with the difficult task of balancing these competing interests. *Compare* Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (holding that a trustee under ERISA can act as an ERISA fiduciary and act on behalf of the employer), *with* Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 176-77 (1976) (holding that a school teacher speaking on behalf of himself and others at a school board meeting could not be disciplined for criticizing agreements that affected his employment). The courts have also come to varying conclusions when balancing the interests of the government employer, the public employee, and the degree of public concern the speech involves. "Balancing tests are messy, ad hoc, and difficult to apply fairly." Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2006/05/ceballos-court-creates-bad-information.html (May 30, 2006, 14:41 EST).

72. *See, e.g.*, Lee, *supra* note 41, at 1116-17 (referring to the Court's production of "conflicting

ployee speech analysis in *Garcetti*, the Court made it even more difficult for a public employee to receive First Amendment protection.[73]

IV. COURT'S DECISION

In *Garcetti v. Ceballos*, the United States Supreme Court was asked to clarify the scope of free speech rights of public employees who speak pursuant to their official duties as employees.[74] The Court examined the *Pickering/Connick* two-tiered analysis and recognized that prior public employee speech decisions "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."[75] The Court, however, also recognized that when applying the *Pickering/Connick* two-tiered analysis, some courts confused the interests of public employees and government employers.[76] In an effort to reduce that confusion, the Court narrowed the free speech rights of public employees and determined that when a public employee makes a statement pursuant to his official duties, he is not speaking as a citizen for First Amendment purposes, and the Constitution will not insulate his communications from employer discipline.[77]

A. Majority Opinion

In a 5-4 decision, the Supreme Court held that public employees do not have *any* free speech protection for what they say pursuant to their official job duties.[78] In an opinion by Justice Anthony Kennedy, the

signals"); Zack, *supra* note 3, at 898-99 (recognizing the Court's deference to employers to allow prevention of disruption in the workplace, but a greater showing of workplace disruption is mandatory if the speech involves matters of much public concern).

73. *See* Krystal LoPilato, *Garcetti v. Ceballos: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 543-44 (2006).

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

75. *Id.* at 1959. *See, e.g.*, *Rankin*, 483 U.S. at 383-84. In *Rankin*, upon hearing that President Reagan was shot, but would survive, a sheriff's dispatcher commented, "If they go for him again, I hope they get him." *Id.* at 380. According to Justice Scalia, the issue was whether she could "ride with the cops and cheer for the robbers." *Id.* at 394 (Scalia, J., dissenting). The dispatcher had no particular expertise about Reagan (she was just expressing her feelings about the President), and because her remark did not sufficiently disrupt the work at the sheriff's office, her speech was given First Amendment protection and she was allowed to keep her job. *Id.* at 392. *See also* Balkin, *supra* note 71 (describing *Rankin* as the "paradigm case of protection").

76. *See Garcetti*, 126 S. Ct. at 1957.

77. *See id.* at 1961.

78. *Id.* at 1960. The opinion was delivered by Justice Kennedy, who was joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Justices Stevens and Breyer dissented separately, and Justice Souter wrote a dissenting opinion joined by Justices Stevens and Ginsburg. *Id.* at 1954. Along with *Garcetti*, the Supreme Court has issued several conservative rulings within the last year. *See, e.g.*, Kansas v. Marsh, 126 S. Ct. 2516, 2520 (2006) (upholding death sentences if the jury is evenly divided between aggravating and mitigating circumstances); League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2605 (2006) (upholding partisan gerrymandering as constitutional). The 2005 Supreme Court term led some commentators to state that Justice Kennedy was "the swing vote" and will likely "determine the outcome of most high profile cases" for the time the same nine

Court determined that a critical factor in public employee speech cases is the employee's role in expressing the speech and reaffirmed the need for the employer to have managerial authority over its employees for the government to operate efficiently.[79] The Court further reasoned that to rule otherwise would inevitably commit the courts to an undesirable supervisory role over the conduct of government employees.[80]

The Court examined Ceballos's speech under the *Pickering/Connick* two-tiered analysis.[81] Applying the *Connick* public

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Justices remain on the high court. *See* Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 335, 335 (2006).

> Chief Justice John Roberts and Justice Samuel Alito were every bit as conservative as conservatives had hoped and progressives had feared. In virtually every important case they made common cause, at least in outcomes, with Justices Antonin Scalia and Clarence Thomas. In many important cases, Justice Kennedy joined them to produce conservative rulings.

Id.; *see also News and Notes with Ed Gordon* (National Public Radio broadcast June 5, 2006) (discussing the split of the Court in *Garcetti v. Ceballos*: "you can take a look at this and really see that the court in and of itself holds on to that 5-4 margin to a great degree in many social ills that they have to look at").

79. *Garcetti*, 126 S. Ct. at 1957, 1960. To provide services efficiently, an employer needs a significant degree of control over the words and actions of its employees. *See* Connick v. Myers, 461 U.S. 138, 148 (1983); FARBER, *supra* note 34, at 730-32. Also, government employers and their public employees have employment at-will relationships, which provide the employer with the power to terminate employment for any reason, or for no reason, just not for a bad reason. *See, e.g.*, Clarke v. Atl. Stevedoring Co., 163 F. 423, 424-25 (E.D.N.Y. 1908); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1029-30 (Ariz. 1985).

80. *Garcetti*, 126 S. Ct. at 1961. It would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.*; *see also Connick*, 461 U.S. at 147.

81. *Garcetti*, 126 S. Ct. at 1959-60. "*Pickering* and [*Connick*] identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." *Id.* at 1958. The Court explained the two-tiered analysis:

> The [*Connick* public concern test] requires determining whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. . . . This [Pickering balancing test] reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Id. The idea of governmental discretion relating to public employee speech is a corollary to governmental discretion relating to other First Amendment expressions. *Compare* Texas v. Johnson, 391 U.S. 397, 420 (1989) (holding that the government's interest in preserving the American "flag as a symbol of nationhood" did not justify a flag burner's "criminal conviction for engaging in political expression"), *with* United States v. O'Brien, 391 U.S. 367, 382 (1968) (holding that the government had a sufficient interest in controlling the expression of a draft card burner, which justified the burner's criminal conviction for engaging in political expression).

The difference in these two cases is that in *O'Brien*, the Court had valid reasons for protecting draft cards that were separate from the draft card burner's expression (i.e., the cards served to notify registrants of their eligibility for the draft). *O'Brien*, 391 U.S. at 377-80. The Court in *O'Brien* created a four-part test to be applied when evaluating symbolic speech:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. To decide whether the *O'Brien* test applied in *Johnson*, the Court initially had to find that Texas "asserted an interest in support of Johnson's conviction that [was] unrelated to the suppression of expression." *Johnson*, 391 U.S. at 407. Because Texas failed to prove such an interest, the

concern test to Ceballos's speech, the Court determined that it was not made as a *citizen* about a matter of public concern, but was rather made pursuant to his responsibilities and obligations as an *employee*.[82] Ceballos did not dispute that he wrote the memo "pursuant to his duties as a prosecutor" and that he commonly prepared disposition reports similar to the memo.[83] Because of the government misconduct cited, however, Ceballos asserted that this particular memo was "not only far from routine, it was extraordinary."[84] The Court acknowledged that Ceballos expressed his views inside his office, rather than publicly,[85] and that the memo addressed the subject matter of his employment,[86] yet determined that those facts were not dispositive in the case.[87] The Court found that those facts showed that the memo did not disrupt the work environment and that Ceballos had a legitimate interest in the memo's contents—facts that would have been weighed in the *Pickering* balancing test.[88]

The Court, however, did not apply the *Pickering* balancing test to Ceballos's speech and explained that an employee's First Amendment rights require *Pickering*'s "delicate balancing of the competing interests surrounding the speech and its consequences" *only if* the employee passes the threshold *Connick* public concern test and "speaks as a *citizen* addressing a matter of public concern . . . ." [89] The Court determined that *even if* Ceballos's speech addressed a matter of public concern, his speech did not pass the *Connick* public concern threshold test because it was made as an employee and not as a citizen.[90] Thus, even though the Court determined that Ceballos's speech was not disruptive

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O'Brien test was not satisfied and the flag burner's expressions were protected.

82. *See Garcetti*, 126 S. Ct. at 1960. The Court explained Ceballos's official duties:

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

Id.

83. Brief of Respondent, *supra* note 12, at 4. This undisputed fact proves to be detrimental in future cases with public employee situations similar to Ceballos's. *See also infra* note 156.

84. Brief of Respondent, *supra* note 12, at 4. "This would have been the first disposition report I've ever written where I was recommending a dismissal or had dismissed a case because of questions regarding the credibility of a police officer. I've done it with other witnesses, but this is the first with a police officer." *Id.* at 5. In contrast, the supervisors characterized Ceballos's memo as "routinely prepared." Brief of Petitioners at 4, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473).

85. In some cases, employees may receive protection for speech made at work. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414-15 (1979).

86. In some cases, employees may receive protection for speech related to the speaker's job. *See, e.g.*, *id.*; Pickering v. Bd. of Educ., 391 U.S. 563, 577-78 (1968).

87. *Garcetti*, 126 S. Ct. at 1959.

88. *See id.* at 1959-60.

89. *Id.* at 1961 (emphasis added). "When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." *Id.*

90. *Id.* at 1960-61.

and that he had a legitimate interest in protecting his speech, the Court did not apply the *Pickering* balancing test to weigh those interests.[91] Ultimately, the Court found that because Ceballos's speech was made pursuant to his official duties, it was not protected under the First Amendment.[92]

B. Dissenting Opinions

1. Justice Stevens's Dissent

Justice Stevens's dissent claimed that the First Amendment should protect public employee "speech made pursuant to the employee's official duties . . . '[s]ometimes' not '[n]ever.'"[93] He agreed with the majority that the employer should have authority to discipline its employees when the employees' "speech is 'inflammatory or misguided.'"[94] Justice Stevens did not agree, however, that the employer should be permitted to discipline its employees when the speech in question is merely unwelcome.[95] He noted that in *Givhan v. Western Line Consolidated School District*,[96] the Court afforded a school teacher (Givhan) First Amendment protection when she spoke to the principal about the school's racist employment practices.[97] The Court's "silence as to whether or not [Givhan's] speech was made pursuant to her job duties demonstrates that the point was immaterial,"[98] and according to Justice Stevens, that argument should still prevail in reference to Ceballos's speech.[99] Justice Stevens concluded that regardless of whether an employee's speech was made pursuant to his job duties, it would be "senseless to let constitutional protection for exactly the same words hinge on whether they fall within [that] job description."[100]

91. *See id.*
92. *Garcetti*, 126 S. Ct. at 1961.
93. *Id.* at 1962 (Stevens, J., dissenting). Interestingly, Justice Stevens dissented twelve years earlier in another public employee free speech case, *Waters v. Churchill*, 511 U.S. 661 (1994). In *Waters*, he predicted: "[t]oday's ruling will surely deter speech that would be fully protected under *Pickering* and *Connick*." *Waters*, 511 U.S. at 697 (Stevens, J., dissenting). In *Waters*, a nurse was fired for a conversation she had with another nurse over their lunch break in which she allegedly criticized her employer. *Id.* at 664. There was, however, dispute about what the nurse actually said: the nurse claimed she never criticized the employer; the employer claimed she did *and* that her speech was disruptive to the work environment. *See id.* at 665-66. In the end, the nurse's claim failed as the Court determined that a public employer may fire an employee for speech that the employer reasonably believes to be unprotected. *See id.* at 680-82.
94. *Garcetti*, 126 S. Ct. at 1962.
95. *Id.* at 1962-63.
96. 439 U.S. 410 (1979).
97. *Garcetti*, 126 S. Ct. at 1963. Givhan, an African American school teacher, complained that the school's desegregation action was racially discriminatory because it led to the nonrenewal of her employment contract. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 411-13 (1979).
98. *Garcetti*, 126 S. Ct. at 1963.
99. *Id.*
100. *Id.*

2. Justice Souter's Dissent

Justice Souter criticized the majority opinion for not applying the *Pickering* balancing test.[101] He agreed with the majority that, under the broad spectrum of First Amendment claims, speech protection is not absolute.[102] He explained that at one extreme, speech by a citizen on a matter of public concern is definitely protected under the First Amendment.[103] At the other extreme, speech by a public employee about a personal complaint is not afforded First Amendment protection.[104] He characterized the speech in between those two extremes as speech by a public employee, which is "unwelcome to the government but on a significant public issue."[105] Justice Souter argued that this speech should be evaluated under the *Pickering* balancing test.[106] For that reason, Justice Souter disagreed when the majority chose to draw a line in the midst of this speech, denying Ceballos's speech the *Pickering* balancing of interests and a chance for First Amendment protection.[107] He further reasoned that Ceballos's speech was made pursuant to his official duties and may even be more valuable to the public because he knew the subject matter so intimately.[108] Justice Souter thus concluded that, by denying Ceballos's speech a *Pickering* balancing of interests, the majority chose "an odd place to draw" its line.[109]

101. *Id.* at 1964-65 (Souter, J., dissenting).
102. *Id.* at 1964.
103. *Id.* at 1963 (citing Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997)).
104. *Garcetti*, 126 S. Ct. at 1963-64 (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).
105. *Id.* at 1964. "Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements." *Id.* In his report for the First Amendment Center, David L. Hudson notes recent appellate decisions in which public employees were disciplined for conduct that was merely unwelcome to their employers. *See, e.g.*, Sowards v. Loudon County, 203 F.3d 426, 429 (6th Cir. 2000) (alleging that she was terminated because her husband ran against her employer in an election for sheriff); Victor v. McElveen, 150 F.3d 451, 453 (5th Cir. 1998) (criticizing a police policy that involved primarily African-American officers, and did not include all races in a community program); Clark v. City of Tucson, No. 98-17082, 2000 WL 1335485, at *1 (9th Cir. Sept. 14, 2000) (complaining about "safety problems and mismanagement" of a helicopter unit); *see also* HUDSON, *supra* note 7, at 1-2.
106. *Garcetti*, 126 S. Ct. at 1964-65.
107. *Id.* at 1965. Justice Souter concluded that "there is no adequate justification for the majority's line categorically denying Pickering protection to any speech uttered 'pursuant to . . . official duties.'" *Id.*
108. *Id.*
109. *Id.* Sarah Ludington, a Senior Lecturing Fellow of Duke Law School agreed with Justice Souter's dissent:

> The categorical rule announced by the majority means that a teacher who complains about racist hiring practices at school is protected from retaliation, but a school personnel officer—whose job it is to implement hiring practices—would not be protected for making the same complaint. Thus, Ceballos might have been protected from retaliation based on the memorandum if his job did not require him to investigate the dubious affidavit. Or, he might have been protected had he chosen to send—or leak—his conclusions about the sheriff's behavior to the press.

Sarah Ludington, *The Supreme Court Further Limits First Amendment Protection for Public Employees*, http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/garvceb.html (last visited Mar. 22, 2007).

3. Justice Breyer's Dissent

Justice Breyer agreed with the majority opinion that government employers should have managerial discretion over their employees and that the courts should not have to supervise the government's every disciplinary action.[110] He argued, however, that "there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced."[111] In such a case, like *Garcetti*, Justice Breyer determined that the Court should apply a *Pickering* balancing to weigh the interests of the employee and the employer, *even if* the employee's speech is about a matter of public concern pursuant to his official duties.[112] Justice Breyer thus agreed with Justice Souter that the *Pickering* balancing test should have been applied to Ceballos's speech, but for different reasons.[113]

Justice Breyer found that the facts in *Garcetti* presented two unique circumstances that especially justified the *Pickering* balancing test and a chance for First Amendment protection.[114] First, Ceballos's "speech at issue [was] professional speech—the speech of a lawyer."[115] Justice Breyer acknowledged that such professional speech is independently regulated by canons of that particular profession.[116] Sometimes those canons require the professional to speak, "[a]nd where that is so, the government's own interest in forbidding that speech is diminished."[117] Second, "the Constitution itself here imposes speech obligations upon the government's professional employee."[118] Justice Breyer explained that, Ceballos, as a prosecutor, "has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's posses-

110. *Garcetti*, 126 S. Ct. at 1974 (Breyer, J., dissenting).

111. *Id.* The official duties of public employment can undoubtedly be matters of public concern and worthy of speech protection:

> [T]he speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these categories bear any obvious relation to the constitutional importance of protecting the job-related speech at issue.

Id. at 1975.

112. *Id.* at 1974, 1976.

113. *Id.* at 1974-75.

114. *Id.* at 1974.

115. *Id.*

116. *Id.*

117. *Id.* Justice Breyer gives an example of a prison doctor who has a similar professional duty to speak out about unsafe or unsanitary conditions in the prison. *Id.* at 1974-75.

118. *Id.* at 1974.

sion."[119] Justice Breyer concluded that when both those special circumstances are present, as in *Garcetti*, a *Pickering* balancing of interests should be applied, and the public employee should be given a chance to receive First Amendment free speech protection.[120]

V. COMMENTARY

In *Garcetti v. Ceballos*, the United States Supreme Court ruled that speech is not protected when an employee communicates pursuant to his official duties. This ruling undermines the information policy goal of the public employee speech analysis.[121] Although the Court attempted to reduce the confusion of *Connick*'s public concern test and *Pickering*'s balancing test, its "no protection" solution when speech is made pursuant to official duties is overly broad.[122] The Court ill-advisedly distinguished between speaking as a citizen regarding a matter of public concern and speaking as an employee pursuant to official duties. Finally, the Court failed to realize that employee speech which is merely unwelcome is still protected speech. As a result of this decision, employee job descriptions will be broadened by employers in an attempt to restrict employee rights and employees may be persuaded to go public with their information rather than first take the information to their superiors.

A. The Information Policy Goal of the Public Employee Speech Analysis

Government employers are generally allowed to discipline employees if the employees' speech challenges the integrity of the office or disrupts morale.[123] Government employers should not, however, use their authority to retaliate against employees for speech that is not disruptive to their operations.[124] In *Connick*, the Court determined that much of

119. *Id.*

120. *Id.* at 1975.

121. The "information policy goal" refers to the protection of matters of public concern and the dissemination of that valuable and necessary information to the public. *See* Discussion, *supra* Part IV.B.2.

122. The *Garcetti* decision "has left four justices—and much of the legal community—scratching its collective head, wondering why five justices chose to draw a line in this particular place, on these particular facts." Ludington, *supra* note 109. If speech made pursuant to official duties is never offered constitutional protection, then some employee speech about matters of public concern will inevitably not receive protection. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 n.* (2006) (Stevens, J., dissenting). There are situations that are *obviously* issues of public concern; for example: health and safety, academic freedom, and the integrity of criminal prosecutions. Private and public interests in addressing official wrongdoing in those situations can outweigh the government's stake in the efficient implementation of policy. Furthermore, when they do, public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection. *See id.* at 1963 (Souter, J., dissenting); *see also* Discussion, *infra* Part V.B.1.

123. *See* HUDSON, *supra* note 7, at 2.

124. The Court also acknowledges that the threat of dismissal and retaliation by employers is in itself a potent means of inhibiting employee speech. *See* Bd. of Regents v. Roth, 408 U.S. 564, 566-68

that suppressed speech involved matters of public concern and was worthy of protection.[125] The threshold *Connick* public concern test evaluates whether an employee's undisruptive speech should be protected because the public would benefit from knowing about the matter expressed.[126]

Legal commentators have criticized the inherent elasticity of the *Connick* public concern test because employees can manipulate it to include almost any speech that is against their employers' interest.[127] Others have criticized the *Connick* public concern test because, as a threshold test, it is too narrow.[128] *Garcetti*, the Court's most recent ruling, added even more confusion to the *Connick* public concern test.[129] According to *Garcetti*, when public employees make statements pursuant to their official duties, regardless of whether the statements are matters of public concern, their speech will not be afforded constitutional protection.[130]

The potential injustice that *Garcetti* may create within the Supreme Court's public employee speech analysis is illustrated in a 2006 Delaware District Court case. In *Price v. MacLeish*,[131] three Delaware state troopers spoke out about hazardous health conditions at the Division State Police's (DSP) Firearms Training Unit facility (FTU).[132] The FTU became operational in 1998, but a short time later, an environmental assessment team concluded that the lead level in the air sufficiently exceeded the maximum acceptable level recommended by the Occupational Safety and Health Administration.[133] By early 2001, in an attempt

(1972); Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

125. *See* Hoppmann, *supra* note 56, at 1004.

126. The purpose of the First Amendment is that "debate on public issues should be uninhibited, robust, and wide-open . . . ." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

127. HUDSON, *supra* note 7, at 24-25. The inherent elasticity of the *Connick* public concern test has been criticized as such:

> One has suggested that employees can manipulate the requirement by stating "virtually any criticism of a public employer in terms that will satisfy the public concern test." Another summed it up this way: "The most fundamental problem with the public concern threshold test has emerged from attempts to apply it: no one knows what 'public concern' is."

HUDSON, *supra* note 7, at 25 (citing Rosenthal, *supra* note 46, at 556, and Smith, *supra* note 54, at 258). "In fact, there is something of a consensus among the commentators that the difficulties in developing any principled approach to the public concern test render it essentially standardless." Rosenthal, *supra* note 46, at 584 n.114.

128. Ma, *supra* note 46, at 126. *See also* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 (1980) (recognizing that free speech is critical to society for the dissemination of political truth) (citing Whitney v. California, 274 U.S. 357, 375 (1927)); First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (recognizing that free speech is critical to individuals to further their own interests in self-expression).

129. Balkin, *supra* note 71. "[T]he Court resolves the original tension in its doctrine by creating a rule that completely undermines the doctrine's information policy goals." *Id.*

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

131. No. 04-956 (GMS), 2006 WL 2346430 (D. Del. Aug. 14, 2006).

132. *Id.* at *1.

133. *Id.* at *2. By the end of 1999, several newspaper articles were published scrutinizing the FTU's air-quality problems. *Id.* For example, an article on June 14, 1999, was entitled, "Shooting range under fire for lead: State police are exposed to levels of metal in air twice federal standard." *Id.* (quoting a local Delaware newspaper).

to decrease lead levels, the DSP switched to lead-free disintegrating ammunition for the weapons in use at the FTU.[134] The hazardous health conditions, however, were not remedied.[135] The new disintegrating ammunition "burst into . . . cloud[s] of heavy-metal particles on impact, . . . and because the ventilation system did not [work] properly, the air within the FTU became potentially unsafe to breathe."[136]

The troopers relayed their concerns to their DSP superiors about the ventilation and overall health conditions at the FTU.[137] Initially, the DSP superiors ignored the troopers' concerns.[138] Later, after another formal assessment of the FTU's environmental conditions concluded that the FTU was still unsafe, the DSP superiors harassed the troopers, both publicly and privately.[139] Despite the troopers' continued updates of the FTU's hazardous conditions and their efforts to identify the cause of the problems and potential solutions, the FTU's air quality remained poor, which resulted in its formal closing in 2004.[140]

Throughout these events, the DSP superiors retaliated against the troopers for speaking out about FTU's unsafe conditions, which they alleged in a subsequent § 1983 action.[141] On May 31, 2006, after an eleven-day trial, the jury found that the DSP superiors had retaliated against the troopers for exercising their free speech rights, and awarded the troopers almost two million dollars in compensatory and punitive damages.[142]

Meanwhile, on May 30, 2006, the Supreme Court was asked to clarify the scope of free speech rights of public employees who speak pursuant to their official duties as employees in *Garcetti v. Ceballos*. The Court defined the rights narrowly, holding that government employees do not have *any* free speech protection for what they say as part of their jobs.[143] Consequently, on August 14, 2006, in a renewed motion for judgment as a matter of law, the troopers' verdict in *Price* was thrown out.[144] District Judge Gregory Sleet held that, under the new *Garcetti*

134. *Id.*
135. *Id.*
136. *Id.* at *2.
137. *Id.* at *3.
138. *Id.* After the troopers initially voiced their concerns, one year passed until the FTU was formally closed. *Id.*
139. Price v. Chaffinch, No. 04-956 (GMS), 2006 WL 1313178, at *3 (D. Del. May 12, 2006), *overruled by* Price v. MacLeish, No. 04-956 (GMS), 2006 WL 2346430 (D. Del. Aug. 14, 2006). Examples of the DSP superiors' retaliatory actions against the troopers include: publicly blaming the troopers for the FTU's poor air quality, placing the troopers on light duty, and banning one of the troopers from attending DSP meetings. *Id.*
140. *MacLeish*, 2006 WL 2346430, at *6. The troopers' recorded their research and observations of the FTU and made the information available to the DSP, the Department of Administrative Services, and the Delaware Auditor's Office. *Id.*
141. *Id.* at *4, *1.
142. *See id.* at *3-4; *Del. Troopers' $2 Million Retaliation Victory Thrown Out*, ASSOCIATED PRESS, Aug. 15, 2006, *available at* http://www.firstamendmentcenter.org/news.aspx?id=17276.
143. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).
144. *See MacLeish*, 2006 WL 2346430, at *1; *Del. Troopers' $2 Million Retaliation Victory*

rule, the troopers were speaking as part of their job duties when they pointed out the health problems at the FTU, and consequently, their speech was not subject to First Amendment protection against employer discipline.[145]

The ultimate result in *Price* highlights the injustice that *Garcetti* may lead to in the Supreme Court's public employee speech analysis.[146] The public employee speech analysis was developed to protect the creation and dissemination of valuable and necessary information to the public—to protect matters of public concern.[147] Public employees are often the members of the community who have informed opinions regarding the operations of their public employers and at times, the operations of those employers are of substantial concern to the public.[148] If public employees are not able to speak on these matters, the community will be deprived of informed opinions on important public issues.[149] Thus, *Garcetti* unduly limits the *Connick* public concern test and undermines the information policy goal of the public employee speech analysis.

B. Inaccuracies in the Supreme Court's Analysis

1. Distinguishing Between Speaking as a Citizen and Speaking as an Employee

In *Garcetti*, the Court ill-advisedly distinguished between speaking

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Thrown Out, *supra* note 142.

145. *MacLeish*, 2006 WL 2346430, at *8. Judge Sleet determined that the troopers were "expected to speak out within the chain of command if they noticed any hazardous range conditions," and thus "the inescapable conclusion is that their chain-of-command speech was within the scope of their official duties." *Id.* "Whether the water has been somewhat cleared or further muddied by *Garcetti* remains to be seen. Suffice it to say, many billable hours will likely be spent wrangling over the scope of every employee-plaintiff's 'official duties.'" *Id.* at *5 (quoting *Garcetti*, 126 S. Ct. at 1962 n.2) (Souter, J., dissenting).

146. *See Garcetti*, 126 S. Ct. at 1960; *see also* Peter Eisler, *U.S. Lets Whistle-Blowers Lose Jobs*, USA TODAY, http://www.usatoday.com/news/washington/2007-03-13-whistle-blowers-lose-jobs_N.htm (last visited Apr. 5, 2007) (discussing government agreements that end up causing employees their jobs after they speak out about job site safety and security lapses).

> Federal law requires the department to safeguard whistle-blowers from reprisals and approve settlements of their retaliation claims against private or federal employers. Yet 45 of 73 settlements approved since 2000 involving whistle-blowers who complained of environmental and nuclear safety problems included permanent bans on working for the employer.

Id.

147. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968). The *Garcetti* Court seems to be repairing the two-tiered analysis to make the *Connick* test harder to pass, and therefore, uses the *Pickering* test for expressions only in a public setting. "The *Pickering* test, as originally conceived, sought to promote the spread and diffusion of valuable information from people who would have reason to know about government policies and whether they made sense or were inefficient, unwise, corrupt, or illegal." Balkin, *supra* note 71; *see also* Discussion, *supra* Part IV.B.2.

148. *See* Waters v. Churchill, 511 U.S. 661, 674 (1994). "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions . . . ." *Id.*; *see* Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 655 (1993) (discussing the arguments for informational remedies for the basic risks people face in day-to-day life).

149. *See Garcetti*, 126 S. Ct. at 1964 (Souter, J., dissenting); *see also supra* notes 111 and 122.

as a citizen and speaking in the course of one's employment.[150] Although speech as a citizen may receive constitutional protection, sometimes that *same* speech as an employee will not.[151] As Justice Stevens noted, it would be senseless to hinge speech protection on a job description.[152] A government paycheck does nothing to eliminate the value to an employee to speak on public matters, or the potential worth to the public to be informed about such issues.[153]

At the same time, the government employer can and should be allowed to restrict speech that impairs the efficiency of the workplace.[154] In the *Pickering* balancing test, however, the employer's interest should be taken into account along with the employee's interest in protecting the speech and the degree of public concern involved with the speech.[155] Thus, speech should not be categorically discounted, merely because it is made by an employee pursuant to official duties, in the initial *Connick* public concern test, before a *Pickering* balancing can occur.[156]

To illustrate the injustice that results from the Supreme Court's categorical denial of speech protection to employees who speak pursuant to official duties, it is helpful to compare *Garcetti* to an Eighth Circuit Court of Appeals case. In *Buazard v. Meredith*,[157] a police officer (Buazard) brought a section 1983 action based on his employer's alleged retaliatory discipline, which he claimed violated his First Amendment right to free speech.[158] Buazard's claim arose when his superior, the police chief, asked him to prepare statements about his conversations with two recently fired officers.[159] A few months later, the police chief told

150. *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting) (arguing that there is no "categorical difference between speaking as a citizen and speaking in the course of one's employment . . . .").

151. *See id.* at 1961 (majority opinion).

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

153. *Id.* at 1965 (Souter, J., dissenting).

154. *Id.* at 1958 (majority opinion).

155. *See, e.g.*, *id.* at 1964 (Souter, J., dissenting). The government does have an interest in protecting the efficiency of its operations. Justice Souter, however, argued that categorically discounting an employee speaking pursuant to official duties is premature, and that in those situations, the speech should continue to be analyzed under the *Pickering* balancing test:

> 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, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer.

Id.

156. This scenario is exactly what occurred in *Garcetti*. *Id.* at 1962 (majority opinion); *see also* Hill v. Borough of Kutztown, 455 F.3d 225, 230 (3d Cir. 2006); Price v. MacLeish, No. 04-956 (GMS), 2006 WL 2346430, at *8 (D. Del. Aug. 14, 2006); Duran v. City of Corpus Christi, No. C-04-500, 2006 WL 1900636, at *4 (S.D. Tex. July 11, 2006); Gilbert v. Flandreau Santee Sioux Tribe, 725 N.W.2d 249, 255-56 (S.D. 2006).

157. 172 F.3d 546 (8th Cir. 1999).

158. *Id.* at 548. Buazard was hired as a patrol officer in 1984, and was promoted to Assistant Chief in 1989. *Id.* at 547.

159. *Id.* Although absent from the incident which led to the officers' firings, Buazard was pre-

Buazard that his statements were false and that he would need to change them.[160] Buazard refused and, thereafter, allegedly suffered adverse action by the police chief.[161]

The court determined that Buazard's speech did not pass the *Connick* public concern test, and therefore, was not subjected to a *Pickering* balancing of interests and did not receive constitutional protection.[162] First, the court evaluated Buazard's role as an employee in making the statements and found that "[a]lthough the incident which led to the firings may itself be a matter of public concern, there is no indication that Buazard, in making, or refusing to change[] his statements, was taking any action as a concerned citizen . . . ."[163] Second, the court analyzed the context in which Buazard's speech occurred and noted that it was entirely internal within the police department.[164] Those two factors led the court to conclude that Buazard's speech was not a matter of public concern.[165]

Comparing the facts of *Buazard* to the facts of *Garcetti*, the *Garcetti* Court's flawed distinction between speaking as a citizen about a matter of public concern and speaking as an employee pursuant to official duties becomes apparent. First, in *Buazard*, the officer was not acting as a concerned citizen when he refused to alter his statements.[166] In *Garcetti*, however, Ceballos created the memo in an attempt to bring "wrongdoing to light," and therefore, Ceballos *was* acting as a concerned citizen when he wrote and delivered his memo.[167]

Second, in *Buazard*, the officer's speech was entirely internal; the statements in question took place solely between his employer and himself.[168] In *Garcetti*, however, Ceballos's speech was not merely internal.[169] Although Ceballos initially submitted his memo to his supervisor, when no corrective action was taken to change the affidavit, Ceballos recounted his observations and skepticisms about the affidavit in court.[170] In *Buazard*, the court concluded that the officer's speech

sent when they were fired, and spoke to both officers and witnesses about the incident. *Id.*

160. *Id.* at 547-48.

161. Buazard was demoted to patrolman from Assistant Chief. *Id.* at 548. Buazard further alleged he was assigned menial work, and did not receive similar training opportunities as other officers. *Id.*

162. *Id.*; *see also* HUDSON, *supra* note 7, at 24 (recognizing that the *Buazard* court took "a narrow view of the type of employee speech that can be said to touch on matters of public concern").

163. *Buazard*, 172 F.3d at 548. "When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern." *Id.*

164. *Id.* at 549; *see also* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414-15 (1979); *supra* note 85.

165. *Buazard*, 172 F.3d at 549.

166. *Id.* at 548.

167. Brief of Respondent, *supra* note 12, at 11.

168. *Buazard*, 172 F.3d at 549.

169. When his supervisors did not respond to his memos, Ceballos revealed his allegations in court. Garcetti v. Ceballos, 126 S. Ct. 1951, 1956 (2006).

170. *Id.*

was not a matter of public concern.[171] The *Buazard* court correctly, albeit narrowly, applied the *Connick* public concern requirement, evaluating both Buazard's role as an employee and the internal nature of the speech.[172] The court then distinguished between speech as a citizen about a matter of public concern and internal speech as an employee.[173] In so doing, the court determined that Buazard's speech was not that of a citizen regarding a matter of public concern, and therefore, was not constitutionally protected speech.[174]

In *Garcetti*, however, and in absence of the two factors the *Buazard* court relied upon, the Court still concluded that Ceballos did not speak as a citizen about a matter of public concern.[175] Ceballos's speech should not be categorically discounted in the initial *Connick* public concern test merely because it was made pursuant to his official duties as an employee.[176] Ceballos was speaking as a citizen about a matter of public concern while, at the same time, speaking as an employee pursuant to his official duties.[177] Thus, the Court should have recognized the dual nature of Ceballos's speech: it *did* address a matter of public concern; therefore, the speech should have been subject to a *Pickering* balancing of interests and given a chance to earn constitutional protection.[178]

2. The Court Failed to Realize that Unwelcome Speech is Still Protected Speech

As a general rule, if government employers believe an employee's speech is inflammatory or misguided, they have the authority to discipline the employee.[179] If the employee's speech, however, "is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover," then the speech should be protected.[180]

171. *Buazard*, 172 F.3d at 549.
172. *Id.*; *see also* HUDSON, *supra* note 7, at 24.
173. *Buazard*, 172 F.3d at 549.
174. *Id.*
175. *Garcetti*, 126 S. Ct. at 1961-62.
176. *Id.* at 1965 (Souter, J., dissenting).
177. *Id.* at 1963 (Stevens, J., dissenting); *see also* Brochure, 24th Annual Section 1983 Civil Rights Litigation Conference, Apr. 26, 2007, http://www.kentlaw.edu/depts/cle/sect1983/Section1983.pdf (referring to *Garcetti*'s "Capacity Analysis"—whether the plaintiff spoke as a citizen or as an employee—as the hot topic for the Conference).
178. *Garcetti*, 126 S. Ct. at 1964 (Souter, J., dissenting) (recognizing that the Court, in determining whether an employer's corrective action was authorized, has "regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer").
179. *See id.* at 1960-61 (majority opinion). That result will be permitted even though the First Amendment prohibits employee termination and retaliation for "public concern" speech. Schoen, *supra* note 7, at 41-43. "All that an employer needs to do to justify termination for speech protected by the First Amendment is argue that it made a reasonable, good-faith mistake about what the employee said." *Id.* at 39 (analyzing the Court's ruling in *Waters v. Churchill*, 511 U.S. 661 (1994)). The *Waters* decision has been criticized for this very notion. In that case, Justices Blackmun and Stevens complained that the majority's ruling, which relied on a good-faith showing from the employer as a threshold, was too easy to meet. *See Waters*, 511 U.S. at 696-97; Schoen, *supra* note 7, at 41-43.
180. Such speech most likely involves matters of public concern. *See Garcetti*, 126 S. Ct. at 1962

As Justice Brennan once stated: "The constitutionally protected right to speak out on governmental affairs would be meaningless if it did not extend to statements expressing criticism of governmental officials."[181]

Under the general rule, Ceballos's superiors had the authority to take "proper corrective action" if they thought his memo was "inflammatory or misguided."[182] Ceballos, however, was honest when he wrote his memo and, pursuant to his duties as an attorney, he was abiding by professional ethics.[183] Ceballos exercised a high level of responsibility when he wrote his memo.[184] Additionally, the memo addressed the integrity of a criminal prosecution, which is certainly a matter of public concern.[185] The memo, however, also addressed facts that his supervisors did not want anyone else to know, even though the facts may have been true.[186] Ceballos's speech, therefore, was definitely unwelcome to his supervisors but probably not inflammatory or misguided.[187] Nevertheless, the Court allowed the supervisors the discretion to take disciplinary action.[188] Thus, the *Garcetti* Court failed to realize speech that is merely unwelcome is still protected.

(Stevens, J., dissenting). Justice Stevens laid out an in-depth footnote in which he explained situations when employer discipline may have been used as a means to keep unwelcome information under wraps: in *Miller v. Jones*, 444 F.3d 929, 931-32 (7th Cir. 2006), police officers were transferred and demoted after opposing the police chief's unilateral decision to merge the Police Athletic League (PAL) with the Boys and Girls Club because that decision violated the PAL national bylaws; in *Herts v. Smith*, 345 F.3d 581, 584 (8th Cir. 2003), a superintendent failed to renew a school district employee's contract because of the employee's testimony at a school desegregation hearing; in *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002), a police officer was sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief; in *Branton v. Dallas*, 272 F.3d 730, 734-35 (5th Cir. 2001), a police internal investigator, who had a duty to present her findings, was demoted when she revealed the perjury of a fellow officer; and, in *Kincade v. Blue Springs*, 64 F.3d 389, 392-93 (8th Cir. 1995), an engineer was terminated after he reported that the structure of a dam was inadequate and homes downstream were in danger of being flooded. *Garcetti*, 126 S. Ct. at 1962 n.* (2006) (Stevens, J., dissenting); *see also* LoPilato, *supra* note 73, at 541.

181. Connick v. Myers, 461 U.S. 138, 162 (1983) (Brennan, J., dissenting).

182. *Garcetti*, 126 S. Ct. at 1960-61.

183. MODEL RULES OF PROF'L CONDUCT R. 5.7, R. 8.3 (2003); *see also* Discussion, *infra* Part IV.B.3.

As this comment is being produced, the Bush administration is under investigation for the firings of eight United States attorneys. *The Gonzalez Eight*, N.Y. TIMES, Mar. 8, 2007, *available at* http://www.nytimes.com/2007/03/08/opinion/08thu1.html. Attorney General Alberto Gonzales claims the attorneys were fired for performance-related matters, but Republicans and Democrats alike speculate the attorneys were ousted for political reasons. *Id.* The attorneys were allegedly fired for refusing to use their offices to help Republicans win elections. *See id.* Even more alarming is the possibility that many other attorneys retained their offices because they participated in the unethical behavior. If the allegations are true, this would be another instance that attorneys have tried to abide by professional ethics and have been retaliated against by their employers.

184. Ceballos thoroughly investigated the affidavit and the scene, and talked to numerous people about his findings before writing his memos. *See* Brief of Respondent, *supra* note 12, at 5-6.

185. *Garcetti*, 126 S. Ct. at 1962 n.* (Stevens, J., dissenting); *see also* Exploring Constitutional Law, Free Speech Rights of Public Employees, http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/publicemployees.htm (last visited Mar. 23, 2007).

186. Brief of Respondent, *supra* note 12, at 4-5; *see also* Ludington, *supra* note 109.

187. The Court did not determine the veracity of Ceballos's memo. *See Garcetti*, 126 S. Ct. at 1960.

188. *Id.* at 1962. The Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties." *Id.*

C. The Future of Public Employee Speech Litigation

The Court's decision in *Garcetti* creates two problems for future public employee speech litigation.[189] First, employee job descriptions will be broadened by employers in an attempt to restrict employee rights.[190] Second, employees may be persuaded to "go public" with their information rather than first take the information to their employers.[191] In several public employee speech cases, the courts have already used the new *Garcetti* rule to analyze the employee's job description as a critical element to determine whether the employee's speech should be protected.[192] The courts' conclusions illustrate the potential injustice *Garcetti* creates.[193]

For example, in *Hill v. Borough of Kutztown*,[194] Hill, a Pennsylvania engineer and manager of the city-elected Borough Council of Kutztown, spoke out about the misconduct of the city's mayor.[195] The mayor made false statements, privately and publicly harassed the council members, and threatened the police chief.[196] Hill sought redress for the mayor's actions by sending letters to the Borough Solicitor and conversing with the Personnel Committee of the Borough Council.[197] In the meantime, "the [m]ayor intensified his attacks on Hill [in] retalia-

189. Many attorneys and legal commentators have speculated about *Garcetti*'s impact on future public employee free speech cases. *See, e.g.*, LoPilato, *supra* note 73, at 543-44; Balkin, *supra* note 71; Ludington, *supra* note 109; *News and Notes with Ed Gordon*, *supra* note 78; Brief for the National Treasury Employees Union as Amicus Curiae Supporting Respondent at 1-2, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473).

190. *See Garcetti*, 126 S. Ct. at 1961-62. The Court rejected, however, the suggestion that employers will be able to restrict employee rights by creating overly broad job descriptions:

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id.

191. For example, under this rule and assuming there were no breach of attorney-client privilege implications, Ceballos could have made his accusation in a letter to the editor of a local newspaper and his speech would have likely been protected from employer discipline. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968). Because, however, Ceballos submitted his memo to his supervisors first in an attempt to solve the problem internally, he was subject to employer discipline. *See Garcetti*, 126 S. Ct. at 1955-56.

192. In *Duran v. City of Corpus Christi*, No. C-04-500, 2006 WL 1900636, at *6 (S.D. Tex. July 11, 2006), the court applied the *Garcetti* test to an independent contractor and determined his speech pursuant to official duties was not protected by the First Amendment.

193. *Compare* Gilbert v. Flandreau Santee Sioux Tribe, 725 S.W.2d 249, 255-56 (S.D. 2006) (denying an education coordinator First Amendment protection because her speech was part of her official duties as an employee), *with* Barclay v. Michalsky, 451 F.Supp.2d 386, 395-96 (D. Conn. 2006) (determining that a nurse's complaints about other employees sleeping on the job was not part of her official duties, even though a Work Code required her to report behavior that may endanger the safety and welfare of others).

194. 455 F.3d 225 (3d Cir. 2006).

195. *Id.* at 230. "As the Borough Manager, Hill was responsible for the administration of all departments within the Borough." *Id.*

196. *Id.* at 230-31. The court particularly noted that the people the mayor harassed were not affiliated with his positions. *See id.* at 230.

197. *Id.* at 231.

tion" for Hill's speech.[198] Eventually, as a result of the mayor's conduct, Hill's workplace became so intolerable that he was forced to resign.[199]

In a section 1983 action, Hill claimed he was unlawfully retaliated against and constructively discharged in violation of his First Amendment right to free speech.[200] The court found that Hill reported the mayor's "hostile, intimidating, oppressive[,] and harassing actions" as part of his duties as manager of the Borough Council.[201] The court thus determined that under *Garcetti*, Hill's First Amendment claim failed because he was speaking pursuant to his official duties as an employee and not as a citizen.[202]

The result in *Hill* demonstrates that, under the *Garcetti* rule, speech communicated "on the job" that is valuable to the public, but unwelcome to the employer, will not have protection.[203] Similarly, if employee speech is restricted because it is categorized as their "official duties," employees will likely contest their job descriptions as being too broad, even if the employer had authority to take disciplinary action for other reasons.[204] An increase in public employee speech litigation was a result the *Garcetti* Court was trying to avoid.[205] The Court drew a line through questionable public employee speech in an effort to reduce the number of public employee free speech claims.[206] Furthermore, when

198. *Id.* at 230.

199. *Id.* at 231-32.

200. *Id.* at 232-33. If workplace "conditions [are] so intolerable that a reasonable person . . . would have felt compelled to resign," then it is generally understood that the employee was constructively discharged. *Id.* at 232 n.7 (quoting Penn. St. Bank v. Saunders, 542 U.S. 129, 141 (2004)).

201. *Id.* at 242.

202. *Id.* "Under *Garcetti*, [Hill] was not speaking 'as a citizen' when he made these reports, and, thus, as a matter of law, the reports are not protected speech." *Id.*

203. Exactly how the scope an employee's official duties will be interpreted remains to be seen. LoPilato, *supra* note 73, at 534. If the scope of employee duties "is liberally construed, is there any forum left for a government employee to speak to a supervisor with First Amendment protection?" *Id.*

204. In both *Paola v. Spada*, No. 06-1379-cv, 2006 WL 3258222, at **1 (2nd Cir. Nov. 9, 2006), and *Locklear v. Person County Bd. of Educ.*, No. 1:05CV00255, 2006 WL 1743460, at *10 n.6 (M.D.N.C. June 22, 2006), upon the employees' argument that speech was not pursuant to official job duties, the courts concluded they did not have enough evidence to determine the scope of employees' job duties.

205. During oral arguments, the Court surmised that if a line was drawn stating that public employee speech pursuant to their official duties had no protection, then many more cases would be dismissed on a pleading. Transcript of Oral Argument at *50-51, *57-58, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473). Ceballos's attorney, Bonnie Robin-Vergeer, disagreed and claimed that the Court's suggestion was unfounded. *Id.* at *58. She further claimed that each year for the past five years about 60 to 70 Court of Appeals cases and about 100 District Court cases had gotten at least as far as summary judgment. *Id.* at *59. Robin-Vergeer reasoned that the question "'Did the employee speak as a citizen or as an employee?' is going to take factual development." *Id.* at *58. Thus, she argued, because the courts cannot decide that kind of question on a pleading, drawing a line as the Court suggested would not decrease public employee speech claims and litigation. *Id.* at *57-58.

206. *Garcetti*, 126 S. Ct. at 1961. The Court reasoned that it had to draw this line, or it "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.* Now, however, the Court's line will commit the courts to a permanent role distinguishing what constitutes an employee's official duties. Tony Mauro, *Head-Scratching Follows* Garcetti *Ruling*, FIRST AMENDMENT CENTER, May 31, 2006, http://www.firstamendmentcenter.org/

claims do arise, the Court intended to give lower courts a way to extinguish employee claims before they made it to trial.[207] So far, the Court's intentions have not succeeded.[208]

For example, in *Cheek v. City of Edwardsville*,[209] a police officer (Cheek) spoke out about misconduct by city officials who had successfully shielded their friends and associates from criminal prosecution.[210] Cheek became aware of this misconduct and communicated his concerns with the Kansas Attorney General's office.[211] As a result of Cheek's speech, the city officials took various retaliatory actions against him.[212] In a section 1983 action, Cheek alleged that he was unlawfully retaliated against in violation of the First Amendment right to free speech.[213] The city officials then filed a motion to dismiss his action, claiming that under *Garcetti*, Cheek's speech was not protected because it was spoken pursuant to his official duties as a police officer.[214] The court denied the city official's motion to dismiss because the scope of Cheek's employment duties was unclear in the complaint.[215] The court found that Cheek's case could not be dismissed under *Garcetti* until his official duties were clarified.[216] As the outcome in *Cheek* suggests, the *Garcetti* rule will not likely succeed in limiting public employee speech litigation, and may in fact add confusion and clog the courts with even more public employee free speech claims.[217]

The second problem is that *Garcetti* may provide employees with incentive to voice their concerns publicly before talking openly and honestly to their superiors.[218] Alternatively, this rule may force em-

analysis.aspx?id=16956. With the *Garcetti* decision, "the Court seemed to raise new questions and guarantee that this nettlesome area of law is far from settled, spawning a new generation of litigation." *Id.*

207. *See Garcetti*, 126 S. Ct. at 1961. The Court predicted that facts like those set forth in *Garcetti* would be few and far between, so the courts would have a simple rule to apply whenever similar cases occurred. "The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official duties." *Id.*

208. *See, e.g.*, *Paola*, 2006 WL 3258222, at **1; Cheek v. City of Edwardsville, No. 06-2210-JWL, 2006 WL 2802209, at *2 (D. Kan. Sept. 29, 2006); *Locklear*, 2006 WL 1743460, at *10 n.6.

209. No. 06-2210-JWL, 2006 WL 2802209 (D. Kan. Sept. 29, 2006).

210. *Cheek*, 2006 WL 2802209, at *1.

211. *Id.* Cheek's communications provided a significant background for the Attorney General's subsequent "investigation of misfeasance and malfeasance by various officials of the City of Edwardsville." *Id.*

212. *Id.* Shortly after Cheek voiced his concerns, he was suspended, then suspended without pay, his fringe benefits were cut off, and eventually he was terminated. *Id.* Prior to those retaliatory actions, there was no evidence that Cheek was inadequately performing his job. *See id.*

213. *Id.*

214. *Id.* at *2. The city officials argued that "Cheek had a duty under Kansas law to report any official misconduct by city officials because he would have been guilty of the felony of concealing evidence of a crime[] if he had not reported the [misconduct]." *Id.*

215. *Id.*

216. *Id.*

217. *See* Mauro, *supra* note 206.

218. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1965 n.1 (2006). This confuses the Court's prior decision that an employee's speech is protected if the employee chooses to meet privately with the employer rather than express the speech publicly. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414-15 (1979); *see also* Posting of Marty Lederman to SCOTUSblog, http://www.scotusblog.com/

ployees to withhold valuable information in fear of retaliation by their employers.[219] If there is no option for an employee to speak freely on matters of public concern that may occur while the employee is performing his or her official duties, then the employee faces a difficult choice.[220] The Court suggests a solution to this problem: employers should create safe, internal forums for employees to express their concerns before going public.[221]

It is doubtful that such internal forums would actually succeed.[222] The question would most likely turn to whether the employee's grievance—and policy for solving the grievance—was part of his official duties to the employer.[223] Consequently, legal commentators predict that "[e]mployees may realize that the safest course of action is to air potentially controversial opinions and information in the public arena, either by leaking to the press or writing to the paper."[224] Ultimately, employees that leak information or speak anonymously about employer corruption, coercion, and overall misconduct are certainly no more in the employer's best interest than are employees whose unwelcome speech causes inefficiency in the workplace.[225]

VI. CONCLUSION

In *Garcetti v. Ceballos*, the United States Supreme Court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. The Court attempted to reduce the confusion of the

movabletype/archives/2006/05/todays_opinion_9.html (May 30, 2006, 10:05 EST).

219. Many legal commentators have asked the same question: "Could the Court develop principles that adequately protect the government's interest in having flexibility in dealing with matters of employee performance and still provide incentives for employees to inform the public of government abuse or fraud?" Exploring Constitutional Law, *supra* note 185. Perhaps such a principle or directed incentive would have helped Ceballos in *Garcetti*: "Although Ceballos believed he was ethically and constitutionally bound to report the deputies' suspected misconduct . . . no policy at the DA's office required him to do so." Brief of Respondent, *supra* note 12, at 5.

220. *See, e.g.*, LoPilato, *supra* note 73, at 543-44; Balkin, *supra* note 71; Ludington, *supra* note 109; *News and Notes with Ed Gordon*, *supra* note 78.

221. The Court acknowledged this possible repercussion and recognized the employer's option to institute "internal policies and procedures that are receptive to employee criticism." *Garcetti*, 126 S. Ct. at 1961. This seems to be the Court's "easy" solution to employees speaking publicly rather than privately to their employers: "Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." *Id.*

222. *See, e.g.*, Balkin, *supra* note 71.

223. *See* Posting of Marty Lederman, *supra* note 218. Internal forums will not encourage employees to settle their complaints privately. "Note that if employees have obligations to settle disputes and make complaints within internal grievance procedures, then they are doing something that is within their job description when they make complaints and so they have no First Amendment protections in what they say." Balkin, *supra* note 71.

224. LoPilato, *supra* note 73, at 543.

225. *See id.*; Ludington, *supra* note 109 (recognizing that the employee's solution of leaking information to the public "may be a particularly unwelcome one to supervisors in government agencies that are struggling to stem the tide of leaks, which, if they catch the attention of the media and the public, can also be highly disruptive to the efficacy of an agency").

Connick public concern test and the *Pickering* balancing test, but the Court's solution of "no protection" when speech is made pursuant to official duties is overly broad. This decision undermines the information policy goal of the public employee speech analysis.

The Court ill-advisedly distinguished between speaking as a citizen about a matter of public concern and speaking as an employee pursuant to official duties. Furthermore, the Court failed to realize that employee speech, which is merely unwelcome is still protected speech. *Garcetti* encourages employers to broaden employee job descriptions to the extent that the employees will have little or no First Amendment protection. Those job descriptions will then be contested by employees, and the employees may be persuaded to go public with their information rather than first take the information to their superiors.

The Court's decision is ill advised because public employees are often the members of the community who have informed opinions regarding the operations of their public employers and at times, the operations of those employers are of substantial concern to the public. If these employees are not able to speak on these matters, the community would be deprived of informed opinions on important public issues. This remains true when an employee's job duties require him to speak about such things, as in *Garcetti*. As a result of *Garcetti*, public employees who speak as citizens about a matter of public concern, but concurrently speak pursuant to their official duties as employees, are beyond the reach of First Amendment protection.