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By Stephen Allred

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Introduction

For almost fifty years, the United States Supreme Court has issued rulings defining the right of public employees to engage in First Amendment protected speech. Although the Court's seminal decision on this important matter, *Pickering v. Board of Education of Township High School District 205*,[1] squarely rejected the notion that public employees could be required as a condition of employment to relinquish their constitutional rights as American citizens,[2] the Court nonetheless placed conditions on those rights from the beginning. Thus, while the Court in *Pickering* recognized for the first time that public employees had free speech rights as part of their employment, the Court also held that First Amendment protection of a public employee's speech depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [3]

Because there has never been a bright line test defining the scope of public employee free speech rights—and because such a test would be virtually impossible to construct[4]—the Court has returned to the task of defining the bounds of public employee free speech in ten cases since first announcing the balancing test first set forth in *Pickering*. Taken together, however, these cases create a somewhat meandering picture, sometimes focusing on the employee as citizen and sometimes focusing on the employee as troublemaker. As a result, employees and managers who work in public agencies, along with the lower courts that hear the competing claims of those parties, might understandably be unsure about what speech is or is not protected, or how the balance of interests might be struck in any given situation.

The bounds of public employee free speech were addressed most recently with a ruling handed down at the end of the Court's last term, *Lane v. Franks*.[5] That case held that an agency director's compelled sworn testimony, made as part of

a criminal trial against a former subordinate accused of defrauding the agency, was entitled to First Amendment protection because the director's testimony was speech outside the scope of the his ordinary job duties. In *Lane*, the Court distinguished its controversial ruling from eight years earlier in *Garcetti* v. *Ceballos*[6] which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."[7] The plaintiff in that case, a district attorney named Ceballos, claimed that he was retaliated against and denied a promotion because he had questioned his supervisor's judgment in procuring a warrant and subsequently testified about his concerns in a criminal trial. The Court in *Garcetti* ruled, in a five to four decision, that because Ceballos' statements were made pursuant to his position as a public employee, rather than as a private citizen, his speech had no First Amendment protection. By contrast, in *Lane* the Court re-emphasized the importance of the balancing test originally announced in 1968 in *Pickering*,[8] finding first that the employee's testimony was protected speech, and second that the employee's interest in speaking as a citizen on a matter of public concern outweighed any concerns the agency had about the possible disruptive effects his truthful testimony might have on the agency's reputation.

But how does one know where to draw the line between one public employee's truthful court testimony about his supervisor's judgment in relying on an allegedly faulty warrant, made in the context of his duties as an officer of the court, and another public employee's testimony about a corrupt state official, made in the context of his duties as an agency director? That line remains unclear, because the Court in *Lane* chose not to answer the broader question of "whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities."[9] While the Supreme Court reached the correct decision in *Lane v. Franks*, it missed an opportunity to reject the unnecessarily confusing exception to public employee free speech rights it created in *Garcetti v. Ceballos*. Is a public employee only entitled to speak on a matter of public concern when the matter in question is unrelated to his work responsibilities? Must he first say, "Not my job, so I can comment"?

This article reviews the Supreme Court's rulings in public employee free speech cases, discusses the significant departure from precedent that *Garcetti* made to those cases, summarizes the Court's most recent ruling in *Lane*, and argues that the Court should return to the broader standard the Court originally announced in *Pickering*. Were the Court to do so, it would significantly reduce the confusion the Court has created about whether public employees can speak in court—or in other for a—on matters that derive from their ordinary job responsibilities.

The *Pickering* Foundation

As noted above, the seminal decision on public employee free speech rights is *Pickering v. Bd. of Education*.[10] In *Pickering*, a public school teacher named Marvin Pickering was dismissed for writing a letter to the local newspaper, in which he criticized the school board and the superintendent of schools for funding athletic programs at the expense of academic offerings. The Court held that the termination of the Pickering was an impermissible infringement on his protected speech, rejecting the notion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."[11] Instead, the Court held, in an opinion by Justice Marshall joined by seven other members of the Court,[12] that public school teachers and other public employees enjoyed the right (not the privilege) of free speech. But, the Court added, the free speech right of public employees is not unfettered.[13] Rather, stated the Court, "[t]he problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[14] The balancing test established in *Pickering* was stated in general terms, with the Court noting the impossibility of anticipating the variety of circumstances in which a public employee's statements might be balanced against the employer's exercise of managerial efficiency. Nonetheless, three factors were set out by the Court in striking the balance: (1) the parties' working relationship; (2) the detrimental effect of the speech on the employer; and (3) the nature of the issue upon which the employee spoke and the relationship of the employee to that issue.[15]

The Court, in weighing the first factor (the parties' working relationship), noted that Marvin Pickering's letter to the newspaper criticized the policies of the school board—not his direct supervisors, with whom he had to maintain a close working relationship. There was neither a threat to his immediate supervisor's ability to maintain necessary discipline at the work site, nor a close working relationship between the board members and one of the system's teachers. Turning to the second factor (the detrimental effect on the employer), the Court found that the letter amounted to nothing more than a difference of opinion over allocation of school board funds, and that the mere act of airing an opinion in the newspaper did not substantially impair the board's ability to make that

allocation. Further, there was no demonstration of any disruption of the workplace or disharmony among the school system's employees as a result of the publication of the letter. Finally, the Court examined the third factor (the relationship of the speaker to the matter) and found that this factor weighed in the employee's favor as well. The matter of public concern was the proper allocation of school funding, which was to be resolved through a referendum by the voting public. As a school teacher, Pickering was one of "the members of the community most likely to have informed and definite opinions"[16] on this matter. When there is a nexus between the employee and the issue, the Court noted, the possibility that the employee will make a valuable contribution to the public's understanding of that issue may tip the scales in favor of protecting the employee's speech.[17]

In many ways, Marvin Pickering was a perfect plaintiff. He was apparently a competent teacher, not a disruptive or hostile employee.[18] He engaged in a quintessential act of free speech, writing a letter to a newspaper, acting in much the same way as any of his neighbors who were following the school board's deliberations on a local bond vote might have done. He was not a close ally or immediate staff member who reported directly to the school superintendent; rather, he was just a teacher in one of the district's many schools. The Court's opinion in *Pickering* stands as a testament to fairness, and as recognition of the appropriate role public employees may play when they join the public discourse on matters that affect the community in which they live.

Post-*Pickering*: The Supreme Court's Rulings on Public Employee Free Speech between 1972 and 2006

A review of the seven cases the Supreme Court handed down in the period after *Pickering* was decided and leading up to the *Garcetti* decision, spanning the years 1972 to 2006, reveals the emergence of two competing views of public employees who bring free speech claims. Sometimes the Court seems to portray the employee primarily as a good citizen doing his or her civic duty and speaking out against wrongdoing by public officials. Sometimes, however, the Court seems to lean more in the direction of describing the employee as a disruptive nuisance, trying to transform every petty workplace gripe into a First Amendment concern and undermining the ability of supervisors to manage the organization. Of course, the composition of the Supreme Court changed over this 34-year period, and with it the philosophies the individual justices brought to the question of balancing public employee free speech rights may have changed as well. The seven cases decided during this period are summarized below.

In 1972, the Court rendered its decision in *Perry v. Sindermann*.[19] That case arose when Robert Sindermann, a professor at Odessa Junior College (a part of the Texas public college system) was denied reappointment. He had been an active member of a group of faculty who wanted the college to change from a junior college to a four-year institution, and had been elected president of the Texas Junior College Teachers Association. In his capacity as association president, he testified before the Texas legislature and agreed to have his name appear in a newspaper ad that criticized Odessa's Board of Regents.

When he was not reappointed, Sindermann challenged his contract nonrenewal as a violation of his First Amendment rights, asserting that he was punished for his public criticism of the board and his appearance before the Texas legislature. The Court, in an opinion by Justice Stewart,[20] reversed the lower court's granting of summary judgment for the employer, finding that Sindermann should have had the opportunity to show that his dismissal was in retaliation for speaking out as a member of the faculty directly affected by the issue in question. Citing *Pickering* as governing precedent, the Court stated: "Plainly, these allegations present a bona fide constitutional claim. For this Court has held 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 of his employment."[21]

Seven years after *Perry v. Sindermann*, in 1979, the Court made a slight adjustment to the law of public employee free speech claims with its decision in *Mt. Healthy Bd. of Educ. v. Doyle*.[22] There the Court held in a unanimous opinion by Justice Rehnquist, that when an employee alleges he or she was dismissed, at least in part, for exercising free speech rights, it is incumbent upon the employee to show that he or she was engaged in constitutionally protected conduct and that this conduct was a motivating factor in the decision of the employer to fire him or her. If the employee meets this test, the Court held, the burden shifts to the employer, who must rebut the employee's claim by showing that the employee would have been fired irrespective of the protected activity. In this case the employee, a high school teacher, aired his disagreement about a school dress code in a public forum (a radio news program) but also made an obscene gesture to students and engaged in disruptive conduct in the school cafeteria. The Court seemed particularly concerned that "constitutionally protected conduct" should not be used to continue the employment of "a borderline or marginal candidate."[23]

The case was remanded, and the lower court found that the employee's teaching contract would not have been renewed, even if his protected speech about the dress code had not occurred.[24]

These "mixed motive" cases vary from the circumstances in *Pickering*, in which the employee had not otherwise engaged in misconduct or exhibited poor performance. While *Mt. Healthy* added an important caveat to the Court's original holding, it did not fundamentally alter the scope of free speech rights of public employees: the *Pickering* balancing test remained the touchstone of inquiry.

Also in 1979, the Court was faced with a claim from a dismissed African-American school teacher named Bessie Givhan who, in a private meeting with the school's principal, expressed her opposition to certain school board policies, claiming they were racially discriminatory. In that case, *Givhan v. Western Line Consolidated School District*,[25] the Court unanimously held that these discussions constituted speech on a matter of public concern, even though they took place in private.[26] The Court stated that its prior decisions

> do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.[27]

Rather, stated the Court: "Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[28] Thus, since the employee had alleged, and the lower court had found, that "the primary reason for the school district's failure to renew [petitioner's] contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach,"[29] the Court remanded the case for further proceedings with the understanding that privately-communicated views could be encompassed within the First Amendment's protection.

We see the first significant shift in how the Supreme Court viewed public employee free speech cases in 1983, when the Court modified the original *Pickering* test with its five to four decision in *Connick v. Myers*.[30] This case arose when an assistant district attorney, Sheila Myers, circulated a questionnaire to her co-workers seeking their views on office morale, the need for a grievance committee, and whether they had been pressured to work on political campaigns. She was fired for her activity, and she challenged her dismissal as a violation of her free speech rights. In an opinion by Justice White, the Court majority created a new two-pronged test to determine whether the *Pickering* balance should be applied: (1) did the speech involve a matter of public concern? (2) If so, did the employee's free speech interest outweigh the employer's interest in efficient public service?[31]

The questionnaire circulated by Myers consisted of fourteen entries. Only one entry, the question concerning pressure to work for office-supported candidates, touched on a matter of public concern, according to the Court. Because that question was "a matter of interest to the community up which it is essential that public employees be able to speak freely,"[32] application of the *Pickering* balancing test was warranted. The Court then considered the employer's right to maintain an efficient workplace by removing a disruptive employee against the employee's right to redress unwilling participation in political campaigns. That redress was sought in the context of a questionnaire that was otherwise characterized as a personal grievance, and the Court resolved the balance in favor of the employer. Noted the Court in *Connick*: "[W]e believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."[33]

The two-pronged test created in *Connick* provided a means to dispose of free speech claims without having to weigh competing interests as required by *Pickering*, if the ruling court found as a threshold inquiry that the speech in question was not speech on a matter of public concern.[34] As the majority in *Connick* explained:

> *Pickering,* its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.[35]

Because Myers' questionnaire did include one item that constituted speech on a matter of public concern, however, the Court applied the *Pickering* balancing test and concluded that the employer's interests in maintaining

a workplace free from undue disruption trumped the employee's free speech right to complain about alleged pressure to work in political campaigns.[36] The majority opinion is noteworthy not only because it created a threshold inquiry that had not previously been required in public employee free speech analysis, but also because of its abundant concern for the ability of public managers to oversee their operations, and to avoid constitutionalizing every employee complaint. Stated the Court:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[37]

In 1987 the Court was presented with a case in which a public employee who worked as a low-level data entry clerk had been fired by her supervisor, a sheriff, for stating to a coworker, upon hearing of the attempted assassination of President Reagan, "If they go for him again, I hope they get him."[38] In that case, *Rankin v. McPherson*,[39] the Court held in a majority opinion by Justice Marshall[40] that the employee's speech was protected. The comments were made in the context of a private conversation with a coworker addressing the President's domestic policies, which the employee's supervisor happened to overhear. Even in that setting—a private conversation with a coworker in which a public employee made a fairly outrageous statement—the employee's statements nonetheless met the first prong of the *Connick* test; the speech was on a matter of public concern. Applying the second prong of the test, the *Pickering* balance, the Court found no evidence that the employee's statement's had interfered with the government's interest in efficient functioning of the office, or had otherwise discredited the office, since it was made in private and was overheard accidently by a supervisor.

In a scathing dissent by Justice Scalia, in which three other justices joined, he observed that the effect of the majority's holding was to permit this low-level sheriff's department employee to "ride with the cops and cheer for the robbers."[41] Again, however, the *Rankin* case did not alter the basic framework for analyzing public employee free speech claims.

Two other cases were decided by the Supreme Court in the twenty years between the *Rankin* decision and the *Garcetti* ruling. The first, *Waters v. Churchill*,[42] arose when the employer, a public hospital, fired a nurse named Cheryl Churchill for insubordination after she allegedly complained to a coworker about her supervisor while taking a break in the hospital cafeteria. Churchill claimed that the employer fired her because she opposed a recently instituted policy of nurse cross-training which she believed resulted in understaffing and endangering patient care.[43] A plurality of the Court, in an opinion by Justice O'Connor, held that a government employer has a duty to make a reasonable investigation into the circumstances surrounding an employee's conduct before taking an action to dismiss the employee for his or her speech.[44] That is, in a free speech challenge, the courts must "look to the facts as the employer *reasonably* found them to be."[45] In this way, the Court added a procedural wrinkle to its free speech jurisprudence, while reaffirming the *Connick*/*Pickering* two part test it had adopted a decade earlier. Importantly, however, the Court in *Waters* reiterated the importance of the third factor in the *Pickering* test, stating "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."[46] At the same time, the Court noted, "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."[47] The second, *Board of County Commissioners v. Umbehr*,[48] extended free speech protection to independent contractors whose contracts are terminated in retaliation for speech critical of the governmental entity. The standard for evaluating free speech claims remained unchanged in both *Waters* and *Umbehr*: was the speech on a matter of public concern, and if so, whose interests should be given greater weight?

Thus, while there were some adjustments and clarifications to the *Pickering* standard in the nearly 40 years between the initial announcement of the balancing test in 1968 and the *Garcetti* decision in 2006, including the significant addition of the threshold inquiry in the *Connick* decision, the effect of the Court's decisions was to create a framework for employers, employees, and the lower courts to follow. That framework may be summarized as follows: Did the employee speak on a matter of public concern? If no, then the *Pickering* balancing test is inapplicable and the employee is without protection (*Connick*). If yes, then the court must balance the employee's interest in speaking on a matter of public concern against the government's legitimate interests as an employer in maintaining a workplace free from undue disruption (*Connick*). Protected speech may arise in a

public setting, such as a letter to a newspaper or a public forum (*Pickering, Sindermann, Mt. Healthy, Umbehr*) or in a private setting (*Givhan, Waters*). And even if an employee engages in protected speech, he or she may still be dismissed if there are other legitimate, non-free speech based reasons for the employer to do so (*Mt. Healthy*).

As noted earlier, however, the framework permitted the Court to emphasize different aspects of the original *Pickering* balancing test as it announced its subsequent rulings. The tension between portraying the public employee as responsible citizen and the public employee as carping bureaucrat may be found in a number of the Court's opinions rendered during this period. Although public employees are often viewed as those who may be in the best position to comment on matters of public concern, given their familiarity with the public agency in question,[49] the Court was also quite mindful of the need to prevent every workplace dispute from becoming the grounds for a constitutional controversy.[50] Stated another way, the Court's opinions recognize both the right of public employees to speak out when needed and the need for public agency supervisors to responsibly manage their organizations. But until 2006, the Court had never focused on whether the speech in question was wrapped up in an employee's official job description. That changed with the *Garcetti* decision, as discussed in the next section.

The Supreme Court's Ruling in *Garcetti v. Ceballos*[51]

Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's Office whose duties as a calendar deputy included supervising other attorneys. Ceballos was asked by defense attorneys to review the statements made in a search warrant in a pending case, because the defense attorneys claimed the statements were inaccurate. Ceballos did so, and found certain inconsistencies in the warrant. He brought his concerns about the accuracy of the warrant to his supervisor in a disposition memorandum recommending dismissal of the case. That led, in turn, to a meeting with Ceballos, two of his supervisors, the warrant affiant and other employees from the Los Angeles County Sheriff's Department. The meeting ended in a sharp disagreement between Ceballos and the other parties, and his supervisor decided to proceed with prosecution of the case.[52] Ceballos was subpoenaed by the defense attorneys to testify, and he did so truthfully. In response, he claimed, his supervisors in the district attorney's turned on him, denying him a promotion and later transferring him to a distant location.[53]

Ceballos challenged his employer's actions as retaliation for engaging in protected speech. He prevailed at the Ninth Circuit Court of Appeals, which determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern."[54] However, the Supreme Court held, in a five to four ruling authored by Justice Kennedy, that Ceballos' speech was unprotected. While acknowledging the importance of the free speech rights of public employees and even reiterating "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion"[55] the Court had originally endorsed in *Pickering*,[56] the majority nonetheless found no protection for the employee in this case. Stated the Court:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. . . That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case— distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[57]

"The significant point" in this case, Justice Kennedy continued, "is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[58] In other words, the Court held, Ceballos actions were simply part of his job description, and he was merely "perform[ing] the tasks he was paid to perform"[59] as an employee, not speaking as a citizen when he wrote the memo.

Clearly, the majority opinion added a significant new limitation to employee free speech claims: because the employee was carrying out his duties in writing the memo, the Court held, he couldn't invoke the protection of the First Amendment, because he was simply doing his job.

But the majority's approach ignored two important aspects of Ceballos' speech. First, he did not simply make a statement pursuant to his official duties in his memorandum to his supervisor; he also engaged in a serious

disagreement with his supervisor and other officials about whether justice was being served, and subsequently testified about his concerns with the search warrant—which was a matter of public concern. How different was Ceballos' dispute, held in the privacy of his supervisor's office and alleging a miscarriage of justice, with that of Bessie Givhan, held in the privacy of her supervisor's office and alleging discriminatory personnel practices? The majority apparently found these two circumstances qualitatively different, although four members of the Court did not. Second, Ceballos was acting in a manner analogous to the other plaintiffs in the Court's prior free speech cases, in that he was directly involved in the controversy or issue in question, which arose out of the workplace and which he documented in his memo.

A review of the prior decisions of the Court to see in what capacity the employee engaged in protected speech shows the following: Pickering's letter to the newspaper was written in his capacity as a school teacher directly affected by the budget decisions of the school board; Sindermann's testimony to the Texas legislature was offered in his capacity as a professor seeking to change the status of the college where he was employed; Doyle's complaints about the school dress code were made to a radio station as a school employee who had to abide by that dress code; Givhan's complaints to her school principal were made in the privacy of the principal's office and in her capacity as a teacher directly affected by the allegedly discriminatory policies of her employer; Myers' complaints about political pressure were made to her coworkers at the office as an employee allegedly directly affected by those pressures; Rankin's complaints about the President were made at the office in her capacity as a member of the law enforcement community; Waters alleged concerns about patient safety at a public hospital were made on the employer's premises as a nurse whose work was affected by her employer's allegedly unsafe practices.

In every case, the matter about which the employee spoke was inextricably linked to the employee's job; the employee wasn't speaking as a disinterested observer of public policy, offering detached critique, but as someone with a genuine stake in the outcome of the dispute. How different was Ceballos' claim? Not different enough to warrant an entirely new barrier to free speech protection. He was deeply involved in the issue at hand, but the fact that the issue arose at the workplace and as part of his broad responsibilities as an employee did not significantly distance him from all the previous plaintiffs.

Further, it is important to note that in the original free speech case, *Pickering*, the Court spoke of the right of the employee "as a citizen"[60] to speak. If the public employee's right is to speak as a citizen, then the employee should be able to speak, as a citizen often does, on matters that affect him directly, including matters that arise out of his work responsibilities. This is not to say that the employee should have unfettered free speech rights, but those rights should not be restricted beyond the disruption factors *Pickering* lists. Citizens speak on matters that concern them directly, as did the plaintiffs in *Connick* and *Garcetti*. And yet, Justice Kennedy, defending the new barrier to protection of employee speech, stated that the majority's holding was

> consistent with our precedents' attention to the potential societal value of employee speech. . . Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.[61]

Of course, the Court had never held that public employees had "a right to perform their jobs however they see fit."[62] In fact, as noted in Part III, the Court had always held that there was a balance to be struck between the employee's right to speak and the disruptive effect of that speech, even when they did so pursuant to their professional duties. What is striking in this case is that Justice Kennedy ruled as off limits any expression that could be linked to those items found in a public employee's job description, rather than acknowledging the fact that whether an employee's statements arose out of his or her specific job duties or not, there is a professional responsibility of public employees to object to mismanagement or abuse by a public agency if they encounter it. Such was clearly the case in *Pickering*, *Givhan*, *Connick,* and *Waters*. Following the logic of Garcetti, if Bessie Givhan had been the school system's Human Resources Director or EEO Officer, her complaints about discriminatory personnel practices would have been dismissed as part of her job duties, not protected speech.

Justice Souter seized on the Court's sharp reversal of its previous approach, in which the role of public employees as informed guardians against governmental misconduct was part of the rationale underlying all the decisions since *Pickering*. Dissenting in *Garcetti*, he wrote:

> As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the

> one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.[63]

Justice Stevens, in his dissent, added: "The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties, is 'Sometimes,' not 'Never.'"[64] Yet, he noted, the majority opinion provided a blanket exception to free speech claims arising out of an employee's official job duties, holding that if the speech arose as a part of those duties, it was categorically without protection.

Predictably, the result of the *Garcetti* decision in subsequent lower court rulings was to thwart a number of free speech claims by characterizing the speech as part of the employee's job duties.[65] That result has been widely criticized by a number of commentators.[66]

A Slight Detour: An Employee Claim brought under the Right to Petition for Redress of Grievances under the First Amendment

In 2011, the Court issued an opinion in a case that differed from the line of public employee free speech cases summarized in this article but that nonetheless invoked the *Pickering* balancing test: *Borough of Duryea, Pennsylvania v. Guarnieri*.[67] The case arose after Charles Guarnieri, who had previously successfully fought his dismissal as the police chief for the borough of Duryea by filing and winning a grievance under a collective bargaining agreement, filed a subsequent lawsuit against the town alleging retaliation. Guarnieri characterized his act of filing a grievance against the town as protected activity encompassed by the Petition Clause of the First Amendment, and further alleged that after he won reinstatement to his job as police chief, the town council directed him not to work overtime hours and incur additional costs to the borough. In other words, Guarnieri argued, the town's directive forbidding him to work overtime amounted to retaliation against him for having petitioned the government in the first place by filing his original grievance contesting his firing.

The Court, in an opinion by Justice Kennedy, held that the absent a showing that Guarnieri's grievance and his subsequent lawsuit were on matters of public concern, he had not engaged in protected activity under the First Amendment. The Court found that his original grievance simply contested his dismissal, and his subsequent lawsuit simply contested his eligibility for overtime payment—and that neither one was a matter of public concern under the *Connick/Pickering* standard. And, reasoned the Court, if a public employee was not speaking "as a citizen, on a matter of public concern" when filing suit against a public employer, then he or she could not invoke the First Amendment. Because there is a close connection between the right of a public employee to petition the government and the right of a public employee to speak as a citizen, it is appropriate, the Court held "to apply the public concern test developed in Speech Clause cases to Petition Clause claims by public employees"[68] even though the Speech Clause and Petition Clause are distinct parts of the First Amendment; that is, the clauses are not co-extensive. This approach is justified in public employee claims, Justice Kennedy explained, "by the extensive common ground in the definition and delineation of these rights. The considerations that shape the application of the Speech Clause to public employees apply with equal force to claims by those employees under the Petition Clause."[69]

In *Connick*, the Court had previously held that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision allegedly made in reaction to the employee's behavior."[70] In this case, Justice Kennedy elaborated on the Court's interest in not constitutionalizing every employee complaint, stating:

> The substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the Petition Clause. Petitions, no less than speech, can interfere with the efficient and effective operation of government. A petition may seek to achieve results that 'contravene governmental policies or impair the proper performance of governmental functions.' Government must have authority, in appropriate circumstances, to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve. A petition, like other forms of speech, can bring the 'mission of the employer and the professionalism of its officers into serious disrepute.' A public employee might, for instance, use the courts to pursue personal vendettas or to harass members of the general public. That

> behavior could cause a serious breakdown in public confidence in the government and its employees. And if speech or petition were directed at or concerned other public employees, it could have a serious and detrimental effect on morale.[71]

Because the lower court had not applied the *Pickering* test to Guarnieri's claim, his case was vacated and remanded. It is worth noting the Court's continuing concern with the potentially disruptive effect of employee speech on the efficiency of a public agency.

The Supreme Court's Ruling in *Lane v. Franks*[72]

The Court's most recent ruling on the bounds of public employee free speech came this past June. The plaintiff was Edward Lane, who worked as the director of a program for underprivileged youth at Central Alabama Community College. In his role as director, Lane had substantial management responsibilities, including hiring and firing authority and financial oversight of the program.[73] Shortly after he was hired, Lane conducted an audit of the program because it was facing severe budget difficulties, and in the course of his audit he discovered that Suzanne Schmitz, an Alabama State Representative who was also an employee of the program, had been collecting a salary without doing any work.[74] When Schmitz ignored Lane's directive that she perform her duties, Lane dismissed Schmitz, and testified truthfully in a subsequent federal fraud trial against her.[75] However, after Lane did so, he was laid off from his position by his supervisor, Steve Franks, ostensibly due to budget cutbacks. Lane sued, claiming that the real reason he was terminated was that he had testified truthfully in the federal trial that led to Schmitz's conviction.[76]

Justice Sonya Sotomayor delivered the opinion for a unanimous Court, holding that Lane's dismissal violated his free speech rights. Justice Sotomayor framed the issue as "whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities."[77] In a footnote, she stated that the Court did not need to address the question of "whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties."[78] But, she added:

> Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.[79]

The Court didn't take the opportunity to overturn *Garcetti*, but by stating that speech is protected when it is based on what a public employee knew as a direct result of his or her employment, the Court may well have reduced the scope or effect of *Garcetti*. Indeed, Justice Sotomayor emphasized that "our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[80] Unfortunately, it is not clear if the Court meant to limit *Garcetti*, and there is still a lot of room for confusion. Remember that in *Lane*, the employee testified in court about what he learned and could only have learned in the course of performing an audit as part of his job, and the Court held that it was protected speech. In *Garcetti*, by comparison, the employee testified in court about what he learned and could only have learned in the course of preparing a memo and disagreeing with his supervisors about the propriety of a warrant, and the Court held it was not protected speech. The Court in *Lane* distinguished the two cases as follows:

> *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue 'concerned the subject matter of [the prosecutor's] employment,' because '[t]he First Amendment protects some expressions related to the speaker's job.' In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.[81]

What a tortured an unnecessary parsing of speech this turns out to be. On the one hand, the Court in *Lane* lauds the virtues of *Pickering*, reiterating the Court's long-standing recognition of the valuable role public employees play as individuals who are often in the best position to speak on a matter that the general public should be concerned about, and adding that the speech

in this case was particularly important because it exposed corruption by public official. On the other hand, saddled with the unwieldy *Garcetti* distinction of speech that is part of one's official job duties versus speech that relates to or is learned as part of one's job, the Court distinguished the two circumstances on a very thin reed by pointing out that Edward Lane wasn't hired to be a regular participant in court proceedings and that Richard Ceballos was hired, in part, to do so. Of course, it is also true that Edward Lane wasn't hired to conduct audits or to seek out evidence of corruption in Alabama state government. He was hired to work with at-risk juveniles and to manage an agency. He went beyond his official job description and did what a good citizen would do: faced with evidence of wrongdoing, he reported it to proper channels and testified truthfully when criminal charges were brought against a state official.

The Court in *Lane*, having first determined that his "truthful sworn testimony at Schmitz' criminal trials is speech as a citizen on a matter of public concern,"[82] then applied the *Pickering* balancing test and found the employer's interest in suppressing the speech "entirely empty."[83] Stated the Court: "There is no evidence, for example, that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential or privileged information while testifying."[84] Thus, the balance of interests clearly weighed in favor of the employee, and the Court held that the lower court erred in dismissing Lane's claim of retaliation for engaging in First Amendment free speech.[85]

Justice Thomas, joined by Justices Alito and Scalia, wrote an opinion concurring in the result, but adding that the Court did not address the broader question of "whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities."[86] Justice Thomas noted that police officers, for example, testify as a "routine and critical part of their employment duties,"[87] but that the Court had properly reserved this constitutional question for another day.

Conclusion: Finding the way Forward by a Return to *Pickering*

The Court in *Lane v. Franks* made the correct decision—and how could it not have reached that decision? As Justice Sotomayor affirmed, "The importance of public employee speech is especially evident in the context of this case: a public corruption scandal."[88] It is hard to imagine under what circumstances the Court have concluded that speech in this context was not speech, "as a citizen, in commenting upon matters of public concern."[89] But what if the Human Resources Department of Central Alabama Community College had included as boilerplate language in Lane's official job description, as Director of Community Intensive Training for Youth, that his duties included "representing the College in appropriate forums, including legislative and judicial proceedings"? How could the Court have then avoided the dilemma created by *Garcetti*? Fortunately for the Court, it wasn't faced with that problem. What it had the opportunity to do, and didn't, was to go beyond the hair-splitting distinction it drew between the employee's courtroom speech in *Lane* and the employee's courtroom speech in *Garcetti*, and to simply admit that *Garcetti* was wrongly decided.

Simply stated, the Court go it right the first time around in 1968: *Pickering*, together with its refinements through *Connick* and other subsequent cases, provides a more than sufficient framework for analyzing public employee free speech claims. *Pickering* guards against constitutionalizing every workplace dispute, and leaves to the judgment of public managers the day to day running of public organizations. The Court's evident concern with the employer's ability to function efficiently has always been sufficiently addressed under the old balancing test. More importantly, *Pickering* also protects the right of public employees who disagree with policy decisions, or who observe waste, fraud or abuse, to speak up without undue fear of retaliation. Sometimes, as we have seen, members of the Court seem to be more concerned with one side of the equation (speaking up) than the other (disrupting the workplace), but the equation, for all its broad wording and purposeful ambiguity, works. Even with the limitations of the two-pronged test created by *Connick*, it works.

What the lower courts and public employers and employees are left with in the meantime, when it comes to speech that public employees make in court settings, is a very murky picture. Over time, it may be that *Lane* supplants *Garcetti* as guiding precedent, and provides a means for lower courts to rely on *Lane* to recognize as protected speech those instances in which public employees truthfully bring forth concerns about waste, mismanagement, fraud, or unethical conduct by public agencies, even when the employees are directly involved in administering those public programs, and even when the employees have some statement in their official job description that arguably covers the matter about which they spoke. That approach would serve the public interest and return public employees to the position they enjoyed previously: appropriately aware of their duty to report wrongdoing, yet sufficiently constrained by the need to adhere to workplace rules and

not to unduly disrupt the functioning of the agencies for which they work. That would end the need for the employee to hide behind the claim that addressing the matter in question was "not my job."

ENDNOTES

1 391 U. S. 563 (1968).
2 391 U.S. at 568.
3 391 U.S. at 568.
4 *Pickering*, 391 U.S. at 569 ("Because of the enormous variety of fact situations in which critical statements by teachers and other 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.").
5 __ U.S. __ (2014), 134 S.Ct. 2369 (2014).
6 547 U. S. 410 (2006).
7 547 U. S. at 421.
8 391 U. S. 563 (1968).
9 Slip op at 8, footnote 4.
10 391 U.S. 564 (1968).
11 *Id.* at 568.
12 Justice White dissented in part, voting to remand to the trial court for further fact-finding.
13 And, of course, the protection does not apply to purely private speech—that is, speech that does not implicate the relationship of the government to the citizen. See, e.g., Yoggerst v. Hedges, 739 F.2d 293 (7th Cir. 1984) (public employee's comment to coworker about firing of agency director "Did you hear the good news?" was not protected speech).
14 391U.S. at 568.
15 391 U.S. at 570-72.
16 391 U.S. at 571-72.
17 Id. at 572.
18 David Hudson, "Teacher looks back on letter that led to firing — and Supreme Court victory" Freedomforum.org, July 20, 2001. Retrieved at http://www.freedomforum.org/templates/document.asp?documentID=14445 .
19 408 U.S. 593 (1972).
20
21 408 U.S. at 598.
22 429 U.S. 274 (1979).
23 429 U.S. at 286.
24 *Doyle v. Mt. Healthy City School Dist. Bd. of Ed.*, 670 F.2d 59 (6th Cir. 1982).
25 439 U.S. 410 (1979).
26 439 U.S. at 413.
27 439. U.S. at 414.
28 439 U.S. at 415-16.
29 439 U.S. at 413.
30 461 U.S. 138 (1983).
31 461 U.S. at —
32 461 U.S. at 149.
33 461 U.S. at 149.
34 461 U.S. at 146. For an earlier discussion on the experience of the lower courts in applying the two-pronged test created by the Supreme Court's ruling in this case, see Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind.L.J. 43 (1988).
35 Id.
36 461 U.S. at 154.
37 461 U.S. at 149.
38 483 U.S. 378, xx.
39 483 U.S. 378 (1987).
40 Like *Connick*, this was also a five to four ruling.
41 483 U.S. at 394 (Scalia, dissenting). Justice Scalia reiterated his concern for the ability of managers to manage, adding that the Supreme Court should not be "sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service." 483 U.S. at 399.
42 511 U.S. 661 (1994).
43 511 U.S. at 665-66.
44 511 U.S. at 667-68.
45 511 U.S. at 677.
46 511 U.S. at 674 (citing *Pickering* at 572).
47 511 U.S. at 675.
48 518 U.S. 668 (1996).
49 *Pickering*, 391 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."); *Waters*, 511 U.S. at 674 ("Government employees are often in the best position to know what ails the agencies for which they work.") (plurality opinion).
50 See, e.g., *Connick*, 461 U.S. at 147 ("We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.")
51 547 U.S. 410 (2006).
52 Id. at 414.
53 547 U.S. at 413-414.
54 547 U.S. at 416, quoting 361 F. 3d 1168 at 1174.
55 547 U.S. at 419.
56 See supra note 31.
57 547 U.S. at 421.
58 547 U.S. at 421-22.
59 Id. at 422.
60 391 U.S. at 568.
61 547 U.S. at 422.
62 Idem.
63 547 U.S. at 430-31.
64 *Id.* at 426 (citation omitted).
65 *See, e.g.*, Bowie v. Maddox, *653 F.3d 45, 48 (D.C. Cir.), denying reh'g to 642 F.3d 1122 (D.C. Cir. 2011), cert. denied,* 132 S. Ct. 1636 (2012) (employee had no free speech right to refuse for refusing to sign an affidavit his employer had drafted for him to sign in response to a former employee's discrimination claim); Decotiis v. Whittemore, 635 F.3d 22, 32 (1st Cir. 2011) (setting out factors to consider in determining whether a public employee's speech was part of his job duties and thus unprotected, or was more like citizen speech and thus protected, including whether the employee was required to produce the speech, or paid for it; the subject
matter; whether speech was made up the chain of command; whether it was made at the workplace; whether it purported to represent the views of the employer; whether it derived from special knowledge acquired as an employee; and whether a non-employee could have engaged in equivalent speech); Evans –Marshall v. Board of Education, 624 F.3d 332 (6th Cir. 2010) (public school teacher did not have free speech right to select books and methods of instruction for use in her classroom without interference from the school board); (Sigsworth v. City of Aurora, 487 F.3d 506 (7th Cir. 2007) (police officer's report to superiors that members of a drug investigation task force had broken the law held unprotected speech); Green v. Bd. of County Comm'rs, 472 F.3d 795 (10th Cir. 2007) (juvenile justice center employee's concerns about accuracy of drug testing and lack of confirmation policy held unprotected speech because her job included administering drug tests); Morales v. Jones, 494 F.3d 590, 592 (7th Cir. 2007) (no free speech protection for police officers retaliated against for informing a district attorney that the police chief had harbored a felon). Vila v. Padron, 484 F.3d 1334 (11th Cir. 2007) (failure to renew instructor's employment contract at Miami Dade Community College because she criticized illegal or unethical behavior of college officials held unprotected speech).
66 See, e.g., Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 Duke L.J. 1 (2009); Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 First Amend. L. Rev. 117 (2008); Erwin Chemerinsky, *The Kennedy Court, 9 GREEN BAG 2D 335, 340-41 (2006)*; Charles W. Rhodes IV, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism,* 15 WM. & MARY BILL RTs. J. 1173, 1193-94 (2007). But see Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense,* 14 Journal of Constitutional Law 631 (2012).
67 131 S.Ct. 2488 (2011).
68 131 S.Ct. at 2494-95.
69 131 S.Ct. at 2495.
70 461 U.S. at 147.
71 131 S.Ct. at 2495-96 (citations omitted).
72 ___ U.S. ___, 134 S.Ct. 2369 (2014).
73 134 S.Ct. at 2375.
74 Id.
75 Id.
76 Id. at 2376.
77 Id. at 2374-2375.
78 Id. at 2378, footnote 4.

[79] Id. at 2378.
[80] Id. at 2379.
[81] Id. at 2379 (citations omitted).
[82] Id. at 2380. Note that this is exactly what Ceballos did—he gave truthful sworn testimony (in his case, about his concerns with the deficiencies in the search warrant). The difference is that because he originally set out his concerns in a memo to his supervisor, the Supreme Court ruled that Ceballos was just doing his job, not speaking as a citizen on a matter of public concern.
[83] Id. at 2381.
[84] Id.
[85] Id.
[86] Id. at 2384.
[87] Id.
[88] Id. at 2380.
[89] Pickering, 391 U.S. at 568.