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FROM *PICKERING* TO *CEBALLOS*: THE DEMISE OF THE PUBLIC EMPLOYEE FREE SPEECH DOCTRINE

*Jessica Reed**

INTRODUCTION

The Los Angeles Police Department suffered an enormous loss of public confidence when the “Rampart” corruption scandal came to the fore in the fall of 1999.¹ Officer testimony revealed drug deals, perjury, and at least one instance of disturbing conduct in which an officer handcuffed a member of a local gang, shot him, and then planted the gun on the now-paralyzed victim to avoid blame.² Gil Garcetti, then Los Angeles District Attorney,³ attempted to sustain some public trust as he promised to thoroughly

* A graduate of the City University of New York School of Law in 2007. The Author offers heartfelt thanks to Nancie Flaxman (Mama), John Reed (Dadjio), and John Daniel Clifton (Ubbo). Lily Goetz, Karuna Patel, Caitlin/Owen Daniel-McCarter, Ruthann Robson, and Andrea McArdle: thank goodness you do not listen when told to hold your tongues.

¹ The scandal had been extensive:

In March 2000 . . . the interest of the LA community in preventing, disclosing, and rectifying police misconduct was at its zenith. Six months earlier, LA had been shaken by one of the worst police scandals in U.S. history, involving corruption and widespread abuses by an anti-gang unit of the LA Police Department (LAPD) assigned to the Rampart area of the city. The Rampart scandal broke in mid-September 1999, when a member of the Rampart unit, Rafael Perez, then being tried on drug-theft charges, revealed in exchange for leniency that he and another officer had shot an unarmed man and planted a gun on him to cover it up Perez implicated dozens of officers in the Rampart unit in criminal activities and serious acts of misconduct, including attempted murder, planting evidence, false imprisonment, beatings, theft of money and drugs, unauthorized searches, obstruction of justice, false police reports, and perjury

Brief for Respondent at 1–2, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473) [hereinafter Brief for Respondent] (internal citations omitted). *But see* John Mills, Op-Ed., *Voices/A Forum for Community Issues, Community Debate on the Rampart Scandal: The Police Must Retain Order* . . . , L.A. TIMES, Oct. 2, 1999, at B9 (“The LAPD is caught in the middle.”).

² *See, e.g.*, Rich Connell & Robert J. Lopez, *Rampart Probe May Put Gang Injunction at Risk: LAPD Officers Testimony Called Fabricated*, L.A. TIMES, Sept. 19, 1999, at A1; *see also* Matt Latt & Scott Glover, *FBI Launches Probe into Rampart Scandal*, L.A. TIMES, Feb. 24, 2000, at A1.

³ Gil Garcetti was the Los Angeles District Attorney from 1992–2000. Los Angeles County District Attorney’s Office, *Former Los Angeles County District Attorneys*, <http://da.co.la.ca.us/history/default.htm> (last visited Oct. 23, 2007).

investigate the charges.⁴

Just one year later Richard Ceballos, a Los Angeles Assistant District Attorney who had alerted his supervisors to possible police misconduct, charged his employers with retaliation for activity protected by the First Amendment.⁵ His case eventually changed public employee free speech doctrine so radically as to take the government employee out of the picture entirely.

According to public employee⁶ free speech doctrine at the time Ceballos initiated his 42 U.S.C. § 1983 action, the *Connick-Pickering* test required first an inquiry into whether the speech pertained to a matter of public concern.⁷ If the speech at issue were classified as merely routine employment speech, with no importance to the public, then it received no First Amendment protection and the inquiry ended there.⁸ If the memo were judged instead to be important to other citizens, then its speaker *might*

⁴ Garcetti made numerous public statements indicating an ensuing, intensive investigation, and expressing remorse at the devastation caused by the scandal. One such statement seems ironic, considering his later actions against Ceballos: "I have been a prosecutor for over [thirty] years. I know the terrible cost to society and the justice system if even one cop goes bad. The credibility of all law enforcement becomes immediately suspect. That's why this corruption investigation is so vitally important to everyone." Greta Van Susteren, Roger Cossack & Charles Feldman, *L.A. Police Turns Investigative Eye on Men and Women in Blue* (CNN television broadcast Sept. 24, 1999).

⁵ Brief for Respondent, *supra* note 1, at 8.

⁶ Within this Note "government employee" and "public employee" will be used interchangeably to remind the reader of the inherent tension between working for the State and working as a citizen for one's peers—a conflict apparent throughout the doctrine of public employee free speech protections.

⁷ In *Pickering*, the Court refused to concretize the definition of public concern due to the "enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968). Yet, Justice Marshall did articulate the heft public concern *could* carry when he wrote that "public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment . . ." *Id.* at 573. Justice White reiterated this worth fifteen years later in *Connick*: "Speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

⁸ *Connick*, 461 U.S. at 146 ("[W]hen a public employee speaks . . . not as a citizen upon matters of public concern . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." (citing *Bishop v. Wood*, 426 U.S. 341, 349–50 (1976) (reasoning that federal courts are not the proper forum for employment decisions when no constitutionally protected right is at issue))).

retain First Amendment protection.⁹ Passing the public concern hurdle, next the speech at issue was weighed against the government's interest in being an efficient employer.¹⁰ The government's interest in avoiding workplace disruption often outweighed the individual's First Amendment right to free speech; overcoming these two barriers—public concern and the balance of interests—was difficult for employees.¹¹ Yet, surviving the first two considerations did not guarantee First Amendment protection: the employee must *also* have proved that the protected speech “was a ‘substantial factor’ or . . . a ‘motivating factor’” in the adverse employment decision.¹² If not, the court may have determined that the employee was justly terminated if the employer could prove “by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.”¹³

A jury never weighed the evidence in Ceballos's case. He brought his claim in the United States District Court for the Central District of California, where it was dismissed at the summary judgment stage.¹⁴ The Ninth Circuit reversed.¹⁵ Eventually the Supreme Court heard the parties' arguments.¹⁶ In its decision, the Court shifted public employee free speech doctrine by adding a bright-line rule that narrowed the group of protected speakers.¹⁷

⁹ See Hon. D. Duff McKee, *Termination or Demotion of a Public Employee in Retaliation for Speaking out as a Violation of Right of Free Speech*, 22 AM. JUR. 3D *Proof of Facts* § 10 (2005) (summarizing Supreme Court decisions regarding right of free speech).

¹⁰ *Connick*, 461 U.S. at 149–54.

¹¹ See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 55–56 (1990).

¹² *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 n.21 (1977)).

¹³ *Id.*

¹⁴ *Ceballos v. Garcetti*, No. CV 00-11106 (C.D. Cal. Jan. 30, 2002), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

¹⁵ *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

¹⁶ In fact, the Court heard the arguments *twice*. *Garcetti v. Ceballos* was first argued in front of the Supreme Court on October 12, 2005, during the brief period when both Chief Justice John Roberts and Justice Sandra Day O'Connor shared the bench. See SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES (2006), available at <http://www.supremecourtus.gov/about/members.pdf>. After Justice O'Connor left the Court and Justice Samuel Alito was sworn in, the Court decided to rehear the arguments on March 21, 2006. Georgetown University law professor Martin Lederman explained: “It is likely that *Garcetti* is the only one of the 20 [sic] 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.” David L. Hudson, Jr., *The Return of the Reargument: Supreme Court to Hear Again a Key Employee Free Speech Case*, 5 No. 1 ABA J. E-REPORT 1 (Mar. 17, 2006).

¹⁷ *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

Justice Kennedy wrote the plurality opinion, holding “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.”¹⁸

Part I of this Note will trace the historical development of public employee free speech doctrine from its inception in *Pickering v. Board of Education*. Part II will relay the factual and procedural history of *Garcetti v. Ceballos*, and explain the arguments that both parties made to the Supreme Court. Part III will discuss the Court’s majority and dissenting opinions in *Garcetti v. Ceballos*. Part IV will conclude the Note with an argument: by separating government employees into unrealistic molds of worker-selves and citizen-selves, the Court’s ruling created a compartmentalization that not only leaves public employees vulnerable to retaliation for exposing governmental misconduct or inefficiencies, but also neglects the public’s interest in hearing such speech.

I. HISTORICAL/CONSTITUTIONAL PERSPECTIVE

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,”¹⁹ and yet, before 1968, government employees could suffer job loss and other retaliation for their speech.²⁰ In his infamous iteration of the right-privilege doctrine at the end of the nineteenth century,²¹ Justice Oliver Wendell Holmes, then serving on the Supreme Judicial Court of Massachusetts, opined that “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”²² Until the late 1960s, courts echoed

¹⁸ *Id.* at 1960.

¹⁹ U.S. CONST. amend. I.

²⁰ See, e.g., Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 895 (2005) (discussing *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892)).

²¹ For a thorough explanation of the right-privilege doctrine current in 1968, see William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

²² *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). Nearly thirty years later, Holmes would write about the usefulness of protecting speech to further democracy’s “free trade in ideas.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.”). Yet, when the government acts as employer and not as sovereign, Holmes saw a distinction. Because the employee “takes the employment

Holmes's rhetoric²³ to quash government workers' petitions for relief from the employment discrimination that often followed their expressions of unpopular beliefs or affiliations.²⁴

A. *The Pickering Balancing Test*

In 1968, the Supreme Court broke from Holmes's dogma when it decided *Pickering v. Board of Education*, which established the seminal rule including public employees within the ambit of the First Amendment right to free speech.²⁵ *Pickering's* analysis balances the government's interest as an employer in efficient control of the workplace against employees' interests in speaking on public matters without fear of retaliation.²⁶

Marvin L. Pickering was a public high school teacher in Will County, Illinois.²⁷ Following the county's failure to approve a proposed tax increase for the school board, Pickering sent a letter to the local paper criticizing the board's disproportionate allocation of funds between educational and athletic programs.²⁸ Pickering signed the letter "as a citizen, taxpayer and voter, not as a teacher," because previously, teachers' letters written for publication first had to receive approval from the superintendent.²⁹ Much to the dismay of the district school board, the paper published Picker-

on the terms which are offered him[,] . . . the [government] may impose any reasonable condition upon holding offices within its control." *McAuliffe*, 29 N.E. at 518.

²³ Justice Holmes recognized the danger in repeating his well-crafted epigrams: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

²⁴ *E.g.*, *Adler v. Bd. of Educ. of N.Y.*, 342 U.S. 485 (1952) (holding that dismissal from employment in the public school system based on membership in a "subversive organization" may limit one's choice between membership in the organization and public employment but does not limit one's right to free speech or association), *overruled in part by Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (rejecting the theory that public employment may be subject to any condition, no matter how unreasonable); *see also Washington v. Clark*, 84 F. Supp. 964, 966 (D.C. Cir. 1949) ("The Government may not imprison a person for making various utterances, but it may, if it sees fit to do so, dismiss a Government employee who makes such utterances.").

²⁵ 391 U.S. 563, 572 (1968) (explaining that, because teachers are the members of the public most likely to have access to information relevant to the school board decisions, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal").

²⁶ *Id.* at 568 ("The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

²⁷ *Id.* at 564.

²⁸ *Id.* at 566.

²⁹ *Id.* at 576-78.

ing's editorial.³⁰ Responding directly to the printed letter, the board fired Pickering.³¹ Pickering challenged his dismissal.³² In its first clear decision for public employees in the field of First Amendment free speech protections, the Supreme Court found for the teacher.³³

The Court reasoned that Pickering's actions were substantially similar to those of a citizen because "the fact of [his] employment [was] only tangentially and insubstantially involved in the subject matter of the public communication"³⁴ As a teacher, Pickering rarely interacted with members of the school board, and so no concerns about "maintaining either discipline by immediate superiors or harmony among coworkers" were present.³⁵

The Court's articulation and application of this doctrine has been inconsistent nearly since its inception in *Pickering*. The first post-*Pickering* cases protected government employees' free speech, while subsequent cases have tended to chip away at that right.³⁶

B. What Pickering Taught During its First Fifteen Years: The Beginning of a Public Employee Free Speech Doctrine

Pickering upheld access to First Amendment protection in recognition that workers are also citizens and, by virtue of their jobs, may be able to add vital information to the public discourse that supports democracy.³⁷ The Supreme Court reaffirmed the

³⁰ *Id.* at 566.

³¹ *Id.*

³² *Id.* at 566–67.

³³ *Id.* at 574–75.

³⁴ *Id.* at 574.

³⁵ *Id.* at 570. "The *Pickering* Court's decision upholding [Pickering's] First Amendment claim was influenced by the fact that the teacher's public statements had not adversely affected his working relationship with the objects of his criticism" *Givhan v. W. Line Consol. Sch. Dist. Bd. of Educ.*, 439 U.S. 410, 414 n.3 (1979).

³⁶ "Over the past thirty years, the extent of First Amendment protection available to public employees' speech has resembled a roller coaster." Patricia C. Camvel, *Waters v. Churchill: The Denial of Public Employees' First Amendment Rights*, 4 WIDENER J. PUB. L. 581, 585 (1995). "The history of protecting the speech of government employees has been one of expansion and subsequent contraction of rights. . . . [M]any appellate courts have been busy devising new tools for restricting the speech rights of government employees." 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, 672 (2005).

³⁷ Justifications for a strong First Amendment often point to the belief that rigorous debate creates a healthy democracy. See *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open

strength of this right in 1972 in *Perry v. Sindermann*, when it held that summary judgment “without full exploration of the issue” of a teacher’s First Amendment claim against a school was “improper.”³⁸

Professor Sindermann raised both a First Amendment free speech claim and a Fourteenth Amendment due process claim after being fired by a junior college for publicly criticizing the school’s Board of Regents.³⁹ The district court granted summary judgment for the school because Sindermann was untenured and therefore an employee at-will.⁴⁰ Both the Fifth Circuit Court of Appeals and the Supreme Court recognized that a lack of tenure was not dispositive of Sindermann’s First Amendment claim because the reason for Sindermann’s termination was “in total dispute.”⁴¹ The Court recalled that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”⁴²

In 1977, Justice Rehnquist articulated a further question for courts to ask after applying the *Pickering* balancing test and finding for the petitioner. Although this subsequent step did not create a significant barrier to petitioners, its addition to the rule demonstrates how the Court built progressive obstacles to accessing the right. The speech at issue in *Mount Healthy City School District Board of Education v. Doyle* was a statement made by an untenured teacher regarding the school’s new dress-code policy for faculty.⁴³ Doyle, angered by the policy, spoke to a local radio personality, who then repeated the statements on air.⁴⁴ Although Doyle apologized to the principal and recognized the impropriety of the venue for first expressing his criticism, the principal recommended that the school

. . .”). This belief presupposes that there is a truth to be revealed by adding more speech to the pot. See William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995) (arguing that the search for truth remains the most viable justification for freedom of speech under the First Amendment). But see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 141 (1989) (proffering a study of the relationships between multiple First Amendment justifications and arguing that “[a] good answer to many social problems depends not so much on the discovery of ‘true principles’ as on an accommodation of competing interests and desires.”).

³⁸ 408 U.S. 593, 598 (1972).

³⁹ *Id.* at 594–95.

⁴⁰ *Id.* at 596.

⁴¹ *Id.* (quoting *Sindermann v. Perry*, 430 F.2d 939, 943 (5th Cir. 1970)).

⁴² *Id.* at 597.

⁴³ 429 U.S. 274, 282 (1977).

⁴⁴ *Id.*

board not rehire the teacher.⁴⁵ Doyle claimed this action infringed his First Amendment right to free speech.⁴⁶

The Court agreed with Doyle that his speech received First Amendment protection but held that a further inquiry was required.⁴⁷ "[T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."⁴⁸ Causation had entered the rule.⁴⁹

Givhan v. Western Line Consolidated School District, decided eleven years after *Pickering* and just shortly after *Mount Healthy*, extended the protection of speech to private conversations between government employees and their superiors, thus swinging the scope of the right back into the employee's domain.⁵⁰ The plaintiff, Bessie Givhan, had been terminated from her position as a junior high school teacher shortly after she voiced concerns to her superior regarding a racially discriminatory school policy.⁵¹ The district court agreed that her speech was protected, but the Fifth Circuit reversed, finding that "because [Givhan] had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment."⁵² The Supreme Court reversed the Fifth Circuit's holding and remanded it for further proceedings: "Neither the [First] Amendment itself nor our decisions indicate that this freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than spread his views before the public."⁵³ Private conversations, which may contain issues of public concern, will burden an employer's interest in efficiency when interpersonal conflicts arise, but they may not be excluded per se from First Amendment protection simply because they were not made directly to the public.⁵⁴

⁴⁵ *Id.*

⁴⁶ *Id.* at 276.

⁴⁷ The Court also agreed with the district court that the speech was protected by the Fourteenth Amendment. *Id.* at 284.

⁴⁸ *Mount Healthy*, 429 U.S. at 287.

⁴⁹ See Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 17-20 (1987) (discussing the hurdle causation places before a plaintiff).

⁵⁰ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

⁵¹ *Id.* at 411-13.

⁵² *Id.* at 413.

⁵³ *Id.* at 415-16.

⁵⁴ Rehnquist further explained this public-private doctrinal distinction:

Although the First Amendment's protection of government employees

C. *Limiting Pickering's Speech-Protective Authority*

The Court's ruling in *Connick v. Myers*⁵⁵ marked the erosion of speech protections for employees once again.⁵⁶ After *Connick*, government employees still retained some First Amendment protection, but courts more heavily weighed the context of the speech and the employee's role at the time.⁵⁷ While *Mount Healthy* added an inquiry after the balancing test, the Court in *Connick* held that a threshold determination that the speech be of public concern must be made *before* the court could move on to a *Pickering* balance.⁵⁸

Connick presented the issue of whether a questionnaire circulated within an office and about purely internal office issues could be protected as a matter of public concern by the First Amendment.⁵⁹ Sheila Myers was employed as an Assistant District Attorney under Harry Connick, the District Attorney for Orleans Parish.⁶⁰ Much to her dismay, Myers was going to be transferred to another location.⁶¹ A superior told her that she held a minority opinion in opposing the office policy on transfers.⁶² Myers decided to research that assertion further and thus created the

extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." . . . Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Id. at 415 n.4 (citation omitted).

⁵⁵ 461 U.S. 138 (1983) (5–4 decision).

⁵⁶ See Jonathan Alen Marks, *Connick v. Myers: Narrowing the Scope of Protected Speech for Public Employees*, 5 U. BRIDGEPORT L. REV. 337 (1984). Marks listed the potential threefold impact: qualified employees will avoid public employment so as to avoid reduced constitutional protections, limiting public employees' speech will cause a loss in governmental efficiency, and the specter of adverse employment actions will silence public employees. *Id.* at 361.

⁵⁷ This limitation of a public employee's right to free speech prompted one author to argue that because *Connick* exempts so much speech from protection, it is a "doctrinal failure." Jeffrey A. Shooman, *The Speech of Public Employees Outside the Workplace: Towards a New Framework*, 36 SETON HALL L. REV. 1341, 1363 (2006).

⁵⁸ *Connick*, 461 U.S. at 146.

⁵⁹ *Id.* at 141.

⁶⁰ *Id.* at 140.

⁶¹ *Id.*

⁶² *Id.* at 141.

speech at issue, a questionnaire.⁶³ Shortly after Myers distributed the questionnaire, a First Assistant District Attorney told Connick that Myers was fomenting a "mini-insurrection."⁶⁴ Connick subsequently fired Myers for her refusal to accept the transfer, and stated that her distribution of the questionnaire was an act of insubordination.⁶⁵

Myers brought suit pursuant to 42 U.S.C. § 1983, claiming that she had been fired in retaliation for the exercise of a constitutionally protected right—free speech.⁶⁶ The district court agreed with Myers and ordered her reinstated with back pay, damages, and attorneys' fees.⁶⁷ Connick appealed to the Fifth Circuit, which affirmed.⁶⁸ The Supreme Court granted Connick's writ of certiorari.

The Court focused on the language in *Pickering* that explained both why public employees' right to free speech cannot be infringed merely because they are employed by the government and why that protection must be limited.⁶⁹ *Pickering's*:

repeated emphasis . . . on the right of a public employee "as a citizen, in commenting upon matters of public concern" . . . reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.⁷⁰

Thus, according to *Connick*, public employees who raise claims under the First Amendment must distinguish their speech as relating to a matter of public concern and not a solely personal expression, such as a workplace grievance.⁷¹ Under this standard, a court must look into all of the facts presented in order to make the distinction. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."⁷² The *Connick* court decided that Myers's "questionnaire touched upon matters of public concern in only a most limited sense; her survey . . . is most accurately characterized as an employee grievance con-

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 141–42.

⁶⁸ *Id.* at 142.

⁶⁹ *Id.*

⁷⁰ *Id.* at 143.

⁷¹ *Id.* at 147.

⁷² *Id.* at 147–48.

cerning internal office policy.”⁷³ As such, the Court held that Myers’s speech failed the first step in the inquiry. The Court did not have to use the *Pickering* balancing test because the speech—not a matter of public concern—would automatically receive no First Amendment protection under the Court’s public employee speech jurisprudence.⁷⁴

The subsequent case in this line, *Rankin v. McPherson*, involved speech overheard by a coworker, and while it did not shift the doctrine, it presents an example of the Court weighing the employee’s interest against the employer’s and finding for the employee.⁷⁵ Ardith McPherson, conversing with a coworker in the county constable’s office about the failed attempt on Ronald Reagan’s life, stated, “[I]f they go for him again, I hope they get him.”⁷⁶ Another coworker overheard her statement and reported it to the employer, Rankin.⁷⁷ McPherson was fired that afternoon.⁷⁸ Justice Marshall authored the Court’s opinion, and found the speech to be a matter of public concern that, when balanced against the employer’s interest in efficiency, weighed in favor of the employee.⁷⁹

The *Rankin* decision suggests that political conversations among employees, in and outside of workplace responsibilities, are conversations that add to public debate and enliven democracy.⁸⁰ Justice Marshall offers a relevant and important advisement, stating “[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it ham-

⁷³ *Id.* at 154.

⁷⁴ *Id.*

⁷⁵ 483 U.S. 378 (1987) (5–4 decision).

⁷⁶ *Id.* at 381.

⁷⁷ *Id.*

⁷⁸ *Id.* at 382.

⁷⁹ *Id.* at 390–92.

⁸⁰ See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–99 (2006) (discussing the democratic benefits of transparency in government and reviewing key scholars of various theories of democracy). Fenster writes: “Ultimately, modern political theory and open government legislation assume transparency can operate as a force capable of establishing a public and a public sphere itself, creating legitimate government and then legitimating the actions of the government that it creates by enabling informed individual choice and collective, democratic decisionmaking.” *Id.* at 899. See also CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003) (discussing the role of the workplace in enriching the diverse democracy that is United States society). Public discourse and political deliberation legitimize democratic decisionmaking, encourage moral obligation of the losers to abide by majority decisions they oppose and serve to form cooperative bonds among diverse individuals. Estlund argues that conversations among co-workers should and do constitute public discourse and a mode of participation in civil society in a regular and vital way. See *id.* at 118–24.

pers public functions but simply because superiors disagree with the content of employees' speech."⁸¹ Mere disagreement with an employee's speech cannot withstand constitutional scrutiny as a reason for disciplinary action.

Waters v. Churchill addressed what to do when the actual content of the speech is in dispute.⁸² Churchill, an employee in the obstetrics department of a public hospital, was fired for a conversation she had with another nurse.⁸³ A coworker who overheard part of the conversation reported it to Churchill's supervisor, Waters.⁸⁴ Waters contended that Churchill had been negatively commenting on Waters and on her department in general.⁸⁵ Churchill maintained that she was speaking about the hospital's "cross-training" policy⁸⁶ and about her concern that it affected patient safety.⁸⁷ Churchill was fired for the statements made during this conversation.⁸⁸ She followed the hospital's internal procedures for appealing the employment decision, but her grievance was rejected.⁸⁹ This led her to bring suit under 42 U.S.C. § 1983, charging an infringement of her First Amendment right to freedom of speech.⁹⁰

The district court granted summary judgment for the employer finding that the speech did not touch on a matter of public concern, regardless of whose version was to be believed.⁹¹ The Seventh Circuit reversed, holding that the speech did qualify as a subject of public concern, and that the actual content of the speech should be at issue—not what the employer believed the speech to be.⁹² The Supreme Court granted certiorari to resolve a conflict among the circuits regarding what to do when the content of the speech itself is at issue.⁹³

Justice O'Connor reminded the Court that "the First Amendment creates a strong presumption against punishing protected

⁸¹ *Rankin*, 483 U.S. at 384.

⁸² *Waters v. Churchill*, 511 U.S. 661, 664 (1994) (plurality opinion).

⁸³ *Id.*

⁸⁴ *Id.* at 665.

⁸⁵ *Id.*

⁸⁶ This policy allowed nurses to work at another location in the hospital when their usual station was overstaffed. *Id.* at 666.

⁸⁷ *Id.*

⁸⁸ *Id.* at 664.

⁸⁹ *Id.* at 666–67.

⁹⁰ *Id.* at 667. In her § 1983 action, Churchill claimed that her employer violated her First Amendment rights because her speech was protected under *Connick*. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 667–68.

speech even inadvertently”⁹⁴ In *Waters*, there existed a few versions of the speech at issue—the employee’s version, the government employer’s version, and the version believed by the trier of fact. The question of whom to believe, and why, led the Court to rearticulate an important distinction between the government’s two roles at play in public speech conflicts: the government-as-sovereign and the government-as-employer.⁹⁵ “The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”⁹⁶ When acting as sovereign, the government must decide the speech it may suppress with care, but when acting as an employer, the demand for efficiency in the government’s business allows for a relaxed standard. Hence, “[t]he government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.”⁹⁷

In order to promote efficiency and yet still protect against a possible invasion of government employees’ free speech, the Court offered a standard of reasonableness. “If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care.”⁹⁸ *Waters* addressed the limited scenario of an employer engaging in a negative employment action because of an erroneous belief about an employee’s speech. The employer will not be held liable if that erroneous belief is reasonable.

In 1994 the Court extended First Amendment free speech protection to at-will, independent contractors who work for the government. *Board of County Commissioners v. Umbehr* involved public comments that a solid-waste hauler made against his employer.⁹⁹ The contractor criticized the county’s landfill user rates and claimed it mismanaged taxpayer funds.¹⁰⁰ Eventually the Board succeeded in voting to negate its contract with Umbehr. Umbehr

⁹⁴ *Id.* at 670.

⁹⁵ *Id.* at 671 (revisiting *Connick v. Myers*, 461 U.S. 138 (1983)).

⁹⁶ *Id.* at 675.

⁹⁷ *Id.*

⁹⁸ *Id.* at 677.

⁹⁹ 518 U.S. 668, 671 (1996).

¹⁰⁰ *Id.*

brought suit charging retaliation for protected speech.¹⁰¹ The Court decided that “independent contractors are protected, and . . . the *Pickering* balancing test, adjusted to weigh the government’s interests as contractor rather than as employer, determines the extent of their protection.”¹⁰² The Court agreed with the lower court holding and remanded the case for a decision using the test as articulated above.¹⁰³

The speech at issue in *San Diego v. Roe*, decided in 2004, occurred outside of the workplace and was *mostly* unrelated to work: a police officer sold videos of himself stripping and masturbating while wearing a generic police uniform.¹⁰⁴ He filmed himself and sold the videos—the speech at issue—on eBay while off-duty.¹⁰⁵ Following an internal investigation, Roe’s supervisor ordered him to cease his side business.¹⁰⁶ After Roe did not fully comply, and following subsequent discipline, he was dismissed from the police force.¹⁰⁷ The Supreme Court, per curiam,¹⁰⁸ found that Roe’s expression did “not qualify as a matter of public concern under any view of the public concern test.”¹⁰⁹ This decision did not move the doctrine, but the Court did offer a definition of public concern: “something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”¹¹⁰ Accordingly, Roe’s videos met none of these definitions.

Garcetti v. Ceballos entered the public employee free speech doctrine at this point, where there existed several steps in the test to determine whether there had been a violation of an employee’s First Amendment right. To summarize, courts must first inquire whether the speech is of public concern, by considering the entire record and the speech’s content, form, and context.¹¹¹ *Connick* explained this as a separation of speech into two categories: speech

¹⁰¹ *Id.* at 671–72.

¹⁰² *Id.* at 673.

¹⁰³ *Id.* at 685.

¹⁰⁴ 543 U.S. 77, 78 (2004).

¹⁰⁵ *Id.* at 78, 80.

¹⁰⁶ *Id.* at 79.

¹⁰⁷ *Id.*

¹⁰⁸ Not only was the case decided per curiam, but it was also decided purely on the parties’ briefs. Shooman, *supra* note 57, at 1359.

¹⁰⁹ *Roe*, 543 U.S. at 84.

¹¹⁰ *Id.* at 83–84. One scholar commented that the Court, in focusing on the detriment and harm to the San Diego Police Department, implicitly applied the *Pickering* balancing test, thereby not addressing whether speech made outside of the workplace and unrelated to one’s job should be protected. Shooman, *supra* note 57, at 1362–63.

¹¹¹ *Connick*, 461 U.S. at 147–48.

that is of public import and speech that is merely personal.¹¹² If the speech passes this public concern/import threshold, the analysis moves to the *Pickering* balance: whether the employee's interest in free speech outweighs the employer's interest in maintaining an efficient operation.¹¹³ If the employee's protections are deemed to outweigh the employer's interest, the employer may still prevail if it can prove that the adverse employment action would have occurred outside of the protected conduct.

II. BACKGROUND TO *GARCETTI V. CEBALLOS*

A. *Factual History*

Richard Ceballos had been a deputy district attorney in Los Angeles County for eleven years and had been acting in a supervisory role when the Rampart scandal unfolded.¹¹⁴ He was subsequently approached by defense attorney Richard Escobedo in February 2000.¹¹⁵ Escobedo expressed his concern about the constitutionality of a particular search, specifically doubting the veracity of the deputies' testimony as to the evidence offered in support of the warrant.¹¹⁶ He "told Ceballos that he believed that one of the arresting deputy sheriffs may have lied in a search warrant affidavit."¹¹⁷ Ceballos decided to investigate the allegation himself, which entailed, *inter alia*, driving to the location described in the warrant and looking at what had been described in the warrant as a driveway.¹¹⁸ This investigation led Ceballos to believe that the dep-

¹¹² *Id.* at 147.

¹¹³ *Id.* at 150. The Court did not provide a static weight to each side of the balance. "[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate balance of the competing interests." *Id.* Some scholars believe the balance is skewed towards the employer by demanding a threshold before the *Pickering* test. See, e.g., Cynthia K.Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109 (1988). "By requiring the public employee to show that his speech was of public concern, the Supreme Court has demonstrated a disproportionate concern for the government employer's interest in managing the workplace." *Id.* at 1121.

¹¹⁴ See Appellant's Opening Brief at 4, *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004) (No. 02-55418). For a thorough exploration of the scandal, see Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 552-53 (2001) (responding to the LAPD's Board of Inquiry-issued report, titled *Rampart Area Corruption Incident*, Chemerinsky concludes that the LAPD is "seriously diseased and the same culture that gave rise to the Rampart scandal will lead to others unless it is cured.").

¹¹⁵ Appellant's Opening Brief, *supra* note 114, at 4-5.

¹¹⁶ *Id.* at 4-5.

¹¹⁷ *Ceballos*, 361 F.3d at 1171.

¹¹⁸ When deposed, Ceballos described his actions:

uty sheriff had, “at the least, grossly misrepresented the facts.”¹¹⁹

Ceballos spoke to his immediate supervisors, Frank Sundstedt and Carol Najera, about his findings.¹²⁰ The two shared his concern, and so Ceballos prepared a memorandum dated March 2, 2000, which he believed would lead to a dismissal of the case.¹²¹ Instead, Sundstedt and Najera instructed Ceballos to rewrite the memo to sound less accusatory of the sheriff’s department.¹²² Ceballos disagreed with their directions, believing that a rewrite would be improper.¹²³ He told them that he believed the “appropriate course was to redact or black out the objectional [sic] . . . portions of [his] memo that were clearly work product, and . . . to then turn over that portion to the defense in its present form so that they would clearly know that there had been some redaction.”¹²⁴ Yet, Ceballos’s superiors were insistent, and so he complied with their directions.¹²⁵

One week after Ceballos presented a more sanitized version of the memo, he joined Sundstedt and Najera for a meeting with a lieutenant from the Sheriff’s Department to discuss the case.¹²⁶ In the meantime, the defendant had moved to traverse the search warrant.¹²⁷ Up until this point Ceballos assumed that the case was going to be dismissed because he believed the search warrant con-

I reviewed the search warrant in detail, and paid particular attention to the . . . description of the property, and then [the defense attorney] provided photographs as well as a videotape depicting the area in question, and I remember comparing the photographs and the videotape with the description of the warrant and noticing that there was an obvious difference. There was clearly a mischaracterization of the description of the property. The way they had described it in the warrant did not at all match what the photographs were depicting.

Joint Appendix, 2005 WL 16203385, at *32, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

¹¹⁹ *Ceballos*, 361 F.3d at 1171.

¹²⁰ *Id.*

¹²¹ Appellant’s Opening Brief, *supra* note 114, at 5.

¹²² *Id.* (specifically, “Sundstedt [was] concerned with the Sheriff’s Department’s reaction to the report . . .”); see also Jim Crogan, *Soft on Crime Fighters: Higher-ups Ignored Problems with Drug Case, Prosecutor Alleges*, L.A. WEEKLY NEWS, Dec. 20, 2000, available at <http://www.laweekly.com/news/news/soft-on-crime-fighters/5173/> (Ceballos believed that his supervisors “set aside their ethical obligations to satisfy a request for prosecution made by the Sheriff’s officers.”).

¹²³ Joint Appendix, *supra* note 118, at 56.

¹²⁴ *Id.*

¹²⁵ During these discussions, Najera made the following comment to Ceballos, which Ceballos perceived to be a threat: “You know, if you keep thinking like that, talking like that, you’re going to get yourself in trouble with this office.” *Id.* at *56–57.

¹²⁶ *Ceballos*, 361 F.3d at 1171.

¹²⁷ *Id.*

tained apparent inconsistencies.¹²⁸ The meeting at the Sheriff's Department changed his perspective. The Lieutenant verbally attacked Ceballos. He turned to Ceballos and started "ranting and raising his voice saying, 'I don't know who he thinks he is He's more like a defense attorney. He's acting more like a public defender, and I want him off the case.'"¹²⁹ No one defended Ceballos; each of his supervisors remained silent.¹³⁰ Following this encounter Sundstedt indicated that the District Attorney's office "would not dismiss the case prior to the hearing on the search warrant, but would allow the issue to be decided by the judge."¹³¹

Ceballos followed the *Brady v. Maryland* mandate,¹³² which requires prosecutors to disclose exculpatory evidence to defendants in criminal cases,¹³³ and decided to disclose both versions of his memo to defense counsel. Although Sundstedt and Najera discouraged his testifying at the traverse hearing, Ceballos believed it was his duty. Ceballos alleged that when he testified, the prosecutor put up a significant resistance by objecting so often that Ceballos was not able to fully disclose his reasons for believing the search warrant had been invalid.¹³⁴ According to Ceballos, following this hearing Petitioners retaliated against him.¹³⁵

¹²⁸ Joint Appendix, *supra* note 118, at 35–40.

¹²⁹ *Id.* at 45.

¹³⁰ *Id.*

¹³¹ Brief for the Association of Deputy District Attorneys and California Prosecutors Association as *Amici Curiae* in Support of Respondent at 6, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473).

¹³² See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

¹³³ *Id.* at 87.

¹³⁴ Brief for Respondent, *supra* note 1, at 7.

¹³⁵ Ceballos maintained that his supervisors retaliated against him in the following ways:

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

Ceballos v. Garcetti, 361 F.3d 1168, 1171–72 (9th Cir. 2004).

B. Procedural History

Ceballos initiated the § 1983 suit against his employers, claiming that he was retaliated against for exercising a right protected by the First Amendment. Although the United States District Court for the Central District of California maintained that “[a]t first blush . . . [Ceballos’s] speech clearly involved a matter of public concern,”¹³⁶ the court dismissed Ceballos’s suit at the summary judgment stage¹³⁷ and held for the defendants as individuals protected by qualified immunity and as a county protected by Eleventh Amendment immunity.¹³⁸ The court readily acknowledged the scandal surrounding the Los Angeles Police Department: “For reasons that need not be recited—the code word ‘Rampart’ says it all—there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community.”¹³⁹ Yet, the court read a false dichotomy into the following Supreme Court holding in *Connick v. Myers*:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.¹⁴⁰

According to the district court’s interpretation, a government employee cannot be speaking as a citizen when the speech occurs pursuant to his or her job duties.¹⁴¹ One is either a citizen speaking upon matters of public concern that do not relate to one’s job duties, or one is a public employee speaking upon matters of personal interest. Another way to understand this distinction is to view the employee’s speech as speech owned by the government.¹⁴² The district court noted the possibility that Ceballos’s memo might have offered information of interest to the Southern California citi-

¹³⁶ *Ceballos v. Garcetti*, No. 00-11106, slip op. at 9 (C.D. Cal. Jan. 30, 2002).

¹³⁷ *Id.* at 7, *rev’d*, 361 F.3d 1168 (9th Cir. 2004), *rev’d*, 126 S. Ct. 1951 (2006).

¹³⁸ *Ceballos*, 361 F.3d at 1170.

¹³⁹ *Ceballos*, No. 00-11106, slip op. at 9.

¹⁴⁰ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

¹⁴¹ *Ceballos*, No. 00-11106, slip op. at 9.

¹⁴² In fact, Chief Justice Roberts made this argument regarding Garcetti’s speech during the first round of oral arguments when he stated that he had expected Garcetti’s attorney to argue “that it’s speech paid for by the Government, that’s what they pay him for, it’s their speech; and so, there’s no first-amendment issue at all.” Transcript of Oral Argument, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473). Under this view, “[a]n employee performing a job duty speaks at the employer’s behest and as the employer’s mouthpiece.” Andrew J. Ruzicho & Louis A. Jacobs, *Employee Speech*, 28 No. 12 EMPL. PRAC. UPDATE 1 (2005).

zenry, but then limited the definition because the speech at issue—Ceballos’s memo—was created “as part of his job.”¹⁴³

On March 22, 2004, the Ninth Circuit reversed the district court,¹⁴⁴ following its precedent in *Roth v. Veterans’ Administration of the United States*.¹⁴⁵ The court relied upon a constitutional standard that was stricter than the formulation of the Supreme Court’s *Connick-Pickering* balancing test. As articulated by the Ninth Circuit, a public employee’s speech will generally be considered to touch upon a matter of public concern, and “only ‘when it is clear that . . . the information would be of *no* relevance to the public’s evaluation of the performance of governmental agencies’ [would the] speech of government employees receive[] no protection under the First Amendment.”¹⁴⁶ The court also heavily weighed Ceballos’s role as a prosecutor.¹⁴⁷ The Ninth Circuit then went on to balance the speech against the government’s efficiency concerns. Ceballos prevailed, as the government “failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office”¹⁴⁸

The employers argued that speech included in a memorandum is purely of a personal nature, but the court disagreed, noting that even speech contained in the medium of daily work may be considered to be of public concern, and thus deserving of First Amendment protection.¹⁴⁹ The Ninth Circuit’s standard offered strong protection for public employees’ speech precisely because the court believed that those employees, in particular, have access to information important—and unavailable—to the public.¹⁵⁰

¹⁴³ *Ceballos v. Garcetti*, No. 00-11106, slip op. at 9, 11–12, *rev’d*, 361 F.3d 1168 (9th Cir. 2004), *rev’d* 126 S. Ct. 1951 (2006).

¹⁴⁴ *Ceballos*, 361 F.3d at 1185.

¹⁴⁵ 856 F.2d 1401 (9th Cir. 1988).

¹⁴⁶ *Ceballos*, 361 F.3d at 1174 (quoting *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 978 (9th Cir. 2002)).

¹⁴⁷ The Ninth Circuit considered certain contexts and content for speech as inherently deserving of protection, because they will necessarily be of public concern. “[W]hen government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, including law enforcement officers, their speech is inherently a matter of public concern.” *Id.*

¹⁴⁸ *Id.* at 1180.

¹⁴⁹ *Id.* at 1173–75.

¹⁵⁰ *Id.* at 1175.

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

Critics of the Ninth Circuit's holding claimed that as "a per se rule . . . any on-the-job speech by a public employee is on a matter of public concern [and thus] the 9th Circuit has undercut the ability of public employers to limit speech made on their behalf."¹⁵¹

Judge O'Scannlain filed a special concurrence, agreeing with the holding because of *stare decisis*, but taking issue with the circuit's continued reliance upon *Roth*.¹⁵² He romanticized about the era when the Holmes adage¹⁵³ was the standard.¹⁵⁴ He drew the distinction between a public employee speaking in the role of employee and a public employee speaking in the role of citizen.¹⁵⁵ This argument emphasized the difference between "viewpoint-laden personal speech" and "ordinary job-related speech."¹⁵⁶ Judge O'Scannlain explained the peculiar separation of identities as though public employees extinguish their personhood upon entering the workplace: "The problem is that when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right. Instead, their speech is, in actuality, the State's."¹⁵⁷ This argument proved reasonable enough to become Supreme Court precedent.

C. Arguments before the Supreme Court in Ceballos

Ceballos's employers claimed that his speech should be considered merely job-related and therefore not receive constitutional protection.¹⁵⁸ Ceballos instead claimed that his speech merited

Id.

¹⁵¹ Thomas E. Wheeler II, *Striking a Faustian Bargain: The Boundaries of Public Employee Free Speech Rights*, 50-SEP RES GESTAE, Sept. 2006, at 13, 17-18 (focusing on free speech in the public-school domain and what he sees as the need for public schools to limit teachers' speech in order to control how students are taught).

¹⁵² *Ceballos*, 361 F.3d at 1185.

¹⁵³ *McAuliffe v. New Bedford*, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

¹⁵⁴ *Ceballos*, 361 F.3d at 1185.

¹⁵⁵ O'Scannlain emphasizes the "distinction between speech offered by an [sic] public employee acting *as an employee* in carrying out his or her ordinary employment duties and speech spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.* at 1186-87.

¹⁵⁶ *Id.* at 1187.

¹⁵⁷ *Id.* at 1189.

¹⁵⁸ Petitioners framed the issue in a fashion that described the speech as if it were unimportant to the general public:

Should a public employee's *purely* job-related speech, expressed *strictly* pursuant to the duties of employment, be *blanketed* with First Amendment protection *simply* because it *touches* on a matter of public concern,

First Amendment protection because it involved a matter of public concern.¹⁵⁹

Garcetti, Sundstedt, Najera, and the County of Los Angeles (“Garcetti”) argued three reasons why the Supreme Court should reverse the Ninth Circuit opinion and find Ceballos’s speech to be unprotected.¹⁶⁰ First, protecting public employees’ job-related speech does not advance the First Amendment.¹⁶¹ Second, speech made pursuant to one’s job duties should not be covered by the First Amendment because one is thus speaking merely as an employee and not as a citizen.¹⁶² And, finally, were the Court to follow the Ninth Circuit’s holding, government employers would be bogged down with “confusion and unpredictability”¹⁶³ and the federal judiciary would be burdened with excessive litigation.¹⁶⁴ Garcetti emphasized the potential for litigation by arguing that the Ninth Circuit created precedent for protecting “*all* public employee speech,” while deemphasizing the need for the speech’s content to be of interest and concern to the public.¹⁶⁵

Ceballos responded to Garcetti’s argument by stating that the case law does not discern if the speaker was acting as a citizen as opposed to an employee, but whether the speech was of public concern.¹⁶⁶ The public matters because the First Amendment protects not only the speaker, but also the public—as a democracy—at

or should First Amendment protection also require the speech to be engaged in “as a citizen,” in accordance with this Court’s holdings in *Pickering* . . . and *Connick* . . . ?

Petitioners’ Brief on the Merits at i, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473) (emphasis added).

¹⁵⁹ Ceballos’s issue statement highlights the content of the speech, rather than the context of its creation: “Does a prosecutor who speaks on a matter of public concern by reporting suspected police misconduct to his superiors lose his First Amendment protection against retaliation by his employer solely because he communicated his message while performing his job?” Brief for Respondent, *supra* note 1, at i.

¹⁶⁰ See Petitioners’ Brief on the Merits, *supra* note 158, at ii–iv.

¹⁶¹ *Id.* at 12.

¹⁶² See *id.* at 32 (“First Amendment protection should be reserved for true citizen speech because public employees necessarily speak on behalf of the government when they engage in routine, job-required speech.”).

¹⁶³ *Id.* at 35.

¹⁶⁴ The final reason was articulated in oral arguments before the Court as follows: The Ninth Circuit’s approach, which “affords no consideration for the role of the speaker as a citizen or an employee . . . plants a seed of a constitutional claim in virtually every speech that public employees express while carrying out their regular job duties.” Transcript of Oral Argument at 3, *Ceballos*, 126 S. Ct. 1951 (2005) (No. 04-473). *Ceballos* was subsequently reargued the following term, with the Supreme Court ruling in 2006. See *supra* note 16.

¹⁶⁵ Petitioners’ Brief on the Merits, *supra* note 158, at 7.

¹⁶⁶ See Brief for Respondent, *supra* note 1, at 18.

large.¹⁶⁷

Ceballos contextualized the speech within the climate of Los Angeles during the Rampart Scandal.¹⁶⁸ And then he challenged Garcetti's characterization of the speech as "routinely prepared."¹⁶⁹ Ceballos reminded the Court that his speech, the memorandum, was not a customary job duty,¹⁷⁰ and that, while he felt "ethically and constitutionally bound to report the deputies' suspected misconduct . . . no policy of the D.A.'s Office required him to do so."¹⁷¹ As such, the speech was of tremendous public import and concern—both to Ceballos as a citizen and to the public at large.¹⁷²

Ceballos posited that the doctrine of public employee free speech had been interpreted to mean that the speaker is protected when the speech is on a matter of public concern and does not outweigh the government's interest, as an employer, in efficiency.¹⁷³

III. *GARCETTI V. CEBALLOS*: THE SUPREME COURT OPINION

A. *The Majority's Holding*

Justice Kennedy authored the majority's opinion, writing that the "controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy."¹⁷⁴ The opinion agreed with Judge O'Scannlain's special concurrence to the Ninth

¹⁶⁷ See *id.* at 18–19 ("To silence a public employee who seeks to bring to light a problem in her workplace of public importance both eviscerates that employee's personal interest in her own speech and subverts the public's interest in holding government officials accountable."). In his statement before the House Committee on Government Reform, Ceballos recognized that "[t]he first amendment protection will only be afforded if the employee goes outside and holds essentially a press conference on the front steps of a government building. This is a predicament that is as perverse as it is illogical. But government employees' action will have another option, an option that I'm fearful that most will now take, and that is the option to keep quiet, to look the other way, to feign ignorance of the corruption, the waste, the fraud that they witnessed. And if this occurs, it is not only the employee that loses, it is the public that will lose." *What Price Free Speech? Whistleblowers and the Ceballos Decision: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 72 (2006) [hereinafter *Hearings*] (statement of Richard Ceballos).

¹⁶⁸ Brief for Respondent, *supra* note 1, at 1–2.

¹⁶⁹ *Id.* at 4.

¹⁷⁰ *Id.* at 5. When deposed about the memorandum, Ceballos explained that it was irregular because "[t]his would have been the first deposition 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." *Id.*

¹⁷¹ *Id.*

¹⁷² See *id.* at 13; see also *Hearings*, *supra* note 167, at 73–74.

¹⁷³ Brief for Respondent, *supra* note 1, at 12.

¹⁷⁴ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959–60 (2006).

Circuit's opinion: employees, per se, have no interest in the speech they make as required by their job.¹⁷⁵ The majority found that individuals have insufficient investment in speech made because of a job duty and thus such speech deserves no protection.¹⁷⁶ *Ceballos* created another hurdle for plaintiffs: before the *Connick* threshold and the *Pickering* balance, the speaker first must have spoken outside of a job duty. The opinion first issued a reminder that—with qualifications—a public employee has the right to “speak as a citizen addressing matters of public concern.”¹⁷⁷ These qualifications entail a *Connick-Pickering* analysis to balance the employee's interest “as a citizen, in commenting upon matters of public concern” and the government's interest “as an employer, in promoting the efficiency of the public services it performs”¹⁷⁸ Accordingly, as Justice Kennedy wrote, there exist two inquiries: whether the employee spoke as a citizen on a matter of public concern, and—only if the first answer is yes—whether the government provided an “adequate justification for treating the employee differently from any other member of the general public.”¹⁷⁹ Because the employee may be a teacher, a police officer, a district attorney, or any other of the myriad roles within government employment, this task is understandably difficult.

The majority next reiterated the “Court's overarching objectives”¹⁸⁰ in this doctrine. For one, citizens who enter public employment necessarily relinquish some freedom.¹⁸¹ This loss happens in direct response to the government's need for control over its workforce. What's more, the government's employees have access to important information, appear to have access to it, or both. They thus hold “trusted positions in society.”¹⁸² Without proper control, the government may therefore lose the cohesive voice of its public policies or operation of its functions.¹⁸³

To flesh out its concerns, the Court also spoke to the First Amendment rights that citizens retain. The First Amendment will reign in public employers who try to use the rules of the workplace to infringe on those rights.¹⁸⁴ When the employee is speaking as a

¹⁷⁵ *Id.* at 1960.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1957.

¹⁷⁸ *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

¹⁷⁹ *Id.* at 1958.

¹⁸⁰ *Ceballos*, 126 S. Ct. at 1958.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

citizen on matters of public concern, then the government may only limit those rights as is needed to operate an efficient and effective workplace.¹⁸⁵ And the Court's final objective is to serve the public's interest in remaining informed. Before addressing Ceballos's and Garcetti's arguments, Justice Kennedy closed this summary of the doctrine as it stood before the *Ceballos* decision by stating that, while First Amendment protections are important for both the individual and the public at large, they do not "empower [public employees] to 'constitutionalize the employee grievance.'"¹⁸⁶

The striking point for the majority—"the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case"—would not change if Ceballos received any personal gratification.¹⁸⁷ Ceballos was not a citizen when he spoke those words—the argument goes—simply because he was a worker, regardless of his individual investment in the work. Citizen and worker are thus mutually exclusive. According to the majority, one may not contemporaneously fill the roles of worker and citizen. Because Ceballos's speech was made in his role as prosecutor, his speech had no corollary to a citizen's speech, and so restricting this speech could not restrict Ceballos's First Amendment right.¹⁸⁸ The way the Court saw it, Ceballos's employers were merely controlling the expression they hired Ceballos to create.

Justice Kennedy made a point that Justice Souter highlighted in his dissent as a potential problem. Essentially, Ceballos retained his rights as a citizen because he could have entered the speech, unprotected as work product, into "civic discourse." Ceballos would then be acting as a citizen and could receive First Amendment protection.¹⁸⁹ Justice Kennedy disputed the Ninth Circuit's concern that his allowance would create a doctrinal anomaly: the same, unprotected speech would be protected if spoken to the

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1959 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1986)).

¹⁸⁷ *Ceballos*, 126 S. Ct. at 1960. In his dissent, Justice Souter described this speech differently: "[w]ould anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance?" *Id.* at 1965 (Souter, J., dissenting).

¹⁸⁸ *Id.* at 1961 ("When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.").

¹⁸⁹ *Id.* at 1960.

public.¹⁹⁰ He wrote that the Ninth Circuit misunderstood the precedent: Pickering's letter to the newspaper was protected because it was the kind of activity in which one who does not work for the government may also engage.¹⁹¹ Furthermore, public employers have the choice to create internal venues for voicing complaints so that employees will be encouraged to voice concerns privately.¹⁹²

Justice Kennedy underscored the government's interest in controlling employee speech and the federalism policy of keeping the judiciary out of employment decisions. The slippery slope argument here is that allowing independent review of Ceballos's case "would be to demand permanent judicial intervention in the conduct of governmental operations"¹⁹³ The specter of judicial oversight threatens more frightfully than that of silenced whistleblowers.

Before ending the opinion, Justice Kennedy addressed two concerns from Justice Souter's dissent: that a public employer will be able to restrict the free speech of its employees by broadening their job descriptions,¹⁹⁴ and that the *Ceballos* opinion will bleed over to affect constitutional protections of public school teachers' academic freedom.¹⁹⁵ First, Justice Kennedy argued, what an "official job duty" entails will not be defined merely by a job description, but by an active, practical inquiry.¹⁹⁶ Second, he recognized that more than employee-speech jurisprudence is implicated by issues surrounding academic freedom and so did not need to be explored in this opinion.¹⁹⁷ Finally, the majority side-stepped the

¹⁹⁰ *Id.* at 1961.

¹⁹¹ *Id.*

¹⁹² *See id.* ("A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism.").

¹⁹³ *Ceballos*, 126 S. Ct. at 1961.

¹⁹⁴ *Id.* Justice Souter wrote, "I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview." *Id.* at 1965 n.2 (Souter, J., dissenting).

¹⁹⁵ *Id.* at 1962 (referencing Justice Souter's dissent, *id.* at 1969–70).

¹⁹⁶ *Id.* at 1961–62.

¹⁹⁷ *Id.* at 1962. Justice Souter responded that placing a factual inquiry at this point in the analysis may still increase litigation, as the judiciary must decide what actions occur pursuant to an employee's official job duties. *Id.* at 1965 n.2 (Souter, J., dissenting). Critics also disagreed with Justice Kennedy here. "[T]he ramifications of this holding on public employees within the academic arena are not likely to go away as quietly as Justice Kennedy implies." 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 (2006).

issue of the important information would-be whistleblowers might now be discouraged from exposing by making a controversial statement as though it were fact: public employers will use sound judgment to listen to criticisms from their employees and those employees will be supported by “the powerful network of legislative enactments” available to whistleblowers.¹⁹⁸

The majority’s categorical separation of speech into speech made as required by work and speech made of one’s own volition triggered dissents. The dissents focused on the creation of a false bifurcation—an individual becomes a worker when thus defined by a job description and a citizen when not—and the repercussions to public debate, a central tenet of First Amendment jurisprudence.

B. The Dissents

The majority opinion provoked three dissents: Justice Stevens wrote a brief dissent; Justice Souter provided a more substantial dissent, joined by Justices Stevens and Ginsburg; and Justice Breyer added his own dissent as well.

Justice Stevens dissented, pointing out that the First Amendment will “[s]ometimes” protect a public employee from speech made pursuant to official duties, “not ‘[n]ever.’”¹⁹⁹ What happens when a supervisor wants to silence an employee, not because the employee is disrupting or misstating the government’s position, but because the employee is revealing “facts that the supervisor would rather not have anyone else discover?”²⁰⁰ In order to protect against the silencing of whistleblowers, Justice Stevens rejected the “categorical difference” between speaking pursuant to one’s job duties and speaking as a citizen.²⁰¹ That separation could fail to protect an employee who, regardless of the fact that his or her speech was articulated by a job description, nevertheless revealed governmental misconduct or waste.²⁰²

Justice Stevens pointed out a possible backlash to the majority’s holding: public employees, to ensure protection, may reach outside of the workplace to speak because they would then be

¹⁹⁸ *Ceballos*, 126 S. Ct. at 1962.

¹⁹⁹ *Id.* (Stevens, J., dissenting).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1963. Justice Stevens noted that the use of a job description to define a constitutional right does not conform to the Court’s precedents: “We had no difficulty recognizing that the First Amendment applied when Bessie Givhan . . . raised concerns Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial.” *Id.*

²⁰² *Id.*

deemed to be speaking as citizens and would thus retain their First Amendment rights.²⁰³ He closed his dissent by describing the majority's opinion with the following pejoratives: "novel" and "misguided."²⁰⁴

Justice Souter's dissent—joined by Justices Stevens and Ginsburg—argued that the majority drew an arbitrary line when it placed speech made pursuant to one's official job duties outside of First Amendment protection.²⁰⁵ This is because "[n]othing . . . accountable on the individual and public side of the *Pickering* balance changes when an employee speaks 'pursuant' to public duties."²⁰⁶ He focused on the speech's recipients and the interests served by the speech at issue: "addressing official wrongdoing and threats to health and safety."²⁰⁷ These public and private interests exist even when the information becomes available by way of a public employee's job fulfillment.²⁰⁸ In fact, the value of such speech may be greater than speech not made pursuant to one's job duties because it is "a subject [the employee] knows intimately for the very reason that it falls within his duties."²⁰⁹ A government employee is still a citizen, and "protection of public employees who irritate the government . . . [flows] from the First Amendment because a government paycheck does nothing to eliminate the value of an individual speaking on public matters"²¹⁰ Accordingly, although the weight given either side may shift, the *Pickering* balance does not disappear when the speech occurs pursuant to one's job duties.

Justice Souter addressed the government's countervailing interest in maintaining an efficient and smooth operation, but noted that the majority's bright-line rule offered a strange concession.²¹¹ He referenced holdings in the Court's line of public employee free speech cases that recognized how a worker for the government can act "not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his

²⁰³ *Id.*

²⁰⁴ *Id.* Here Justice Stevens used "novel" to imply that the Court—rather than following its own precedent—created new law.

²⁰⁵ *Id.* at 1964–65 (Souter, J., dissenting).

²⁰⁶ *Id.* at 1967.

²⁰⁷ *Id.* at 1963.

²⁰⁸ *Id.* at 1965.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1964.

²¹¹ *Id.* at 1965 ("[T]here is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered 'pursuant to . . . official duties.'" (alteration in original) (quoting *id.* at 1960 (majority opinion))).

government.”²¹² As stated earlier, Justice Souter argued that nothing changes on the “individual and public side” of the *Pickering* balance when the speech occurs pursuant to official duties; however, he did agree with the majority that such speech might have the capacity to use its “greater leverage to create office uproars and fracture the government’s authority to set policy to be carried out coherently through the ranks.”²¹³ Yet, Justice Souter did not see this possibility as sufficient justification for categorically excluding such speech from First Amendment protection.

Justice Souter tackled the majority’s fear of increased litigation.²¹⁴ He first offered a way to recalibrate the *Pickering* scale when the employee speaks pursuant to his official job duties: the content must be of “unusual importance” and the speaker must satisfy “high standards of responsibility in the way” the speech is disseminated.²¹⁵ He also pointed out that the Ninth Circuit’s experience with public employee free speech suits demonstrates that a “debilitating flood of litigation” is not opened just by protecting public employee’s job-related speech.²¹⁶ What’s more, the majority’s current rule might increase litigation with fact-based questions centering on what speech falls within an employee’s duties.²¹⁷ Justice Souter warned that future employment descriptions may expand to protect the government against litigation from disgruntled former employees who claim that they were subject to an adverse employment action based on protected speech.²¹⁸

What about when the government dictates the actual words to be spoken? Justice Souter addressed the majority’s contention that the government owns the words themselves and distinguished Ceballos’s speech from instances where the government funds the dissemination of one viewpoint or policy.²¹⁹ Following *Rust v. Sullivan*, the majority conflated Ceballos’s speech with governmental policy advertised through its employees. Ceballos’s speech, rather than espousing one viewpoint or applauding one policy, included the work product of a prosecutor who investigated numerous criminal and non-criminal activities. In order to enforce the law, Cebal-

²¹² *Id.* at 1964 (quoting *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rel. Comm’n*, 429 U.S. 167, 175 (1976)).

²¹³ *Id.* at 1967.

²¹⁴ *Id.* at 1967–68 n.5.

²¹⁵ *Id.* at 1967.

²¹⁶ *Id.* at 1968.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1965 n.2.

²¹⁹ *Id.* at 1969.

los had to remain flexible, and not “speak from a government manifesto.”²²⁰ Souter also repudiated the majority’s reliance on whistleblower protections, which—instead of the strong network hailed by Justice Kennedy—he described as a “patchwork.”²²¹

Justice Breyer filed his own dissent. While he agreed that Ceballos’s case should have been provided a *Pickering* balance, he disagreed with the analysis supporting the other dissents. He pursued two lines of reasoning thus far unreviewed by the Court in *Ceballos*. First, Ceballos spoke as an attorney and so faced the independent limitations set by lawyers’ professional canons.²²² The government’s interest in quieting speech, therefore, is reduced by this professional requirement. Second, the government also has a constitutional responsibility to require government prosecutors to disclose exculpatory information to defendants’ attorneys.²²³ Because of these two special circumstances, Justice Breyer believed that the balancing test should have been applied.

Justice Breyer departed from Souter’s dissent in the procedure for adjudicating cases such as Ceballos’s, stating that he would give more credence to efficiency concerns and that the adjusted test casts too wide a net.²²⁴ His offered correction would rely on whistleblower statutes for areas that those statutes cover.²²⁵

IV. CONCLUSION: WHY THE MAJORITY GOT IT WRONG

As the doctrine now stands, when a public employee speaks pursuant to official job duties, she cannot be speaking as a citizen. Because she is not speaking as a citizen, she is unprotected by the First Amendment. This unsubtle argument ignores the employee who retains her citizen’s conscience while at work. It also faintly echoes Justice Holmes’s insistence that one may have the right to speak out, but one doesn’t have the right to public employment: now one may have the right to speak out, but one doesn’t have the right to speak out “pursuant to official job duties.”

Must public employees check their individuality at the door? One critic of the Ninth Circuit’s approach claimed that public employees are engaged in a Faustian bargain: for the glamour and money from public employment, one must give up her free speech

²²⁰ *Id.*

²²¹ *Id.* at 1970.

²²² *Id.* at 1974 (Breyer, J., dissenting).

²²³ *Id.*

²²⁴ *Id.* at 1975.

²²⁵ *Id.* at 1976.

rights.²²⁶ This dichotomy—Erwin Chemerinsky, a noted constitutional scholar, called it “a false and unprecedented distinction between individuals speaking as ‘citizens’ and as ‘government employees’”—gives one the mental picture of automatons at work.²²⁷

When, exactly, is one a citizen and when is one an employee? The Court’s holding should have recognized this tension and continued to protect employees based upon the “content, form, and context” of their speech; not narrowed the protection to the parameters of their job descriptions.²²⁸ As it now stands, public employee free speech is a misnomer: one cannot be acting as a public employee when receiving free speech protection. Speech is only protected when one is being a citizen and not an employee.

Within one month of the Court’s decision, the House Committee on Government Reform was investigating how the decision affected whistleblower protections,²²⁹ with the hope that legislation would fill in the space where the First Amendment used to protect public employees.²³⁰ On March 14, 2007, the House of Representatives passed the Whistleblower Protection Enhancement Act, which would, for example, increase protection for federal contractor employees, expand whistle blower protections to Transportation Security Administration airport screeners, other intelligence agency employees, and federal scientists.²³¹ Perhaps more importantly, the Act would provide access to any federal courts, addressing the Federal Circuits’ weakening of existing protections for federal employees.²³² Additionally, the bill would cover both formal and informal communications by federal employees,²³³ an im-

²²⁶ See Wheeler, *supra* note 151.

²²⁷ Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2D 335, 340 (2006).

²²⁸ Connick v. Myers, 461 U.S. 146, 147–48 (1983).

²²⁹ See *Hearings*, *supra* note 172, at 55–60 (statement of Roger Pilon, Director of the Center for Constitutional Studies, Cato Institute). Pilon noted that the Court failed in its attempt to draw new boundaries and that the dissents did not get it right either. *Id.*

²³⁰ Despite these federal efforts, state protections remain inconsistent. See National Conference of State Legislatures, *State Whistleblower Laws*, <http://www.ncsl.org/programs/employ/whistleblower.htm> (last visited Sept. 13, 2007) (“Although legislatures in all fifty states have enacted whistleblower protection statutes, the measure and scope of state laws vary greatly.”). See also Laurence S. Moy & Nantiya Ruan, *When Good Deeds are Punished: The Legal Landscape of Retaliation and Whistleblowing*, 745 PLI/LIT 581, 616 (2006) (providing information to support a claim that “protections afforded victims of retaliation are far from uniform”).

²³¹ Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (§§ 11–13) (addressing contractors in § 11; TSA in § 12; and scientists in § 13).

²³² Whistleblower Protection Enhancement Act § 10(c)4.

²³³ *Id.* § 10(f)1.

portant amendment in light of *Ceballos*. On December 17, 2007, the Senate passed whistleblower legislation that would further enhance protection of federal employees.²³⁴ This dual legislation sets up the possibility of a merger of the two, however the President has threatened to veto it under the guise of national security²³⁵ and for the time being, access to federal whistleblower protections remains limited.²³⁶

Ironically, while denying public employee free speech protections, *Ceballos* did reinvigorate the debate surrounding whistleblower statutes for public employees—thus adding to the public discourse that the First Amendment encourages. *Ceballos* may deny First Amendment protection to public employees whose speech is also work, but in the process its holding has provoked an awareness that whistleblower protections must be strengthened.²³⁷ While the focus of such legislative initiatives has been the protection of federal employees who make public the fraud and abuse of their employers, one should not dismiss the perseverance of public speech as fundamental to democracy.²³⁸

²³⁴ The Senate unanimously approved legislation to strengthen the Whistleblower Protection Act for federal government workers. The Senate legislation mitigates the effects of the *Ceballos* decision by extending protections to “include a disclosure made in the ordinary course of an employee’s duties. . . .” S. 274, 110th Cong. (2007). See Government Accountability Project (GAP), Press Release, Senate Approves Whistleblower Protection Legislation, Dec. 18, 2007, available at http://www.whistleblower.org/content/press_detail.cfm?press_id=1259 (last visited Jan. 17, 2008).

²³⁵ Helen Thomas, Editorial, *President is Happy to Govern by Veto*, SEATTLE POST-INTELLIGENCER, Dec. 21, 2007, at B6.

²³⁶ See Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick’s Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc’y 45, 79 (2007); see also Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 761 (2007). The most striking federal legislation of recent years that seeks to protect federal employees’ First Amendment rights in the context of whistleblowing came in response to the large Enron-type accounting scandals in 2000. Congress passed the Sarbanes-Oxley Act (“SOX”) of 2002, which provides increased protection within the accounting industry for whistleblowers and prohibits employers from retaliating against any employee who engages in protected activity. 18 U.S.C. § 1514A (2002). However, SOX “give[s] the illusion of protection for whistleblowers without effectively providing it.” Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1757 (2007) (advocating a revision of SOX and comparing SOX whistleblowing provisions with relevant state and federal statutes).

²³⁷ See Press Release, Government Accountability Project, Senate Committee Reinroduces Whistleblower Protection Legislation (Jan. 12, 2007), available at http://www.whistleblower.org/content/press_detail.cfm?press_id=710 (last visited Feb. 25, 2008).

²³⁸ *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (holding state-mandated loyalty oath for state employees violates due process). “That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if

it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens." *Id.*