March 2008

Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos

Elizabeth Dale

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38705H

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jceralaw.berkeley.edu.
Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos

Elizabeth Dale†

In the two years since the decision came down, courts and commentators generally have agreed that the Supreme Court’s decision in Garcetti v. Ceballos sharply limited the First Amendment rights of public employees. In this Article, I argue that this widely shared interpretation overstates the case. The Court in Garcetti did not dramatically change the way it analyzed public employees’ First Amendment rights. Instead, it restated the principles on which those claims rest, emphasizing management rights and the unconstitutional conditions doctrine. By making those two theories the centerpiece of the decision, the Court in Garcetti defined public employee speech rights in a way that may ultimately strengthen the hand of public employees.

I. INTRODUCTION .............................................................................. 176

II. THE STATE OF THE LAW BEFORE GARCETTI .......................... 177

A. Background .............................................................................. 177

B. Creating the Pickering-Connick Test ..................................... 181

C. The Larger First Amendment Context ...................................... 184

1. Shifts in the Unconstitutional Conditions Doctrine .............. 185

2. Moving away from a Parallel ................................................. 188

III. CEBALLOS v. GARCETTI ......................................................... 189

A. In the Lower Courts .............................................................. 193

† J.D., Ph.D.; Affiliate Professor, Levin College of Law, University of Florida; Associate Professor of Constitutional and Legal History, Department of History, University of Florida. The impetus for this article came from a debate on Garcetti that I participated in last year on the conlawprof listserv, part of which was later republished at SCOTUSblog.com. See http://www.scotusblog.com/movabletype/archives/2006/06/the_mysteries_o_1.html.
I. INTRODUCTION

For more than forty years the United States Supreme Court has recognized a First Amendment protection of public employees' free speech rights.¹ Last year the Court revisited those protections in Garcietti v. Ceballos,² and found that an assistant district attorney could not make a First Amendment claim for speech on a matter within the scope of his duties.

In the two years since, court and commentators generally have agreed that Garcietti sharply limited the First Amendment rights of public employees.³ Yet this widely held conventional wisdom overstates the case.

---

¹ See Pickering v. Bd. of Educ., 391 U.S. 563 (1968). Pickering is typically characterized as the first case to recognize this right. See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies 1069 (2d ed. 2002), but in Pickering the Court declared that its decision in that case was part of a long line of cases, stretching back to Wieman v. Updegraff, 344 U.S. 183 (1952) (reversing a state court's decision to uphold the withholding of state employees' salaries for failure to complete a loyalty oath) and beyond. Pickering, 391 U.S. at 568. The Court reiterated that history in Connick v. Myers, 461 U.S. 138, 142 (1983) ("a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression") and Garcietti v. Ceballos, 126 S. Ct. 1951, 1955 (2006), (quoting Connick, 461 U.S. at 138).

² 126 S. Ct. 1951.

The Court in *Garcetti* did not significantly change the way it analyzed public employees' First Amendment rights; rather, it restated settled principles on which those claims rest. And in doing so, the decision may ultimately strengthen the hand of public employees.

This alternative reading of *Garcetti* requires understanding the case in its larger context. To that end, this article begins with an overview of the Court's First Amendment jurisprudence as it evolved from *Pickering v. Board of Education* to *Garcetti*. Then, after examining the opinions in *Garcetti* and reviewing the lower courts' application of the case, I provide an alternative reading. This alternative reading has two aspects: (1) I follow a few lower court opinions and emphasize the narrow and fact-based nature of the *Garcetti* ruling; (2) I consider how the Court's reliance on theories of management rights and the unconstitutional conditions doctrine offers additional protections for public employees.

II.

THE STATE OF THE LAW BEFORE *GARCETTI*

A. Background

The Supreme Court recognized that public employees retained First Amendment rights in *Pickering v. Board of Education*.

But *Pickering*, which was decided in 1968 in a period that saw great expansion in First Amendment protection, was not a departure from the settled doctrine that individuals did not "relinquish the First Amendment rights they would otherwise enjoy as citizens" by virtue of their employment by the State.

Earlier cases had recognized that the State could not refuse to hire or retain workers based their on First Amendment expression; in *Pickering*, the Court ruled that the State could not retaliate against public employees for

---

*Garcetti* case represents "a big setback" for section 1983 litigation); Erwin Chemerinsky, *The Rookie Year of the Roberts Court and A Look Ahead: Civil Rights*, 34 PEPP. L. REV. 535, 539 (2007) (*Garcetti* "is not only a loss of free speech rights for millions of government employees, but it is really a loss for the general public, who are much less likely to learn of government misconduct"); Beverley H. Earle and Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L. J. 1, 17 (2007) ("Although the holding is limited in that it deals with public employees and the extent of their First Amendment protections, the message [of *Garcetti*] is still clear. The newly constituted Supreme Court will not give broad readings to statutes or the Constitution to undercut [the] government's executive decision-making power and authority."); Paul M. Secunda, *More Than Employees*, 30 Legal Times (May 21, 2007), at 1 (questioning the case's assumptions about public employment).

4. 391 U.S. at 563.


"commenting upon matters of public concern." To that end, the Court declared that the First Amendment protected even false statements by public employees so long as those statements were not made with knowing or reckless disregard of their falsity.

Even at its most expansive, the Supreme Court has never suggested First Amendment rights were absolute, and the decision in Pickering was no exception. In Pickering, the Court cautioned that public employees' rights to freedom of expression could be limited by the State's "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." In Pickering and the cases that followed, the Court mapped out the intersection of employee rights and employer interests.

That balance of rights and interests changed considerably in the forty years after Pickering. Initially, in Pickering, the Court emphasized the First Amendment rights of public employees, identifying the variety of ways in which those rights could be exercised. The Pickering Court held that the First Amendment protected the speech of a public school teacher who wrote a letter to the editor protesting a school district's budget allocations. Subsequent decisions extended the principle to phone calls public employees made to radio shows, and to comments made on the job in private conversations (when those comments touched on matters of community concern). The Court also held that the First Amendment protected comments made in private to supervisors and statements made by untenured teachers.

In Pickering, the Court suggested that the First Amendment might not extend to protect false statements when there was evidence that a public employee knew such statements were false, or made them with reckless

---

8. Id. at 574. In Pickering, there was evidence that plaintiff's letter to the editor misreported some data about the school district budget. Id. at 571. The Court held that even these misstatements were entitled to First Amendment protection. Id. at 573 (drawing an analogy to the rule set out in Sullivan, 376 U.S. at 254; St. Amant v. Thompson, 390 U.S. 727 (1968), and Time, Inc. v. Hill, 385 U.S. 374 (1967)).
9. Chemerinsky, supra note 1, at 895.
10. 391 U.S. at 568.
13. Id.
14. Perry v. Sindermann, 408 U.S. 593, 597-98 (1972) (finding that untenured professor has First Amendment protection, and "lack of contractual or tenure 'right' to re-employment ... is immaterial to [a] free speech claim"); Mt. Healthy, 429 U.S. at 274 (holding that untenured school teacher’s speech rights are protected).
disregard for their truth. Alternatively, there might be some instances where "the need for confidentiality [was] so great [that] even completely correct public statements might furnish a permissible ground for dismissal." The Court also suggested that the First Amendment may not protect some insubordinate remarks, comments that created workplace disharmony, or public criticisms of an immediate superior that "seriously undermine[d] the effectiveness of the working relationship." But consistent with its focus on protecting speech rights, Pickering emphasized that there could be no general rule establishing the employer's interests.

With its 1982 decision in Connick v. Myers, the Court began to shift its focus in these cases to protecting public employer interests. In Connick, the Court determined that a questionnaire that a public employee had prepared and distributed to her co-workers was related to an "employee grievance" rather than a matter of public concern, and that it was therefore outside the protections of the First Amendment. The Court emphasized that the government had a "legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service.'"

In Rankin v. McPherson, the Court reached a different outcome, but the First Amendment analysis it relied on stayed the same. After quickly acknowledging that the plaintiff's remarks (regarding the assassination attempt on President Reagan) addressed a matter of public concern, the

---

15. 391 U.S. at 574-75 n.6 ("Because we conclude that [plaintiff's] statements were not knowingly or reckless[ly] false, we have no occasion to pass upon the additional question whether a statement that was knowingly or reckless[ly] false would, if it were neither shown nor could be reasonably be presumed to have had any harmful affects, still be protected by the First Amendment.").
16. Id. at 570 n.3.
17. Id. at 568-69.
18. Id.
19. Id. at 570 n.3. But see 391 U.S. at 574 (citing Garrison v. Louisiana, 379 U.S. 64 (1964) and Wood v. Georgia, 370 U.S. 375 (1962)) ("This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal supervisors.").
20. 391 U.S. at 569.
22. Id. at 147-49 & n.8 (employee grievance distributed to co-workers was not protected). But see id. at 149 ("One question in [plaintiff's] questionnaire, however, does touch upon a matter of public concern." The Court found, however, that the employer's interests outweighed the employee's right to distribute this question to her co-workers during work hours, in the workplace.)
23. Id. at 150-51. Ironically, given the Court's ultimate determination that even the part of the questionnaire that asked if other employees felt pressured to work on political campaigns was not entitled to protection, the Court's language about the integrity and efficiency in public service is a quote from Ex Parte Curtis, 106 U.S. 371, 373 (1882), where the Court upheld a federal law that made it illegal for public officials to solicit political contributions from public employees.
25. Id. at 384-85.
26. Id. at 386. See also id. at 393 (Powell, J., concurring).
Court turned its attention toward the employer’s interests. Conceding that the defendant, a county sheriff, had a particularly strong need to maintain workplace discipline and public respect, the Court ultimately concluded that the remarks posed no threat to the employer’s interests because the plaintiff was a clerical worker who made her remarks to a co-worker in an area inaccessible to the public. The fact-based nature of the decision suggested that if the plaintiff’s job had been more central to the law enforcement role of the sheriff’s office, or her comments more public, the sheriff would have been more likely to prevail.

The Court’s deference to the employer’s interests became even more marked in Waters v. Churchill. The Court held that a public employee’s comments criticizing working conditions, made in a private, workplace conversation with a co-worker, were not protected because the comments did not address a public concern. That conclusion would have been enough to distinguish Rankin. However, the plurality staked out a broader claim, announcing that the government qua employer was entitled to special deference. Asserting that the Court’s prior rulings “consistently [gave] greater deference to government predictions of harm used to justify restriction of employee speech,” Justice O’Connor added that “many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.”

The Court never made that strong of a statement again; plaintiffs prevailed in the next public employee speech case. In United States v. National Treasury Employees Union (NTEU), the Court applied Pickering to strike down an act of Congress that prohibited public employees from receiving honoraria for speeches and articles they wrote off duty. The majority found for the employees, holding that the government’s burden in justifying such a blanket restriction was greater outside of the work setting, where the nexus between the speech and the employment relationship was attenuated.

Although a victory for the employees, the Court’s opinion in NTEU reflected post-Connick assumptions: Rather than start from the premise that a public employee’s off-duty speech was entitled to the same First Amendment protection that was provided for the speech of other private

27. Id. at 388-92.
28. Id. at 390-91.
29. 511 U.S. 661 (1994). Although there was no majority on the other propositions in the case, five justices agreed that the employee’s speech, as characterized above, was not entitled to First Amendment protection. Id. at 681-82 (plurality consisting of O’Connor, Souter, and Ginsberg, JJ., and Rehnquist, C.J.); id. at 684 (concurring opinion by Souter, J., joined by Scalia, J.).
30. Id. at 671.
31. Id. at 673.
32. Id. at 672.
34. Id. at 468-74.
citizens, the Court reasoned that a public employee was subject to greater speech limitations than the ordinary citizen, regardless of where that speech might occur. In a subsequent case, the Court extended its *Pickering* analysis to independent contractors and assumed that the plaintiff’s speech rights were limited by virtue of his association with the government. By the turn of the century, the Court had inverted its analysis in public employee speech cases: in *Pickering*, the Court started by analyzing the public employee’s protected free speech rights, whereas now the Court started by analyzing the employer’s interests.

**B. Creating the Pickering-Connick Test**

As the Court shifted its focus to more carefully assess the government employer’s interest in limiting speech, it altered the methods it used to evaluate these cases. In *Pickering*, the Court declared that given the enormous variety of fact situations in which critical statements by... public employees may be thought by their superiors, against whom the statements are directed, 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 such statements may be judged.

The Supreme Court directed lower courts to engage in a case-by-case inquiry that balanced the citizen-employee’s interest in speaking on matters of public concern against the government employer’s interest in “promoting the efficiency of the public services it performs through its employees.”

For a decade after *Pickering*, the Court treated that balancing of interests as something less than a formal test, and described the required inquiry several different ways. In *Mt. Healthy v. Doyle*, the Court cast its inquiry as a shifting burden of proof: the burden was initially on the plaintiff to show that constitutionally protected speech was the “substantial factor” that prompted the government’s action. Once that was done, the burden shifted to the government to establish “by a preponderance of the

---

35. *Id.* at 468-69. *Accord* San Diego v. Roe, 543 U.S. 77 (2004) (per curiam) (holding that police department could fire officer who appeared in pornographic film wearing identifiable police insignia; the Court concluded that because the employee’s on-camera activities did not relate to a matter of public concern he failed to meet the first part of the *Pickering* balancing test); *cf* NTEU, 513 U.S. at 481-82 (O’Connor, J., concurring in part).


37. 391 U.S. at 569.

38. The balance that had to be struck was articulated in *Pickering*, 391 U.S. at 568, and was defined as a two-step test in *Connick*, 461 U.S. at 142. After *Connick* it was usually characterized as a two-step test. *See*, e.g., Roe, 543 U.S. at 82. *But see Chemerinsky, supra* note 1, at 1071-72 (characterizing it as a three-step burden of proof). *Accord* Sheppard v. Beerman, 317 F.3d 351, 355 (2d Cir. 2003) (articulating a three-part burden of proof test).

39. *Mt. Healthy*, 429 U.S. at 287. *Cf* Perry v. Sindermann, 408 U.S. 593, 598 (1972) (citing *Pickering* for the proposition that “a teacher’s public criticism of his superiors on matters of public concern may be constitutionally protected, and may, therefore, be an impermissible basis for termination” without reference to a balancing test).
evidence that it would have reached the same decision... even in the absence of the protected conduct."

A few years later, in *Givhan v. Western Line Consolidated School District*, the Court tweaked the *Pickering* balance, creating different tests that varied with the context of the speech. The Court declared that when a public employee "speaks publicly, it is generally the content of his statements that must be assessed to determine whether they ‘in any way impeded [his] proper performance of his daily duties... or interfered with the regular operation of [his workplace] generally.’" This narrow inquiry increased the likelihood that an employee’s speech would be protected. However, the majority in *Givhan* went on to hold that when an employee speaks privately (for example, when he “personally confront[s] his immediate superior”), the risk to the public employer increases; the employer’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.” This sort of private statement should therefore prompt a more extensive inquiry into the possible harm to the public employer’s interests. That deeper inquiry, in turn, increases the likelihood that the employee’s speech would be denied protection.

*Connick* turned *Pickering*’s flexible balancing of interests into a rigid two-step test and, in so doing, changed the very nature of the inquiry. The Court declared that the first question was whether the employee’s speech was regarding a matter of public concern. This was a threshold issue; if there was a finding that the employee’s speech was not on a matter of public concern, the inquiry ended and First Amendment protections were

40. Id. In *Waters v. Churchill*, a majority of the Court ruled that the defendant could meet its burden by showing what it reasonably believed the employee’s speech to be, as opposed to what it was. 511 U.S. 661, 679-80 (1994) (plurality opinion); id. at 686 (concurring justices express a similar view). There was, however, no majority on the issue of whether a plaintiff could rebut this evidence. Compare id. at 681 (plurality opinion) (concluding that a plaintiff could rebut this evidence and defeat a motion for summary judgment) with id. at 689-90 (Souter, J., concurring) (arguing that this should not be the rule).


42. Id. at 415 n.4 (emphasis in original).

43. Id.

44. The Supreme Court never explained how this balancing test intersected with the burden of proof it outlined in *Mt. Healthy*. As a result, the lower courts have used a variety of standards. Some concluded that the *Pickering-Connick* balance went to the first and second steps of the *Mt. Healthy* examination. See Aikens v. Fulton County, Ga., 420 F.3d 1293, 1303-04 (11th Cir. 2005). Others have held that it went to a later part of a burden of proof analysis. See Belk v. City of Eldon, 228 F.3d 872 (8th Cir. 2000). Some courts turned to *Connick* to make a determination about whether the speech was protected by the First Amendment, and then applied the *Pickering* balancing test. See Brochu v. City of Riviera Beach, 304 F.3d 1144, 1157 (11th Cir. 2002). Some courts emphasized protecting employee speech. See Roth v. Veterans Admin. of U.S., 856 F.2d 1401, 1406 (9th Cir. 1988). Others emphasized the harm to the employer. See Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640, 644 (8th Cir. 1983) (listing six factors to consider in a public employee speech case, starting with harm to the employer).
denied. As it discussed this step, the Connick Court also altered the way it analyzed employee speech. In Givhan, the Court noted that “the First Amendment’s protection of government employees extends to private as well as public expression,” but added that the two types of speech had to be assessed differently. Public statements should be assessed in terms of their content, to determine if they impeded the employee’s performance of her duties or interfered with the regular operation of the agency. Because of the risk they posed to institutional efficiency, private one-on-one conversations between a public employee and a supervisor had to be subject to additional scrutiny, which took into account the content of the speech and the “manner, time and place in which it [was] delivered.”

By contrast, in Connick, the Court declared that its assessment of whether the plaintiff’s questionnaire was entitled to First Amendment protection depended not only on its content, but also on the “manner, time, and place in which [it] was distributed.” With that step, Connick collapsed the two types of speech identified in Givhan into one. This decision thus indicated the Court’s increased attention to the public employer’s interests.

In yet another shift, the Connick Court ruled that the issue of whether a public employee spoke on a matter of public concern was a question of law rather than fact. This meant that any determination about the nature of the public employee’s speech would be reviewed de novo. As the majority put it, “we are compelled to examine for ourselves the statements in issue and the circumstances under which they [were] made to see whether or not they... are of a character which the principles of the First Amendment... protect.”

The second step of the Connick test also altered the inquiry into the employer’s conduct. In Pickering, the Court indicated that speech that undermined the employer’s ability to perform its public function, was directly insubordinate, or caused serious conflict, might merit dismissal.

45. Connick, 461 U.S. at 149. In Connick, the Court ruled that part of the questionnaire was on a matter of public concern, and that with respect to that question the second step of the test had to be engaged. Id. (“One question in Myers’ questionnaire, however, does touch upon a matter of public concern. . . . Because one of the questions in Meyer’s survey touched upon a matter of public concern, and contributed to her discharge we must determine whether Connick was justified in discharging Myers.”) But cf. San Diego, 543 U.S. at 83 (2004) (“[T]he Court found that—with the exception of the final question—the questionnaire touched not on matters of public concern but on internal workplace grievances, the Court held no Pickering balancing was required [in Connick].”).

46. Givhan, 439 U.S. at 415 & n.4.

47. Connick, 461 U.S. at 152-153. The Court left open the possibility that comments made at the workplace, but outside the work area, or during “non-work” time (such as lunch) might be treated differently. Id. at 153 n. 13.

48. See discussion supra notes 40-41.


50. Id. at 150 n. 10 (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

51. See Pickering, 391 U.S. at 569-70 & n.3.
By contrast, in **Connick**, the Court declared that any employee statement that interfered with a close working relationship was presumptively disruptive and grounds for termination. The Court added that it was appropriate to give “a wide degree of deference” to the employer’s assessment that a particular statement posed potential harm to the workplace.

In **Rankin v. McPherson**, the Court retreated slightly, indicating that it was inappropriate to defer to the employer’s assessment of harm when an employee’s private statement was related to an obvious matter of public concern. But the Court reiterated that reviewing courts had the power and the duty to evaluate the evidence relating to each step in the **Pickering-Connick** balancing test *de novo*.

Then a few years later, in **Waters v. Churchill**, the Court reasserted **Connick**’s strong claim for the primacy of the employer’s interests. Although it was a plurality decision, a majority of the justices agreed that when determining whether an employee’s remarks disrupted a workplace, a court should ask only what the employer reasonably believed the employee said. There was no need to determine the actual content of the employee’s remarks. The plurality went on to declare that the employer’s interest in “effectively” achieving its goals justified restrictions on employee speech.

In **Pickering**, the Court emphasized that public employee rights to speak trumped the interests of public employers. By the middle of the 1990s, the Court had reweighed that balance, deferring to the interests of public employers at the expense of protecting the rights of public employees.

**C. The Larger First Amendment Context**

The Court’s increasing willingness to subordinate public employee speech rights to the government’s interests as an employer led the Court to

---

52. **Connick**, 461 U.S. at 151-52. Later in its opinion, the Court went further and suggested that Connick was entitled to discipline Myers because her statements carried “the clear potential for undermining office relations.” *Id.* at 152. That suggests that any remark that undermined the morale of co-workers could be grounds for termination.

53. *Id*. The Court emphasized that the employer could act to prevent possible disruption, stating “we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest . . .” The Court added that less deference might be appropriate where the “employee’s speech more substantially involved a matter of public concern.” *Id*.

54. See 483 U.S. at 388 n.13 (referring to the concurring opinion by Justice Powell. *Id.* at 392-94.)

55. See *id.* at 388-92. See **Connick**, 461 U.S. at 150.

56. This includes the plurality plus the justices who joined Justice Souter’s concurring opinion.

57. **Waters**, 511 U.S. at 677-78 (citing the related passages in the concurring opinion).

58. *Id.* at 674-75 (offering as an example the case of a governor who legitimately fired an employee because he “justifiably [felt] that a quieter subordinate would let [the staff] do [their] job more effectively”).
reposition public employee speech claims with respect to two other areas of First Amendment law: the unconstitutional conditions doctrine and restrictions on political patronage.

1. Shifts in the Unconstitutional Conditions Doctrine

In Pickering, the Court used the unconstitutional conditions doctrine as a basis for its holding that a government employer could not retaliate against a public employee for speech. The doctrine provides that the government "cannot condition a benefit on the requirement that a person forego a constitutional right," or "deny a benefit to a person because he exercises a constitutional right." The Court reaffirmed that doctrine as the foundation of public employee speech cases in Perry v. Sindermann and again in Connick v. Myers. But for more than a decade after Connick, the Court dropped the unconstitutional conditions doctrine from its analysis.

The disappearance of the unconstitutional conditions doctrine in public employee speech cases mirrored a change in the Court’s broader treatment of the doctrine during the 1980s. Discussions of the doctrine in the 1960s

59. See generally CHEMERINSKY, supra note 1, at 534-35, 946-47. Chemerinsky emphasizes the First Amendment aspect of the doctrine, id. at 946-50, though others have argued that the doctrine extends beyond the First Amendment; see, e.g., Richard Epstein, Forward: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 HARV. L. REV. 4 (1989). For an example of the doctrine extending beyond the First Amendment, see Adam Liptak, Full Constitutional Protection for Some, but No Privacy for the Poor, N.Y.TIMES, July 16, 2007, at A9 (discussing public benefits for the poor conditioned on relinquishing Fourth Amendment and privacy rights). Here, I am only interested in developments that relate to the First Amendment.

60. See CHEMERINSKY, supra note 1, at 1076-77.

61. Pickering, 391 U.S. at 568 (citing Wieman, 344 U.S. at 183; Shelton, 364 U.S. at 479; Keyishian, 385 U.S. at 589).

62. CHEMERINSKY, supra note 1, at 946.

63. Id. at 946 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983)).

64. 408 U.S. 593, 597 (1972). But see Mt. Healthy, 429 U.S. at 284 and Givhan, 439 U.S. at 414 (in both cases the Court assumed that public employees retained First Amendment rights, and merely cited Pickering to assert that general premise without reference to the unconstitutional conditions doctrine).

65. Connick, 461 U.S. at 147 (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government . . . .”) .

66. See, e.g., Rankin, 483 U.S. at 383 (asserting simply that public employee’s have some First Amendment rights (citing Perry, 408 U.S. at 593), and examines whether the employer’s right in this case trumped to employee’s right); Waters, 511 U.S. at 674-76 (discussing extensively the reasons why a government employer may restrict speech but omitting any discussion of unconstitutional conditions doctrine); NTEU, 513 U.S. at 468-69 (analyzing the limits on Congressional power to enact legislation that restricts the First Amendment rights of public employees in terms of viewpoint discrimination); San Diego, 543 U.S. at 80 (2004) (focusing on government-employer’s power to limit employee speech).

67. The Court’s shifts with respect to the unconstitutional conditions doctrine is a classic example of how the Court’s membership matters. In the early years, the Court’s treatment of the doctrine was shaped by Justice Brennan, who wrote many of the relevant cases. From 1980-1992, when the Court retrenched in this area, its opinions were frequently authored by Chief Justice Rehnquist. The Court returned to a more expansive view of the doctrine in 1992; these recent decisions have been written by Justice Kennedy.
and 1970s emphasized its importance in preventing the government from inducing orthodoxy in thought by imposing unconstitutional conditions. Those cases echoed, and at times explicitly invoked, Justice Jackson’s attack on government-sponsored orthodoxy in *West Virginia State Board of Education v Barnette*. Jackson explained that such conditions were unconstitutional because they compelled speech of a particular sort and silenced contrary points of view.

During the 1980s, the Court began to explore the possibility that the government could condition funding or receipt of other benefits on the agreement that its recipients would only advance a particular point of view. Just after *Connick*, the Court held in *Regan v. Taxation with Representation* that Congress could condition tax exempt status on the promise that groups will not engage in lobbying. Then in *Rust v. Sullivan*, the Court upheld a federal law that barred doctors employed at federally-subsidized family planning clinics from advocating abortions or recommending abortion providers. The Court indicated that the government could use its funding powers to silence particular points of view, in effect encouraging orthodoxy.

Although *Rust* appeared to mark the end of the unconstitutional conditions doctrine, its broad reach was quickly limited. In 1995, the Court reaffirmed its commitment to the unconstitutional conditions doctrine in *Rosenberger v. University of Virginia*, which struck down a public university’s funding scheme because it denied money to student groups that advanced religious ideas. The Court explained that *Rust* stood only for the proposition that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”

Harking back to the fear of orthodoxy expressed in its earlier cases, the *Rosenberger* Court held that the university’s funding rules endangered “[v]ital First Amendment principles” by “granting to the State the power to examine publications to determine whether or not they are based on some


71. 319 U.S. 624, 642 (1943).


76. *Id.* at 833 (citing *Rust*, 500 U.S. at 194, 196-200) (the Court added that when the government “disperses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”)
ultimate idea" and to restrict some because they advanced disfavored ideas.\textsuperscript{77}

The Court then repeated its commitment to the older understanding of the unconstitutional conditions doctrine in \textit{Legal Services v. Velazquez}, striking down an act of Congress that provided that legal services lawyers who received federal funding could not challenge the constitutionality of welfare laws to which their clients were subjected.\textsuperscript{78} The Court again read \textit{Rust} narrowly, noting that the federal law at issue in that case "did not single out a particular idea for suppression because it was dangerous or disfavored; rather, Congress prohibited [covered] doctors from counseling that was outside the scope of the project."\textsuperscript{79} Although the funded doctors in the family planning centers could not discuss abortions, others were permitted to do so. Even the funded doctors could provide abortion information to their clients in other settings.\textsuperscript{80} In \textit{Velazquez}, by contrast, the Court reasoned that the restriction on legal services lawyers would silence a particular point of view relating to the constitutionality of welfare laws. This would harm the lawyers' clients irreparably and deprive the legal system of access to particular arguments.\textsuperscript{81}

The Court's return to a more traditional view of the unconstitutional conditions doctrine briefly influenced its public sector free speech cases. The year after \textit{Rosenberger} was decided, the Court relied on the doctrine in \textit{County Board v. Umbehr} to conclude that the owner of a private company contracting with the government to provide services retained First Amendment rights.\textsuperscript{82} But the reference was brief and the doctrine's application to an independent contractor did little to clarify whether the Court continued to believe that public employment could not be conditioned on restrictions of First Amendment rights. In this vacuum, some lower courts ruled that salaries were a form of funding that allowed government employers the right to demand employees advance only particular points of view.\textsuperscript{83}

\textsuperscript{77} \textit{Id.} at 835. The Court added that in a university setting this was particularly dangerous. \textit{See also} Univ. of Wis. v. Southworth, 529 U.S. 217 (2000) (holding that Wisconsin's funding policies should be upheld precisely because they encouraged expression of a wide range of ideas).

\textsuperscript{78} 531 U.S. 533, 549 (2001).

\textsuperscript{79} \textit{Id.} at 540.

\textsuperscript{80} \textit{Id.} at 542-43. The Court distinguished these circumstances from the situation in which the clients found themselves in \textit{Velazquez}, where there were no alternative avenues for pressing the prohibited arguments.

\textsuperscript{81} \textit{Id.} at 533-34.

\textsuperscript{82} \textit{Umbehr}, 518 U.S. at 674-75 (the Court, in determining whether an independent contractor had First Amendment rights, began assessment with reference to unconstitutional conditions doctrine).

\textsuperscript{83} \textit{See. e.g.}, Mayers v. Monroe County, 474 F.3d 477, 479 (7th Cir. 2007) (citing Piggee v. Carl Sandburg College, 464 F.3d 667, 672 (7th Cir. 2006); Webster v. New Lenox School District No. 122, 917 F.2d 1004 (7th Cir. 1990).
2. Moving away from a Parallel

In Connick, the Court drew a parallel between the rights protected by Pickering and the right to be free from political coercion, which it had recognized in Elrod v. Burns and Branti v. Finkel. There were obvious connections between the two lines of cases. In Branti, the Court relied on the unconstitutional conditions doctrine, declaring that a patronage plan that conditioned the employment of two public defenders on their membership in the Democratic Party violated the First Amendment because it imposed a political orthodoxy on public employees. The Court added that “[i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him for what he believes.” Subsequent cases reaffirmed the close connection between these lines of cases. In Rutan v. Republican Party, the Court extended the prohibition against conditioning employment on political affiliation to promotions, transfers, recalls, and other employment practices. In the process, it repeated that the unconstitutional conditions doctrine was at the heart of the holdings in the patronage cases, and again noted that a public employee could not be fired for her speech or her political beliefs.

But the Court weakened the relationship between these two lines of cases in O'Hare Truck Service v. City of Northlake. Although the Court held that independent contractors could not lose their state contracts for their political beliefs—noting once again the connection between the Pickering-Connick and Elrod-Branti cases—the Court declared in dicta that there were differences between these two types of cases. In patronage cases, where employment was conditioned “on the raw test of political affiliation,” evidence of the demand for political affiliation “sufficed to show a constitutional violation, without the necessity of an inquiry any more detailed than asking whether the [political] requirement was reasonable for the employee in question.” The Court contrasted that situation with public employee speech cases, where there was a greater possibility that the employer had a legitimate reason to restrict an

---

84. Connick, 461 U.S. at 142 (1983) (citing Branti, 445 U.S. at 515-16 for the proposition that “a State could not condition public employment on a basis that infringed the employee’s constitutionally protected interest in freedom of expression.”).
86. Branti, 445 U.S. at 507.
87. Id. at 514 (citing Barnette, 319 U.S. at 624) (noting that the First Amendment existed to oppose orthodoxy).
88. Id. at 515.
90. Id. at 69, 74.
91. Id. at 69.
93. Id. at 716-17 (citing, inter alia, Keyishian, 385 U.S. at 589 and Pickering, 391 U.S. at 563).
94. Id. at 719.
employee's speech. Although the Pickering-Connick balancing test allowed for an inquiry into the employer's motive, it reasoned that inquiry should give greater leeway to the employer's justification than would be proper in a patronage case.

As this suggests, by the start of the 21st century, the logic of the Court's public employee free speech cases had changed considerably. No longer did it emphasize carving out a narrow workplace exception to general First Amendment rights. The Court had become more concerned with expanding the power of public employers to restrict employee speech. To that end, it had replaced Pickering's balancing of interests with a two-step test, and had drawn a distinction between public employee speech cases and political patronage decisions. What was less clear was the extent to which the old theory of the unconstitutional conditions doctrine, with its emphasis on restraining the government's power to impose orthodoxy, continued to shape the Court's understanding of public employee speech rights.

III.

CEBALLOS v. GARCETTI

In February 2000, Richard Ceballos, a calendar deputy in the Pomona office of the District Attorney for Los Angeles, was approached by a defense attorney during a court call. The defense attorney advised Ceballos that he believed that the warrant used against his client in the pending case was based on a perjured affidavit and asked Ceballos to look into the situation.

Ceballos agreed to do so and obtained the file from a more junior deputy district attorney handling the case. He read through the materials in the file, including the search warrant and supporting affidavit, reviewed photos and a video tape of the area that had been searched and then went to

95. Id. (extending this principle to hybrid cases where "specific instances of the employee's speech or expression . . . are intertwined with a political affiliation requirement").

96. Id. But cf. Hartman v. Moore, 547 U.S. 250 (2006), a Bivens action decided a few months before Garcetti. Emphasizing the precise nature of the pleading and proof of causation that was necessary in a Bivens claim, 126 S.Ct. at 1703-04, the Court compared that with the less stringent proof required in Pickering actions, where causation was inferred from "evidence of the motive and the discharge." Id. at 1703.

97. In this, the Court's opinions reflected general workplace law trends. See Carol Hymowitz, Personal Boundaries Shrink as Companies Punish Bad Behavior, WALL ST. J., June 18, 2007, at B1 (noting that off duty misconduct is increasingly grounds for discipline, including termination, regardless of rank).


100. Garcetti, 361 F.3d at 1171 (Garcetti supervised the more junior deputy attorney).
the property.\textsuperscript{101} When his investigations suggested that the affidavit rested on significant misrepresentations, he contacted the deputy sheriff who had prepared it.\textsuperscript{102} The officer advised Ceballos that he had no personal knowledge of the scene and had relied on the statements of two other deputy sheriffs.\textsuperscript{103} Ceballos then discussed the affidavit with the other deputy attorneys general and with his supervisors.\textsuperscript{104} As the Ninth Circuit found, "[e]veryone agreed that the validity of the warrant was questionable."\textsuperscript{105}

The problem of the warrant’s validity was hardly abstract. Aside from the obvious ethical and constitutional problems posed by a perjured affidavit,\textsuperscript{106} the situation was complicated by circumstances in Los Angeles in February 2000. For the previous 18 months, a series of incidents had exposed misconduct by the Los Angeles Police Department.\textsuperscript{107} In September 1999, one officer charged with misconduct entered a plea agreement that revealed a sustained pattern of police abuse and misconduct in the Rampart Division of the Police Department. His revelations gave rise...
to the Rampart Scandal, which led to the overturning of more than 100 convictions.\(^{108}\)

Ceballos may not have known the full extent of the Rampart Scandal in February 2000 because the first investigatory report on the problem was not released until March 1, 2000, and because the scandal did not touch the Los Angeles Sheriff’s Department.\(^{109}\) But the Los Angeles law enforcement problems were in the air as Ceballos considered what to do about the warrant.

At least initially, it seemed as though others in the Office of the District Attorney shared Ceballos’ concerns.\(^{110}\) Ceballos understood that his supervisors planned to dismiss the charges in the case. Accordingly, on March 2, 2000, he prepared a disposition memo for his supervisor’s review, in which he outlined why he believed the affidavit was based on false evidence, and recommended dismissal.\(^{111}\) At his supervisor’s request, Ceballos revised the memorandum so that it was “less accusatory.”\(^{112}\)

\(^{108}\) Independent Review, supra note 107, at 4-5. See generally Burcham & Fisk, supra note 107, at 537.


But see Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States at 71 n.2 (July 1, 1999) (reporting that some believed that the LA sheriffs were more brutal than the LAPD), available at http://www.hrw.org/reports98/police/uspo71.htm (last visited Aug. 22, 2007).

\(^{110}\) Garcetti, 2002 U.S. Dist. LEXIS 28039, at *3 (everyone agreed that there were problems with the warrant). Cf. Chemerinsky, Independent Analysis, supra note 106 at 632-33 (criticizing the office of the Los Angeles District Attorney for lacking procedures to evaluate Brady requests or perjured testimony). See also Moran, supra note 107; Adam Liptak, Federal Judge Files Complaint Against Prosecutor in Boston, N.Y.TIMES, July 3, 2007, at A11 (article on federal judge who filed complaint against federal prosecutor asserting the prosecutor failed to turn over evidence to the defense); Adam Liptak, Prosecutor Becomes Prosecuted, N.Y.TIMES June 24, 2007, at Sec. 4 (discussion of prosecutorial misconduct, including Brady issues, in the context of the Nifong case in North Carolina). Cf. Transcript Oral Argument, Mar. 21, 2005, at 59-60 (colloquy between Ceballos’ attorney and Supreme Court justices regarding whether there are problems with prosecutors being afraid to raise questions about prosecutions).

\(^{111}\) 2002 U.S. Dist. LEXIS 28039, *3-4; J.A.1 at *20-21; Garcetti, 361 F.3d at 1171. The Rampart Scandal must have been on the minds of all concerned by this point; Ceballos presented the memo to his supervisor on March 2, 2000, the day after the Police Board of Inquiry’s report on the scandal came out. Id. at 1171.

\(^{112}\) 2002 U.S. Dist. LEXIS 28039, at *4; J.A.1 at *41-42.
Based on that memo and his understanding of the facts, Ceballos’ supervisor authorized the defendant’s release.\(^ {113} \)

A little over a week later, Ceballos, his two supervisors, and representatives of the Los Angeles Sheriff’s Office met to discuss the memorandum and the underlying case.\(^ {114} \) This meeting changed things. Ceballos’ memo had enraged the Sheriff’s representatives, who denounced him for acting like “a public defender.”\(^ {115} \) They also expressed concern that a dismissal would provoke the defendants to sue the Sheriff’s office.\(^ {116} \) Persuaded by that reaction,\(^ {117} \) Ceballos’ supervisors allowed the case to go to trial in the hope that the courts could properly adjudicate the reliability of the affidavit.\(^ {118} \)

When the case was not dismissed, one defense attorney filed a motion for a traverse to challenge the warrant, and called Ceballos as a witness.\(^ {119} \) Ceballos notified his supervisors and advised them that he believed he had an obligation to turn over his disposition memo.\(^ {120} \) One supervisor initially directed Ceballos to prepare a new, shorter version of his original memo, but he convinced her that it would be more appropriate to turn over a redacted version of the memo.\(^ {121} \)

At the hearing,\(^ {122} \) Ceballos was cross-examined by a supervisor,\(^ {123} \) who managed to limit Ceballos’ testimony through evidentiary objections.\(^ {124} \)

\(^ {113} \) Id. at *54-55; Transcript Oral Argument, Mar. 21, 2005, at 55 ("The employer sided with [Ceballos] initially and released the defendant . . . .").

\(^ {114} \) J.A.I at *27; 2002 U.S. Dist. LEXIS 28039, at *4.

\(^ {115} \) J.A.I at *45.

\(^ {116} \) Id. at *49 (they added that one of the defendants had sued in an earlier case).

\(^ {117} \) Garcetti, 361 F.3d at 1171. The decision may also have been influenced by political concerns. Gil Garcetti, the District Attorney for Los Angeles, was up for re-election in 2000, and in March of that year, his opponents already were using the Rampart Scandal against him during the campaign. See, e.g. Scott C. Smith, Groveman, Cooley Blast Garcetti over Rampart, METROPOLITAN NEWS COMPANY, LOS ANGELES, February 18, 2000, at 3 (opponents attack Garcetti for his handling of the Rampart Scandal during election event). Cf. J.A.I at *84-86 (Mexican American Bar Association expresses concern that Ceballos’ complaints might become a campaign issue); id. at *98 (one of the individual defendants charged that Ceballos was making his claims to help Garcetti’s opponent in the upcoming election). See generally Mitchell Landsberg, Garcetti Far Behind in Race for Third Term, L.A. TIMES, Apr. 10, 2000, at A1 (Garcetti’s poll results reflect anger over Rampart Scandal); Mitchell Landsberg and Twila Decker, Los Angeles District Attorney: Colley Beats Garcetti by a Wide Margin, L.A. TIMES, Nov. 8, 2000, at A1 (quoting campaign officials as suggesting that the Rampart Scandal helped lead to Garcetti’s defeat); Barbara Whiaker, Rocky Tenure Ends for Los Angeles Prosecutor, N.Y. TIMES Nov. 10, 2000, at A18 (quoting Steve Cooley, who defeated Garcetti in election, as suggesting that the Rampart Scandal was the main reason Garcetti lost).

\(^ {118} \) J.A.I at *50-51.

\(^ {119} \) Id. at *53-54.

\(^ {120} \) Id. at *54-55.

\(^ {121} \) Id. at *55-57; Joint Appendix, Volume II, at *419 [hereinafter JA.II].

\(^ {122} \) J.A.II at *158.

\(^ {123} \) J.A.I at *61-62. Ceballos testified that the presiding judge at the hearing told him that the cross examination was harsh. Id. at *87.
Ultimately, the judge rejected the motion for a traverse and the criminal case proceeded.  

Ceballos claimed that he had suffered retaliation at work as a result of his statements about the warrant affidavit, which culminated in his transfer to a less prestigious job. He protested this treatment in a variety of ways: he brought a grievance and asked the Mexican American Lawyers Association to intervene with his supervisors on his behalf. When those routes failed, he filed a lawsuit, claiming that he had been retaliated against for exercising his First Amendment rights in violation of the Pickering-Connick line of cases.

A. In the Lower Courts

Ceballos’ claims never made it to trial. In an unpublished opinion, the District Court granted the defendants’ motions for summary judgment on Ceballos’ federal claims. After first ruling that the First Amendment claim rested solely on Ceballos’ March 2 memo, the court concluded that the memo “clearly involved a matter of public concern,” but added that because Ceballos “wrote [it] as part of his job,” the memo was not protected.


125. After the hearing on the motion for a traverse, Ceballos notified one of his supervisors that he felt he had an obligation to turn information over to the defense under Brady. J.A.1 at *89-90. He was told not to do so, and that he could be sued if he did. Id. at *90, 93. The record is not clear about whether he did so or not. One amicus brief filed with the Supreme Court argued that Ceballos’ did turn over the material, and should have been fired for doing so. Brief of the Nat’l Ass’n of Counties et al. as Amici Curiae Supporting Petitioners at 15 n.8, Garcetti, 547 U.S. at 410 (No. 04-473), 2004 U.S. Briefs 473. But as another amicus brief points out, that issue was not before the Court. Brief of Ass’n of Deputy Dist. Attorneys and California Prosecutors Ass’n as Amici Curiae In Support of Respondent at 18 n.8, Garcetti, 547 U.S. at 410 (No. 04-473), 2004 U.S. Briefs 473.


127. J.A.1 at *82-83.

128. Id. at *84-85.

129. Garcetti, 361 F.3d at 1172. Ceballos also brought a common law claim for intentional infliction of emotional distress. Second Amended Complaint, paragraphs 32-34; J.A.1 at *146-47.

130. There were two motions for summary judgment. The first was filed on behalf of the individual defendants; the second on behalf of the county and the District Attorney, in his official capacity. The District Court granted the first motion on the ground that the individual defendants were entitled to qualified immunity, Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *3 (C.D. Cal. Jan. 30, 2002), and the second on the ground that the county and District Attorney were entitled to sovereign immunity under the Eleventh Amendment. Garcetti, 361 F.3d at 1170.


132. Id. at *17-18.
In support of that conclusion, the District Court relied on a Seventh Circuit decision, Gonzales v. City of Chicago. The plaintiff in that case, a newly recruited police officer, claimed that his colleagues retaliated against him for the reports he had written during his previous job as an investigator of police misconduct at the Office of Professional Standards (OPS). The Seventh Circuit ruled that the plaintiff was not entitled to First Amendment protection because he had written the reports as part of his job. Yet the court limited the reach of its ruling:

If Gonzales were writing reports of police misconduct, and his supervisors told him to rewrite the reports so as not to disclose police corruption, Gonzales would have a First Amendment right to expose the police cover-up to the public. But in that circumstance, Gonzalez would be acting beyond his employment capacity. Instead of simply performing his job of writing truthful, internal reports, he would be speaking as a citizen on a matter of public concern—a police cover-up.

In light of that caveat, the district court’s conclusion that Gonzales supported a ruling against Ceballos seems misguided; but ultimately, the district court’s discussion of Gonzales was dicta. That court determined that it was not clear whether work-related statements were entitled to First Amendment protection, and granted summary judgment on the ground that the defendants were entitled to qualified immunity.

On appeal, the Ninth Circuit reversed with a 2-1 majority holding that Ceballos’ “allegations of wrongdoing in the memorandum constitute[d] protected speech under the First Amendment....” The court conceded that the First Amendment rights of public employees on the job were not absolute, but it determined nonetheless that Ceballos’ speech was protected under the analysis developed by the Supreme Court in Pickering and elaborated in Connick. The majority found that Ceballos’ memorandum

133. 239 F.3d 939 (7th Cir. 2001).
134. Id. at 941.
135. Id. The Seventh Circuit clarified the limits of Gonzales in Delgado v. Jones, 282 F.3d 511 (7th Cir. 2001) by extending First Amendment protection to an employee who suffered retaliation after he reported misconduct to supervisors. The court explained: “Our holding in Gonzales is limited to routine discharge of assigned functions, where there is no suggestion of public motivation. In the case now before the court, [plaintiff]’s communications with his superiors were designed not only to convey information of possible crimes, but also additional facts that were relevant to the manner and scope of any subsequent investigation.” Id. at 518-19.
136. Garcetti, 2002 U.S. Dist. LEXIS 28093, at *20-22 (having granted summary judgment on Ceballos' constitutional claim, the district court declined to exercise jurisdiction over his remaining state law claim.).
137. Garcetti, 361 F.3d at 1173. The court declined to reach the question of whether his other communications were protected, noting that the parties did not agree about the scope of Ceballos’ communications. Id. at 1172-73. The court ruled that it need only consider the memorandum, about which the parties did agree, and that question of the nature and extent of Ceballos’ other communications was best addressed at trial.
138. Id. at 1173.
addressed a matter of public concern. Applying several decades of Ninth Circuit precedent, the majority reaffirmed the well-settled rule that "when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees... their speech is inherently a matter of public concern." The majority dismissed as absurd the defendants' argument that a public employee who complained internally, but not publicly, lacked First Amendment protection. It likewise rejected the defendants' contention that Ceballos lacked protection because he had written the memorandum "pursuant to his job responsibility." The majority reasoned that such a rule would not protect employees who spoke on matters of public concern in the course of performing their jobs, and would thus "seriously undermine our ability to maintain the integrity of our governmental operations." The court added that such a rule would fall harshly on public employees because they "all... have a duty to notify their supervisors about... wrongful conduct...."

In a special concurring opinion, Judge O'Scannlain agreed that the settled law in the Ninth Circuit dictated a ruling for Ceballos, but argued that the Ninth Circuit law was inconsistent with the Supreme Court's Pickering-Connick decisions. Conceding that the point had "rarely been stated explicitly by the Supreme Court," Judge O'Scannlain criticized the majority's interpretation for ignoring the "implicit premise underlying the First Amendment's hostility toward viewpoint-driven rules abridging the freedom of speech is that such constraints impermissibly infringe upon individuals' freedom of choice to express their personal opinions or otherwise express themselves." Public employees who express themselves "in the course of carrying out their job duties" have no

139. Id. at 1173-1174 (noting that whether or not a statement was a matter of public concern was a question of law).
140. Id. (citing Blair, 223 F.3d at 1079 (police officer who reports the misconduct of other officers to his supervisors is entitled to First Amendment protection); Roth, 856 F.2d at 1405-6 (specifically distinguishing between the speech on a matter of personal concern that was not protected in Connick and plaintiff's statements revealing problems with government operations); and Johnson v. Multnomah County, 48 F.3d 420, 425 (9th Cir. 1995)).
141. Garcetti, 361 F.3d at 1174 (citing Hufford v. McEnaney, 249 F.3d 1142, 1150 (9th Cir. 2001); Ulrich v. City and County of S.F., 308 F.3d 968, 979 (9th Cir. 2002); Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 747 (9th Cir. 2001); Connick, 461 U.S. at 147-49).
142. Garcetti, 361 F.3d at 1174-75.
143. Id. at 1175.
144. Id. at 1175-76.
145. Id. at 1185 (O'Scannlain, J., concurring).
146. Id. at 1186-88 (O'Scannlain, J., concurring). But see id. at 1177 n.7 (offering an alternative interpretation of the cases cited by Judge O'Scannlain, and concluding there was no split in the circuits).
147. Id. at 1188 (O'Scannlain, J., concurring).
148. Id. at 1188-89 (O'Scannlain, J., concurring) (emphasis in original).
149. Id. at 1189.
personal interest in the content of their speech because they speak for their employer.\textsuperscript{150}

\subsection*{B. In the Supreme Court}

The Supreme Court held that Ceballos' had no First Amendment claim, reversing the Ninth Circuit with a 5-4 majority.\textsuperscript{151} Writing for the majority, Justice Kennedy stated that "while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'"\textsuperscript{152} Applying that principle in the case before the Court, Kennedy concluded Ceballos' memo was not entitled to First Amendment protection because it had been written "pursuant to his duties as a calendar deputy."\textsuperscript{153} He added that statements made pursuant to official duties might be protected by whistleblower laws\textsuperscript{154} and "obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws."\textsuperscript{155}

\section*{IV. \textit{GARCETTI} APPLIED}

As lower courts struggle to implement the decision, they approach \textit{Garcetti} in several ways: Some decisions emphasize process, assuming that \textit{Garcetti} altered plaintiff's burdens of pleading or proof. Others turn on substance, focusing on the employee's position, the content of the employee's speech, or the audience for the employee's statement.

Procedural concerns have complicated these post-\textit{Garcetti} adjudications. Courts frequently have been unwilling to decide these claims on motions to dismiss,\textsuperscript{156} and their decisions reveal considerable confusion

\begin{thebibliography}{99}
\bibitem{150} Id. at 1189, 1193.
\bibitem{151} 126 S. Ct. at 1951.
\bibitem{152} Id. at 1959 (quoting \textit{Connick}, 461 U.S. at 154).
\bibitem{153} Id. at 1959-60 (noting that Ceballos admitted this was the case).
\bibitem{155} Id. at 1962.
\end{thebibliography}
about the burden of pleading after *Garcetti*. While some courts require discovery to provide evidence about a plaintiff’s actual job duties, others simply assume that the employee spoke as a citizen absent an allegation to the contrary. In addition, while some courts instruct plaintiffs to refile their complaints to address the issues raised in *Garcetti*, others refuse to allow plaintiffs to amend their complaint in light of *Garcetti*.

Nor has *Garcetti* made summary judgment more likely. Some courts have relied on the case to grant motions for summary judgment; others have used the decision to justify revisiting and reversing prior rulings denying motions for summary judgment. But other courts have refused

(denying motion to dismiss because unable to determine from the complaint whether plaintiff’s complaints made allegations that fell within her job duties) [hereinafter Pezzolla].

157.  See, e.g., Rohrbough v. Univ. of Colo. Hosp., No. 06-CV-00995-REB-MJW, 2006 U.S. Dist. LEXIS 82087, at *7-8 (D. Colo., Nov. 8, 2006) (denying defendants’ motion to dismiss because it is unclear from the complaint whether plaintiff’s job duties included the allegations of fraud and cover-ups covered in her reports and complaints, the record must be developed more fully).


159. See, e.g., Winters v. Meyer, 442 F. Supp. 2d 82, 87 (S.D. N.Y. 2006) (noting that in the Second Circuit, plaintiffs who allege retaliation “must plead in their complaints that their conduct is protected by the First Amendment.”).

160. See, e.g., Sigsworth v. City of Aurora, No. 05-4143, 2007 U.S. App. LEXIS 12204, at *11, 13 (7th Cir. May 25, 2007) (affirming district court’s decision refusing to allow the plaintiff to amend).

161. See, e.g., Boykin v. City of Baton Rouge, 439 F. Supp. 2d 605, 610 (M.D. La. 2006) (granting summary judgment to plaintiff who wrote diversity report pursuant to job as director of human resources); Levy v. Office of Legislative Auditor, 459 F. Supp. 2d 494, 498-99 (M.D. La. 2006) (granting motion for summary judgment against auditor who spoke at Toastmaster’s meeting as part of duties); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 693-94 (5th Cir. 2007) (affirming summary judgment to athletic director’s who wrote memo about funding related to his job); Ruotolo v. New York, No. 03 Civ. 5045 (SHS), 2006 U.S. Dist. LEXIS 49903, at *10-12 (S.D.N.Y. July 19, 2006) (granting summary judgment against police sergeant, who produced report and statements about environmental hazards made pursuant to official duties); Maras-Roberts v. Phillipe, No. 1:05-cv-1148-SEB-JMS, 2007 U.S. Dist. LEXIS 31661, at *18 (S.D. Ind. Apr. 27, 2007) (finding “no basis on which a reasonable jury could reach [a] conclusion as a matter of fact that [plaintiff]’s speech was uttered by her in her capacity as a private citizen . . . .”); Del Conte v. Borough of Ambler, No. 05-6191, 2006 U.S. Dist. LEXIS 64941, at *17-18 (E.D. Pa. Aug. 18, 2006) (granting summary judgment to assistant superintendent of waste water treatment facility who made comments that were not on a matter of public concern); Weintraub v. Bd. of Educ. of N.Y., 489 F. Supp. 2d 209, 222 (E.D.N.Y. 2006) (granting summary judgment motion with respect to plaintiff’s comments to superior and grievance, denying motion with respect to conversations with co-workers). Trujillo v. Bd. of Educ., No. 05-2305, 2007 U.S. App. LEXIS 827, at *15, 17 (10th Cir. Jan. 12, 2007) (upholding district court’s order denying motion for summary judgment on the grounds that a fact finding hearing on the nature of the plaintiff’s duties was required); Kodrea v. City of Kokomo, 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (refusing to grant defendant’s motion for summary judgment because questions remained about whether the plaintiff acted as a citizen or an employee when complaining about a worker who was not doing his job); Jackson v. Jimino, No. 1:03-CV-722 (RFT), 2007 U.S. Dist. LEXIS 4373, at * 17 (N.D.N.Y. Jan. 19, 2007) (denying defendants’ motion for summary judgment on plaintiff’s First Amendment claim because it is unclear whether plaintiff, former Director of the Bureau of Real Estate, spoke as a knowledgeable private citizen in his official capacity, or was defending himself from public attack).

162. Weintraub, 489 F. Supp. at 214 (quoting Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1325 (10th Cir. 2007) (*Garcetti* "profoundly alters how courts review First Amendment retaliation claims . . . ." and requires reversal of prior decision denying defendant’s motion for summary judgment); Logan v. Dep’t of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 U.S. Dist. LEXIS 43631, at *7-8 (S.D. Ind. Nov. 8, 2006) (denying motion to dismiss because unable to determine from the complaint whether plaintiff’s complaints made allegations that fell within her job duties) [hereinafter Pezzolla].


164. See, e.g., Sigsworth v. City of Aurora, No. 05-4143, 2007 U.S. App. LEXIS 12204, at *11, 13 (7th Cir. May 25, 2007) (affirming district court’s decision refusing to allow the plaintiff to amend).

165. See, e.g., Boykin v. City of Baton Rouge, 439 F. Supp. 2d 605, 610 (M.D. La. 2006) (granting summary judgment to plaintiff who wrote diversity report pursuant to job as director of human resources); Levy v. Office of Legislative Auditor, 459 F. Supp. 2d 494, 498-99 (M.D. La. 2006) (granting motion for summary judgment against auditor who spoke at Toastmaster’s meeting as part of duties); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 693-94 (5th Cir. 2007) (affirming summary judgment to athletic director’s who wrote memo about funding related to his job); Ruotolo v. New York, No. 03 Civ. 5045 (SHS), 2006 U.S. Dist. LEXIS 49903, at *10-12 (S.D.N.Y. July 19, 2006) (granting summary judgment against police sergeant, who produced report and statements about environmental hazards made pursuant to official duties); Maras-Roberts v. Phillipe, No. 1:05-cv-1148-SEB-JMS, 2007 U.S. Dist. LEXIS 31661, at *18 (S.D. Ind. Apr. 27, 2007) (finding “no basis on which a reasonable jury could reach [a] conclusion as a matter of fact that [plaintiff]’s speech was uttered by her in her capacity as a private citizen . . . .”); Del Conte v. Borough of Ambler, No. 05-6191, 2006 U.S. Dist. LEXIS 64941, at *17-18 (E.D. Pa. Aug. 18, 2006) (granting summary judgment to assistant superintendent of waste water treatment facility who made comments that were not on a matter of public concern); Weintraub v. Bd. of Educ. of N.Y., 489 F. Supp. 2d 209, 222 (E.D.N.Y. 2006) (granting summary judgment motion with respect to plaintiff’s comments to superior and grievance, denying motion with respect to conversations with co-workers). Trujillo v. Bd. of Educ., No. 05-2305, 2007 U.S. App. LEXIS 827, at *15, 17 (10th Cir. Jan. 12, 2007) (upholding district court’s order denying motion for summary judgment on the grounds that a fact finding hearing on the nature of the plaintiff’s duties was required); Kodrea v. City of Kokomo, 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (refusing to grant defendant’s motion for summary judgment because questions remained about whether the plaintiff acted as a citizen or an employee when complaining about a worker who was not doing his job); Jackson v. Jimino, No. 1:03-CV-722 (RFT), 2007 U.S. Dist. LEXIS 4373, at * 17 (N.D.N.Y. Jan. 19, 2007) (denying defendants’ motion for summary judgment on plaintiff’s First Amendment claim because it is unclear whether plaintiff, former Director of the Bureau of Real Estate, spoke as a knowledgeable private citizen in his official capacity, or was defending himself from public attack).

166. Weintraub, 489 F. Supp. at 214 (quoting Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1325 (10th Cir. 2007) (*Garcetti* "profoundly alters how courts review First Amendment retaliation claims . . . ." and requires reversal of prior decision denying defendant’s motion for summary judgment); Logan v. Dep’t of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 U.S. Dist. LEXIS 43631, at *7-8 (S.D. Ind. Nov. 8, 2006) (denying motion to dismiss because unable to determine from the complaint whether plaintiff’s complaints made allegations that fell within her job duties) [hereinafter Pezzolla].
to grant those motions, finding that issues of fact (particularly with respect to the employee's official duties) remain.\(^{163}\) *Garcetti* has also caused confusion in cases that went to trial. Several courts have ruled that they must apply the decision to reverse verdicts,\(^{164}\) but other have refused to do so.\(^{165}\)

**A. Shifting the Balance**

Some early decisions found that *Garcetti* replaced the two-step *Pickering-Connick* balancing test with a new, three-part inquiry.\(^{166}\) The

---


\(^{164}\) See, e.g., *Trujillo*, 2007 U.S. App. LEXIS 827, at *17 (requiring fact finding hearing on the nature of the plaintiff's duties); *Kodrea*, 458 F. Supp. 2d at 868 (stating that questions remain about whether the plaintiff acted as a citizen or an employee when he complained about a worker who was not doing his job); *Jackson*, 2007 U.S. Dist. LEXIS 4373, at *17 (stating that it is unclear whether plaintiff, former Director of the Bureau of Real Estate, spoke as a knowledgeable private citizen in his official capacity, or to defend himself from public attack).

\(^{165}\) See, e.g., *Spiegla* v. Hull, 481 F.3d 961, 967 (7th Cir. 2007) (setting aside verdict in light of *Garcetti*); *Broderick*, 2007 U.S. Dist. LEXIS 23698, at *6 (granting qualified immunity based on *Garcetti* after jury ruled for plaintiff); *Cf.* *Dillon* v. Fermon, No. 04-CV-2029, 2006 U.S. Dist. LEXIS 59650, at *10-11 (C.D. Ill. Aug. 23, 2006) (relying on *Garcetti* to enter judgment for defendant after first trial ended without a verdict.).

\(^{166}\) See, e.g., *DeLuzio* v. Monroe County, No. CV-00-1220, 2006 U.S. Dist. LEXIS 78900, at *19-20 (M.D. Pa. Oct. 30, 2006) (refusing to overturn jury verdict on First Amendment claim); *Hailey* v. City of Camden, No. 01-3967, 2006 U.S. Dist. LEXIS 45267, at *46-47 (D.N.J. July 5, 2006) (refusing to overturn jury verdict on First Amendment claim). This seems to be the better view. While a reviewing court can surely consider whether instructions were consistent with *Garcetti*, it is not clear that appellate courts have the power to review the facts de novo. *The Supreme Court has the power of de novo review, but it apparently reserved that power to itself.* *Connick*, 416 U.S. at 150 n.10 (1983). *Cf.* *Freitag* v. *Ayers*, 468 F.3d 528, 540, 548 (9th Cir. 2006) (affirming part of verdict and remanding part of verdict for further findings by trial judge).

\(^{167}\) See, e.g., *Spiegla* v. *Hull*, 481 F.3d 961, 967 (7th Cir. 2007) (revisiting, and granting in light of *Garcetti*, defendants' motion for summary judgment). *Cf.* *Chen*, 2007 U.S. App. LEXIS 827, at *17 (requiring fact finding hearing on the nature of the plaintiff's duties); *Kodrea*, 458 F. Supp. 2d at 868 (stating that questions remain about whether the plaintiff acted as a citizen or an employee when he complained about a worker who was not doing his job); *Jackson*, 2007 U.S. Dist. LEXIS 4373, at *17 (stating that it is unclear whether plaintiff, former Director of the Bureau of Real Estate, spoke as a knowledgeable private citizen in his official capacity, or to defend himself from public attack).
new test, articulated most completely by the Third Circuit, involves the following steps:

1. A court must first examine the speaker's role to determine the context of the speech. If the court finds that the speaker was speaking within the scope of her official duties, the inquiry ends and there is no First Amendment claim.167

2. If the court determines that the speaker was speaking outside of her official duties, then the court must next resolve whether the speech was on a matter of public concern. If the court determines that the speech is not on a matter of public concern, the inquiry ends and there is no First Amendment protection.168

Finally, if the court concludes that the speech was on a matter of public concern, it must once again address the context of the speech, this time looking to see whether the time, place and manner of the expression disrupted or interfered with the government employer's mission. Where the court finds the speech did either, First Amendment protection is denied.169

As this suggests, the circuits that employ this three-step analysis assume that Garcetti established two distinct threshold questions: first, whether the employee spoke as a citizen; and second, whether the speech was on a matter of public concern.170

---

167. See, e.g., Maras-Roberts v. Phillippe, No. 1:05-cv-1148-SEB-JMS, 2007 U.S. Dist. LEXIS 31661, at *18 (S.D. Ind. Apr. 27, 2007) (finding that, while there might be questions about whether plaintiff spoke on a matter of public concern, there was "no basis on which a reasonable jury could reach [a] conclusion as a matter of fact that [plaintiff]'s speech was uttered by her in her capacity as a private citizen . . . ").

168. See, e.g., Benvenisti, 2006 U.S. Dist. LEXIS 73373, at *30-34 (holding that plaintiff spoke as a citizen when he threatened to complain to another agency about nepotism problems in his department, but his comments were not regarding a matter of public concern).

169. See, e.g., Mills, 452 F.3d at 648 (finding that even if Mills' statements were protected, her superiors could conclude from her remarks that she did not intend to "zealously implement the Chief's plans").

170. See also Cooper, supra note 3.
B. Formalism

In a recent article, Charles Rhodes argues that *Garcetti* exemplifies the Supreme Court’s increasing emphasis on formalism, an interpretative method emphasizing bright-line rules and categorization. Rhodes contends that *Garcetti*’s distinction between “official duty speech” and “unofficial speech” is a classic example of this approach. A number of decisions seem to have read *Garcetti* in much the same way, though the different cases offer various approaches to formalism. Some ground their decision on the employee’s status; others emphasize the content of the speech; and still others focus on the audience at which the remarks were directed.

Quite a few decisions that deny First Amendment protection focus on the plaintiff’s occupation. Three groups in particular have been singled out in these decisions: law enforcement officers, lawyers, and teachers. Most of these cases involve police officers or prison guards, and a disproportionate number of those decisions deny these employees protection. Unsurprisingly, given Ceballos’ occupation, quite a few cases involve government lawyers – and in each of these cases, courts have denied First Amendment protection.

*Garcetti* left open the issue of whether teachers were entitled to special First Amendment protection. Courts have uniformly refused to protect teachers’ out-of-classroom statements, treating teachers as no different from other public employees. The cases that have addressed the issue of teachers’ classroom statements have come out in opposite directions. A New York district court ruled that academic freedom protects the statements of teachers within classrooms, and refused to dismiss the case of a teacher who claimed to have not been rehired because she told her class that she supported the re-election of President Bush. In contrast, the Seventh Circuit held that a school district was entitled to dismiss a teacher for telling a student that she had honked her car horn when she passed a sign that read

---


172. More than a quarter of the cases decided in the year after *Garcetti* involve police officers or prison guards. See Appendix, infra, for a list of cases.


174. Pagani v. Meriden Bd. of Educ., No. 3:05-CV-01115 (JCH), 2006 U.S. Dist. LEXIS 92267, at *11 (D. Conn. Dec. 19, 2006) (holding that teacher who reported to supervisor and state agency that another teacher had shown nude photos to middle school students was not protected); Weintraub, 2006 U.S. Dist. LEXIS 96714, at *26-27 (teacher’s statements to assistant principal and during grievance not protected, but see id., 2006 U.S. Dist. LEXIS 96714, at *27 (same teacher’s discussion of situation with other teachers may be protected).

“Honk for Peace.” The court concluded that because the school paid her salary, it could determine what she was entitled to teach and how she should teach it.

Other formalist decisions emphasize position, not profession. In these decisions, courts have found that the statements of supervisors, inspectors, security officers, and any other employee whose duties include monitoring or reporting were not entitled to First Amendment protection.

176. Mayers v. Monroe County, 474 F.3d 477, 478 (7th Cir. 2007).
177. Id. at 479. The court suggested that Garcetti left open the question of how much room was left for “constitutional protection of scholarly viewpoints” in post-secondary education. Id. at 480.
178. Cavozos v. Edgewood Ind. Sch. Dist., No. 05-51417, 2006 U.S. App. LEXIS 31114, at *2 (5th Cir. Dec. 18, 2006) (holding that school principal who made statements in the course of a discipline procedure was not protected because disciplining students was part of her supervisory job); Casey, 473 F.3d at 1331 (10th Cir. 2007) (holding that because school superintendent had duty to report mismanagement regarding Head Start funds, no protection); Boykin, 439 F. Supp. 2d at 610 (M.D. La. 2006) (holding that report written by director of Human Resources, criticizing city’s handling of diversity, was part of his job, and thus, he had no protection); Benvenisti, 2006 U.S. Dist. LEXIS 73373, at *27-28 (manager, no protection for his internal complaints about an employee); Franklin v. Clark, 454 F. Supp. 2d 356, 361-62 (D. Md. 2006) (holding that because duties of the director of human resources included overseeing use of vehicles, no protection for report he wrote calling attention to misuse); McGee v. Pub. Water Supply, 471 F.3d 918 (D. Md. 2006) (holding that because district manager’s complaint regarding the award of a contract fell within his job duties it was not protected); Logan v. Dep’t of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 U.S. Dist. LEXIS 43631, at *5-6 (S.D. Ind. June 26, 2006) (holding that health care supervisor’s “broad duties” included all aspects of prisoner health care, and thus her complaints about the head nurse fell within the scope of her duties). But see Falk, 2006 U.S. Dist. LEXIS 6148, at *10 (finding that assistant lab director may have viable claim that his report of fraud in the lab was protected).
179. Ruotolo, 2006 U.S. Dist. LEXIS 49903, at *13-14 (holding that environmental officer who wrote a report on health issues at precinct and then spoke to inspectors about his report made statements within the scope of his duties, and thus there was no protection); Posey v. Lake Pend Oreille Sch. Dist., No. CV05-272-N-EJL, 2007 U.S. Dist. LEXIS 7829, at *13-14 (Idaho Feb. 2, 2007) (holding school security officer not entitled to protection for his complaint about school security problems); Schuster v. Henry County, No. 1:05-CV-239-TWT, 2007 U.S. Dist. LEXIS 41780, at *17-19 (N.D. Ga. June 7, 2007) (holding that CFO had duty to report financial fraud, thus, comments were not protected); Clarke v. Multnomah County, No. CV-06-229-HU, 2007 U.S. Dist. LEXIS 21427, at *20-21 (D. Or. Mar. 23, 2007) (holding that statements made by business manager, about budget and taxes were part of her job, and thus, not protected); Dennis v. Putnam County Sch. Dist., No. 5:05-CV-07-CAR, 2007 U.S. Dist. LEXIS 23598, at *13-14 (M.D. Ga. Mar. 21, 2007) (holding no protection where fiscal officer’s duties included reporting financial irregularities).
180. Jaworski, 2007 U.S. Dist. LEXIS 6063, at *13-14 (holding that because engineer’s job involved reporting on projects, he had no protection); Dunleavy v. Wayne County Comm’n, No. 04-CV-74670-DT, 2006 U.S. Dist. LEXIS 57238, at *12-13 (E.D. Mich. Aug. 16, 2006) (holding that auditor whose job included investigating financial fraud was not entitled to protection for speaking to police officers about fraud he uncovered); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007) (holding that because athletic director’s duties included football budget, no protection for complaints regarding funding); Clarke, 2007 U.S. Dist. LEXIS 21427, at *21 (invoking business manager); Johnson v. George, No. 05-157-MPT, 2007 U.S. Dist. LEXIS 35344, at *22-23 (D. Del. Mar. 15, 2007) (holding that director of community college had no protection for comments made during chairs and directors meeting) [hereinafter George]; Yatzus, 458 F. Supp. 2d at 245-46 (holding that because school psychologist’s job required her to advocate for students, when she complained about discrimination against special needs students her remarks were not protected). But see City of Nashville, 2006 U.S. Dist. LEXIS 78133, at *8, 11-12 (holding that remarks of city financial director to the press
When deciding cases that involve statements by non-supervisory employees, courts inquire whether rules or laws required an employee to make the statements at issue. This variation on the formalist approach has resulted in non-supervisory employees being disciplined for a variety of comments, including some made outside of work. In *Levy v. Office of the Auditor General*, the court held that an auditor could be demoted for a talk he gave at a Toastmaster's session. His department required employees to join and participate in organizations that encouraged public speaking, including Toastmasters. Because plaintiff participated in Toastmasters as a result of that directive, the court concluded that his remarks were part of his official duties and therefore lacked First Amendment protection.

Other courts have applied a similar logic to statements made pursuant to law, holding, for example, that a teacher with a statutory obligation to report evidence of sexual harassment of students was not entitled to

---

181. See, e.g., *Jennings v. County of Washtenaw*, 475 F. Supp. 2d 692, 705 (E.D. Mich. 2007) (involving attendant at juvenile center who reported security breaches by other attendants and whose duties included reporting on the center’s safety); *Pagani*, 2006 U.S. Dist. LEXIS 92267, at *11 (finding that state law required school teacher to report sexual abuse and harassment of students, and that there was no protection for reporting that another teacher had shown nude photos to middle school students); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007) (holding that because police officers were required to report criminal activities, there was no protection for advising district attorney of apparent criminal conduct by political figures); *Spiegla*, 484 F.3d at 969 (where rules required prison guard to report misconduct, there was no protection; the court noted the irony of the fact that plaintiff was disciplined for following the rules). *Cf. Walters v. County of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 U.S. Dist. LEXIS 60272, at *42 (D. Ariz. Aug. 22, 2006) (holding that speech was protected where plaintiff’s job did not entail reporting the wrongdoing of employees in other departments); *DeLuzio v. Monroe County*, No. CV-00-1220, 2006 U.S. Dist. LEXIS 78900, at *19-20 (M.D. Pa. Oct. 30, 2006) (holding caseworker in juvenile home who complained about budget issues and misconduct by other caseworkers was protected as there was no evidence that his job duties included oversight of either of these matters); *Rhodes v. Prince*, No. 3:05-CV-2343-D, 2007 U.S. Dist. LEXIS 9028, at *17-18 (N.D. Tex. Feb. 8, 2007) (holding that a crime scene investigator’s report that police officers and co-workers were falsifying evidence was protected because job did not include duty to report); *Barclay*, 451 F. Supp. 2d at 396 (holding that because plaintiff claimed that she had never received training on work rules requiring the reporting of misconduct, questions remained about whether her statements were made as part of her official duties). *But see Skrutski v. Marat*, No. 3: CV-03-2280, 2006 U.S. Dist. LEXIS 66024, at *29 (M.D. Pa. Sep. 15, 2006) (stating: "Defendants have relied on state police regulations and the job description. This evidence is not dispositive of the issue [of whether plaintiff spoke as an employee].")

182. *Levy v. Office of Legislative Auditor*, 459 F. Supp. 2d 494 (M.D. La. 2006) (finding that plaintiff auditor was required by his job to join Toastmasters and give speeches and thus, his comments in a Toastmasters speech were not entitled to First Amendment protection).

183. *Id.* at 497-98.

184. *Id.* at 498.
protection.\textsuperscript{185} At the same time, this version of formalism has protected some statements by non-supervisory employees when courts have found that the statements were outside the scope of the employee’s defined duties.\textsuperscript{186}

Still other holdings hinge on audience.\textsuperscript{187} In Milde v. Housing Authority, the court ruled that the First Amendment might protect a plaintiff’s comments to a local newspaper, but that it did not protect a memo she had written to her supervisor, or her formal complaint to the Board.\textsuperscript{188} The court noted that the plaintiff’s official duties involved

\textsuperscript{185} Pagani, 2006 U.S. Dist. LEXIS 92267, at *11 (finding state law required school teacher to report sexual abuse and harassment of students, and thus, there was no protection for reporting that another teacher had shown nude photos to middle school students).

\textsuperscript{186} See, e.g., Coles v. Moore, No. 3:04-cv-1623 (JCH), 2006 U.S. Dist. LEXIS 73505, at *13 (D. Conn. Sept. 25, 2006) (holding that plaintiff, whose speech went beyond job duties, was entitled to protection); Lindsey, 2006 U.S. Dist. LEXIS 61439, at *12 (holding that although plaintiff was required by his job to go to city council meetings, because he spoke on matters unrelated to his assignment, his speech was protected); Case, 473 F.3d at 1331-32 (holding that employee fired for making comments to several different people was only entitled to protection for statements made to Attorney General because those statements were outside of his job duties); Morales, 494 F.3d 590 (holding that police officer’s statements to attorney general were not protected, but deposition testimony about the same matter was protected because the officer did not make these statements as part of his job duties). Cf. Pezzolla, 2007 U.S. Dist. LEXIS 13609, at *28 (holding more evidence was needed to determine whether case worker’s obligation to serve as advocate for her clients included duty to write letters to NYCLU).

\textsuperscript{187} See, e.g., City of Nashville, 2006 U.S. Dist. LEXIS 78133, at *8-9 (holding that city finance director who wrote report during city election, gave interviews about it to reporters, and was thereafter fired, had viable First Amendment claim for her statements to the press); Benvenisti, 2006 U.S. Dist. LEXIS 73373, at *38 (noting that the forum in which the speech is made is an important factor in determining whether the speech is protected); Battle v. Bd. of Regents, 468 F.3d 755, 759 (11th Cir. 2006) (holding that because plaintiff did not make her complaints about fraud to anyone outside of the university, she had no protection); Iott, 2007 U.S. Dist. LEXIS 17517, at *8 (noting in finding that plaintiff had no First Amendment claim, that it was significant his comments were made on the job at the workplace and not to a member of the general public).

These cases often employ an internal-external distinction, protecting statements made outside the office (external) and denying protection to those made at work (internal). Cf. Randy J. Kozel, Reconceptualizing Public Employee Speech, 99 Nw. U. L. Rev. 1007 (2005) (arguing that the Pickering-Connick analysis should be abandoned and replaced by a standard that protects speech by government employees made outside the workplace, while providing no protection to speech at work). Interestingly, Kozel clerked for Justice Kennedy in the 2005 Term in which Garcetti was decided. http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States)

\textsuperscript{188} Milde v. Hous. Auth. of Greenwich, No. 3:00CV2423(AVC), 2006 U.S. Dist. LEXIS 62791, at *19-20 (D. Conn. Sept. 5, 2006). See also Green v. Bd. of County Comm’rs., 472 F.3d 794, 800-01 (10th Cir. 2007) (noting as significant that plaintiff did not protest faulty drug tests to newspapers or the legislature, but rather complained internally and to the manufacturer of the machine with whom she was supposed to communicate about problems, and finding she had no protection); Iott, 2007 U.S. Dist. LEXIS 17517, at *8 (noting, in finding plaintiff had no First Amendment claim, that it was significant his comments were made on the job, at the workplace and not to a member of the general public); Jackson v. Jimino, No. 1:03-CV-722 (RFT), 2007 U.S. Dist. LEXIS 4373, at *48-49 (N.D.N.Y. Jan. 19, 2007) (distinguishing between letters plaintiff wrote on official letterhead which were not protected and subsequent letters and statements made to the press which were protected); City of Nashville, 2006 U.S. Dist. LEXIS 78133, *8-9 (holding that although the report on finances written by city finance director would not be protected because written as part of her job, the interviews she gave about the report to the press were protected).
reporting to her supervisor and that state licensing laws required that she attend Board meetings. In contrast, because it found that it was unclear whether she had an obligation to speak to the press, the court refused to rule as a matter of law that her statements to the Greenwich Times were unprotected.

Applying variations on this formalist logic, some courts have protected public employees who sent letters and complaints to another agency, the state prosecutor, the city council, state legislators, the governor, or senators. Decisions that focus on audience also draw distinctions based on the medium of the message. Typically courts find no First Amendment protection for comments, statements, or writing prepared on official letterhead. In contrast, statements prepared on home computers, using personal email accounts, or sent from home addresses often are protected.

190. Id. at *20-21. Accord Hailey v. City of Camden, No. 01-3967, 2006 U.S. Dist. LEXIS 45267, at *48 (D.N.J. July 5, 2006) (holding letter to the editor was protected); Sassi v. Lu-Gold, No. 10450 (CLB), 2007 U.S. Dist. LEXIS 13643, at *11-12 (S.D.N.Y. Feb. 26, 2007) (holding that letters to editor written by police chief that stated they were written by "a resident taxpayer" were protected). But see Andrew v. Clark, 472 F. Supp. 2d 659, 661-63 (D. Md. 2007) (holding that internal memo written as an employee did not become protected when he gave it to the press); Kougher v. Burd, No. 1:04-CV-2220, 2007 U.S. Dist. LEXIS 8416, at *31-32 (M.D. Pa. Jan. 25, 2007) (holding that state dog warden who responded to reporter's queries about complaint he had filed against kennel had no First Amendment claim because he was not disciplined for his remarks, but rather for violating department policy requiring employees obtain permission before answering media inquiries).

191. See, e.g., Falk, 2006 U.S. Dist. LEXIS 63148, at *10 (finding it significant that plaintiff complained to an outside agency); Benvenisti, 2006 U.S. Dist. LEXIS 73373, at *30-34 (finding that plaintiff made threat to take complaint to state agency was as a citizen, however no protection since the complaint was not on a matter of public concern); Freitag, 468 F.3d at 545-46 (holding that written and oral comments to inspector general are entitled to protection, but forms and reports written pursuant to job duties are not).

192. Compare Casey, 473 F.3d at 1332 (holding that district superintendent who reported noncompliance with open meetings act to the state's attorney was entitled to First Amendment protection for that report, since she had no duty to make a report to that office) with Dillon, 2006 U.S. Dist LEXIS 59650, at *10-11 & n.1 (holding that Illinois state trooper was not entitled to protection for his phone call informing Indiana prosecutor that another officer was not telling the truth about a criminal investigation, because it was related to his job duties); Brewster v. City of Poughkeepsie, 434 F. Supp. 2d 155 (E.D.N.Y. 2006) (holding letters by police officer to district attorney not protected because their content was related to his job duties).

193. See, e.g., Hailey, 2006 U.S. Dist. LEXIS 45267 at *48 (involving a city council meeting); Lindsey, 2006 U.S. Dist. LEXIS 61439, at *4-5 (involving a city council meeting).

195. See, e.g., Benoit v. Bd. of Comm'rs, 459 F. Supp. 2d 513, 518 (E.D. La. 2006) (holding that letter to governor was protected even though it related to matters employee plaintiff worked on). But see Franklin, 454 F. Supp. 2d at 360 (holding no protection for reporting abuse of official vehicles to city officials because memo and emails were within scope of Plaintiff's job).

196. See, e.g., Benoit, 459 F. Supp. 2d at 518 (finding letter to Senator was protected); Freitag, 468 F.3d at 544-45 (also finding letter to Senator was protected).

C. Implications

The majority in *Garcetti* encouraged employers to create "internal policies and procedures that are receptive to employee criticism."199 At least one *amicus* brief filed with the Supreme Court worried that employers that required employees to report misconduct through formal processes would then claim that employees who used these processes were acting pursuant to their official duties, and were therefore not entitled to constitutional protection.200 That worry was well founded; several lower courts have allowed employers to punish employees who report misconduct through official channels.201 In the process, courts have held that seemingly justified complaints of harassment,202 discrimination,203 abuse,204 fraud,205 (holding that when plaintiff used university email account, but indicated in subject line that the content was not work related, it may have been protected).

199. See, e.g., *Deluzio*, 2006 U.S. Dist. LEXIS, at *22 (finding it significant that plaintiff's complaints about a co-worker's conduct were written "on his own paper, rather than on official complaint forms."); *Charles*, 2006 U.S. Dist. LEXIS 84032, at *12-13 (noting that plaintiff used private email account and gave home address and phone number). *But see Bowers*, 2006 U.S. Dist. LEXIS 78114, at *26-27 (holding that plaintiff who used university email account, but indicated in subject line that the content was not work related, may be protected).


201. *Casey*, 473 F.3d at 1330-31 (holding that a school official who was obliged by law to report misconduct to federal government, and did so, is not protected); *Pagani*, 2006 U.S. Dist. LEXIS 92267, at *11 (holding that a teacher is not protected for reporting sexual abuse of students by another teacher, even though the law required him to do so); *Spiegla*, 481 F.3d at 967 (holding no protection for prison guard who reported, as she was required to do, that other guards violated security rules).

202. *Thampi* v. Collier County Bd. of Comm'r's, No. 2:04-cv-441-FtM-29SPC, 2007 U.S. Dist. LEXIS 15311, at *26-31 (M.D. Fla. Mar. 5, 2007) (involving harassment of employees); *Campbell*, 483 F.3d at 271-72 (noting that complaints of sexual harassment fall into "gray area" between private complaint and public concern, and are therefore not protected); *Iott*, 2007 U.S. Dist. LEXIS 17517, at *6, 10 (involving complaints about harassment of prisoners).

203. *Jennings*, 475 F. Supp. 2d at 699 (holding that no protection for plaintiff who complained that a co-worker who had committed safety violations would not be punished because she was having affair with supervisor); *Yatzus*, 458 F. Supp. 2d at 235 (finding no protection for school psychologist who complained that special needs students were being discriminated against); *Wilburn*, 480 F.3d 1140, 1150-51 (D.C. Cir. 2007) (holding that complaint of discrimination with respect to job appointments was not protected).

204. *Pagani*, 2006 U.S. Dist. LEXIS at *11 (involving sexual abuse of students); *Thampi*, 2007 U.S. Dist. LEXIS 15311 at *32-33 (involving harassment of workers); *Iott*, 2007 U.S. Dist. LEXIS at *6 (involving abuse of prisoners). *But see Black* v. Columbus Public School, No. 2:96-cv-326, 2006 U.S. Dist. LEXIS 57768 (S.D. Ohio Aug. 16, 2006) (holding that assistant principal who reported an affair at her school that she felt created inequitable treatment was protected, as such reporting was not part of her job duties).

criminal acts, safety or security violations, and equipment failures were not protected.

A few decisions take this line of reasoning a step further, declaring that there is no constitutional protection for statements, including sworn testimony, made during investigations into wrongdoing. Courts in the Eleventh Circuit have pushed this principle the farthest, ruling that a police officer who testified before a grand jury and a prison official who testified at an emergency hearing regarding jail security were not entitled to First Amendment protection because they testified as part of their official duties.

Ignoring the long history of constitutional protection for political speech, still other cases have extended Garcetti's reach into the political process. In Hogan v. Township of Haddon, the court ruled that the First Amendment was not violated when two members of the township commission denied an elected township commissioner access to the.

---

206. Sigsworth, 2007 U.S. App. LEXIS 12204, at *12-13 (holding police officer who reported that the targets of a drug raid had been tipped off by other officers was not protected); Dillon, 2006 U.S. Dist. LEXIS 59650, at *11 (holding there was no protection for state trooper who reported that another officer was not telling the truth about a particular criminal investigation, because it was part of plaintiff's job duties).


208. Green v. Bd. of County Comm'rs, 472 F.3d 794, 800-01 (10th Cir. 2007) (holding that lab technician who determined drug screening system used by her department was reporting false positives and spoke to state agency and manufacturer about the problem was not protected because communications were related to her official duties).

209. Bradley, 479 F.3d at 538 (holding that because police officer had duty to cooperate with an investigation, his statements during that investigation were not entitled to protection); Ruotolo, 2006 U.S. Dist. LEXIS 49903, at *11-13 (holding that police officer who spoke to union lawyers in the course of their investigation into his report that the precinct was unsafe was not entitled to protection because he had to cooperate with the investigation); Burns, 2007 U.S. Dist. LEXIS 42069, at *22-23 (holding no protection for statements made during an investigation because plaintiff had duty to cooperate). But cf. Harris v. Tunica County, No. 2:05CV126, 2007 U.S. Dist. LEXIS 7473, at *7-8 (N.D. Miss. Feb. 1, 2007) (finding that a jailer who made statements to Internal Affairs as part of an investigation into another jailer's alleged misconduct may be entitled to First Amendment protection since her job duties did not entail monitoring the behavior of other employees or participating in investigations).


212. In contrast, several cases from the Seventh Circuit indicate that statements made in testimony are protected. See Morales, 494 F.3d at 590 (holding that police officers' reports of criminal activity to district attorney are not protected because required by their job, but one officer's deposition testimony was protected because testimony was not part of his official duties); Fairley v. Fermaint, 482 F.3d 897, 902 (7th Cir. 2007) (holding prison guards could not be retaliated against for testifying in civil rights trials). See also Broderick, 2007 U.S. Dist. LEXIS 23698 (refusing to grant summary judgment against plaintiff on his claim he was retaliated against for bringing a lawsuit protesting his treatment for earlier complaints).

213. See discussion supra at notes 6-8, and 84-95.
township website, cable channel and newspaper.\textsuperscript{214} The court reasoned that because the township paid the commissioner’s salary, the latter used those media “as part of her official duties and in her capacity [as] a Township commissioner (and Township employee), rather than as a private citizen.”\textsuperscript{215} In \textit{Mills v. City of Evansville}, the Seventh Circuit held that a police chief could transfer a sergeant who intimated that she “would try to enlist community organizations against [a proposed shift change plan] rather than describe its virtues,”\textsuperscript{216} thereby allowing the government employer to take a retaliatory measure to prevent an employee from publicizing concerns about a policy decision.\textsuperscript{217}

As these summaries suggest, in the first wave of post-\textit{Garcetti} cases, the lower courts read the case in a variety of ways as they struggled to implement it. But for all the confusion they reveal over the precise nature of \textit{Garcetti}’s holding, these cases demonstrate a tendency to read the case as a broad restriction on public employee’s First Amendment rights.

\textbf{V. RECONSIDERING GARCETTI}

Yet it is not clear that \textit{Garcetti} should be read so broadly, and some lower courts refused to do so. A few courts declined to adopt the formalist reading of \textit{Garcetti},\textsuperscript{218} emphasizing instead that the question of whether an employee’s speech is made pursuant to official duties is a practical, factual inquiry.\textsuperscript{219} As one court put it, the inquiry should not be whether the speech is related to the employee’s work, but whether it is made in the employee’s

\begin{flushleft}
\textsuperscript{215} Id. at *23.
\textsuperscript{216} 
\textit{Mills}, 452 F.3d at 647.
\textsuperscript{217} Id. \textit{But cf. Rutan}, 497 U.S. at 65 (holding that transfers based on political affiliation are not allowed in political patronage cases).
\textsuperscript{218} \textit{Barclay}, 451 F. Supp. 2d at 397 (holding it is not dispositive that plaintiff complained to his supervisors and did not go to the press).
\textsuperscript{219} \textit{Walters}, 2006 U.S. Dist. LEXIS 60272, at *42 (noting that “[a]ny attempt to inflate [Plaintiff’s] job description so as to include blowing the whistle on other officers would likely exceed the ‘practical inquiry’ suggested by the Supreme Court [in Garcetti].”); \textit{Burke v. Nittman}, No. 05-cv-01766-WYD-PAC, 2007 U.S. Dist. LEXIS 15329, at *13-15 (D. Colo. Mar. 2, 2007) (noting inability to determine if plaintiff’s job as a safety and security officer entitled the reporting of misconduct); \textit{Falk}, 2006 U.S. Dist. LEXIS 63148, at *9-10 (holding that assistant lab director’s report of fraud in the lab may be protected); \textit{Rohrbough}, 2006 U.S. Dist. LEXIS 82087, at *8 (holding that hospital administrator who spoke out on misconduct and a possible cover up may be entitled to protection for her remarks); \textit{Barclay}, 451 F. Supp. 2d at 396 (holding that because plaintiff claimed she had no training on work rules, questions remained about whether her statements were required by her job); \textit{Pezzolla}, 2007 U.S. Dist. LEXIS 13609, at *28 (holding that more evidence was needed to determine whether case worker’s obligation to act as advocate included duty to write letters to an NYCLU attorney); \textit{Abbatello}, 2007 U.S. Dist. LEXIS 8906, at *28, 31-32 (finding a question of fact as to whether plaintiff’s job duties as a police officer included reporting the misconduct of others).
\end{flushleft}
official capacity. Additionally, some courts note that *Garcetti* required a case-by-case analysis of public employee speech claims.

Other courts ruled that the two-step *Pickering-Connick* test remains the standard. They treat the "citizenship" inquiry, which *Garcetti* highlighted, as part of the "public concern" analysis required by the first step. These courts emphasize that the word "citizen" has always been an element of the *Pickering-Connick* test, appearing initially in *Pickering* and then in the first step of the test established in *Connick*.

There is some merit to both interpretations. The facts of the case and the *Pickering-Connick* test were more important to its outcome than many lower courts have recognized. But recognizing the importance of those factors is not enough. Analysis that tries to limit *Garcetti*'s reach by limiting it to its facts or by asserting that the opinion merely restates the law ignores an important element of the case — the extent to which *Garcetti* reframed the problem of public employee speech cases and, in the process, clarified the protections to which public employees are entitled.

A. Limiting *Garcetti* to its Facts

The lower court decisions that reject the formalist view of *Garcetti* provide a more accurate interpretation of the Court's opinion. *Garcetti* emphasized the fact-based nature of the inquiry in determining whether a particular plaintiff spoke as a citizen or as an employee. The majority explicitly stated that the fact that Ceballos' memo "concerned the subject matter of [his] employment" was "not dispositive.' Furthermore, the Court stated that certain statements, even if they were made at work, were

---

220. *Barclay*, 451 F. Supp. 2d at 395 (noting that *Garcetti* provides that the determination of job duties is a practical analysis).

221. *Abattiello*, 2007 U.S. Dist. LEXIS 8906, at *28, 31-32 (finding a question of fact as to whether plaintiff's job duties, as police officer, included reporting the misconduct of others); *Barclay*, 451 F. Supp. 2d at 395 (employing fact-based analysis).


223. *Cheek*, 2006 U.S. Dist. LEXIS 71353, at *5 (noting that inquiry as to whether plaintiff spoke as a citizen is part of the first step in a *Pickering-Connick* analysis).


226. 126 S. Ct. at 1959 (citing *Pickering*, 391 U.S. at 573 and *Givhan*, 439 U.S. at 414). *But see Price*, 2006 U.S. Dist. LEXIS 57026, at *17 (characterizing the Court's statement in this regard as *dicta*).
still entitled to First Amendment protection. Far from mandating protections based on a type of formalist pigeonholing, *Garcetti* requires courts to undertake a case-by-case analysis of the nature of an employee’s duties and of the context of the employee’s speech.

But it is not enough to recognize that the Supreme Court’s decision in *Garcetti* requires a fact-based analysis. Several specific findings of fact were so crucial to the Court’s holding that they limit *Garcetti*’s reach to a greater extent than even the anti-formalist decisions recognize.

The first critical finding of fact relates to Ceballos’ communication. The majority focused exclusively on Ceballos’ memo, ruling that it failed both steps of the *Pickering-Connick* test. With respect to the first step, the majority concluded that memo was not a statement by a citizen on a matter of public concern. With respect to the second step, the majority found that it urged a course of action Ceballos’ superiors felt was inappropriate.

The tight focus of the Court’s inquiry is important. As Justice Souter noted in his dissent, the Court never reached the issue of whether Ceballos’ statements to his colleagues, or to his supervisors, or to the Mexican American Lawyers Association, were made as an employee or as a citizen. Nor did the majority address whether Ceballos’ testimony during the motion to traverse was made in his capacity as a citizen or as an employee. Thus, the holding in *Garcetti* does not clearly extend to similar statements made by other public employees.

Nor does *Garcetti* necessarily stand for the proposition that memos or reports that public employees write at work lack First Amendment protection. The majority explained that it held Ceballos’ memo was not entitled to First Amendment protection because “the parties do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties.” Whereas routine memos and reports written by other public employees may indeed lack protection when they fall within

---

227. *Garcetti*, 126 S. Ct. at 1959 (noting, “That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions at work ...,” and citing *Givhan*, 439 U.S. at 414).
229. Id. at 1962.
230. Id. at 1959-60.
231. Id. at 1960 (noting Ceballos “did not speak as a citizen writing a memo that addressed the proper adjudication of a case”).
232. Id. at 1960-61 (“If Ceballos’ superiors thought his memo was inflammatory or misguided they had the authority to take proper corrective action.”).
233. Id. at 1971-72 (Souter, J., dissenting) (noting that the Court remanded the case for the Ninth Circuit to consider Ceballos’ other communications).
234. Cf *Transcript Oral Argument at 13, Garcetti*, 126 S. Ct. at 1951 (Ceballos’ comments to the Bar Association went beyond step one of the *Pickering-Connick* test because they were not part of his normal duties).
the category of "expressions made pursuant to official responsibilities," the majority's opinion did not create a blanket rule to that effect. The Court also declined to explain how lower courts should determine whether a memo or report was written as part of an employee's official duties when the scope of those duties is in dispute.

Two other factors, though not explicit in the Court's analysis, appear to have influenced the majority's opinion. The first is the fact that Ceballos was an assistant district attorney. In Legal Services Corporation v. Velazquez, in an opinion by Justice Kennedy, the Court noted that attorneys who represent the government in civil and criminal cases "deliver the government's message." The Court went on to draw a distinction between public defenders and legal aid lawyers, who are paid by the government, but are presumed to speak only for their clients, and prosecutors, whose message is controlled by their government employer. The fact that Ceballos was a prosecutor appears to have influenced the Garcetti opinion for much the same reason.

In dissent, Justice Breyer also emphasized Ceballos' position, asserting that the majority's treatment of his case ignored the constitutional imperatives that constrained prosecutors. He feared the majority's decision would discourage some prosecutors from reporting constitutional or ethical violations. Justice Breyer noted that the federal judiciary should be especially concerned with the integrity of the legal system, which was particularly fraught at the time Ceballos wrote his memo.

---

236. Id.
237. Id. at 1959 (noting that “[t]he memo concerned the subject matter of Ceballos’ employment, but that, too, is not dispositive.”).
238. Id. at 1961 (“We thus 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.”).
239. 531 U.S. at 542.
240. Id. (citing Polk County v. Dobson, 454 U.S. 312 (1981)).
241. Garcetti, 126 S. Ct. at 1960 (referring repeatedly to the fact that Ceballos wrote his memo pursuant to his duties as a calendar deputy).
242. Id. at 1974-76 (Breyer, J., dissenting). See also Berger v. United States, 295 U.S. 78, 88 (1935) (noting “[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest, therefore, in a criminal prosecution is ... that justice shall be done ... . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”); A.B.A. SEC. CRIM. JUST., PROSECUTORIAL FUNCTION, Standard 3-1.2(b-c) and 3-1.5. But see Richard A. Epstein, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 HARV. L. REV. 4, 70 (1988) (“The government does not have anything like a monopoly position over the district attorneys it employs, for both local governments and private firms hire criminal lawyers.”). Epstein's analysis of the lack of monopoly power misses the point about the impact of the Garcetti-like silencing of a prosecutor with respect to a particular case, since in such a case the unconstitutional condition completely preempts a particular viewpoint.
243. 126 S.Ct. at 1974-75 (Breyer, J., dissenting).
244. Id. Cf. Velazquez, 531 U.S. at 547 (noting the harm to the judicial system if legal and constitutional challenges cannot be made).
245. See discussion supra notes 105-110.
Thus, it is noteworthy that the majority did not engage in analyzing the content of Ceballos’ memo.

A second fact may explain why the majority failed to address the content of Ceballos’ memo. The majority noted that a judge had evaluated and rejected Ceballos’ misgivings about the affidavit during the motion to traverse. This adjudication meant that although the majority recognized that Ceballos believed his memo exposed serious problems, the majority could reduce the dispute between Ceballos and his supervisors to a disagreement over trial tactics. This allowed the Court to avoid framing the case as a situation in which an employee alerted his superiors to a criminal act or significant misconduct, or as one in which a supervisor suppressed an investigation into such wrongdoing.

B. Garcetti and the Pickering-Connick Test

The majority’s characterization of the case as a tactical disagreement between an employee and his supervisors influenced the way it applied the Pickering-Connick test. Consequently, while the minority of lower courts was correct in rejecting the notion that Garcetti added an element to that test, they missed a crucial element of the decision by failing to consider how the majority applied the test in this case.

Garcetti did not add elements to the Pickering-Connick test. On the contrary, the majority cited both opinions frequently, referred explicitly to the two-step analysis derived from those cases, and used both steps in...
its analysis of Ceballos' claim. Yet while the majority applied the *Pickering-Connick* test, it did not follow the test as it was articulated in *Connick*. The *Garcetti* majority observed *Connick*’s holding that the first step in the two-step test was a threshold question. In *Connick*, the two steps were completely distinct; if the plaintiff’s claim failed at the first, there was no need to even address the employer’s treatment of the employee’s speech. In *Garcetti*, however, the steps were mingled together; evidence of the supervisor’s treatment of Ceballos’ memo (relevant to the second step of the test) was used to show that Ceballos’ work product was prepared as part of his official duties (relevant to the first step of the test). In this respect, *Garcetti* returned to the older, more fluid, relative approach that the Court had used in *Pickering*, where the two parts of the test were balanced against one another.

### C. Management Rights & Employee Speech

Balancing the two parts of the *Pickering-Connick* test against one another, the *Garcetti* Court used the supervisors’ response to Ceballos’ memo to help establish that Ceballos spoke as an employee and not as a citizen. This approach has larger implications for public employee speech claims, and requires an analysis of the way the majority characterized Ceballos’ claim.

In describing the difference between speaking as an employee and speaking as a citizen at work, the majority treated a number of phrases—"professional responsibilities," "professional capacity," "performing . . . job duties," "tasks . . . paid to perform," "official duties," "official responsibilities," and "employment duties"—as synonyms that defined whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

---

253. *Id.* at 1960-61.
254. *Id.* at 1958.
255. *Connick*, 461 U.S. at 147.
256. *Id.*
257. 126 S. Ct. at 1960-61.
258. *Id.* at 1958.
259. *Id.* at 1960.
260. *See discussion supra* at notes 37-40.
262. *Id.* at 1960.
263. *Id.* at 1961.
264. *Id.* at 1960.
265. *Id.*
266. *Id.* at 1961.
267. *Id.*
EMPLOYEE SPEECH & MANAGEMENT RIGHTS

The term employee (as opposed to the term citizen). The majority elaborated on what it meant by these terms\(^{268}\) when it characterized Ceballos’ tasks: “When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”\(^{269}\)

The majority has equated “acting as an employee” with two elements: (1) performing routine, reviewable tasks; and (2) working under the control of supervisors to carry out the mission of the office. \(^{270}\) The fact that a supervisor controls the employee’s speech establishes that the latter speaks as an employee, rather than as a citizen. The idea that management control is central to the definition of an “employee” was reinforced when the majority noted that Ceballos’ supervisors could “take proper corrective action” if they thought his memo was “inflammatory or misguided.”\(^{271}\)

By framing the issue this way, the majority echoed the idea of management rights, a concept long familiar in labor law. \(^{272}\) The parameters of that doctrine are contested,\(^{273}\) but all theories of management rights accept that employers have the discretion to define their mission, tasks, and work product. As Arthur Goldberg once put it, the concept of management rights is simply “a recognition of the fact that somebody must be the boss.... People can’t be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do.”\(^{274}\)

---

\(^{268}\) Id. ("We thus 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.").

\(^{269}\) Id. at 1960.

\(^{270}\) Id. (Ceballos’ supervisors had the right to make sure statements are “accurate, demonstrate sound judgment, and promote the employer’s mission.”).

\(^{271}\) Id. at 1960-61.

\(^{272}\) See generally ELKOURI & ELKOURI, HOW ARBITRATION WORKS 634-833(6th ed. 2003) (extended discussion of the concept) [hereinafter ELKOURI & ELKOURI]; GORMAN & FINKIN, BASIC TEXT ON LABOR LAW 635 (2d ed. 2004). But see Developments in the Law—Public Employment, 97 HARV. L. REV. 1676, 1691 (1984) [hereinafter Public Employment] (arguing that the idea of management rights, developed in the private sector, is “ultimately flawed [in the public sector], both because it accords government the same unwarranted managerial prerogatives that have been granted to private employers and because it fails to account for the public employer’s special role as political decision maker.”). See also Public Employment, supra note 272, at 1691; ELKOURI & ELKOURI, supra note 272, at 634-41.


\(^{274}\) Arthur Goldberg, Management’s Reserved Rights: A Labor View, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS: PROCEEDINGS OF THE 9th ANNUAL MEETING OF THE NAA 118, 120-21 (1956). See also ELKOURI & ELKOURI, supra note 272, at 634 (quoting HILL & HOOK, MANAGEMENT AT THE BARGAINING TABLE 56 (1945) (arguing that management rights are “those rights, or that authority, which management must have in order successfully to carry out its function of managing the enterprise.”)).
is apparent in the majority’s finding that Ceballos made his statements as an employee because his memo was subject to his supervisor’s review and revision.  

By embedding the doctrine of management rights into public employee speech cases, Garcetti established that government agencies have the ability to silence some employee speech. But by employing the concept of management rights, the Garcetti Court also defined the limits of management’s power more clearly than it had in Connick or in any decision since. An extensive body of law establishes that management’s right to control employees is constrained by past practices in the workplace, unionization and labor law, collective bargaining, legislation, and other legal rules.

Garcetti thus implies that management’s control over its employees is limited in three ways: by internal restraints such as workplace custom or a collective bargaining agreement; by external constraints such as laws prohibiting discrimination, harassment, or laws providing protections for worker safety and health; and by public policy, which prohibits management from asking employees to commit criminal actions, or to engage in activities that pose an immediate threat to the safety or health of the employee or others.

---

276. ELKOURI & ELKOURI, supra note 272, at 641 (addressing past practice and industry custom).
277. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-8 (1945) (noting that NLRA balances management rights to maintain discipline against employees’ rights to organize and act collectively); NTEU v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006) (FLRA limits the Department of Homeland Security’s exercise of management rights); Doggett, 2006 U.S. Dist. LEXIS 80722, *13-14 (in case involving public employee, citing cases that hold that union activity is provided special protections under the First Amendment). See generally ELKOURI & ELKOURI, supra note 272, at 642 & nn. 36-38.
278. ELKOURI & ELKOURI, supra note 272, at 642 (Noting that “[t]he labor relations acts, by legitimizing and endorsing collective bargaining, set the stage for overall restriction of management rights through the provisions of collective bargaining agreements.”). The scope of management rights in the public sector is often defined by law; compare 5 U.S.C. §7106(a) (defining management rights) with 5 U.S.C. §7106(b) (establishing that the procedures by which those rights may be exercised are subject to bargaining).
279. ELKOURI & ELKOURI, supra note 272, at 642. See e.g., St. Louis Symphony Soc’y, 70 LA 475, 481-482 (1978) (holding “management retains all rights of a common law employer which are not bargained away or limited by the collective bargaining agreement.”).
281. ELKOURI & ELKOURI, supra note 272, at 641-42 & nn. 32-47 (listing a range of laws, including antitrust laws, the FMLA, and OSHA).
282. This last principle is so strong that the general rule is that an employee may refuse to obey an order to commit a crime or act in a way that poses an immediate threat to health or safety. See American Arbitration Association Ruling, 2005 AAA LEXIS 298, at *38 (July 20, 2005) (making this point). See also Beverly Enterprises, 100 LA 522, 529 (Feb. 4, 1993) (employee’s reasonable concern for safety justified his refusal to follow order); Muter Co., 47 LA 332, 335-336 (July 7, 1966) (recognizing...
When the Supreme Court incorporated the idea of management rights into its analysis of public employee speech rights in *Garcetti*, it simultaneously incorporated certain attached limitations on management rights. The claim of a managerial right to control an employee’s statements establishes that those statements are outside the scope of the First Amendment’s protections. But by the same logic, *Garcetti* holds that employees whose speech is not subject to managerial control by virtue of one of the limits defined above speak not as employees, but rather, as citizens.283

D. Management Rights & Reserved Rights

In labor law, the doctrine of management rights is complicated by the theory of reserved management rights, which asserts that rights not expressly constrained by law (or waived by management through negotiation or practice) are reserved to the employer.284 The *Garcetti* Court offered an interesting twist on the idea of reserved rights when it reaffirmed the importance of the unconstitutional conditions doctrine.285 In effect, *Garcetti* established that public employees have a type of reserved rights derived from the unconstitutional conditions doctrine.

This approach adopted by the Court was not the one respondents preferred. In its brief in support of respondents in *Garcetti*, the United States urged the Supreme Court to return to the principles of *Rust v. Sullivan*, which created a rule that the government could control its employees’ speech because it “‘purchased’ the speech . . . through a grant of funding or payment of a salary.”286 The respondents’ attorneys offered employees right to refuse to work in environment with no heat). Cf. Transcript Oral Argument at 9-10, *Garcetti*, 126 S. Ct. at 1951 (defendants’s attorney agreed, during oral argument, that government control of employees did not extend to asking employees to lie or commit crimes or conceal evidence).

283. The majority articulates this very distinction in the first two paragraphs of Part IV of its opinion, where it distinguishes between laws and regulations that check supervisors’ control over employees, and circumstances in which employees speak on matters relating to their professional duties, when they are subject to employer’s control. 126 S. Ct. at 1962.

284. ELKOURI & ELKOURI, supra note 272, at 635 & n.5.

285. For another article that notes the importance of the unconstitutional conditions doctrine, and the threat of "employer orthodoxy," see Stephen A. Yokich, Public Employees' First Amendment Rights in the Wake of Garcetti v. Ceballos: The Public Employee’s Perspective, 24 ILL. PUB. EMP. REL. REP. 1 (2007).

286. Brief for the United States as Amicus Curiae Supporting Petitioners, *Garcetti*, 126 S. Ct. at 1951 (No. 04-473) 2004 U.S. Briefs 473, at *20-21 (quoting Urofsky v. Gilmore, 216 F.3d 401, 408 n.6). See also *Garcetti*, 126 S. Ct. at 1951, Transcript Oral Argument at *20 (argument of Mr. Kneedler for U.S.: “When the Government pays for someone to do its work, it has an absolute right to control and direct the manner in which that work is performed. This is a basic rule of agency law, and insofar as Federal employees are concerned, it’s a basic rule of our constitutional structure.”). Pressed by members of the Court, Kneedler conceded that agency principles might not command compliance when a principal ordered an agent to violate *Brady*, but added that the First Amendment did not provide the appropriate remedy. Id. at *22. But then he added, "it would be an unconstitutional condition to require him to put his job at peril for committing a due process violation or something like that...[",] it just would not be a First Amendment violation since the speech was undertaken as part of job duties. Id.
an even stronger version of that argument, asserting during oral argument that the government had an absolute right to control the statements of its employees, even if that silenced a report of criminal conduct, or extended into a classroom.  

But the majority in Garcetti refused to go that far. On the contrary, the majority opinion offers the strongest restatement of the place of the unconstitutional conditions doctrine in public employee speech cases in recent years. The opinion opens with an invocation of the unconstitutional conditions doctrine, and its discussion of the Pickering line of cases in Part II of the opinion emphasizes that doctrine as well. Part II begins with a review of the development of that doctrine:

As the Court’s decisions have noted, for many years “the unchallenged dogma was that a public employee had no right to object to the conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.” That dogma has been qualified in important respects. The Court has made it clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.

The majority restates the doctrine in the middle of Part II of its opinion, noting that “the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, indirectly or intentionally, the liberties employees enjoy in their capacity as private citizens.” This part of the opinion ends with a

See Restatement of the Law (Third) of Agency, § 8.15 note D (2005) (“the [principal’s] duty to refrain from conduct likely to injure the agent’s business reputation or reasonable self-respect”). The Reporter’s comments cite Malik v. Bank of Credit and Commerce Int’l S.A., [1998] A.C. 20 (H.L.), where it was held that innocent managers of a bank that “operated in a dishonest and corrupt fashion” had a claim for breach of this duty.

287. Garcetti, 126 S. Ct. at 1951, Transcript Oral Argument at *5-6 (Mar. 21, 2005) (arguments by Ms. Lee). Cf. 126 S. Ct. at 1968 (Souter, J., dissenting) (expressing the fear that the majority opinion would be read as an extension of Rust so that “any statement made within the scope of public employment is (or should be treated as) the government’s own speech.”)

288. Garcetti, 126 S. Ct. at 1951, Transcript Oral Argument, (Oct. 12, 2005) (arguments by Ms. Lee) (“Well, it would be our view that if the job duties of that university professor was to speak on a particular topic or content and they were getting paid to do that, that is a job-required speech and it should not be entitled, presumptively, to First Amendment protection . . .”). See http://www.oyez.org/cases/2000-2009/2005/2005_04_473/ argument.

289. Cf. discussion at supra notes 61-82.

290. 126 S. Ct. at 1955.

291. Id. at 1957-59.

292. Id. at 1957 (quoting Connick, 461 U.S. at 143 (internal citations omitted)).

293. Garcetti, 126 S. Ct. at 1958 (citing Perry, 408 U.S. at 597).
statement of the balancing approach that *Pickering* and its progeny require as a result of the unconstitutional conditions doctrine.  

Far from reading public employee speech issues in light of *Rust*, the majority used management rights theory to reinforce *Rosenberger* and to limit *Rust* further.  

It equated the university in *Rosenberger* to an employer who had a right to managerial control over official duties, but lacked the power to control statements made by public employees outside their official acts. Presumably the other protections that the Court recognized in *Rosenberger* and *Velazquez* applied as well, limiting the public employer’s ability to restrict the expression of ideas to advance a particular orthodoxy by silencing other ideas.

*Garcetti* did not limit the protections granted to public employees by the unconstitutional conditions doctrine. Rather, the doctrine now serves as an additional limit on managerial power. While the managerial rights of private employers are limited by agreements and laws, the managerial rights of public employers are restrained by the U.S. Constitution. As the Court concludes in its opinion, legislative enactments, ethical constraints, and “obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.” They do so by carving out exceptions to the managerial rights that employers, public and private, have over the “expressions employees make pursuant to their professional duties.” By limiting employers’ rights, those provisions set the boundaries between employees and citizens.

VI. CONCLUSION

The Supreme Court’s decision in *Garcetti v. Ceballos* may indeed have “profoundly altered how courts review First Amendment retaliation claims,” but it should not be assumed that the change significantly rolled back public employee speech rights. Instead, by characterizing those rights in relation to management rights and the unconstitutional conditions doctrine, the Court clarified its previous case law in a way that should increase the protections for public employees in the long run. In areas where a public employer has managerial control over the message

---

295. *Id.* at 1960.
296. *Id.* (making this distinction between *Rosenberger* and *Pickering*).
299. *Id.*
300. *Casey*, 473 F.3d at 1325.
expressed, public employees may only speak as employees, and therefore lack the protection of the First Amendment. But in areas where management’s rights are constrained by the constitution, laws, contracts, or public policy, a public employee may speak as a citizen, and under Garcetti, those statements are protected by the First Amendment.

VII.
APPENDIX

Abbatello v. County of Kauai, 2007 U.S. Dist. LEXIS 8906 (D. Ha. 2007) (not clear that the police officer who reported misconduct by officers in her division had a duty to do so; possible First Amendment claim).

Andrew v. Clark, 472 F.Supp. 2d 659 (D. Md. 2007) (police officer; no protection).

Batt v. City of Oakland, 2006 U.S. Dist. LEXIS 77087 (N.D. Cal. 2006) (police officer; comments may be protected).


Bradley v. Jones, 429 F.3d 536 (8th Cir. 2007) (police officer; no protection).


Burke v. Nitman, 2007 U.S. Dist. LEXIS 15329 (D. Colo. 2007) (security officer in juvenile home; emails may be protected).


Campbell v. Galloway, 483 F.3d 258 (4th Cir. 2007) (police officer; no protection).


Fairley v. Fermiant, 482 F.3d 897 (7th Cir. 2006) (prison guards, statements not protected; testimony at civil rights trials should be).

Frietag v. Ayers, 468 F.3d 528 (9th Cir. 2006) (prison guard; some statements are protected).

Harris v. Tunian County, 2007 U.S. Dist. LEXIS 7473 (N.D. Miss. 2007) (jailer; statements may be protected).

Haynes v. City of Circleville, 474 F.3d 357 (6th Cir. 2007) (police officer; no protection).


Mills v. City of Evansville, 452 F.3d 646 (7th Cir. 2006) (prison guard; no protection).

Morales v. Jones, 2207 U.S. App. LEXIS 16936 (7th Cir. 2007) (police officers, testimony protected, statements to district attorney are not).


Sigsworth v City of Aurora, 2007 U.S. Dist. LEXIS 12204 (7th Cir. 2007) (police officer; no protection).


Skrutski v. Marut, 2007 U.S. Dist. LEXIS 37866 (M.D. Pa. 2007) (refusing to enter judgment notwithstanding the verdict in case in which police officer established that he was retaliated against for complaining to a supervisor when his superior officer ordered him to falsify evidence, and for filing a subsequent law suit).

Spiegla v. Hull, 481 F.3d 961 (7th Cir. 2007) (prison guard; no protection).


Walters v. County of Maricopa, 2006 U.S. Dist. LEXIS 60272 (D. Ariz. 2006) (police officer; whistle blowing may be protected).