

SEPARATING THE EMPLOYEE FROM THE CITIZEN:
THE SOCIAL SCIENCE IMPLICATIONS OF *GARCETTI V.*
CEBALLOS

I. INTRODUCTION

On Christmas Day, 2009, the United States watched in terror and relief as Atlantic Northwest Airlines Flight 253 landed safely in Detroit, Michigan.¹ Nigerian passenger Abdul Farouk Abdulmutallab became the new face of extremist terrorism after his failed attempt to detonate the chemical explosive PETN onboard.² While the country remained grateful to Flight 253's crew and passengers for apprehending Abdulmutallab,³ the global public could not help but wonder—how did the American government fail to catch him earlier?

President Barack Obama blamed a mixture of human and system failures in the federal government's national security agencies.⁴ No federal air marshal was aboard Flight 253.⁵ Immediately after this incident, the U.S. Department of Homeland Security (DHS) increased security and law enforcement aboard international flights.⁶

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1. See Anahad O'Connor & Eric Schmitt, *U.S. Says Plane Passenger Tried to Detonate Device*, N.Y. TIMES, Dec. 26, 2009, at A1.
 2. See *id.*; see also Kenneth Chang, *Explosive on Flight 253 is Among Most Powerful*, N.Y. TIMES, Dec. 28, 2009, at A14 (“The complaint identified the explosive as pentaerythritol tetranitrate, or PETN.”).
 3. See O'Connor & Schmitt, *supra* note 1, at A3.
 4. President Barack Obama, Remarks by the President on Security Reviews (Jan. 5, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>. Although the intelligence agencies had prior red flags on Abdulmutallab, including a warning from his father, he was never placed on a “no-fly” list. See President Barack Obama, Statement by the President on Preliminary Information from his Ongoing Consultation About the Detroit Incident (Dec. 29, 2009), <http://www.whitehouse.gov/the-press-office/statement-president-preliminary-information-his-ongoing-consultation-about-detroit-> [hereinafter President Barack Obama, Detroit Incident].
 5. See Press Release, Representative Yvette Clarke, Rep. Clarke Releases Statement on President Obama's Review of Foiled Terror Plot Aboard Northwest Airline Flight 253 (Dec. 30, 2009).
 6. See *id.*; see also *Flight 253: Learning Lessons from an Averted Tragedy: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. (2010) (statement of Jane Holl Lute, Deputy Secretary of the Department of Homeland Security).

Even amidst this confusion, President Obama hailed the employees of the national security agencies as “some of the most hardworking, most dedicated Americans that I have ever met. In pursuit of our security here at home they risk their lives, day in and day out, in this country and around the world.”⁷

As one can imagine, the challenges of national security have weighed heavily upon public employees. Several have paid a high price for fulfilling a moral obligation to blow the whistle⁸ and reveal their government employers’ alleged fraud or misuse of public funding.⁹ In 2006, the DHS fired United States Air Marshal Robert MacLean after he successfully exposed the DHS’s cost-saving plan to avoid paying air marshals’ overnight lodging expenses by removing them from non-stop long-distance flights, such as Flight 253 on Christmas Day from Amsterdam to Detroit.¹⁰ Although Congress has enacted several whistleblower protection statutes,¹¹ MacLean and other public employees have found little-to-no insulation from employer retaliation.¹² President Obama, deemed an advocate for whistleblowers,¹³ pushed Congress to withhold statutory protection from public employees in the national security agencies under the Whistleblower Protection Enhancement Act (WPEA) of 2009.¹⁴

7. See President Barack Obama, Detroit Incident, *supra* note 4.

8. For the purposes of this comment, a “whistleblower” is broadly defined as a public employee “who [in good faith] reveals classified information because he or she considers it their moral obligation to reveal perceived wrongdoing” of his or her government employer. Anthony R. Klein, Comment, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 FED. COMM. L.J. 433, 459 (1990).

9. See Barbara Hollingsworth, *Whistleblowers Punished for Warning of Aviation Security Lapses*, WASH. EXAMINER, (Dec. 29, 2009), <http://washingtonexaminer.com/node/134481>.

10. See Joe Davidson, *Labor-Management Talks a First for TSA*, WASH. POST, July 24, 2009, at A19; Hollingsworth, *supra* note 9.

11. See, e.g., Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16.

12. See MacLean v. Dep’t of Homeland Sec., 543 F.3d 1145, 1150–51 (9th Cir. 2008); Joe Davidson, *Requiem for the Whistleblower Protection Act*, WASH. POST, June 30, 2009, at A11; *Fallout from FBI Investigation Intensifies Call for Reform at OSC*, 15 FED. HUM. RESOURCES WK. 85 (2008) (“Between 2003 and 2006, the number of favorable actions for whistleblowers declined from 150 to 77,” and spawned new advocacy for WPA reform).

13. See Joe Davidson, *Whistleblowers May Have a Friend in the Oval Office*, WASH. POST, Dec. 11, 2008, at D3.

14. See S. 372—*The Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372 Before the Oversight of Gov’t Mgmt., the Fed. Workforce, and the D.C. Subcomm. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. (2009) (statement of Rajesh De, Deputy Assistant Att’y Gen., Office of Legal Policy, U.S. Department of Justice).

2011] Separating the Employee From the Citizen 543

Interestingly, the First Amendment has historically served as the “safety net” to protect public-employee speech, given that Congress has never enacted a national, uniform whistleblower protection law.¹⁵ Balancing the interests both for and against protection, the Supreme Court of the United States has repeatedly held that government employers may not retaliate against their employees for speech regarding matters of public concern unless the speech substantially interferes with the government’s interest in the efficient implementation of policy.¹⁶

In 2006, the Supreme Court severely restricted this constitutional refuge in *Garcetti v. Ceballos*.¹⁷ Holding that the First Amendment was a citizen right with very limited application in the public employment context,¹⁸ *Garcetti* now precludes whistleblowers from judicial recourse and discourages altruistic and valued citizens from working productively as public employees.

This comment will argue that *Garcetti*’s bright-line rule is counterproductive to the federal government’s interest in efficiency. Part II will outline the history of the First Amendment in the public employment context.¹⁹ Although once believed to be the central watchdog of public-employee speech and its benefit to society, the United States Supreme Court in *Garcetti* stepped aside and deferred to the federal legislature to craft limited whistleblower protection.²⁰

Part III will discuss the impact of *Garcetti* on the balance of public-employee speech interests. Previously, the Court defined protection as a balance of the benefits and harm of speech versus that of speech suppression.²¹ Now, *Garcetti* ignores the need to protect employee speech that benefits the government employer and society.²²

Part IV will discuss the vitality of citizenship in public employment and introduces social science to refute *Garcetti*’s reasoning that a citizen’s right under the First Amendment should not apply to employees. Under the Public Service Motivation (PSM) Theory,

15. *Ceballos Decision Fans Flame for Proposed Whistleblower Legislation*, 13 FED. HUM. RESOURCES WK., 241 (2006).

16. *See infra* Part II.A.

17. 547 U.S. 410 (2006).

18. *Id.* at 421 (“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.” (emphasis added)).

19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. *See infra* Part III.

22. *See infra* Part III.

public employees are hardworking, unique from their counterparts in the private sector, and dedicated *citizens*.²³ The government furthers its efficiency interest by recruiting, hiring, and retaining individuals with high levels of these PSM characteristics.²⁴

Part V will resolve the discrepancy between *Garcetti* and the PSM Theory by proposing a return to the previous balancing test that provided constitutional protection to public-employee speech that furthers government efficiency and individual autonomy.²⁵

II. THE PUBLIC EMPLOYEE AND THE FIRST AMENDMENT

A. History and Pickering's Balancing Test

Defining the constitutional rights of public employees against employment retaliation has been in near constant debate since the nineteenth century.²⁶ The coexisting, parallel relationships of citizen and sovereign versus employee and employer have provided challenges in defining when a government employer may or may not discipline an employee for conduct or speech that seems to conflict with the goals of the government office.²⁷

Historically, a waiver of First Amendment speech protection was a condition precedent to government employment.²⁸ In 1892, First Amendment pioneer Oliver Wendell Holmes,²⁹ then an Associate Justice of the Supreme Judicial Court of Massachusetts, concluded that a public employee did not merit the same speech protection as an ordinary citizen.³⁰ In *McAuliffe v. Mayor of New Bedford*,³¹ Justice Holmes held that a government employee "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."³² Therefore, the public employee holds no constitutional protection from employment retaliation on the basis of his speech.³³

23. See *infra* Part IV.A.

24. See *infra* Part IV.A.

25. See *infra* Part V.

26. See, e.g., *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008) (Equal Protection Clause); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (Fifth Amendment); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (First Amendment).

27. See *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

28. See *McAuliffe*, 29 N.E. at 517–18.

29. See generally G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 397–98 (1992).

30. See *McAuliffe*, 29 N.E. at 517–18.

31. 29 N.E. 517.

32. *Id.* at 517.

33. Randy J. Korzel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1028–29 (2005) ("Under the [Holmesian] model, government employees retain

2011] Separating the Employee From the Citizen 545

A public employee “had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”³⁴

By the mid-twentieth century, the role of the government employee had morphed into that of a valued individual and citizen.³⁵ By then, *McAuliffe* was an extreme view³⁶ and public employees retained some constitutional protections in the workplace.³⁷ In 1968, the Supreme Court in *Pickering v. Board of Education* held that a public school teacher was wrongfully fired in retaliation for writing and publishing a letter in the local newspaper that criticized his school board’s use of public funding.³⁸

By holding that the public employee’s letter was constitutionally protected,³⁹ the *Pickering* Court introduced a new balancing test to determine whether a public employee’s speech was entitled to First Amendment protection.⁴⁰ Speaking for the Court, Justice Thurgood Marshall explained that the law must weigh “the interests of the [public employee], as a citizen, in commenting upon matters of public concern [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁴¹

The Court concluded that the citizen’s interest in speech outweighed the government’s interest in efficiency given that the letter was based on public information, had an attenuated relationship with the employee’s official duties, and minimally impacted the

their free speech and free association rights, as do all citizens. But they also must accept, as a result of their employment by the government, that the exercise of these rights may cause their employers to discipline or fire them.”)

34. See *Connick v. Myers*, 461 U.S. 138, 143 (1983).

35. See Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court’s Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 121 & n.1 (1996).

36. See *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674–75 (1996) (citing, among others, *Wieman v. Updegraff*, 344 U.S. 183 (1952), as modern First Amendment precedent denouncing *McAuliffe*’s speech restrictions as conditions of public employment).

37. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967) (“[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”) (quoting the lower court’s ruling in *Keyshian v Board of Regents*, 345 F.2d 236, 239) (1965)); see also *Umbehr*, 518 U.S. at 674.

38. 391 U.S. 563, 566, 574–75 (1968).

39. *Id.* at 570, 574–75.

40. *Id.* at 568.

41. *Id.*

professional relationships, morale, and efficiency of his office.⁴² This factual review suggests that the Court defined the government's interest in efficiency as preventing the speech's disruptive impact on the individual employee's own performance, the harmony and discipline of the office, the regular operation of the office, and, if the statements were false, on the public's trust in the organization.⁴³

In its rationale, the Supreme Court recognized that society benefits from the public employee's participation in the public debate: "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 operations of the schools should be spent."⁴⁴

Even though *Pickering* was a victory for public-employee speech protection, the Court continued to permit restrictions on employee speech in furtherance of the government's interests in efficiency, morale, and discipline of the office.⁴⁵ In *Connick v. Myers*, the Court held that employee speech concerning a personal grievance, compared to matters of public concern, was more harmful and disruptive to office morale and efficiency.⁴⁶ Where an assistant district attorney distributed a survey concerning her office transfer to her peers during their lunch break,⁴⁷ the Court held that, with one exception, the survey was not a "matter of political, social, or other concern to the community," and was precluded from the *Pickering* balancing test and First Amendment protection.⁴⁸

The exception noted by the Court involved one question on the survey regarding official pressure on employees to support political campaigns.⁴⁹ The Court held that this question addressed the government's unlawful coercion of public employees and therefore

42. *Id.* at 569–70.

43. D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 252 (1990) (citing *Pickering*, 391 U.S. at 569–73) (arguing that "[t]he Court implicitly adopted a broad definition of disruption in *Pickering*").

44. *Pickering*, 391 U.S. at 571–72.

45. See *Connick v. Myers*, 461 U.S. 138, 150–51 (1983). "To this end [of efficient and proper discharge of official duties], the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs [regarding efficient and proper discharge of official duties]." *Id.* (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

46. 461 U.S. 138, 147–48 (1983).

47. *Id.* at 153 n.13.

48. *Id.* at 146–48. Characterizing speech as a matter of public concern is a factual determination: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147–48.

49. *Id.* at 149.

2011] Separating the Employee From the Citizen 547

constituted a matter of public concern.⁵⁰ The Court then applied the *Pickering* balancing test to determine whether this single question “substantially interfere[d]’ with official responsibilities,” considering the nature of the public employee’s speech.⁵¹ The Court concluded that the government employer’s interest in efficiency outweighed the assistant district attorney’s interest in speech and participation in public debate because the survey interfered with the office’s close and essential working relationships, and thus the effective performance of public responsibilities.⁵² Furthermore, disrupting speech concerning personal grievances provided substantial potential injury to the employer without serious countervailing harm in suppression of individual expression.⁵³

Like the public concern limitation in *Connick*, the Court continued to refine *Pickering* throughout the twentieth century. In *Waters v. Churchill*, the Court provided the government employer significant deference to define the limits of its employees’ speech.⁵⁴ *Mount Healthy v. Doyle* confirmed that the employee bears the burden of proving unconstitutional retaliation by showing that his speech was a substantial factor that caused the government employer’s retaliatory dismissal.⁵⁵ Employer control of employee speech in pursuit of office initiatives squares perfectly with the principles that the government has broader powers as an employer than as a sovereign,⁵⁶

50. *Id.*

51. *Id.* at 150 (quoting the district court below, *Myers v. Connick*, 507 F. Supp. 752, 758 (D.C. La. 1981)). Together, the public concern limitation and balancing test are known as the *Connick–Pickering* analysis. See *infra* note 107 and accompanying text.

52. See *id.* at 151–52.

53. See *id.* at 154. “The limited First Amendment interest involved here does not require that Connick [as his government employer’s agent] tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships.” *Id.*

54. See 511 U.S. 661, 675, 677 (1994). Cheryl Churchill was fired from her position as a nurse at a public hospital in Illinois after others overheard her conversation with another coworker and claimed she portrayed the department in a negative light. *Id.* at 664–65. The hospital rejected Churchill’s side of the story and terminated Churchill on the basis of her speech as overheard by fellow employees. *Id.* at 664.

55. 429 U.S. 274, 285–87 (1977). A public school teacher submitted an inter-office memo to a local radio station and the school board did not renew his employment contract. *Id.* at 282. The Supreme Court held that the school board’s action did not violate the First Amendment because the teacher failed to establish that his expression was a substantial or motivating factor of his employer’s adverse action. *Id.* at 285.

56. *Waters*, 511 U.S. at 673 (“[W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.”).

may control its own message (as communicated by its employees),⁵⁷ and that discretion in the government's employment decisions is a necessary ingredient of at-will employment.⁵⁸

Still, the Court has closely guarded the speech of public employees since *Pickering*. The Court held in *Rankin v. McPherson* that judicial scrutiny is a central watchdog of a citizen's freedom of expression, stating that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."⁵⁹ *Givhan v. Western Line Consolidated School District*⁶⁰ and *City of San Diego v. Roe*⁶¹ emphasized the judiciary's responsibilities of furthering the First Amendment's protection of speech upon matters of public concern and of balancing the nature of each expression on a case-by-case basis rather than creating a general rule.⁶² Further, the Court continued to echo *Pickering*'s rationale that the societal value of public-employee speech was central to First Amendment jurisprudence.⁶³

Despite the Court's deference to government employers, *Pickering* reconciled the long-standing debate of how to define a public

57. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

58. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 591, 594 (2008) (holding that the "class-of-one" theory under the Equal Protection Clause, established by the Court in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), is inapplicable in the government employment context given the necessary discretion of the at-will employment doctrine).

59. 483 U.S. 378, 384 (1987).

60. 439 U.S. 410 (1979). A public employee does not lose First Amendment protection merely because he agrees to communicate privately with his employer rather than publicly. *Id.* at 415–16.

61. 543 U.S. 77 (2004). A police officer's discharge after selling a homemade sexually explicit video online, in which he identified himself as a police officer, did not violate the First Amendment because the speech was not a matter of public concern. *Id.* at 78, 84–85.

62. *See supra* notes 52–53.

'[W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character with the principles of the First Amendment' Because of this obligation, we cannot 'avoid making an independent constitutional judgment on the facts of the case.'

Connick v. Myers, 461 U.S. 138, 150 (1983) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) and *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964), respectively).

63. *Waters v. Churchill*, 511 U.S. 661, 672–74 (1994).

2011] Separating the Employee From the Citizen 549

employee's First Amendment protection against retaliation. Where the privilege of public employment once required the waiver of First Amendment protection, the public employee after *Pickering* is revered as a valued citizen, whose speech may be restricted only when it is a disruption to the efficiency of the office.⁶⁴

B. Present State: Garcetti v. Ceballos

The Supreme Court refined the *Pickering-Connick* analysis in its 2006 decision, *Garcetti v. Ceballos*.⁶⁵ In that case, the Court held that a public employee is afforded no constitutional protection under the First Amendment for speech pursuant to official duties.⁶⁶ This bright-line rule divided the protected citizen and unprotected employee, furthered the lower courts' confusion in determining public employees' First Amendment rights,⁶⁷ and improperly left whistleblower protection to the legislature.⁶⁸ Above all, the Court sought to define a clear threshold rule but arguably lost sight of the balancing considerations of *Pickering* and the government's interest in efficiency.⁶⁹

1. The Case

In 2000, Los Angeles County deputy district attorney Richard Ceballos wrote a memorandum regarding an allegedly inaccurate and falsified affidavit used to obtain a search warrant in a pending criminal trial.⁷⁰ In reaction to his memorandum and recommendation to dismiss the case, Ceballos claimed that his superiors violated the First Amendment by subjecting him to a series of retaliatory employment actions, including reassignment and denial of a promotion.⁷¹

Six years later, the Supreme Court held that the *Connick-Pickering* analysis and the First Amendment were inapplicable because

64. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569–72 (1968).

65. 547 U.S. 410 (2006).

66. *Id.* at 421–22.

67. See generally Sarah F. Suma, Comment, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under Garcetti v. Ceballos*, 83 CHI. KENT L. REV. 369, 379–86 (2008) (arguing that a bright line rule eliminating First Amendment protection for job-duty speech is inconsistent with theories supporting the protection of free speech).

68. See *Garcetti*, 547 U.S. at 425.

69. See *infra* Part III.

70. *Garcetti*, 547 U.S. at 413–14.

71. *Id.* at 414–15.

Ceballos spoke as an employee pursuant to his official duties.⁷² The majority reasoned that the public employee “by necessity must accept certain limitations on his or her freedom” because employer control is necessary for the efficient provision of public services.⁷³

According to the majority, Ceballos’s memorandum was separate and distinct from the speech of public employees previously held as constitutionally protected by the Court.⁷⁴ First, the protected letter to the newspaper in *Pickering* was “the kind of activity engaged in by citizens who do not work for the government,” whereas Ceballos’s memorandum “owe[d] its existence to . . . professional responsibilities”⁷⁵ and lacked any “relevant analogue to speech by citizens who are not government employees.”⁷⁶ Separating the roles of protected citizen and unprotected public employee “does not infringe any liberties the employee might have enjoyed as a private citizen.”⁷⁷ Second, speech pursuant to job duties represents an official communication of the government agency, raising the employer’s interest in controlling the speaker’s message.⁷⁸ Third, this heightened interest in controlling employee speech mandates that government employers, like their counterparts in the private sector, have managerial discretion rather than judicial oversight.⁷⁹

In removing judicial oversight of public-employee speech, the Court deferred to the legislature. Protection for whistleblowers, who report unethical misconduct or governmental inefficiency, would now predominately be through “the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes”⁸⁰

Finally, *Garcetti* left open the question of how to define its bright-line “spe[ech] pursuant to official duties” test.⁸¹ Majority-opinion author Justice Kennedy stated that the facts of Ceballos’s memorandum provided “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.”⁸² In the future, lower courts

72. *See id.* at 424.

73. *Id.* at 418–19 (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion); *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

74. *Id.* at 422.

75. *Id.* at 421–23.

76. *Id.* at 424.

77. *Id.* at 421–22.

78. *Id.* at 422.

79. *See id.* at 418.

80. *Id.* at 425.

81. *See id.* at 424–25.

82. *Id.* at 424.

2011] Separating the Employee From the Citizen 551

should use a factual, practical inquiry, rather than a review of a written job description, to determine whether the individual spoke as an unprotected public employee pursuant to official duties or as a citizen, mandating further judicial review under *Connick* and *Pickering*.⁸³

2. The Dissents

Although all the Justices agreed that speech related to employment could lead to the disruption of office work,⁸⁴ they remained divided on the level of control necessary to preserve the government's interest in efficiency. Justices Stevens, Souter, Ginsburg, and Breyer did not believe that the government employer's control required a constitutional line to be drawn at the workplace, given the intrinsic ambiguity of defining the roles or "hats" of employee and citizen.⁸⁵

In their separate opinions, Justices Stevens and Souter agreed that establishing a categorical difference between a citizen's speech and that of an employee was incorrect.⁸⁶ Because a government employee should retain some citizen speech protection in the workplace, Justice Souter argued that the majority's "official duties" distinction was absolute, arbitrary, and backed by no adequate justification.⁸⁷

Focusing on the much-valued citizenship of public employees, Justice Souter characterized whistleblowers like Ceballos as "citizen servants . . . whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract."⁸⁸ Ceballos's former employer, Los Angeles County District Attorney's Office, along with Congress, and the United States Food and Drug Administration, are government employers who advertise a fulfillment of civic duty as a means of recruiting potential employees.⁸⁹ With the "right to speak on public issues he decides to make the subject of his work day,"⁹⁰ public

83. *See id.* at 424–25.

84. *See id.* at 422–23, 426 (Stevens, J., dissenting), 428 (Souter, J., dissenting), 446 (Breyer, J., dissenting).

85. *See id.* at 430 (Souter, J., dissenting) (emphasizing that the public employee continues to wear a citizen's hat while he speaks on matters of public concern in regards to his job duties, as stated in *Pickering*).

86. *See id.* at 427 (Stevens, J., dissenting).

87. *Id.* at 430 (Souter, J., dissenting).

88. *Id.* at 432.

89. *Id.* at 432 n.4.

90. *Id.* at 431.

employees are in the best position to recognize “what ails the agencies for which they work” under *Pickering*;⁹¹ pursue their civic duties when speaking pursuant to official duties; and excel professionally as a result of their civic appreciation for their public work.⁹² These examples demonstrate the inequity of citizen servants, who can further government efficiency through their civic-driven initiative at work, facing impending punishment for their beneficial employee speech.⁹³

Given the interest in recruiting these citizens, the need for managerial discretion in the office, and the societal value of whistleblower speech,⁹⁴ Justice Souter, with Justices Stevens and Ginsburg, concluded that the *Pickering* balancing test should be adjusted.⁹⁵ Under this approach, the Court would allow the government employer to control the employee’s speech pursuant to official duties, except where the employee speaks on matters of “unusual importance,” such as “official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”⁹⁶

Justice Breyer was the only member of the Court to conclude that the *Connick–Pickering* analysis was still viable and should be applied

91. *Id.* at 429 (citing *Waters v. Churchill*, 511 U.S. 661, 674 (1994)).

92. *See id.* at 432.

Indeed, the very idea of categorically separating the citizen’s interest from the employee’s interest ignores the fact that the ranks of public service include those who share the poet’s ‘object . . . to unite [m]y avocation and my vocation’ There is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.

Id. at 432–33 (citations omitted) (quoting Robert Frost, *Two Tramps in Mud Time*, COLLECTED POEMS, PROSE, & PLAYS 251, 252 (R. Poirier & M. Richardson eds., 1995)).

93. *See id.* at 431–34.

94. *Id.* at 430–34.

‘Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.’

Id. at 433 (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam)).

95. *See id.* at 434.

96. *Id.* at 435.

2011] Separating the Employee From the Citizen 553

where the public employee speaks on matters of public concern in the course of his professional work.⁹⁷ Justice Breyer discounted Justice Souter's adjustment, arguing that it would counteractively invite more judicial scrutiny as another form of inefficiency and office disruption.⁹⁸ Nevertheless, Justice Breyer joined the other dissenters, concluding that the majority's holding, to withhold constitutional protection from speech pursuant to official duties, was "too absolute."⁹⁹

3. The Reactions

a. Support and criticism

The *Garcetti* decision was met with immediate negative public reaction,¹⁰⁰ as civil rights activists argued that the Court wrongfully turned a blind eye to legitimate whistleblowing,¹⁰¹ and critics hailed Ceballos as a heroic citizen.¹⁰²

Supporters of the decision emphasized the public employer's need for managerial discretion to ensure competence, accountability, and

97. *Id.* at 449–50 (Breyer, J., dissenting):

I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech But [only where there is an] augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

98. *Id.* at 449.

99. *Id.* at 446.

100. Linda Greenhouse, *Some Whistle-Blowers Lose Free-Speech Protections*, N.Y. TIMES, May 31, 2006, at A16; *High Court Trims Whistleblower Rights*, ST. PETERSBURG TIMES, May 31, 2006, at 1A.

101. *Ceballos' Casualties*, CRIME & FEDERALISM, (July 21, 2009), <http://www.crimeandfederalism.com/2009/07/ceballos-casualties.html> (discussing *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009)).

The biggest fear [sic] civil rights and open-government advocates is coming true. In *Garcetti v. Ceballos* . . . [t]he Supreme Court did not consider what would happen. An opinion issued by a 2-1 panel of the Ninth Circuit Court of Appeals is illustrative of a nationwide trend: Police officers who speak out against official corruption are losing their jobs; and the courts will do nothing to stop it.

Id.

102. See J. Michael McGuinness, *Whistleblowing and Free Speech: Garcetti's Early Progeny and Shrinking Constitutional Rights of Public Employees*, 24 TOURO L. REV. 529, 529 (2008).

efficiency.¹⁰³ If the Court had ruled in Ceballos's favor, supporters believed that protecting employee grievances would inappropriately clog the federal courts and intrude upon supervisors' management and control decisions.¹⁰⁴

At the same time, critics argue that *Garcetti*'s bright-line rule invites more judicial interference and inefficiency. Although bright-line rules are "preferable when the decision must be applied by numerous actors facing common or frequent situations,"¹⁰⁵ scholars label *Garcetti* as too minimalistic and inconsistent with the case-by-case nature of the previous public employee First Amendment decisions such as *Pickering* and *Connick*.¹⁰⁶

b. Inconsistent applications by lower courts

Generally, lower courts apply *Garcetti* as a threshold determination prior to the *Connick–Pickering* analysis, reviewing the speech's public concern nature under *Connick* and balancing the individual and government interests under *Pickering*.¹⁰⁷ Beyond that concurrence, the lower courts' applications of *Garcetti* are inconsistent because the Court's "practical inquiry" instruction left

103. John Gamble, Commentary, *Court Made Right Decision for Well-Managed Workplaces*, FED. TIMES, June 19, 2006, at 21:

[E]ffective control of an organization is possible only when its managers can act in the confidence that their reasonable personnel decisions made for the good of the organization will be sustained without undue interference. The court's decision in *Garcetti* has avoided the potential for massive judicial interference in government's ability to hold its employees accountable.

Id.

104. *See id.*

105. Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL OF RTS. J. 1173, 1192 (2007) (citing Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1913 (2006)) (stating that potential benefits of *Garcetti*'s bright-line decision include predictability, uniformity, and transparency, and limiting future judicial discretion).

106. *See id.* ("[R]ules may be hazardous when . . . the court lacks the necessary information to produce a workable rule that will ensure predictability in future decisions."); *see also supra* note 63–64 and accompanying text (discussing the case-by-case approach of *Pickering* and its progeny).

107. *See, e.g.,* Chaklos v. Stevens, 560 F.3d 705, 711–12 (7th Cir. 2009); Davis v. McKinney, 518 F.3d 304, 312 (5th Cir. 2008) (quoting Ronna Greff Schneider, 1 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:20 (2010)) ("The inquiry whether the employee's speech is constitutionally protected involves three considerations. First it must be determined whether the employee's speech is pursuant to his or her official duties. If it is, then the speech is not protected by the First Amendment."); Mills v. City of Evansville, Ind., 452 F.3d 646, 647–48 (7th Cir. 2006).

2011] Separating the Employee From the Citizen 555

open and unclear how to specifically define “pursuant to official duties.”¹⁰⁸

The United States Courts of Appeals for the District of Columbia,¹⁰⁹ the Tenth,¹¹⁰ and the Eleventh¹¹¹ Circuits have interpreted *Garcetti* to broadly encompass speech related to the completion of the employee’s work duties and block First Amendment protection thereof.¹¹² In contrast, the Fourth Circuit in *Andrew v. Clark*¹¹³ and the Seventh Circuit in *Chaklos v. Stevens*,¹¹⁴ interpreted *Garcetti* to require that the act of speaking was an official duty itself, not merely that the speech related in subject matter to an employee’s job or fulfilled a general duty.¹¹⁵ The Fifth Circuit in *Davis v. McKinney*¹¹⁶ and the Ninth Circuit in *Freitag v. Ayers*¹¹⁷ defined *Garcetti*’s “speech pursuant to official duties” as through the “chain of command,”¹¹⁸ a theory expressly rejected by the Sixth Circuit in *Weisbarth v. Geauga Park District*.¹¹⁹

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108. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). “The Court’s failure to articulate an ‘official duties’ test has caused lower courts to interpret *Garcetti* in many different, and sometimes conflicting, ways.” Christine Elzer, Note, *The “Official Duties” Puzzle: Lower Courts’ Struggle with First Amendment Protections for Public Employees After Garcetti v. Ceballos*, 69 U. PITT. L. REV. 367, 367 (2007).
 109. *Winder v. Erste*, 566 F.3d 209, 214–16 (D.C. Cir. 2009).
 110. *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1328–34 (10th Cir. 2007).
 111. *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1285–86 (11th Cir. 2009).
 112. *See Winder*, 566 F.3d at 215 (“In our cases applying *Garcetti*, we have consistently held that a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command.”); *Abdur-Rahman*, 567 F.3d at 1285–86 (“Speech that owes its existence to the official duties of public employees is not citizen speech . . . and the speech is unprotected.”); *Casey*, 473 F.3d at 1330 (referencing Black’s Law Dictionary to define “pursuant to” in *Garcetti* as “in accordance with”).
 113. 561 F.3d 261 (4th Cir. 2009). The Fourth Circuit held that a Baltimore police officer’s memorandum to his superiors regarding a police unit’s recent shooting of a suspect was not barred from First Amendment protection without a factual demonstration that writing the memorandum was an official duty of the officer. *Id.* at 263, 267.
 114. 560 F.3d 705 (7th Cir. 2009). State-employed scientists did not speak pursuant to official duties when they submitted a protest letter to the Illinois State Police procurement official because the state employers did “not demonstrate that they expected [the state employees] to write this letter.” *Id.* at 712.
 115. *See Andrew*, 561 F.3d at 267; *Chaklos*, 560 F.3d at 712.
 116. 518 F.3d 304, 315 (5th Cir. 2008) (“Speech related to an employee’s job duties that is directed within the employee’s chain of command is not protected.”).
 117. 468 F.3d 528 (9th Cir. 2006).
 118. *Davis*, 518 F.3d at 313 (citing *Frietag*, 468 F.3d at 545) (“If however a public employee takes his job concerns to persons outside the work place in addition to

As of 2009, the lower courts' application of *Garcetti* continues to be unpredictable and highly scrutinized. The Eleventh Circuit decision *Abdur-Rahman v. Walker*,¹²⁰ which applied *Garcetti* to bar protection to speech related to but not required by employment,¹²¹ epitomizes the frustration of academia and the public, who see the protection of viable whistleblowers withering away.¹²² In the five years after *Garcetti*, the "practical inquiry" defining official duties continues to be unclear, suggesting the need for revision and review by both the judiciary and the legislature.¹²³

c. Reliance on unresolved legislative whistleblower protection

The majority's deference to the "powerful network of legislative enactments"¹²⁴ for public-employee speech protection has also proven to be inconclusive. Although grounded in long-held principles of federalism and the separation of powers,¹²⁵ the Court's reliance on the legislatures has yielded frugal results,¹²⁶ as the current whistleblower protections remain limited and sparse,¹²⁷ and the Whistleblower

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- raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.").
119. 499 F.3d 538 (6th Cir. 2007). "[T]he determinative factor in [*Garcetti*] was not where the person to whom the employee communicated fit within the employer's chain of command, but rather whether the employee communicated pursuant to his or her official duties." *Id.* at 545.
120. 567 F.3d 1278 (11th Cir. 2009).
121. *See id.* at 1286.
122. *See, e.g., Court Further Limits Whistleblower Protections Under Civil Rights Law*, 20 CLEAN AIR REP. (Inside Wash. Publisher's), May 28, 2009, available at 2009 WLNR 10035171.
123. *See* Elzer, *supra* note 108, at 368 ("The lower courts' efforts to apply *Garcetti*'s categorical holding to various fact scenarios have resulted in some puzzling outcomes that seem to have raised more questions than *Garcetti* purported to settle.").
124. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.").
125. *Id.* at 423.
126. *See S. 372—The Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372*, *supra* note 14, at 67–69 (statement of Thomas Devine, Legal Director, Government Accountability Project) (arguing that the WPA's recourse system for retaliation, under which a majority of public employees seek retribution for speech retaliation after *Garcetti*, cannot properly handle the amount of whistle blowing disputes).
127. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 39–40 (2009) ("[S]uch protections are incomplete, patchwork, and of decidedly limited utility

2011] Separating the Employee From the Citizen 557

Protection Enhancement Act (WPEA) is still in great debate between both houses of Congress¹²⁸ and the President.¹²⁹

d. Separating the employee from the citizen

As Professor Paul M. Secunda stated, “*Garcetti v. Ceballos* does nothing less than redefine the whole conception of what role public employees should play in ensuring the fair and efficient administration of government services.”¹³⁰ Where the roles of citizen and public employee were once thought to have coexisting relationships with the government,¹³¹ *Garcetti* now requires that they be separately defined and mutually exclusive.¹³² To the majority in *Garcetti*, public employees are comparable to their counterparts in the private sector and can be silenced by their employers without First Amendment consideration because employee speech pursuant to

[L]ower courts’ application of *Garcetti* to reject the plaintiffs’ First Amendment claims meant the end of the case because no statutory or other claims remained available.”).

128. Since *Garcetti*, WPEA legislation has been introduced in some form by both houses of Congress, but no joint resolution has passed. See Jocelyn Patricia Bond, *Efficiency Considerations and the Use of Taxpayer Resources: An Analysis of Proposed Whistleblower Protection Act Revisions*, 19 FED. CIR. B.J. 107, 117 (2006); see also Joe Davison, *Whistleblower Protection Enhancement Act Reintroduced in Senate*, WASH. POST (Apr. 14, 2011, 7:35 PM), http://www.washingtonpost.com/local/politics/whistleblower-protection-enhancement-act-reintroduced-in-senate/2011/04/14/AFdCnLfD_story.html. On April 6, 2011, a bipartisan group of senators introduced the Whistleblower Protection Enhancement Act of 2011, providing whistleblower protection for employees of intelligence agencies for the first time. Press Release, U.S. Senate Comm. on Homeland Security & Gov’t Affairs, *Senators Reintroduce Bipartisan Whistleblower Protection Bill* (Apr. 6, 2011), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=2c6498al-5056-8059-766c-43a7d77fe22b.
129. *Obama Administration, Legislators at Odds over Whistleblower Protection Amendments*, 16 FED. HUM. RESOURCES WK. 654 (2009).
130. Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMENDMENT L. REV. 117, 117 (2008).
131. See *Garcetti v. Ceballos*, 547 U.S. 410, 432 (2006) (Souter, J., dissenting) (quoting Frost, *supra* note 93, at 252) (“[T]he ranks of public service include those who share the poet’s ‘object . . . to unite [m]y avocation and my vocation’”).
132. See *id.* at 421; Jessica Reed, Note, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y. CITY L. REV. 95, 123–25 (2007) (arguing that the *Garcetti* holding “ignores the employee who retains her citizen’s conscience while at work.” and resembles *McAuliffe*); see also *supra* text accompanying notes 17–18.

official duties is not analogous to citizen speech.¹³³ Of particular concern is that this distinction compels whistleblowers to avoid directly addressing their employers with problems and to seek out the media to safely speak as citizens.¹³⁴ Therefore, speaking as a citizen under *Garcetti* can arguably lead to an increase in public scrutiny of government agencies and a decrease in office efficiency.

III. UNDERSTANDING *GARCETTI*'S IMPACT ON THE BALANCING OF PUBLIC -EMPLOYEE SPEECH INTERESTS.

Generally, the protections of the First Amendment have never been adopted as absolute.¹³⁵ Nevertheless, the Supreme Court has instilled a “presumptive prohibition on infringement,” such that restraints on speech have always required appropriate reasons,¹³⁶ justified by a balance of conflicting interests.¹³⁷ This balance addresses societal interests¹³⁸ and recognizes that matters of public concern are “at the heart of the First Amendment’s protection.”¹³⁹ As the Court stated in *First National Bank of Boston v. Bellotti*,¹⁴⁰ “[t]he inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source.”¹⁴¹

With these principles in mind, the *Pickering* balance defined the boundaries of the First Amendment’s application in the public-employment context by weighing the harm of the speech on government efficiency¹⁴² against the harm of suppressing the speech on the interests of the individual and society.¹⁴³ Subsequent cases showed that the disruptive impact of speech on office efficiency could be outweighed by the harm of suppressing speech on matters of public concern, where the consequences of that silence stretched

133. See *Garcetti*, 547 U.S. at 418–19, 421–22.

134. See, e.g., Elizabeth M. Ellis, Note, *Garcetti v. Ceballos: Public Employees Left to Decide “Your Conscience or Your Job,”* 41 IND. L. REV. 187, 200 (2008).

135. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976).

136. *Id.*

137. *Id.* at 362.

138. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (“The Constitution often protects interests broader than those of the party seeking their vindication.”).

139. *Id.*

140. 435 U.S. 765.

141. *Id.* at 777.

142. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) noting the State’s interest, “as an employer, in promoting the efficiency of the public services it performs through its employees”).

143. See *id.* (noting “the interests of the teacher, as a citizen, in commenting upon matters of public concern”).

2011] Separating the Employee From the Citizen 559

farther than the individual to also impair the government employer and society.¹⁴⁴ Because public employees provide a clear lens into how to further government efficiency, “[w]ere they not able to speak . . . the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”¹⁴⁵ *Pickering* and its progeny allowed for the balancing of potential harms implicated by public-employee speech, as well as the protection of speech that positively enhanced the interests of the individual, the government employer, and society.¹⁴⁶

In a way, *Garcetti* furthered the *Pickering* balancing test. Generally, employee speech that relates to the job possesses a greater tie to the performance of the government office and poses a greater risk of harm than other types of speech.¹⁴⁷ This increased concern of efficiency led *Garcetti* to introduce a definitional balance.¹⁴⁸ Rather than a rule providing for case-by-case balancing like in *Pickering*, the Court conclusively held in favor of managerial discretion for all future public-employee speech cases, and against the consideration of the harm of speech suppression.¹⁴⁹

With managerial discretion in place of case-by-case analysis, *Garcetti* placed the individual employee and the government employer on opposite sides of the balancing scale in spite of the prior theory that public-employee speech can be beneficial to all involved. If the Court defines public-employee speech protection as a victory solely for the individual and speech suppression as a *per se* benefit to

144. See, e.g., *Connick v. Myers*, 461 U.S. 138, 149 (1983).

145. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam).

146. “[T]he lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.” *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting).

147. *Id.* at 422 (majority opinion) (“Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences . . .”).

148. See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 142–43 (3d ed. 2008) (quoting Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942–43 (1968)) (arguing that the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), balanced interests at a definitional level by implicitly weighing the competing policy considerations to hold that “knowingly and recklessly false speech was not ‘speech’ within the meaning of the [F]irst [A]mendment”).

149. See *Garcetti*, 547 U.S. at 422.

the government,¹⁵⁰ it will lose sight of the societal value that public-employee speech provides to both the employee and employer.

A prime example is the aforementioned whistleblower and former air marshal Robert MacLean. In 2003, when MacLean learned that the DHS would no longer place air marshals on nonstop long distance flights, he gave this information to an MSNBC reporter after his safety concerns went ignored by his superiors.¹⁵¹ In 2005, DHS supporters justified the retaliation against MacLean by highlighting the harm of his speech, specifically that he leaked sensitive security information and increased the likelihood that terrorists would fly on these long distance planes with knowledge of less onboard security.¹⁵²

There is no doubt that leaking national security information poses risks exponentially greater than the criticism of the school board in *Pickering*.¹⁵³ However, the harm of the speech should be assessed under the *Pickering* balance, to first recognize the potential interests of society and the individual speaker and then determine whether the heightened efficiency interests clearly outweigh and permit speech suppression.¹⁵⁴

As the government employer, the DHS should have considered the harm of its speech suppression and the benefit of MacLean's speech. First, the permitted termination of MacLean's employment removed an extremely dedicated employee, who believed that his speech was in pursuit of the oath he took as an air marshal.¹⁵⁵ Second, MacLean's speech ignited a strong response from Congress to the need for more security on long-distance flights.¹⁵⁶ Despite these

150. *See id.* at 418–19.

151. *See American Morning* (CNN television broadcast Nov. 20, 2006). The order to reduce air marshals on long distance flights came just three days after DHS issued a warning that more terrorists were planning hijackings. Audrey Hudson, *Ex-Air Marshal to Sue Over 'SSI' Label*, WASH. TIMES, Oct. 30, 2006, at A4.

152. *See American Morning*, *supra* note 151; *see also* Commentary, *Lessons for Supervisors*, FED. TIMES, Nov. 6, 2006, at 20 (“It is horrifying to imagine what terrorists could do with the hugely valuable information MacLean exposed.”).

153. *See Lessons for Supervisors*, *supra* note 152, at 20; Porter Goss, Editorial, *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006, at A25 (discussing “[t]he battle to protect our classified information” and advocating against speech protection for national security public employees who speak to the media and place American lives at risk).

154. *See* Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1537–38 (2008) (discussing the current lack of consideration for the societal benefit of whistleblower speech).

155. *See Lessons for Supervisors*, *supra* note 152, at 20.

156. *See American Morning*, *supra* note 151 (noting that if terrorists know there is no air marshal on long-distance flights, they are “more likely to take those long distance flights and to use those flights to perpetrate terrorist attacks.”).

2011] Separating the Employee From the Citizen 561

assurances of in-air security, Flight 253 from Amsterdam to Detroit had no air marshal aboard on December 25, 2009, when passenger Abdulmutallab attempted to detonate a bomb.¹⁵⁷ This attempted terrorist attack, the subsequent promise to increase the number of air marshals on such flights, and President Obama's recognition of National Security Agency employees as valuable citizens¹⁵⁸ now reaffirms the benefit of MacLean's speech to the DHS as the government employer and to society as a whole.

MacLean initially argued that his termination violated the First Amendment.¹⁵⁹ However, his case followed *Garcetti* and the Ninth Circuit decided against him under 49 C.F.R. § 1520.7, holding that the termination was proper for his wrongful disclosure of sensitive security information.¹⁶⁰ Nevertheless, the compelling societal benefit stresses the need to consider public-employee speech as an advantage to all and weigh First Amendment conflicting interests on a case-by-case basis.¹⁶¹ Clearly, the presumption that employee speech can benefit only the individual does not account for instances such as Flight 253, in which the potential harm of the suppression of the speech was carried by all.¹⁶²

The *Garcetti* definitional balance presumes that employee speech, pursuant to official duties and disagreeable to supervisors, is *per se* harmful to the government employer and should justify the use of full managerial discretion in retaliation.¹⁶³ Stemming from its separation of the public employee from the citizen and rationalization that speech pursuant to employment duties is an official communication without analogue to speech by a citizen, the *Garcetti* majority disregarded any potential countervailing societal benefit that protecting public-employee speech would provide to society.¹⁶⁴

However, as the next section will demonstrate, citizenship is integral to public employment, employee speech, and the furtherance of the government's interest in efficiency.¹⁶⁵ Therefore, employee

157. *CNN Newsroom* (CNN television broadcast Feb. 7, 2010).

158. See President Barack Obama, Detroit Incident, *supra* note 4.

159. Brief of Petitioner at 6, *Maclean v. Dep't of Homeland Sec.*, 543 F.3d 1145 (9th Cir. 2008) (No. 06-75112).

160. See *Maclean*, 543 F.3d at 1150.

161. See *Garcetti v. Ceballos*, 547 U.S. 410, 420–21 (2006); see also *supra* notes 150–154 and accompanying text.

162. See Vladeck, *supra* note 154, at 1546 (discussing the societal benefits of national security whistleblowing in the war on terrorism).

163. See *supra* notes 73–83 and accompanying text.

164. See *Garcetti*, 547 U.S. at 422–24.

165. See *infra* Part IV.A–B.

speech does not always represent official government communications and can further both the individual's interest in participating in public debate as well as the government's interest in office efficiency. When balancing the harms of speech protection, the Court must recognize and preserve the benefit of employee speech in the furtherance of societal interests.

IV. THE CITIZENSHIP IN PUBLIC EMPLOYMENT

A. Social Science's Public Service Motivation Theory

The study of the American government as an employer has led social scientists to review the value of civil society and civic duty in America. From historical Greek philosophers such as Aristotle to today's social scientists such as Professor Gene A. Brewer, Ph.D. of the University of Georgia, the concept of civil society has remained a vague yet key and valuable component to a functional and stable democratic government.¹⁶⁶ In fact, Alexis de Tocqueville observed in the mid-nineteenth century that the success of the "American Experiment" as a prosperous community and political institution with respected laws and a satisfied people relied upon the civic-mindedness of ordinary Americans.¹⁶⁷

In the twentieth century, Tocqueville's observations were followed by further studies, revealing that a strong, civil society, separate from government and driven by the interpersonal relationships of families and voluntary associations, promotes effective democratic government by integrally interacting with the state and economic sectors.¹⁶⁸ Therefore, strong social norms of trust and civic participation have been repeatedly demonstrated as catalysts to both economic and democratic stability and prosperity.

Although the civil society research of de Tocqueville and beyond have focused on the success of ordinary citizens in voluntary associations, theorists have paralleled this research with a similar review of the government-employment context. In 1982, scholar Hal G. Rainey first observed the differences in public- and private-sector employee motivation, as public-sector managers yielded significantly higher scores by responding more positively about "a desire to

166. Gene A. Brewer, *Building Social Capital: Civic Attitudes and Behavior of Public Servants*, 13 J. PUB. ADMIN. RES. & THEORY 5, 5–6 (2003) [hereinafter *Building Social Capital*].

167. *Id.*

168. *Id.* at 6.

2011] Separating the Employee From the Citizen 563

engage in meaningful public service.”¹⁶⁹ Since then, social scientists have expanded upon the distinction between public and private sectors’ professional motivation, defining the Public Service Motivation (PSM) as “an individual’s predisposition to respond to motives grounded primarily or uniquely in public institutions and organizations.”¹⁷⁰ PSM is a “multidimensional concept,” having three main pillars from which social scientists gauge an individual’s level of PSM as a means of understanding their willingness to engage in prosocial behavior.¹⁷¹ These are commitments to public interest, service to others, and self-sacrifice.¹⁷²

Social scientists have found that individuals with higher levels of these PSM characteristics are more likely to pursue employment in the public sector, given their greater sense of public interest.¹⁷³ A greater sense of public interest communicates to a higher PSM level, which is positively correlated with several benefits to his or her organization, including a higher level of job commitment, greater productivity, and higher job satisfaction.¹⁷⁴ These findings suggest that those with greater PSM levels in public sector jobs work harder and are less likely to leave their jobs.¹⁷⁵

The PSM Theory has become a major topic of investigation in public administration, given its instrumental implications to productivity, accountability, and improved management practices.¹⁷⁶

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169. See Gene A. Brewer & Sally Coleman Selden, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. PUB. ADMIN. RES. & THEORY 413, 414 (1998) (quoting Hal G. Rainey, *Reward Preferences Among Public and Private Managers: In Search of the Service Ethic*, 16 AMER. REV. PUB. ADMIN. 288 (1982)).
170. James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367, 368 (1990).
171. See David J. Houston, “Walking the Walk” of Public Service Motivation: Public Employees and Charitable Gifts of Time, Blood, and Money, 16 J. PUB. ADMIN. RES. & THEORY 67, 69 (2006).
172. *Id.* at 68–69 (citing Gene A. Brewer et al., *Individual Conceptions of Public Service Motivation*, 60 PUB. ADMIN. REV. 254 (2000)). Social scientists dispute over whether an interest in politics or policy making should be an additional consideration to define an individual’s PSM level. See *id.*
173. Donald R. Moynihan & Sanjay K. Pandey, *The Role of Organizations in Fostering Public Service Motivation*, 67 PUB. ADMIN. REV. 40, 41 (2007).
174. *Id.*
175. *Id.*
176. *Id.* (citing Brewer et al., *supra* note 172; see also Houston, *supra* note 171, at 67 (citing Robert D. Behn, *The Big Questions of Public Management*, 55 PUB. ADMIN. REV. 313 (1995)) (“[L]earning how to motivate employees [is] one of the ‘big’ questions of public management.”)).

Researchers have concluded that public employees have a greater sense of civic duty than other individuals.¹⁷⁷ As public employment is readily referred to as a calling rather than merely a job,¹⁷⁸ the majority of public employees who answer this call exhibit higher levels of trust in their government, civic participation, altruism, support of equality, tolerance, and humanitarian behavior than other citizens.¹⁷⁹ Similar to the link drawn from civic participation and social trust to economic and democratic stability in civil society, the higher rates of these characteristics in public employees suggest that what makes the “American Experiment” prosperous will also make a government organization perform efficiently.

In 1995, Professors Gene A. Brewer, Ph.D. and Sally Coleman Selden, Ph.D. found that a majority of federally employed whistleblowers exhibited PSM characteristics similar to those mentioned above.¹⁸⁰ Professors Brewer and Selden distributed a questionnaire to 20,851 executive branch employees of the federal government and received 13,432 complete responses.¹⁸¹ The survey revealed that 2,188 responding employees had observed one or more illegal or wasteful activities at their federal agencies.¹⁸² Of these witnesses, 51.4% stated they had blown the whistle and reported the activity.¹⁸³ Based on data from the 1992 Merit Principles Survey by the United States Merit Systems Protection Board and prior PSM and whistleblower research, the survey compared the public employees’ perceived importance of personal rewards, job security, complaint success, job commitment and satisfaction, achievement, organizational performance, and their regard for public interest.¹⁸⁴

The survey revealed that the whistleblowers were among the most productive, valued, and committed members of their public organizations and had strong consciences and senses of professional responsibility.¹⁸⁵ Compared to the survey’s inactive observers of

177. Houston, *supra* note 171, at 70.

178. *Id.* at 68 (citing Alex N. Pattakos, *The Search for Meaning in Government Service*, 64 PUB. ADMIN. REV. 106 (2004)).

179. Brewer, *supra* note 166, at 14 (“[P]ublic servants are more civic minded than other citizens are. Specifically, they are more trustful, altruistic, supportive of equality, tolerant, and humanitarian than other citizens are.”).

180. Brewer & Selden, *supra* note 169, at 413.

181. *Id.* at 427.

182. *Id.*

183. *Id.*

184. *Id.* at 427, app. 1 at 435.

185. *Id.* at 419–20; accord Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 J. MGMT. 507, 511 (1996) (connecting PSM and morality as personal variables directly related to whistleblowing).

2011] Separating the Employee From the Citizen 565

unethical activity, the whistleblowers demonstrated higher rates of performance, achievement, job satisfaction, and job commitment.¹⁸⁶ In addition, whistleblowers were not motivated by monetary rewards to report unethical activity; instead, whistleblowers most valued job security and the public interest.¹⁸⁷ These distinctions led Professors Brewer and Selden to conclude that the act of whistleblowing was positively correlated with PSM.¹⁸⁸ Their survey confirmed the 1992 Merit Principles Survey's finding that half of all federal employees who witness illegal or wasteful activity report it, and it also provided further support of the widespread existence of PSM-related attitudes and behaviors among the public workforce.¹⁸⁹

The PSM Theory has been met with criticism. Under the rational-choice theory, critics counter the altruistic and civic-minded portrayal of public employees by arguing that their higher rates of political participation suggest self-interest.¹⁹⁰ Because public employees rely on the government for their livelihood, it is in their best interests to be involved in politics and more beneficial to vote than those in the private sector.¹⁹¹

However, the rational-choice theory does not account for the higher rates of civic participation and self-sacrifice found within public employee populations. Because they are motivated by altruistic, civic-minded goals, public employees perform one-third more civic activities than other citizens.¹⁹² Professors Brewer and Selden demonstrated that whistleblowers are not motivated by personal

186. See Brewer & Selden, *supra* note 169, at 431–33, exhibit 5.

Our findings reveal that federal whistle blowers act in ways that are consistent with the theory of PSM. That is, they are motivated by concern for the public interest, they are high performers, and they report high levels of achievement, job commitment, and job satisfaction. Moreover, federal whistle blowers are likely to work in high performing work groups and organizations.

Id. at 413.

187. See *id.* at 429–31, exhibit 4.

188. See *id.* at 413, 431–33.

189. *Id.* at 433–34 (“[W]histle blowers are productive, valued, and committed members of their organizations. This study extends these findings beyond a small, heroic set of whistle blowers to a larger group of federal employees.”).

190. See Brewer, *supra* note 166, at 17.

191. *Id.* (citing James C. Garand, et al., *Bureaucrats, Policy Attitudes, and Political Behavior: Extension of the Bureau Voting Model of Government Growth*, 1 J. PUB. ADMIN. RES. & THEORY 177 (1991)).

192. See *id.* at 16.

rewards but are willing to speak out to reduce waste and fraud at the expense of their own livelihood.¹⁹³

Even with this opposing criticism, the PSM Theory continues to thrive in academia and social-science communities. Because the PSM Theory shows that office performance is tied to the prosocial behaviors of its employees,¹⁹⁴ Professors Brewer and Selden concluded that “public managers and scholars should utilize this knowledge in ways that make the public service a more efficient and effective delivery system for democratic government.”¹⁹⁵ Among the theory’s many suggestions for public administration is to further organization initiatives by capitalizing on PSM characteristics rather than self-interest¹⁹⁶ and reforming public-employee whistleblower protection.¹⁹⁷

B. The Government Employer’s Use of Citizenship to Motivate Public Employees

1. Recruitment

Government employment has often been referred to as a calling or fulfillment of civic duty that strikes a chord with particular individuals.¹⁹⁸ A strong sense of citizenship has always been a part of the federal government’s recruitment of public employees. In *Garcetti*, Justice Souter highlighted the Food and Drug Administration’s advertisement of public employment as a way to “‘give back to [their] community, state and country by making a difference in the lives of Americans everywhere.’”¹⁹⁹ The Department of Homeland Security has linked patriotism and civic duty with border-patrol positions when recruiting in areas of the country where people are not otherwise familiar with the work.²⁰⁰ According to the Office of Personnel Management, thousands answered this call of civic duty in response to the terrorist attacks of

193. See Brewer & Selden, *supra* note 169, at 420, 429, 434.

194. See Brewer, *supra* note 166, at 7.

195. See Brewer & Selden, *supra* note 169, at 434.

196. See Brewer, *supra* note 166, at 20.

197. See Brewer & Selden, *supra* note 169, at 433–34.

198. Houston, *supra* note 171, at 68.

199. *Garcetti v. Ceballos*, 547 U.S. 410, 433 n.4 (Souter, J., dissenting); see also text accompanying notes 89–90.

200. See Adam Jadhav, *Border Patrol Recruits Here*, ST. LOUIS POST-DISPATCH, June 5, 2008, at B1.

2011] Separating the Employee From the Citizen 567

September 11, 2001,²⁰¹ and subsequently, the federal government has not struggled in employment recruitment.²⁰² Therefore, it is of no surprise that the federal government benefits from the perception of strong citizenship in public employment.

2. Whistleblower Speech

Beyond recruitment, civic duty has been tied to the public employee's speech and duty to report waste, fraud, and abuse in their government agencies.²⁰³ Because public employees are the best source for reporting government breaches of public trust,²⁰⁴ the Department of Justice recognizes that a whistleblower "who speaks out about waste, fraud or abuse performs a public service. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled."²⁰⁵ Just as President Obama calls public employees outstanding Americans, research and practice demonstrate that citizenship is tied to the government's recruitment of public employees, its encouragement of whistleblower speech as a necessary part of accountability and efficiency, and the individual employees' motivation to work in public service.²⁰⁶

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201. Hon. Dan G. Blair, Acting Dir., U.S. Office of Pers. Mgmt., Driving Change—Driving Results (March 10, 2005), available at <http://www.opm.gov/speeches/2005/DGB-Mar10.asp> ("The good news, though, is that people want to work for the Federal government. There is no difficulty in attracting candidates to join the Federal Team. Let me say that again—attracting people is not the issue. Tens of thousands of Americans answered the call of public service after 9/11 - and the interest continues.").
202. *Id.*
203. Dawn R. Franklin, *The Outsiders: Broadening the Scope of Standing in Whistleblower Actions in Light of Anderson v. United States Department of Labor*, 20 J. NAT. RESOURCES & ENVTL. L. 281, 289–90 (2006) ("[B]oth employees and non-employees have the same civic duty to 'blow the whistle' on employers . . .").
204. S. 372—*The Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372*, *supra* note 14, at 3 (statement of Rajesh De, Deputy Assistant Att'y Gen., Office of Legal Policy, U.S. Department of Justice) ("The administration recognizes that the best source of information about waste, fraud, and abuse is often a government employee committed to public integrity and willing to speak out.").
205. *Id.*
206. See Brewer, et al., *supra* note 172, at 259–60 ("As an official you are accountable to the public you serve . . . I love my country . . . I will do anything to keep the freedom we have so duty, honor and country raise my emotions."); President Barack Obama, Detroit Incident, *supra* note 4.

V. CORRECTING THE BALANCE BY RETURNING TO *PICKERING*

In law as well as in research, public-employee speech provides societal value because “[a]s civically active citizens, public employees are in a prime position . . . to initiate a dialogue on community issues”²⁰⁷ based on their “informed and definite opinions as to how [public] funds . . . should be spent.”²⁰⁸ In light of the PSM Theory, it is clear that *Garcetti*’s separation of public employment and citizenship ignores civic participation and social trust as integral characteristics to efficient public servants and the correlation between these characteristics and whistleblower speech.²⁰⁹ To preserve the societal benefit of employee speech, citizenship should remain at the heart of defining constitutional speech protection. Justice Souter’s argument in his dissent (that the roles of citizen and public employee are not mutually exclusive and that the government benefits from incorporating civic duty into public employment²¹⁰) parallels social science research findings that public service motivation is a behavioral concept, defined by the individual’s citizenship initiative rather than his employment status.²¹¹ With elevated rates of civic participation and job dedication, whistleblowers cannot sever their roles of citizen and employee without discounting these PSM characteristics and inhibiting their related contributions to office efficiency. Whistleblowers are catalysts for government efficiency because they stop government corruption through informing the electorate who can react to the whistleblower’s report, vote to end unwanted waste, and legally pursue those accountable for it.²¹² In short, *Garcetti* permits retaliation for the very speech that would otherwise further government efficiency and mischaracterizes the First Amendment balance as one of parties rather than of societal interests.²¹³

Professors Brewer and Selden suggest that whistleblower protection statutes are not the proper solution for the inequity of *Garcetti*.²¹⁴ In the past fifteen years, the increase in legislative

207. Houston, *supra* note 171, at 82.

208. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–72 (1968).

209. *See supra* notes 166–79 and accompanying text.

210. *See Garcetti v. Ceballos*, 547 U.S. 410, 432–33 (2006) (Souter, J., dissenting).

211. *See Brewer & Selden, supra* note 169, at 416.

212. *See id.* at 434.

213. *See supra* notes 130–34, 144–149 and accompanying text.

214. *See Brewer & Selden, supra* note 169, at 434 (suggesting that, rather than enacting statutes, governments should increase efforts to study and utilize the link between PSM Theory and the public service ethic).

2011] Separating the Employee From the Citizen 569

protection has proven correlated with the rise in retaliation against whistleblowers and thus has not alleviated the job-security concerns of those public employees with high PSM levels and a strong likelihood to speak out against unethical activity.²¹⁵ At the same time, legislatures continue to dispute amendments to the Whistleblower Protection Act of 1989 without resolve²¹⁶ at the expense of whistleblowers.²¹⁷

To address *Garcetti*'s inequity and the unresolved problems of statutory protections, the *Connick–Pickering* analysis should be reinstated because it implicitly adopts the reasoning of the PSM Theory. In highlighting the societal value of the public employee who is in the best position to address the problems of the government employer,²¹⁸ *Pickering* and its progeny introduced the public employee as a valued individual and contributor to both his government employer as well as the greater community.²¹⁹ It is no coincidence that the PSM Theory proposes that public employees, particularly whistleblowers with high PSM levels, are the best suited, in behavior as much as in position, to pursue the government's interests of office morale and efficiency.²²⁰ The *Pickering* balancing test echoes the PSM Theory that whistleblowers can enhance government interests, and that those public employees should not ordinarily be adversely treated on the basis of speech prior to a demonstrated harm to office efficiency.²²¹

215. *Id.*

216. *See supra* notes 124–29 and accompanying text.

217. *See, e.g.,* Vladeck, *supra* note 154, at 1546 (stating that the lack of whistleblower protection jeopardizes “the next government employee in the wrong place at the wrong time”).

218. *See* *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)); *see also* *S. 372—The Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372, supra* note 14, at 3 (statement of Rajesh De, Deputy Assistant Att’y Gen., Office of Legal Policy, U.S. Dep’t of Justice).

219. *See generally* *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (noting that “The community would be deprived of informed opinions on important public issues” if public employees were unable to speak on matters regarding operations of their employers.); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (recognizing the importance of harmony among coworkers “for which personal loyalty and confidence are necessary”); *Connick v. Myers*, 461 U.S. 138, 143 (1983) (noting that emphasis upon public employees’ rights as citizens “reflects both . . . historical involvement . . . and . . . common sense”).

220. *See* *Brewer, supra* note 166, at 6, 20 (concluding that public employees are more civic-minded than other citizens, a trait related to effective self-government and conducive to economic development).

221. *See* *Brewer & Selden, supra* note 169, at 433–34.

A return to the *Connick–Pickering* analysis would allow for consideration of the speech’s benefits to both the individual and the government employer as well as reunite citizenship with public-employee speech.²²² For the individual with PSM characteristics such as job dedication and civic participation, protecting employee speech would promote both the societal benefit of his or her informed participation in the improvement of government agencies as well as the internal benefits of self-determination and autonomy.²²³ For the government employer, the *Connick–Pickering* analysis considers the efficiency benefits of some employee speech but also provides justifiable limitations, such as the *Connick* public concern requirement and the ability to control speech where its harm outweighs that of speech suppression.²²⁴ For society in general, a case-by-case balancing approach more readily responds to the changing challenges of our government and the ability of dedicated public employees to recognize these challenges and redress them with solutions.

VI. CONCLUSION

The First Amendment has never been absolute, but neither has the government’s control over the public employee.²²⁵ Whistleblowing and public-employee speech on matters of public concern further both the individual’s autonomy and the government’s interest in efficiency.²²⁶ *Garcetti*’s separation of employee speech from citizenship and its societal benefit ignores the overwhelming evidence that “[t]his is freedom of speech when it counts.”²²⁷

The PSM Theory demonstrates that whistleblowers are generally the type of employees that the government employer would like to have: altruistic, efficient, and dedicated to public service.²²⁸ These desirable characteristics and past whistleblowers like Robert MacLean suggest that *Garcetti* should be reviewed and a return to the

222. See *supra* Part IV.B.

223. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804–05 (1978) (White, J., dissenting) (discussing self-fulfillment or “affirmation of self” as a principal function of the First Amendment (quoting THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 5 (1966)).

224. See *Connick*, 461 U.S. at 142–46, 147–48, 154; *supra* Part II.A; *supra* text accompanying notes 143–47.

225. See *supra* text accompanying notes 37, 135–39.

226. See *supra* text accompanying notes 63–69, 220.

227. *S. 372–The Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372*, *supra* note 14, at 60 (statement of Thomas Devine, Legal Dir., Gov’t Accountability Project).

228. See *Brewer & Selden*, *supra* note 169, at 433–34; see also *supra* note 179.

2011] Separating the Employee From the Citizen 571

previous balance of the *Connick–Pickering* analysis should be implemented to cultivate beneficial public-employee speech.²²⁹

As public-employee unions join together in the Make It Safe Coalition to petition for greater whistleblower protection²³⁰ and states review their own constitutional law in light of *Garcetti*,²³¹ they should consider the Public Service Motivation Theory in defining whistleblower protection and encourage employee speech as a benefit to society, government efficiency, and the individual’s fulfillment of civic duty.

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229. See *supra* text accompanying notes 142–49, 161–64.

230. See *S. 372-The Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372*, *supra* note 14, at 19–21 (statement of Thomas Devine, Legal Dir., Gov’t Accountability Project).

231. J. Michael McGuinness, *Developments in Public Employee First Amendment and Equal Protection Law*, GEO. U. L. CENTER CONTINUING LEGAL EDUC., Apr. 17–18, 2008, at 1, 4, available at 2008 WL 2500678 (“In light of *Garcetti*[,] . . . plaintiffs must explore state constitutional claims as an alternative [T]here is often very little applicable case law. There is often room for development of the law.”).

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