

**Tough Talk from the Supreme Court on Free Speech:
The Illusory Per Se Rule in *Garcetti* as Further Evidence of *Connick*'s
Unworkable Employee/Citizen Speech Partition**

Sonya Bice*

ABSTRACT

Garcetti v. Ceballos was intended to clear up an area of First Amendment law so murky that it was the source not only of circuit splits but also of intra-circuit splits—panels from within the *same* circuit had arrived at opposite results in nearly identical cases. As it turned out, the Supreme Court itself was as splintered as the circuits. Of all the previously argued cases that remained undecided during the Court's transition involving Justice O'Connor's retirement and Justice Alito's confirmation, *Garcetti* was the only one for which the Court ordered a second argument. This suggested to some that without a ninth vote the Court was deadlocked or even split three ways. After reargument, the Court held, in a 5-4 opinion with two dissents, that speech made "pursuant to an employee's official duties" is not citizen speech for First Amendment purposes.

Garcetti was a long-overdue effort to address a decades-old ambiguity in the Court's First Amendment jurisprudence. In 1968, the Court had established the *Pickering* balancing test to weigh the competing interests of government employer and government employee in First Amendment retaliation claims. Then in *Connick*, it created a threshold question for such claims: only speech made "as a citizen on matters of public concern" could proceed to analysis under *Pickering*. One issue had remained unclear after *Connick*: Is there ever a time when an employee speaks "as a citizen on matters of public concern" in the course of doing her job?

That is exactly what Richard Ceballos said he was doing when he wrote an internal memo to his superiors in the Los Angeles District Attorney's Office critical of a questionable affidavit used to obtain a search warrant; he claimed they later retaliated against him. The Supreme Court found that because the memo was prepared as part of Ceballos's duties, it was not citizen speech and thus was not protected.

This Article analyzes how published district and appellate court decisions issued in the months immediately following *Garcetti* illustrate that certain First Amendment retaliation claims are now foreclosed. What is perhaps surprising, however, is the type and number of claims that are *surviving Garcetti*. Circuits had often referred to the approach chosen by the Court as a per se rule, but *Garcetti* is a per se rule with an Achilles' heel—a refusal to say how "official duties" are to be defined—that gives plaintiffs unexpected leverage to resist dismissal and summary judgment.

This Article analyzes how courts have interpreted the "pursuant to the employee's official duties" requirement and on what grounds *Garcetti* has been distinguished. It offers examples that call into question the assertion that First Amendment protection is inappropriate and unnecessary because other protections are available. Having concluded that current whistleblower statutes have significant gaps and that going public with negative information would likely only mean the employee who suffers retaliation wins the battle (the *Connick/Garcetti* test) and loses the war (the *Pickering* balancing test), the Article ends by arguing for the approach found in the *Garcetti* minority opinion advocating an "adjustment" of *Pickering* that would take into account the public's interest in protection of the speech in question regardless of the capacity in which the speaker made the statements.

* J.D. candidate at Marquette University Law School (sonya.bice@marquette.edu). The author wishes to thank Professor Scott Moss for providing invaluable suggestions and edits.

TABLE OF CONTENTS

Introduction: A Divided Court Tries—Again—To Distinguish Employee and Citizen Speech.....	2
I. Public Employees’ First Amendment Rights, from <i>McAuliffe</i> to <i>Garcetti</i>	5
A. Protected Speech for Public Employees—the Road from “Never” to “Sometimes”	5
B. Circuit and Intra-Circuit Splits over the Definition of “Citizen Speech”	7
C. <i>Garcetti v. Ceballos</i>	10
1. Background	10
2. <i>Ceballos v. Garcetti</i> in the District and Appellate Courts	11
3. The Supreme Court Takes the Case	12
II. The Early Returns: How Courts Are Applying <i>Garcetti</i> ’s So-Called “Per Se Rule”	15
A. Appellate Courts	17
B. District Courts	18
1. Cases in Which <i>Garcetti</i> Ends the Analysis	19
2. The Cases <i>Garcetti</i> Is Not Ending	22
3. Initial Confusion	25
III. Where <i>Garcetti</i> Forecloses First Amendment Protection: What Now?	26
A. The Insufficiency of Whistleblower Statutes	26
B. Reporting Misconduct to the Press or to External Authorities: A Catch-22	28
IV. Revisiting <i>Pickering</i> , <i>Connick</i> and <i>Garcetti</i> with a Focus on Public Interest	30
Conclusion	32

**Tough Talk from the Supreme Court on Free Speech:
The Illusory Per Se Rule in *Garcetti* As Further Evidence of *Connick*'s
Unworkable Employee/Citizen Speech Partition**

Sonya Bice

"Everything is vague to a degree you do not realize till you have tried to make it precise

When you pass from the vague to the precise . . . you always run a certain risk of error."

- Bertrand Russell¹

INTRODUCTION

The line the Supreme Court drew in *Connick v. Myers*² between speech made "as a citizen upon matters of public concern" (constitutionally protected when it outweighs employer interests) and speech made "as an employee upon matters only of personal interest" (not) has proved tricky to apply. That has been especially true in cases of so-called "whistleblowers"—those who "seek to bring to light actual or potential wrongdoing or breach of public trust."³ One of the big questions *Connick* left unanswered⁴ was whether an employee's *job-related* speech (as opposed to speech on a public issue unrelated to her job) ever qualifies as "speech made as a citizen on matters of public concern"—the threshold inquiry—and thereby proceeds to the balancing test devised in *Pickering v. Board of Education*.⁵ Prior to *Garcetti v. Ceballos*,⁶ federal courts applying

¹ BERTRAND RUSSELL, THE PHILOSOPHY OF LOGICAL ATOMISM 38 (Open Court Publishing Company, 1985) (1918).

² *Connick v. Myers*, 461 U.S. 138, 144 (1983).

³ *Id.*

⁴ At least partly unanswered. *Connick* cannot properly be reconciled with an absolute per se rule eliminating protection of speech made at work to other coworkers about the terms of working conditions because the Court did undertake a balancing test for one of the statements in question—a statement made at work to other co-workers about alleged pressures to work on political campaigns. ("Because one of the questions in Myers's survey touched upon a matter of public concern . . . we must determine whether *Connick* was justified in discharging Myers." *Id.* at 149.) An interesting question is thus raised as to whether *Garcetti* would block Myers from reaching the balancing test that she reached under the *Connick* test. If so, does the recent ruling overrule rather than clarify the precedent? If not, it follows that *Garcetti* should be read narrowly.

⁵ *Pickering v. Board of Education*, 391 U.S. 563, 567 (1968).

⁶ *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006).

Connick had given different answers to this question.⁷ The Fourth and Fifth Circuits said it does not; the Ninth and Eleventh Circuits said it does; and in four other circuits, panels within a circuit had reached opposite conclusions in apparently indistinguishable cases.⁸

When the Supreme Court took up the question in *Garcetti*, a 5-4 majority held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes,”⁹ and thus lose constitutional protection for that speech.

A New York City cop who had been given responsibility for safety issues in the precinct alerted officials to employees’ chronic health problems and the potential link to leaking gasoline storage tanks. Almost immediately after he revealed the embarrassing problem, he was stripped of duties, reassigned multiple times and disciplined for minor infractions. His First Amendment retaliation claim, which had survived summary judgment motions under the *Pickering/Connick* test and had been in litigation for three years, was one of *Garcetti*’s first casualties.¹⁰ The district court found that his case fell squarely within the type of First Amendment claim categorically excluded from protection under *Garcetti*’s added rule—that whistleblower claims cannot be brought by employees for whom reporting problems was part of the job.¹¹

⁷ Legal scholars have criticized the *Connick* framework as turning on an unnecessarily arbitrary distinction between “employee speech” and “citizen speech.” See, e.g., Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) (calling current free speech doctrine “fundamentally flawed” and advocating full protection for “external” speech and no protection for “internal” speech with four specific exceptions); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L. Q. 529 (1998) (arguing that a better test would require an employer to show “an interest unrelated to suppressing an employee’s beliefs about management” modeled on *United States v. O’Brien*); Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L. J. 43 (1988) (advocating a “return to *Pickering*” without the narrowing effects of *Connick*, and allowing any speech that addresses a matter of public concern to be subject to the balancing test); and Toni Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 68 (1987) (advocating protection of all speech, on both private and public matters, unless “any government interests exist that might justify restriction of the speech”).

⁸ See *infra* pp. 6-8.

⁹ *Garcetti*, 126 S.Ct. at 1960.

¹⁰ *Ruotolo v. City of New York*, No. 03 Civ. 5045(SHS), 2006 WL 2033662 (S.D.N.Y. July 19, 2006).

¹¹ *Id.* at *3.

Outside of that relatively limited subset are employees who face retaliation for speaking out about job-related problems when it is not so explicitly their jobs to do so, such as Keith Hill, a borough manager who claimed constructive termination after he opposed some of the policies and projects of the mayor.¹² In considering cases in this second group of First Amendment retaliation claims in just the first few months following *Garcetti*, lower courts have already diverged on interpreting the Supreme Court's "pursuant to official duties" requirement. Courts that take to heart the Supreme Court's words about "a proper inquiry" into whether a task is "within the scope of the employee's professional duties for First Amendment purposes"¹³ have made clear with surprising swiftness: *Garcetti* will not turn out to be quite the per se rule it was hailed (and decried) to be.

Based on an analysis of published opinions handed down in the months immediately following *Garcetti*, this Article contends that despite the apparently categorical nature of the holding, its "per se" standard has proved to be unexpectedly elastic in application. The Court's implied directive to lower courts to conduct a "proper inquiry" into whether the speech in question is part of the duties the employee "actually is expected to perform" opens the door for lower courts to evade *Garcetti* or at least mitigate its potential harshness.

Part I starts with a brief explanation of the development of the jurisprudence on public employees' First Amendment rights. It goes on to describe the circuit and intra-circuit splits that led to *Garcetti* and to discuss the rationale of the Supreme Court's ruling as well as the three dissents. Part II analyzes how the district and appellate courts that handed down opinions immediately following *Garcetti* interpreted the "pursuant to the employee's official duties" requirement and on what grounds *Garcetti* was distinguished. Assuming *Garcetti* now forecloses First Amendment protection for certain public employee speech, Part III discusses the viability of statutory protection for government employees who face retaliation for exposing misconduct and whether their "safest avenue of expression"¹⁴ is to forego internal reporting procedures and take the information public. Having concluded that current whistleblower statutes have significant gaps and that the option of going public with negative information would likely only mean that the employee wins the battle (the *Connick/Garcetti* test) and loses the war (the *Pickering* test), the Article ends by arguing that a better approach to

¹² Hill v. Borough of Kutztown, No. 05-1356, 2006 WL 2061145 (3d Cir. July 26, 2006).

¹³ *Garcetti*, 126 S.Ct. at 1962.

¹⁴ The words are from the majority opinion: "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.* at 1961.

determining what speech is protected and what is not is found in the *Garcetti* minority's advocacy of *Givhan v. Western Line Consolidated School District*¹⁵ (a unanimous decision written by then-Justice Rehnquist)¹⁶ as the controlling precedent and of an "adjustment" of *Pickering* that would take into account the public's interest in protection of the speech in question regardless of the capacity in which the speaker made the statements.

I. Public Employees' First Amendment Rights, from *McAuliffe* to *Garcetti*

A. Protected Speech for Public Employees: The Road from "Never" to "Sometimes"

When a Massachusetts constable was fired in 1892 for breaking a department rule that prohibited political activity, he failed to persuade the Massachusetts Supreme Court that there was anything constitutionally objectionable about the rule.¹⁷ In a two-page decision dismissing the case, Justice Oliver Wendell Holmes, Jr., a state jurist not yet appointed to the U.S. Supreme Court, stated as a self-evident fact that "there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman,"¹⁸ and he added a statement that would not be successfully challenged for decades: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹⁹

Like many well-crafted sound bites, Holmes's statement had the ring of truth and the benefit of being memorable while disguising logical fallacies and failing to address certain inconvenient facts—which included, in this instance, the fact that the employer was the government. This leave-your-rights-at-the-door approach generally prevailed at the U.S. Supreme Court from 1882 to 1952,²⁰ perhaps not coincidentally, since Holmes's tenure on the Court spanned most of that period.²¹

¹⁵ *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

¹⁶ *Garcetti*, 126 S. Ct. at 1963 (Stevens, J. dissenting).

¹⁷ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (1892) (Mass.).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Connick v. Myers*, 461 U.S. 138, 144 (1983) ("For many years, Holmes' epigram expressed this Court's law").

²¹ Holmes himself authored at least one of the Court's public employee free speech rulings that was consistent with *McAuliffe*: *U.S. v. Wurzbach*, 280 U.S. 396 (1930). Holmes's tenure on the Supreme Court lasted from 1902 to 1932. OLIVER WENDELL HOLMES, THE ESSENTIAL HOLMES:

When Marvin Pickering, a public school teacher who had been fired over a letter he wrote and sent to a newspaper on the issue of a local bond referendum, appealed a state high court decision that essentially tracked Holmes's reasoning from 75 years earlier,²² the Court reversed, saying,

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.²³

The Court was referring to a string of cases in which it had struck down loyalty oaths and various mechanisms designed to deny employment to anyone who would not disclose and renounce Communist and "anti-government" associations.²⁴ These cases culminated in *Keyishian v. Board of Regents*,²⁵ which overturned a law requiring state university faculty members to sign, among other things, anti-Communist Party statements. It was *Keyishian* the *Pickering* Court quoted when it said, "[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."²⁶

The Court then fashioned a balancing test, in place nearly four decades later, that requires an employee to show that the speech in question was made as a citizen on matters of public concern and that the employee's interest in free

SELECTIONS FROM THE SPEECHES, LETTERS, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. xi-xiv (Richard Posner ed. 1992).

²² *Pickering v. Board of Education*, 391 U.S. 563, 567 (1968) ("Pickering's claim that his letter was protected by the First Amendment was rejected [by the Illinois courts] on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.'").

²³ *Id.* at 568.

²⁴ *Id.*

²⁵ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

²⁶ *Pickering*, 391 U.S. at 568 (quoting *Keyishian*, 385 U.S. at 605-606).

expression outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”²⁷

In *Connick v. Myers*, in 1983, the Court addressed the claim of Sheila Myers, a district attorney fired after circulating a survey critical of management to fellow employees following a personnel decision to which she objected.²⁸ *Connick* was the first case to “require[] a separate examination of the speech involved to determine whether the *Pickering* balancing test was to be applied.”²⁹ *Connick* thus “made it more difficult for an employee to invoke the *Pickering/Mount Healthy* standard by holding that a threshold inquiry must be made to classify the speech as a matter of public concern.”³⁰

B. Circuit and Intra-Circuit Splits over the Definition of “Citizen Speech”

In trying to apply *Connick*’s distinction between speech made as a citizen and speech made as an employee, lower courts ran squarely into the question of whether there is ever a time when an employee speaks as a citizen in the course of doing her job. Analyzing more than 300 post-*Connick* cases addressing the question of what constituted speaking “on a matter of public concern,” Professor Steven Allred found in 1988 that

[L]ower federal courts have been anything but consistent in their determination of what speech is protected under *Connick v. Myers*. Although broad categories of cases can be identified, there exist contradictions within every category, leaving public employees and employers

²⁷ *Id.* at 568.

²⁸ *Connick v. Myers*, 461 U.S. 138, 138 (1983).

²⁹ Steven Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L. J. 43 (1988) (categorizing and analyzing lower court rulings in representative cases in which speech was about 1) matters of current community debate, 2) allegations of malfeasance or abuse of office, 3) public safety and welfare, 4) quality of public education, 5) discrimination, and 6) purely personal interest).

³⁰ *Id.* at 49, referencing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (where employer would have reached the same decision for reasons besides the protected speech of the employee, protected speech that played some part in the employer’s decision does not shield employee from adverse employment decisions).

confused as to the scope of their free speech rights and responsibilities.³¹

Part of the reason for the confusion, Professor Toni Massaro argues, is that “defining a ‘public concern’ is subjective.”³²

The Ninth Circuit’s *Ceballos v. Garcetti* ruling, which found that speech made within the scope of an employee’s duties can sometimes be citizen speech on matters of public interest worthy of First Amendment protection, described “nearly unanimous opposition” to a per se rule³³ and noted that “the weight of authority in other circuits accords with our precedents.”³⁴ It noted the sole exception of the Fourth Circuit, which “seems to be moving toward a [per se] rule.”³⁵

In the appeal of that decision to the Supreme Court, of course, matters were characterized differently.³⁶ The petition for writ of certiorari described a “major inter-circuit conflict,”³⁷ with the Ninth and Eleventh Circuits finding that speech made in the course of employment could in some circumstances qualify as speech made as a citizen on matters of public concern and therefore be constitutionally protected,³⁸ and the Fourth and Fifth Circuits adopting an approach that focused on whether the speech was made in the speaker’s role as a citizen or her role as an employee (and if the latter, finding it automatically unprotected).³⁹ Perhaps more interestingly, in the Sixth, Seventh, Eighth and Tenth Circuits, different panels *in the same circuit* were applying *Connick* to

³¹ *Id.* at 75.

³² Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987).

³³ *Ceballos v. Garcetti*, 361 F.3d 1168, 1177 (9th Cir. 2004), *rev’d by* 126 S.Ct. 1951 (2006).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Pet. for Writ of Cert. to the U.S. Ct. of Appeals for the 9th Cir., *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04-473).

³⁷ *Id.* at 14.

³⁸ *Id.* (citing *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir. 2000) (finding constitutionally protected a request from police officers to supervisor for permission to alert district attorney to others’ improper review of records)).

³⁹ *Id.* at 15 (citing *Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000) (finding no First Amendment violations where a law banned state university faculty from accessing porn sites on publicly owned computers on the grounds that the regulation was of “speech clearly made in the employee’s role as employee”) and *Gillum v. City of Kerrville*, 3 F.3d 117, 120-21 (5th Cir. 1993) (finding no First Amendment protection for police officer who claimed retaliation after he had reported misconduct of chief to internal affairs department)).

markedly similar fact patterns and coming to different conclusions about whether speech was protected.⁴⁰

For example, the Seventh Circuit found no constitutional protection for speech made as part of Gerardo Gonzales's work as a civilian doing investigations of police misconduct.⁴¹ Gonzales had alleged that after joining the police department, he himself was harassed and ultimately terminated by supervisors hostile to him based on earlier investigations of other police officers.⁴² The court found that Gonzales "was clearly acting entirely in an employment capacity when he made those reports."⁴³

A different panel of Seventh Circuit judges came to a different conclusion in *Jones v. Delgado*,⁴⁴ where a police officer whose job involved narcotics investigations suffered retaliation after disclosing allegations of drug activity by a person connected to the police chief.⁴⁵ Because "Delgado's investigation here was not a routine discharge of an assigned duty," his First Amendment retaliation claim survived summary judgment.⁴⁶

⁴⁰ *Id.* at 17. See also Tony Coppola, *Content, Form and Context—The Eighth Circuit Misapplies the Connick Test in Examining the First Amendment Rights of a Public Employee in Buazard v. Meridith*, 33 CREIGHTON L. REV. 417, 431-446 (2000) (discussing cases that illustrate the variety of approaches circuits were taking in interpreting *Connick*) and 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).

⁴¹ *Gonzales v. City of Chicago*, 239 F.3d 939, 940 (7th Cir. 2001).

⁴² *Id.* at 940.

⁴³ *Id.* at 941.

⁴⁴ *Delgado v. Jones*, 95 Fed. Appx. 185 (7th Cir. Apr. 1, 2004).

⁴⁵ News accounts identified the person as the husband of a Milwaukee alderwoman who was a friend of the chief. (Gina Barton, "Other Suits from Jones Era Pending," *Milwaukee Journal Sentinel*, March 30, 2005, at B1. At <http://www.jsonline.com/story/?id=313860>.) In an earlier decision, the court had alluded to the reputation of the chief within the department for being quick to retaliate with unwanted transfers (in violation of Department rules); the court quoted the appellee's brief: "Delgado then showed the letter to his supervising lieutenant, who commented: 'What district do you want to be transferred to?'" Delgado was in fact transferred the day the chief learned of Delgado's disclosure. *Delgado*, 282 F.3d at 514.

⁴⁶ The court found Delgado's speech protected because he was outside his area of responsibility (routine narcotics investigations) and into internal affairs when he recommended an outside investigation of the allegations. It is unclear how the outside investigation Delgado recommended could be characterized as an "internal affairs" investigation when there was no allegation that any police officer was involved in the drug activity, and no cover-up or unlawful retaliation had occurred at the time Delgado disclosed the information.

C. Garcetti v. Ceballos

1. Background

In 2000, a defense attorney filed a motion challenging a search warrant and asked Richard Ceballos, a calendar deputy⁴⁷ in the Los Angeles County District Attorney's office, to investigate what the defense attorney considered to be "inaccuracies in an affidavit" that was the basis for granting the warrant.⁴⁸ The request was not an unusual one.⁴⁹ When Ceballos, at the time an 11-year veteran of the office who had been promoted and supervised other attorneys, reviewed the affidavit, he was convinced that misrepresentations had been made to obtain the warrant.⁵⁰ After a conversation with the deputy sheriff who had signed the affidavit, Ceballos wrote a memo detailing his reservations about the validity of the warrant and recommending that the case be dismissed, which his supervisor considered but ultimately decided against.⁵¹ With the knowledge of his supervisor, Ceballos turned over his memo, with his own opinions redacted, to the defense, on the assumption that he was obligated to do so under a leading case about prosecutors' disclosure obligations.⁵² When the hearing on the warrant was held, Ceballos testified for the defense.⁵³ The appellate court pointed out that at the search warrant hearing, the court "sustained the prosecution's objections to several questions defense counsel asked [Ceballos,]" which left him unable to tell the reasons for his conclusions about the warrant.⁵⁴ The judge upheld the validity of the warrant, saying that probable cause for the warrant was shown by other facts anyway and the disputed statements were irrelevant to the judge's conclusion.⁵⁵

In the months following the hearing, Ceballos was demoted, stripped of his only homicide case, denied a promotion, and transferred to a branch that would

⁴⁷ *Garcetti*, 126 S.Ct. at 1955 (describing a calendar deputy's job as "exercis[ing] certain supervisory responsibilities over other lawyers" and, at the request of defense attorneys, "investigat[ing] aspects of pending cases").

⁴⁸ *Garcetti*, 126 S.Ct. at 1955.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1956. There appears to have been some initial agreement that the warrant was flawed prior to the hearing on the motion to traverse.

⁵² *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the disclosure by prosecutors of exculpatory evidence).

⁵³ *Garcetti* 126 S.Ct. at 1972.

⁵⁴ *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), *rev'd by* 126 S.Ct. 1951 (2006).

⁵⁵ *Garcetti* 126 S.Ct. at 1972.

mean a longer commute.⁵⁶ Never, however, did any of his supervisors openly reprimand him, put anything into his personnel file, or even make any argument that his actions had been reckless or inappropriate; the county contended that none of its actions were adverse employment actions, and none were taken in response to the conflict over the search warrant affidavit.⁵⁷ It contended, however, that Ceballos's supervisor *could* have done so because the speech in question—the memo, which Ceballos acknowledged was prepared “pursuant to his duties as a prosecutor”⁵⁸—was not protected.⁵⁹

Ceballos pursued an employee grievance over the alleged retaliation, but no retaliation was found and his claim was denied.⁶⁰

2. *Ceballos v. Garcetti* in the District and Appellate Courts

Ceballos filed a First Amendment retaliation lawsuit in federal court and, after losing a summary judgment motion, appealed to the Ninth Circuit.⁶¹ The Ninth Circuit reversed, citing circuit precedent that rejected a per se application of *Connick*⁶² and noting, “a per se rule stripping all First Amendment protection from speech uttered in the performance of routine, as opposed to non-routine, job functions would be inconsistent with the very nature of the *Connick* test which contains a second step that requires us to balance various factors”⁶³ Judge O’Scannlain concurred that precedent dictated the majority’s decision but argued that such precedents were wrong and should be overruled.⁶⁴ He ridiculed the majority’s “seductively simple” argument that whistleblowing speech should be covered by the First Amendment because such speech is important and, in a tone dripping with sarcasm, wrote:

⁵⁶ *Id.* at 1956 and 1974 at n.13; the appellate court ruling mentions that retaliatory transfers are known in the DA’s office as “Freeway Therapy” (*Ceballos v. Garcetti*, 361 F.3d 1168, 1171, n.2).

⁵⁷ Tr. of Oral Argument at 15, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), Oct. 12, 2005 (Petitioner’s counsel: “[I]t is not our position, and we have never taken the stance, that the deputy district attorney in this case was reckless in regards of his speech [interruption] or his evaluation”).

⁵⁸ *Garcetti*, 126 S.Ct. at 1960, quoting Resp’t Br. at 4.

⁵⁹ Tr. of Oral Argument at 15. *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), Oct. 12, 2005 (“[I]t is our view that the supervisor—while the supervisor contended that he did not react to this speech adversely, that he could have.”).

⁶⁰ *Garcetti*, 126 S. Ct. at 1956.

⁶¹ *Ceballos*, 361 F.3d 1168.

⁶² *Roth v. Veteran’s Admin. of United States*, 856 F.2d 1401 (9th Cir. 1988).

⁶³ *Ceballos*, 361 F.3d at 1176.

⁶⁴ *Garcetti*, 361 F.3d at 1194 (O’Scannlain, J., dissenting).

How strange it must now be for the hundreds, if not thousands, of legislators throughout this country who have voted to enact or retain [whistleblowing] laws now to discover that their votes were essentially meaningless—that the First Amendment already provided public employees with protections co-extensive with, and in many respects even greater than those purportedly conferred by, the legislation they crafted and helped shepherd through their state legislative processes.⁶⁵

3. The Supreme Court Takes the Case

The question before the Supreme Court when it granted certiorari concerned only the status of the speech in the disposition memo; the instances of Ceballos's other speech—his comments to the bar association (which in any event occurred after the employment actions), his conversation with his supervisors about the case, and his testimony at the hearing on the motion to traverse—were not addressed.⁶⁶

The case proceeded on a schedule that coincided with critical turnover on the Court. Oral arguments were first heard October 12, 2005, and the case was scheduled for reargument March 21, 2006, following Justice O'Connor's retirement and the confirmation of her replacement, Justice Alito.⁶⁷ The decision to schedule a reargument was seen by some as an indication that the court was evenly split without Justice O'Connor's vote.⁶⁸ The ruling was handed down

⁶⁵ *Id.* at 1192 (O'Scannlain, J., dissenting).

⁶⁶ The Ninth Circuit opinion stated, “[W]e hold that, for purposes of summary judgment, Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment; accordingly, we need not determine here whether similar protection should be afforded to his other communications. Those matters are best explored at trial.” *Ceballos*, 361 F.3d 1168, 1173.

⁶⁷ David L. Hudson, Jr., “The Return of the Reargument: Supreme Court to Hear Again a Key Employee Free Speech Case,” ABA Journal eReport, March 17, 2006. <http://www.abanet.org/journal/ereport/m17employ.html>.

⁶⁸ *Id.* (quoting Georgetown University law professor Martin Lederman as saying, “It is likely that *Garcetti* is the only one of the 20 outstanding cases in which Justice O’Connor’s vote was determinative—in other words, in which the court is divided 4-4 without her vote.”) *New York Times* reporter Linda Greenhouse wrote that “[t]he reality may have been more complex,” citing Justice Breyer’s separate dissent and suggesting that his vote “may have been uncertain until late in the process.” Linda Greenhouse, *Some Whistle-Blowers Lose Free-Speech Protections*, N. Y.

May 30, 2006, the majority opinion written by Justice Anthony Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.⁶⁹

The Court reversed the finding of First Amendment protection for the memo written to recommend dismissing the disputed criminal case and remanded for the appellate court to take up Ceballos's remaining claims.

The majority 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."⁷⁰ It focused on the relationship of the speech in question to the speaker's responsibilities as an employee:

The controlling factor in Ceballos's case is that his expressions were made pursuant to his duties as a calendar deputy. . . . That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos's case from those in which the First Amendment provides protection against discipline.⁷¹

The majority also dwells at length on the needs of government as an employer and the havoc it says would ensue if speech such as Ceballos's were constitutionally protected. To object, as the appellate court had,⁷² that it is a doctrinal anomaly to leave unprotected the same speech made in the context of the workplace that is protected when made in a public forum "misconceives the theoretical underpinnings of [the Court's] decisions," the majority sniffed.

The opinion's last paragraphs, however, reveal *Garcetti's* Achilles' heel: "We have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."⁷³ Beyond noting that a written job description is "neither necessary nor sufficient" and differentiating between formal job descriptions and the duties an employee

TIMES, May 31, 2006, at A16.

⁶⁹ *Garcetti*, 126 S. Ct. at 1954.

⁷⁰ *Id.* at 1960.

⁷¹ *Id.* at 1959-60.

⁷² The same objection was raised in Justice Stevens's dissent, *id.* at 1963.

⁷³ *Id.* at 1961.

“actually is expected to perform,”⁷⁴ the Court gave little guidance for resolving what will likely be a highly litigated question.⁷⁵

It was accompanied by a dissent written by Justice Souter (joined by Justices Ginsburg and Stevens), as well as dissents by Justices Stevens and Breyer.⁷⁶ Justice Souter’s dissent recognized the “tension between individual and public interests”⁷⁷ but advocated for something that could be dubbed a “*Pickering* plus” analysis:

“[T]he risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. . . . [I]t is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee’s favor.”⁷⁸

Justice Stevens’s dissent considered the controlling precedent to be *Givhan v. Western Line Consolidated School District*, which he noted was a unanimous opinion written by Chief Justice Rehnquist.⁷⁹ In *Givhan*, a conversation a teacher had with a principal concerning the administration’s racism was found to be protected speech.⁸⁰ “Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial,” Stevens

⁷⁴ *Id.* at 1962.

⁷⁵ Kathleen Sullivan, professor and former dean of Stanford Law School, once observed: “Rule choices are suspicious, and in the end rules never hold. Turn the page and you’ll find the codifier scrambling for an exception. This is because general propositions cannot decide concrete cases” Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (identifying the “key fault lines along which the Reagan and Bush appointees fractured” during the previous term as “a split over the choice of rules or standards”).

⁷⁶ *Id.* at 1963. With a Court highly divided on this question, it is conceivable that if the Court were to revisit the issue in the near future, a case with an only slightly different set of facts might well come out a different way.

⁷⁷ *Id.* at 1965.

⁷⁸ *Id.* at 1967.

⁷⁹ *Id.* at 1963.

⁸⁰ *Id.*, citing *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

wrote. “That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.”⁸¹

Justice Breyer found the majority’s rule “too absolute” and Justice Souter’s proffered standard no real improvement over *Pickering* because it was still too broad and ultimately saved courts no time.⁸² He argued that constitutional protection was not precluded when a government employee speaks about matters of public concern “in the course of ordinary job-related duties”⁸³ and said *Pickering* is the appropriate analysis in such a case.

II. The Early Returns: How Courts Are Applying *Garcetti*’s So-Called “Per Se Rule”

Much of the debate about the issues raised in *Garcetti* has been framed in terms of whether *Pickering* and *Connick* are properly read to require a so-called “per se rule”—that speech made “as an employee” is per se excluded from First Amendment protection. Disparaging reference is made to a “per se rule” seven times in the Ninth Circuit’s decision on Ceballos’s case, and the dissent quotes a Tenth Circuit decision using the phrase.⁸⁴ Though the phrase is nowhere to be found in the Supreme Court opinion or in any of the dissents, the term has been widely used as shorthand for the concept that speech made in the course of employment is automatically unprotected for purposes of *Pickering* analysis.⁸⁵

The term “per se,” defined as “standing alone, without reference to additional facts,”⁸⁶ seems ill-suited for describing the *Garcetti* rule. As the Court’s decision indicated, courts still need to make a “proper inquiry” into the question of what the employee is “actually expected to do.”⁸⁷ While the new test adds a twist to the *Connick* analysis, it is unclear whether it does more than create more deference in the employer’s favor—as a thumb on the scale of the *Pickering* balancing test. As Ceballos’s counsel pointed out in oral argument, “[A]ll this per se rule does is add complexity and the need for greater factual development. It’s

⁸¹ *Id.* at 1963.

⁸² *Id.* at 1974-1975.

⁸³ *Id.* at 1976.

⁸⁴ *E.g.*, “The proposed per se rule would be particularly detrimental to whistleblowers” *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004), *rev’d by* 126 S.Ct. 1951 (2006).

⁸⁵ *E.g.*, Marni Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. Rev. 893 (2005).

⁸⁶ Black’s Law Dictionary (8th ed. 2004).

⁸⁷ *Garcetti*, 126 S. Ct. at 1961.

not the magic bullet that the Petitioners seem to think it is.”⁸⁸ Yale Law School professor Jack Balkin⁸⁹ stated, following *Garcetti*, “I am sympathetic to the Court's desire to reduce the burden of ad hoc balancing by creating a bright line rule of no protection. But in this case, the Court's decision doesn't really create a bright line rule, because the boundaries of what is within an employee's job description may turn out to be quite contestable, and will be contested in future cases.”⁹⁰

In this way, *Garcetti* resembles *Connick* and other tests designed to block disfavored types of cases. Analogous developments can be found in administrative law in the application of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*⁹¹ As Professor Cass Sunstein has observed, a seemingly straightforward test can get bogged down in the threshold inquiry: does the test even apply in this case?

Chevron famously creates a two-step inquiry for courts to follow in reviewing agency interpretations. . . . It is an understatement to say that a great deal of judicial and academic attention has been paid to the foundations and meaning of *Chevron*'s two-step inquiry. But in the last period, the most important and confusing questions have involved neither step. Instead they involve *Chevron* Step Zero—the initial inquiry into whether the *Chevron* framework applies at all.⁹²

Subsequent Supreme Court decisions attempting to clarify the *Chevron* test reflected, Sunstein said, “an intense and longstanding disagreement . . . involving a classic rules-standards debate [that] echoes throughout the law.”⁹³ Such echoes can be heard in the rulings and dissents of First Amendment cases following *Pickering*, including *Garcetti*.

⁸⁸ Tr. of Oral Argument at 44. *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (March 21, 2006).

⁸⁹ Jack Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School. <http://www.yale.edu/lawweb/jbalkin/index.htm>.

⁹⁰ Jack Balkin, “Ceballos—The Court creates bad information policy.” May 30, 2006. <http://balkin.blogspot.com/2006/05/ceballos-court-creates-bad-information.html>.

⁹¹ *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁹² Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

⁹³ *Id.*

There is a subset of cases that survives summary judgment under *Pickering/Connick* but fails to survive under *Garcetti*,⁹⁴ but the number of post-*Garcetti* decisions that have focused on the opinion's requirement of a fact-intensive inquiry shows it would be naïve to expect the decision to curb litigation of First Amendment claims.⁹⁵

A. Appellate Courts

Garcetti has been cited to affirm cases in which the plaintiff appealed after having lost under the *Pickering* test in the court below. (One can also envision cases that survive summary judgment under *Garcetti* and *Pickering* in district court being reversed on appeal.) But the dismissal of at least one case that had failed *Pickering* in the lower court was reversed under a somewhat counterintuitive reading of *Garcetti*.

During June and July 2006, the Seventh, Eighth and Eleventh Circuits issued rulings⁹⁶ that cited *Garcetti* in affirming lower courts' summary judgment rulings. These rulings were hardly surprising; plaintiffs who had lost the *Connick* and *Pickering* analyses would not be expected to prevail under an even narrower test.

The Third Circuit, however, reversed a dismissal of a First Amendment claim by a borough manager alleging retaliation by the mayor,⁹⁷ saying that it was

⁹⁴ For cases that fail *Pickering/Connick* tests on the grounds that the employee's interest in the protected free speech are outweighed by the employer's interests, the *Garcetti* rule obviously makes no difference.

⁹⁵ Another possible explanation for the lower courts' hesitation to use *Garcetti* to dismiss what they may see as close cases is suggested by an argument made by Professor Dan Kahan of Yale Law School in the context of legislation and social change. Kahan's thesis is that "[a]s severity of condemnation . . . increases, the percentage of decisionmakers who are willing to enforce the law declines." He suggests that corrective actions that are perceived as overly harsh are ultimately counter-productive. As applied in the context of Supreme Court precedents, his theory would suggest that lower courts that perceive a Supreme Court rule as resulting in injustice in individual cases would seek ways to distinguish them. Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

⁹⁶ *Mills v. City of Evansville*, No. 05-3207, 2006 U.S. App. Lexis 15082 (7th Cir. June 20, 2006) (affirming dismissal where police officer was transferred after expressing opposition to changes in department policy); *Bailey v. Dep't of Elementary & Secondary Educ.*, 451 F.3d 514 (8th Cir. 2006) (affirming dismissal of claim by consultant who objected to the handling of state disability benefits claims); *Gilder-Lucas v. Elmore County Bd. of Educ.*, No. 05-16561, 2006 Lexis U.S. App. 16167 (11th Cir. June 26, 2006) (affirming dismissal of claim by high school junior varsity cheerleader sponsor who alleged retaliatory non-renewal of contract after she raised concerns to principal about the fairness of cheerleading tryouts).

⁹⁷ *Hill v. Borough of Kutztown*, No. 05-1356, 2006 WL 2061145 (3rd Cir. July 26, 2006).

premature for the district court to determine as a matter of law that some of the speech was not protected: “[The employee’s] First Amendment claim, insofar as it is premised on [his] advocacy and support for ideas, principles and projects [the mayor] disfavored, should not have been dismissed at this stage of the proceeding.”⁹⁸ The Circuit upheld the dismissal of the plaintiff’s First Amendment claim as to reports of the supervisor’s harassing behavior the employee had made to the Borough Council on the grounds that the plaintiff’s own brief had said that he “*as part of his duties as Manager and otherwise* duly reported them,”⁹⁹ which killed the claim under *Garcetti*. That the speech related to carrying out the projects of the borough, such as a telecommunications project, is *not* ruled out as protected speech, and speech made to the borough council about an elected official *is* ruled out as protected speech is, to say the least, counterintuitive. It illustrates, however, that lower courts are going about defining “pursuant to duties” as less of a per se rule than the *Garcetti* Court seemed to intend.

B. District Courts

1. Cases in Which *Garcetti* Ends the Analysis

Summary judgment ended some claims when *Garcetti* was decided where courts found the plaintiff’s job included reporting the kind of wrongdoing that was claimed as the basis for subsequent retaliation.

Ruotolo v. City of New York: If there is a case that embodies equally the concerns of *Garcetti*’s fans and foes, it might be the case of Angelo Ruotolo, a Bronx cop whose First Amendment claim, just two weeks from trial after three years of litigation, went down in flames thanks to *Garcetti*.¹⁰⁰ In 1999, Ruotolo had, in his capacity as Training and Safety Officer, written a report about the department’s leaking gasoline storage tanks and suggested a link between the resulting on-the-job chemical exposure and health problems of officers.¹⁰¹ Though he alleged that

⁹⁸ *Id.* at *11.

⁹⁹ *Id.*

¹⁰⁰ *Ruotolo v. City of New York*, No. 03 CIV. 5045 (SHS), 2006 WL 2033662 (S.D.N.Y. July 19, 2006).

¹⁰¹ *Id.* at *1.

the City of New York apparently viewed his concerns as valid and worked to resolve the problems, he soon began receiving transfers and discipline, and, for the first time in his 20-year career with the department, received a negative performance review.¹⁰² Fearing the complete loss of his pension if he were fired, he retired voluntarily.¹⁰³ His First Amendment claim of retaliation had survived motions to dismiss and motions for summary judgment. When *Garcetti* was handed down, however, the motion to dismiss was renewed,¹⁰⁴ and this time the court granted it, saying, “[s]ince Ruotolo prepared his Report in the course of his employment duties, his speech is exactly the type addressed in *Garcetti*; i.e., employer commissioned work over which the employer is entitled to exercise control.”¹⁰⁵

*Donnell v. City of Cedar Rapids*¹⁰⁶: Here *Garcetti* was used not to determine whether the speech in a First Amendment claim was protected but to arrive at a finding of qualified immunity for a defendant in a whistleblower case. The case involved allegations of deliberately lax enforcement of building codes,¹⁰⁷ and the only evidence the court could find of a “habit or practice” of violating free

¹⁰² *Id.* at *2. An earlier decision details the claims of retaliation, which allegedly included demotions, some 140 reassignments over a nine-month period, including a transfer to the most violent precinct in the city, and discipline for such infractions as “sitting at an unassigned desk or using an overly-narrow margin on a typed report.” *Ruotolo*, 2005 WL 1253936 at *1-2. The case also received press attention. See Helen Peterson, “140 Transfers Fuel Sgt’s \$1.2M Beef vs. NYPD,” *New York Daily News*, July 9, 2003.

¹⁰³ *Ruotolo*, 2005 WL 1253936 at *1-2.

¹⁰⁴ *Id.* at *1.

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *Donnell v. City of Cedar Rapids*, No. 05-CV-49LRR, 2006 U.S. Dist. Lexis 35722 (N.D. Ia. June 1, 2006).

¹⁰⁷ *Id.*

speech rights was the defendant's "repeated attempts to shield preferred contractors from [plaintiff's] inspections and citations."¹⁰⁸ The court granted summary judgment on qualified immunity grounds, citing *Garcetti* for the proposition that those actions did not count as violations because "[p]laintiff has no free speech interest in performing the duties of his job"¹⁰⁹

*Logan v. Indiana Department of Corrections*¹¹⁰: The statements of a correctional facility healthcare administrator about "persistent serious problems with nursing care for the inmates"¹¹¹ were found unprotected because her job description included "evaluating the provision of all medical services to prevent inappropriate use or duplication."¹¹² It was not found relevant that the plaintiff "had no direct responsibility for the state's nursing personnel decisions."¹¹³

It should be noted that in several cases in which the claim failed on the grounds that the statements involved were "made pursuant to the employee's official duties," that conclusion was supported by reference to the plaintiff's own written statements, including pleadings made in the case. One plaintiff included in a letter to defendant the statement, "I consider any time I spend addressing this matter with you or the agency to be services I am giving the state as a consultant,"¹¹⁴ which the court cited as evidence that the statement was made "as an employee concerned with being paid for his time."¹¹⁵ Another had submitted a report with officious and self-defeating thoroughness, noting that the report was

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 65, n.13.

¹¹⁰ *Logan v. Indiana Dep't of Corrections*, No. 1:04-cv-0797-SEB-JPG, 2006 U.S. Dist. Lexis 43631 (S.D. Ind. June 26, 2006).

¹¹¹ *Id.* at *6.

¹¹² *Id.* at *5.

¹¹³ *Id.* at *5.

¹¹⁴ *Bailey v. Dept. of Elementary & Secondary Education*, 451 F.3d 514, 520 (8th Cir. 2006).

¹¹⁵ *Id.*

“submitted pursuant to Interim Order 45, dated 10-19-99, wherein the Training Sergeant is designated the Command Safety Officer on matters relating to occupational safety”; in the subject line, he had written “Survey Pursuant to Request”; and in the report he had explained who requested it.¹¹⁶ (As the court responded in that case, “[i]t is clear beyond peradventure that the Report was prepared as part of plaintiff’s official duties.”¹¹⁷) Another plaintiff’s brief stated, “Plaintiff as part of his duties as Manager and otherwise duly reported [harassment of employees by a supervising official]”¹¹⁸

The plaintiff’s choice of phrasing proved fatal to these claims. While such statements by plaintiffs may have made for an easy post-*Garcetti* call, no responsible plaintiff’s counsel should make the mistake of using such phrases in the future.

2. The Cases *Garcetti* Is Not Ending

In *Garcetti*, the plaintiff did “not dispute that he prepared the memorandum ‘pursuant to his duties as a prosecutor.’”¹¹⁹ It is unlikely that future plaintiffs will follow his lead. Where that fact is disputed, it falls to the court to decide it. Several lower courts have refused defendants summary judgment on the question, deciding either that the plaintiff’s circumstances were distinguishable from *Garcetti* or that there were insufficient facts in evidence to make the call.

*Kodrea v. City of Kokomo*¹²⁰: A supervisor allegedly fired Kodrea in response to Kodrea’s reports of an apparent kickback scheme and the presence of an employee under his supervision who was on the payroll but was not actually working.¹²¹ His retaliation claim survived a summary judgment motion because, the court found, “[u]nlike the situation in *Garcetti* . . . there is a factual dispute in this case concerning whether Kodrea’s complaints . . . were made pursuant to his ordinary duties. As Kodrea notes,

¹¹⁶ *Ruotolo*, 2006 WL 2033662 at *3.

¹¹⁷ *Id.*

¹¹⁸ *Hill*, 2006 WL 2061145 at *11.

¹¹⁹ *Garcetti* 126 S.Ct. at 1960.

¹²⁰ *Kodrea v. City of Kokomo*, No. 1:04-cv-1843-LJM-WTL, 2006 WL 1750071 (S.D. Ind. June 22, 2006).

¹²¹ *Id.* at *4.

nothing in his job description required him to monitor or report misconduct.”¹²²

*Day v. Borough of Carlisle*¹²³: A police officer alleged retaliatory termination after confronting a supervisor about the department’s failure to investigate allegations of criminal acts by other officers.¹²⁴ The court noted that neither the subject matter nor the place of the statements was dispositive before concluding, “[a]lthough the record indicates that Plaintiff had supervisory responsibility over junior officers, and it may be inferred that he had a duty to report disciplinary problems to his superiors, Plaintiff has not alleged that he was duty-bound to report or investigate infractions by those persons who were the subject of his statements.”¹²⁵

*Batt v. City of Oakland*¹²⁶: A court denied summary judgment in case involving a rookie police officer alleging First Amendment claims after reporting egregious criminal misconduct by the officers who were training him.¹²⁷ Making reference to the language in *Garcetti* that discusses the difference between “formal job descriptions” and “the duties an employee actually is expected to perform,” the court determined that, given the evidence of a culture to the contrary, the department’s assertions that

¹²² *Id.* at *8.

¹²³ *Day v. Borough of Carlisle*, No. CIV 1:CV04-1040, 2006 U.S. Dist. Lexis 46434 (M.D. Pa. July 10, 2006).

¹²⁴ *Id.* at *4.

¹²⁵ *Id.* at *18.

¹²⁶ *Batt v. City of Oakland*, No. C 02-04975 MHP 2006 U.S. Dist. Lexis 47889, (N.D. Cal. July 12, 2006).

¹²⁷ *Id.* at *1 (“during plaintiff’s two-week tenure . . . he witnessed numerous illegal and brutal acts on the part of his supervising officer and three other OPD officers” as well as “deliberate falsification of police reports”).

reporting police misconduct was an official duty of the employee were not dispositive.¹²⁸

*Locklear v. Person County Board*¹²⁹: A principal alleged retaliation in response to her having voiced concerns about a new test score policy initiated by the administration. She spoke about her concerns in a private meeting with her immediate supervisor and in a meeting with her staff.¹³⁰ The court dismissed other claims but refused to dismiss the claim of First Amendment retaliation, saying, “the record is not sufficiently developed at this stage of the case to determine whether Dr. Locklear’s speech was made pursuant to her official duties.”¹³¹

*Wilcoxon v. Red Clay Consolidated School District Board of Education*¹³²: Here the court not only denied defendant’s motion to dismiss but added an explicit finding that a journal kept by the plaintiff “was protected speech within the meaning of the First Amendment.”¹³³ The teacher had documented a colleague’s frequent absences in a private journal kept in his desk.¹³⁴ When the document was discovered by a school official, he faced retaliation, including nonrenewal of his contract. The court found *Garcetti* irrelevant because “[p]laintiff’s journal containing the absences of a fellow teacher was

¹²⁸ *Id.* at *12.

¹²⁹ *Locklear v. Person County Board of Education*, No. 1:05CV00255, 2006 WL 1743460 (M.D. N.C. June 22, 2006).

¹³⁰ *Id.* at *9.

¹³¹ *Id.*

¹³² *Wilcoxon v. Red Clay Consolidated School Dist. Bd. of Educ.*, No. CIV. 05-524SLR, 2006 WL 1793546 (D. Del. June 30, 2006).

¹³³ *Id.* at *6.

¹³⁴ *Id.* at *2 and 4. The plaintiff indicated he had kept the documentation in order to protect himself in the event that a student was injured due to the lack of supervision resulting from the colleague’s absence.

not written pursuant to his official duties as a teacher. He was not employed to monitor the absences of fellow teachers”¹³⁵ The court found that the information about the no-show teacher on the public payroll was a matter of public concern and the “personal nature” of the plaintiff’s speech—a private journal—did not “vitiating the status of the statement as addressing a matter of public concern.”¹³⁶

Without reading too much into early returns (the courts’ hesitation to grant summary judgment may reflect nothing more than caution in interpreting a recent ruling and the plaintiff-friendly standard in early stages of litigation), there is reason to believe *Garcetti* is less pro-employer than it would initially appear. Courts are interpreting *Garcetti* as a recognition that an employer’s word about an employee’s official duties is not dispositive, giving plaintiffs some leverage to resist dismissal and summary judgment.

3. Initial Confusion

Courts wishing to evade a higher court ruling rarely do so openly.¹³⁷ And it is not uncommon for it to take a while for the dust to settle after a Supreme Court ruling. As one court noted, “I have no doubt that many courts will struggle to define the breadth of *Garcetti* and its impact on First Amendment jurisprudence.”¹³⁸ It is unclear whether a desire to evade or mere confusion was to blame where a court addressed a teacher’s claim of retaliation for having worn a t-shirt at school drawing attention to a union contract dispute.¹³⁹ The court quoted *Garcetti* at some length but failed entirely to conduct the relevant

¹³⁵ *Id.* at *5.

¹³⁶ *Id.* at *6 (quoting *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-416 (1979)).

¹³⁷ Lower courts rarely disagree with Supreme Court holdings, at least in published opinions. One departure from this general rule was *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000), in which the appellate panel took exception in a footnote to the Supreme Court’s reading of *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997), an en banc decision: “It is arguable that the Supreme Court’s reading of *Fisher* was inaccurate. . . . In any event, any possible disagreement . . . is rendered moot by *Reeves*, which now becomes our principal guide on these questions.” *Schnabel*, 232 F.3d at 89, n.5.

¹³⁸ *Hailey v. City of Camden*, No. 01-3967, 2006 WL 1875402 (D. N.J. July 5, 2006) at *16.

¹³⁹ *Montle v. Westwood Heights School Dist.*, No. 05-10137-BC, 2006 WL 1663304 (E.D. Mich. June 15, 2006).

analysis. Instead, the court proceeded directly to the *Pickering* balancing test,¹⁴⁰ appearing to read *Garcetti* as requiring no additional analysis but merely restating the two sides of the balancing test.¹⁴¹

III. Where *Garcetti* Forecloses First Amendment Protection: What Now?

Even if an unexpected number of employee First Amendment claims survive dismissal and summary judgment motions under post-*Garcetti* analysis, there remains a subset of claimants who now find no First Amendment protection because they are explicitly charged with reporting misconduct and thus almost any speech about wrongdoing can be seen as “pursuant to their official duties.” The position articulated at oral arguments and in the majority opinion echoes the reasoning of Judge O’Scannlain’s dissent from the Ninth Circuit decision: internal whistleblower speech should be protected somehow, just never by the First Amendment.¹⁴² At the second oral argument in *Garcetti*, counsel arguing as amicus curiae for the U.S. responded to a hypothetical from Justice Souter about a prosecutor ordered by a superior not to turn over potentially exculpatory material as required by law: “Well, there would no doubt be other restrictions. . . . The first amendment would not be the—would not be the source of protection.”¹⁴³ The *Garcetti* majority referred to “a powerful network of legislative enactments—such as whistleblower protection laws and labor codes—available to those who seek to expose wrongdoing.”¹⁴⁴ There is also assurance in the text of the Court’s decision, of “some possibility of First Amendment protection” for external whistleblower speech.¹⁴⁵ These claims are worth a closer look.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at *2. Citing *Garcetti* twice, but never mentioning its holding, the court wrote: “As the Supreme Court explained just last month, ‘public employees do not surrender all their First Amendment rights by reason of their employment. . . . However ‘when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.’” (citations omitted)

¹⁴² *Ceballos* 361 F. 3d. at 1192-93 (O’Scannlain, J., dissenting) (“Those who ‘blow the whistle’ on government corruption or mismanagement do deserve reasonable legal protections . . .”).

¹⁴³ Tr. of Oral Argument at 22, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006). March 21, 2006.

¹⁴⁴ *Garcetti*, 126 S.Ct. at 1962.

¹⁴⁵ *Id.* at 1961.

A. The Insufficiency of Whistleblower Statutes

A full analysis of federal and state whistleblower statutes is beyond the scope of this Article; however, even a cursory investigation reveals that expecting existing law to protect legitimate whistleblower claims is at best naïve, at worst, facetious.

As Justice Souter noted in dissent, “the majority’s counsel to rest easy fails on its own terms.”¹⁴⁶ After citing a series of cases in which whistleblower law afforded no protection, he added, “[m]ost significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, the very speech that the majority says will be covered”¹⁴⁷

The gaps in federal law are matched by gaps in state law; at oral argument, counsel for Ceballos described the state of whistleblower laws as “a complete hit-or-miss situation across the country.”¹⁴⁸ For example, Iowa’s whistleblower statute creates a private cause of action when a government employee is discharged in reprisal for disclosing “information [that] evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety”¹⁴⁹ In Indiana, no private right of action exists at all; although the statute provides that “a public employer may not terminate an employee for reporting in writing a violation of law or misuse of public resources,” the employee’s remedy is limited to “appealing any disciplinary action.”¹⁵⁰ Thus, when an Indiana employee was fired for “reporting in writing a violation of law or misuse of public resources,” and filed constitutional and state claims, the claims made under the state whistleblower statute, far from being the most protective of the employee, were instead the ones that were *dismissed first*.¹⁵¹ It was only the plaintiff’s First Amendment claim that survived.¹⁵² New York’s statute, Labor Law Section 740, is similarly unavailing. It has been called “probably the most restrictive and

¹⁴⁶ *Id.* at 1970. (Souter, J. dissenting)

¹⁴⁷ *Id.* at 1971 (citing *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1352 (C.A. Fed. 2001)).

¹⁴⁸ Tr. of Oral Argument at 39, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006). March 21, 2006.

¹⁴⁹ Iowa Code § 70A.29.

¹⁵⁰ Indiana Code § 36-1-8-8(c) and (d).

¹⁵¹ *Kodrea*, 2006 WL 1750071, at *15.

¹⁵² *Id.* at *8.

arcane” of state whistleblower laws.¹⁵³ The law has been found not to cover employees “opposing Medicare billing improprieties,” “fraudulent billing practices,” “fiscal improprieties,” “disclosure of medical records,” or “fraudulent banking activities,” as none of these activities “involve immediate threat to public health and safety.”¹⁵⁴ The state’s Civil Service Law, which covers public employee whistleblowing, is slightly less restrictive but protects only internal, and never public, disclosures.¹⁵⁵

B. Reporting Misconduct to the Press Or to External Authorities: A Catch-22

It has been observed that “[c]ommunications with the news media concerning allegations of misconduct by public officials or employees are among the most jealously guarded forms of free speech.”¹⁵⁶ The *Garcetti* majority took care to note, “[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who “do not work for the government. The same goes for writing a letter to a local newspaper.”¹⁵⁷

Other courts have taken pains to note that even when First Amendment rights are curtailed within the public workplace, the freedom to contact the press is unquestioned.¹⁵⁸ But this freedom is an illusory one. Professor Jack Balkin summed up the realities facing a would-be whistleblower after *Garcetti* thus:

[E]mployees will have incentives not to use such procedures but to speak only in public if they want First Amendment protections (note that if they speak both privately and publicly, they can

¹⁵³ Wayne N. Outten et al., Overview of Workplace Claims in New York: Perspective’s of Employees’ Counsel, in 30th Annual Institute on Employment Law 1210 (PLI LITIG. & ADMIN. PRACTICE, COURSE HANDBOOK SERIES NO. 662, 2001).

¹⁵⁴ Scott Moss, *Where There’s At-Will, There are Many Ways: Redressing The Increasing Incoherence of Employment At Will*. 67 U. PITT. L. REV. 295, 311 & n.70.

¹⁵⁵ *Id.* at n.73.

¹⁵⁶ Leon Friedman, *First Amendment Retaliation* 59 (PLI LITIG. ADMIN. PRACTICE COURSE HANDBOOK SERIES NO. 6700, 2005).

¹⁵⁷ *Garcetti*, 126 S.Ct. at 1961.

¹⁵⁸ *E.g.*, “In contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee’s capacity as a private citizen and touches on matters of public concern.” *Urofsky v. Gilmore*, 216 F.3d 401, 408 (4th Cir. 2000).

be fired for their private speech). However, if they speak only publicly, they essentially forfeit their ability to stay in their jobs, first because they become pariahs, and second, because they have refused to use the employer's internal mechanisms for complaint (mechanisms which, if they used them, would eliminate their First Amendment rights). In short, whatever they do, they are pretty much screwed.¹⁵⁹

Counsel for the defendant acknowledged this Catch-22 when asked at oral arguments about how an employee who goes public with allegations of misconduct fares under the First Amendment¹⁶⁰:

“[I]n some respects, if you're talking about job-required speech that you are -- part of those duties, and the function, is to keep it internally until at least there's some decision by the supervisor, and, rather than do that, you send it to the press or leak that information out, I think a governmental disruption in efficiency can be presumed there. So, I don't think it's as -- I don't think it's as clear that that -- that Mr. Ceballos would have ultimately prevailed under the [Pickering] balancing. I mean, if he had taken the [interrupted] . . . the speech externally, I think there -- that he ultimately would have lost, as well”¹⁶¹

As plaintiff's counsel bluntly put it: “It's a trap.”¹⁶²

¹⁵⁹ Jack Balkin, “Ceballos—The Court creates bad information policy,” May 30, 2006. <http://balkin.blogspot.com/2006/05/ceballos-court-creates-bad-information.html>. A related Catch-22 has been pointed out by Professor Toni Massaro: To avoid the characterization of a problem as a single employee's grievance, an employee would need to seek the support of other employees; doing so, however, can create the kind of disruption that weighs in the employer's favor in a retaliation claim. Recall that Myers, the plaintiff in *Connick*, “was accused of provoking a ‘mini-insurrection.’” Toni Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 24 (1987).

¹⁶⁰ Tr. of Oral Argument at 17, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006). March 21, 2006.

¹⁶¹ *Id.*

¹⁶² *Id.* at 18.

Reporting problems internally first also means it would be impossible for the employee subsequently to give the information to an external source, whether the press or a government official, and remain anonymous. Under *Garcetti*, the safest avenue—still risky and not especially efficient—may well be “to speak anonymously or leak information to reporters and hope that the reporters don’t have to reveal their sources.”¹⁶³ This is an odd incentive being created by a decision—*Garcetti*—premised on the importance of smooth workplace functioning and employee loyalty.

There are also many circumstances where an anonymous tip is simply insufficient to expose wrongdoing. Popular Deep Throat-inspired understandings of how the media work notwithstanding, there are many circumstances in which taking a story public either requires identifying a source or makes the source’s identity easy to determine.¹⁶⁴

IV. Revisiting Pickering, Connick, and Garcetti with a Focus on Public Interest

Connick has been criticized for dragging *Pickering* into a quagmire by drawing unworkable distinctions between employee speech and citizen speech.¹⁶⁵

¹⁶³ Balkin, “Ceballos,” <http://balkin.blogspot.com/2006/05/ceballos-court-creates-bad-information.html>. In “Ceballos and Public Speech: Response to Roosevelt,” June 1, 2006, Georgetown Law professor Marty Lederman discusses how risky this approach has become in light of recent government efforts to force reporters to reveal sources. See, e.g., Adam Liptak, *Justice Dept. is Criticized by Ex-Official on Subpoenas*, N.Y. TIMES, June 1, 2006, at A16. <http://www.nytimes.com/2006/06/01/washington/01chronicle.html?ex=1154404800&en=650ecaf4c47d68bf&ei=5070>.

¹⁶⁴ A tip about incriminating public documents can lead a reporter to file an FOIA request, and the source’s anonymity is undisturbed. However, that approach is ineffectual in many situations, including those involving destroyed public documents or non-public documents beyond the reach of an FOIA.

¹⁶⁵ E.g., Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) (calling current free speech doctrine “fundamentally flawed” and advocating full protection for “external” speech and no protection for “internal” speech with four specific exceptions); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L. Q. 529 (1998) (arguing that a better test would require an employer to show “an interest unrelated to suppressing an employee’s beliefs about management” modeled on *United States v. O’Brien*); Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L. J. 43 (1988) (advocating a “return to Pickering” without the narrowing effects of *Connick*, and allowing any speech that addresses a matter of public concern to be subject to the balancing test); Toni Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987) (advocating protection of all speech, on both private and public matters, unless “any government interests exist that might justify restriction of the speech . . .” *Id.* at 68.)

Yet that much-criticized distinction was retained, and made even more pivotal, in *Garcetti*.

Following the path paved in *Connick* and forgoing the less-traveled-by *Givhan*,¹⁶⁶ the *Garcetti* majority is content to draw a line that will have the effect of shutting out some employees who expose government wrongdoing before any *Pickering* balancing analysis can be undertaken. This in spite of the fact that the distinction between employee speech and citizen speech, always flimsy, is at its weakest where a person is criticizing government corruption, and in spite of the fact that such employees are often uniquely positioned to share information of great public interest. The Court's statement that such employees retain "some possibility" of First Amendment protection when they pursue external channels only emphasizes how little assurance there is of doing so. As Jack Balkin has pointed out, "[T]he effect of the Court's decision is to create very strong incentives against whistleblowing of any kind."¹⁶⁷

Justice Souter would have opted for tweaking the *Pickering/Connick* test in a different way that would have accomplished the majority's goal of weeding out claims not worthy of judicial resources¹⁶⁸ while retaining protection for the most valuable speech.¹⁶⁹

[T]he extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not

¹⁶⁶ A curious choice—*Connick* was a 5-4 decision and *Givhan* a unanimous one.

¹⁶⁷ *Id.*

¹⁶⁸ This concern is evident in the questioning at oral argument. For example, Chief Justice Roberts at one point asked, "[A]ren't these cases going to cause terrible litigation problems?" and at another point noted, "Well, that was my point earlier. They can't make short shrift of those cases, because they're not going to be thrown out at the pleading stage. They're going to have to progress at least to summary judgment . . ." Tr. of Oral Argument at 45 and 50, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), March 21, 2006.

¹⁶⁹ It is arguable that Ceballos would not prevail under Justice Souter's approach. Though Justice Souter would allow "comment on official dishonesty" to "weigh out in an employee's favor," there is no reason to believe it must weigh out in an employee's favor. *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. . . . [I]t is fair to say that only comment on official dishonest, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor.¹⁷⁰

This approach avoids creating perverse incentives to take complaints public before giving supervisors a chance to rectify problems. It raises the bar for First Amendment retaliation claims rather than shutting the door on them.

The wisdom of the Souter approach is illustrated by a claim such as Keith Batt's. Batt is the Oakland Police Department rookie who observed ruthless and pervasive criminal behavior, including the beating of citizens, by his fellow police officers—even by his supervisor.¹⁷¹ It is absurd for a claim regarding a matter of such high public import to have to step over an obstacle as arbitrary as the one created in *Garcetti*¹⁷² to reach the *Pickering* test. As Ceballos's counsel said at oral argument in response to a suggestion that employers “would not be hostile” to receiving information about misconduct: “Unfortunately, there's too much evidence, there's too much water under the bridge that shows that public employees who deliver bad news, and are the unwelcome messenger, do face retaliation in their workplaces.”¹⁷³

CONCLUSION

At first blush, *Garcetti* looked like it had the potential to eviscerate First Amendment protections for the speech of public employees,¹⁷⁴ but the bigger picture indicates that the per se ruling is neither as airtight as its fans hope nor as devastating as its foes fear. There is a subset of employees whose claims can now

¹⁷⁰ *Id.*

¹⁷¹ Batt v. City of Oakland, No. C 02-04975 MHP, 2006 U.S. Dist. Lexis 47889 (N.D. Cal. July 12, 2006).

¹⁷² As Justice Souter put it, in reference to the “scope of responsibilities” test, “This is an odd place to draw a distinction [for First Amendment protection] . . .” *Garcetti*, 126 S.Ct. at 1965 (Souter, J., dissenting).

¹⁷³ Tr. of Oral Argument at 60, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), March 21, 2006.

¹⁷⁴ Bonnie Robin-Vergeer, the Public Citizen Litigation Group attorney who argued on behalf of Ceballos, was quoted as saying that the chances of winning a First Amendment retaliation case after *Garcetti* are “almost none.” Melissa Harris, *Top Court's Actions Affect Rights of Employees*, BALTIMORE SUN, June 9, 2006, at 1G.

be more easily dismissed by a court that wishes to do so—and the decision may well furnish convenient grounds for courts to toss cases from employees even outside that subset. If the first published post-*Garcetti* cases are any indication, however, courts are finding it possible to read *Garcetti* in ways that allow plaintiffs with First Amendment claims to survive summary judgment even when the speech they assert is protected was job-related. *Garcetti* may ultimately have affected far fewer claims than has been hoped or feared.

Nevertheless, there is reason to be concerned that *Garcetti* has cut off avenues for internal and external disclosure of government misconduct by eliminating First Amendment protection. There is also reason for concern that neither existing law nor the option of complaining publicly is an adequate substitute for constitutional protection. The loss of protection of valuable speech is not even likely to be offset by expedited disposition of cases or a corresponding drop in case filings because the threshold question requires determining what constitutes an employee’s “official duties” and is itself subject to litigation, as post-*Garcetti* cases illustrate.

A better adjustment of *Pickering* and *Connick* would be one that, as Justice Souter recommends, raises the bar for employee claims but leaves the door open for constitutional protection of particularly valuable kinds of speech alerting the public to government wrongdoing.

That yet another major First Amendment case has been decided by a single vote lends credence to Professor Rodric Schoen’s observation that “reasonable minds will differ on the ‘proper’ resolution of these cases.”¹⁷⁵ Years before the Court revisited the issue, Schoen wrote, “[G]iven the sharp divisions in *Connick* and *Rankin* [both 5-4 decisions], perhaps the Justices . . . have decided that there is nothing more to be said on public employee free speech cases,” and added somewhat presciently, “or at least nothing to be added that would simplify resolution of these cases in the lower courts.”¹⁷⁶

¹⁷⁵ Rodric Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 51 (1999).

¹⁷⁶ *Id.*