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A More Perfect Pickering Test: *Janus v. AFSCME Council 31* and the Problem of Public Employee Speech

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A MORE PERFECT *PICKERING* TEST: *JANUS V. AFSCME COUNCIL 31* AND THE PROBLEM OF PUBLIC EMPLOYEE SPEECH

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ABSTRACT

In June 2018, the Supreme Court issued its long-awaited—and, for the American labor movement, long-feared—decision in Janus v. AFSCME Council 31. *The decision is expected to have a major impact on public sector employee union membership, but could have further impact on public employees' speech rights in the workplace. Writing for the majority, Justice Samuel Alito's broad interpretation of whether work-related speech constitutes a "matter of public concern" may have opened the floodgates to substantially more litigation by employees asserting that their employers have violated their First Amendment rights. Claims that would have previously been unequivocally foreclosed may now be permitted. This Note proposes a test to allow courts to meaningfully respond to this influx of claims. By explicitly incorporating the "social value" of public employee speech into the* Pickering *balance test as a factor of equal weight alongside the existing factors—the individual employee's right to speech and the employer's interest in operating an effective workplace—courts can make meaningful sense of the doctrinal conflict* Janus *created while also respecting and promoting the unique role public employee speech plays in public discourse.*

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INTRODUCTION

In the final days of its 2018 term, the United States Supreme Court decided *Janus v. AFSCME Council 31*,[1] a concerted effort that had been several years in the making. A series of Supreme Court decisions in the previous decade laid the groundwork for this monumental judgment, rejecting decades of precedent and embracing the conservative majority's radical interpretation of the First Amendment.[2] Decades earlier, in *Abood v. Detroit Bd. of Educ.*,[3] the Court upheld the so-called agency fee arrangement, which permitted public sector unions to collect "fair share" fees to cover the union's cost of collective bargaining on behalf of all employees. In *Janus*, the Court overruled this longstanding precedent by holding that public sector employees could not be compelled by their union to pay agency fees without violating First Amendment protections against compelled speech.[4] Commentators mused on the case's likely impact on the collective power of organized labor in the workplace, anticipating an exodus of paying union members who would now recognize that they will be able to reap the benefits of union representation without having to pay to receive those benefits.[5]

In writing for the majority, Justice Alito asserted that public sector union activity necessarily involves speech that constitutes matters of "public concern"; compelling employees to support this speech through mandatory agency fees therefore runs afoul of non-union members' First Amendment rights.[6] But in the process of freeing non-union members from allegedly unconstitutional compelled speech, Justice Alito may have opened up government employers to liability for First Amendment violations from which the Court had previously protected them.[7] Justice Alito's reliance on an expansive definition of "public concern" puts the *Janus* deci-

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1. 138 S. Ct. 2448 (2018).

2. Alice O'Brien, *Symposium: Janus' Radical Rewrite of the First Amendment*, SCOTUSBLOG (June 27, 2018, 9:58 PM), http://www.scotusblog.com/2018/06/symposium-janus-radical-rewrite-of-the-first-amendment/.

3. 431 U.S. 209 (1976).

4. *Janus*, 138 S. Ct. at 2460.

5. *See, e.g.*, Alana Semuels, *Is This the End of Public Sector Unions in America?*, THE ATLANTIC (June 27, 2018), https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/.

6. *Janus*, 138 S. Ct. at 2460.

7. *Id.* at 2498 (2018) (Kagan, J., dissenting).

sion in conflict with employee workplace speech doctrine after *Pickering v. Bd. of Educ.*[8] As Justice Kagan highlighted in her searing dissent, such a broad formulation of what constitutes a matter of public concern might render government entities subject to significantly more litigation on speech claims that had previously been foreclosed.[9]

Responding to this critique, Justice Alito pointed to the significant difference in scale between individual employment disputes and collective union activity.[10] But it's unclear why this distinction should matter for First Amendment purposes. Further, the line-drawing problems inherent to a test that turns on "scale" are significant. For example, during oral arguments for *Janus*, Justice Breyer struggled to find the appropriate line to determine when a requested wage increase becomes a matter of public concern.[11] Justice Sotomayor went a step further, suggesting that, according to the petitioner's argument, any decision made by a public employer arguably affects the public fisc and is therefore a matter of public concern.[12]

If the dissenting justices' perception of *Janus*' expansion of the meaning of "public concern" is correct, how do lower courts confront this impending influx of employee speech claims of unprecedented scope? More importantly, how *should* courts deal with these claims in a manner that recognizes the unique role public employees play in our public discourse?

I propose that the Supreme Court adjust the *Pickering* balancing test by explicitly considering the public interest value of public employee speech. Specifically, I suggest that a third factor be added to the balancing test. Currently, when confronted with a public employee First Amendment claim, courts must balance only the rights of the employee as an individual citizen to comment on matters of public concern against her government employer's interest in operating an effective workplace. My proposed amendment to the *Pickering* test would also require courts to explicitly incorporate the public interest value of the employee's speech as a third, independent factor of equal weight.

Incorporating the public value of employee speech into the *Pickering* balancing test will make post-*Janus* First Amendment claims more manageable and ideologically consistent. It will reconcile the

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8. 391 U.S. 563 (1968).
9. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting).
10. *Id.* at 2472–73.
11. Transcript of Oral Argument at 64–65, Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466).
12. *Id.* at 69–70.

Court's employee speech doctrine while still ensuring that employee speech on meaningful workplace matters is protected.

In Part I of this Note, I outline Supreme Court precedent on agency fees and public employee speech protections, highlighting the doctrinal tension *Janus* creates. Part II considers in more depth the public interest value of employee speech, which I will generally call "social value." It also highlights a selection of existing proposals for heightened First Amendment protections that would apply to sector- or situation-specific circumstances, proposals that I suggest would be better addressed in a more broadly applicable, modified balancing test. Part III discusses the proposed three-pronged balancing test, illustrates some potential applications, and anticipates counterarguments.

I. *Dueling Doctrines*

This section lays out relevant Supreme Court precedent with respect to public sector union agency fees, starting with *Abood v. Detroit Bd. of Educ.*[13] and ending with *Janus*.[14] It then walks through the line of cases, originating under *Pickering v. Bd. of Educ.*,[15] that governs employee First Amendment rights in the workplace. The shifting contours of the Court's First Amendment jurisprudence, specifically as it is applied to workplace speech and agency fees, converge and become apparent in *Janus*, a point discussed at the closing of this section.

A. *The Road to* Janus

In *Abood v. Detroit Bd. of Educ.*, Detroit public school teachers filed suit against the Detroit Board of Education and the Detroit Federation of Teachers.[16] The plaintiff teachers challenged the agency shop clause in the union's collective bargaining agreement with the Board of Education.[17] Under this arrangement, even teachers who did not wish to be members of the union were required to pay a specified amount, called an "agency fee," that funded union activities.[18] These activities included representation of the teachers in collective bargaining, grievance procedures, and

13. 431 U.S. 209 (1976).
14. 138 S. Ct. 2448 (2018).
15. 391 U.S. 563 (1968).
16. 431 U.S. at 212.
17. *Id.* at 213.
18. *Id.* at 211.

other workplace matters. However, it also included the union's political activities, including its contributions to political candidates and lobbying expenses.[19] The plaintiffs argued that this arrangement violated the First Amendment rights of those non-member teachers who did not support the union's activities.[20]

The *Abood* Court recognized that potential First Amendment problems existed in compelling employees to financially support their collective bargaining representative.[21] Nonetheless, the Court upheld agency fees as constitutional, holding that the state's interest in labor peace was a compelling one that was legitimately served by the existing agency fee arrangement.[22] This holding was consistent with longstanding Supreme Court precedent that upheld the permissibility of agency fees under the Railway Labor Act. In those cases, the Court relied on congressional intent prioritizing stability in management-labor relations.[23] For Congress, the requirement that nonmembers pay agency fees facilitated labor peace by enabling unions' exclusive representation of workers and thereby reducing worker-led strikes.[24] Exclusive representation also ensured that unions had sufficient funds to advocate for their members' interests.[25]

However, in *Abood* and its predecessors, the Court held a union's ability to require these fees was constitutional only if the funds generated by the fees were not used to further the union's explicitly ideological or partisan activities. Specifically, a union could only use these fees to fund activities related to its duties as a collective bargaining representative.[26] The Court recognized that this may present a challenging line-drawing problem, as it may be difficult to discern an activity performed in the union's role as the exclusive bargaining representative of public sector employees from a union activity which is expressly political.[27] Nevertheless, due to longstanding precedent, congressional intent, and the fact that the arrangement had proved workable, the Court found its decision to be the correct balance to strike, holding that any interference with

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19. *See id.* at 213, 215.
20. *Id.* at 213.
21. *Id.* at 222.
22. *Id.* at 224–26.
23. *See id.* at 217–23 (discussing Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956) and Machinists v. Street, 367 U.S. 740 (1961)).
24. *See id.* at 219 (discussing the holding of *Hanson* and highlighting that "Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one.").
25. *See id.* at 220–21.
26. *See id.* at 235–36.
27. *Id.* at 236.

employees' First Amendment protections that may be presented by agency fees was "constitutionally justified."[28]

Non-right-to-work states—those states that, prior to the decision in *Janus*, did require non-union-member public sector employees to pay agency fees to the union that represents their workplace[29]—and their municipalities relied on *Abood*'s holding for decades in drafting their collective bargaining agreements with public employee unions.[30] The *Abood* doctrine has remained "remarkably stable," as Justice Kagan points out in her dissent in *Janus*, striking a balance between employees' constitutional right to free expression and government entities' right to regulate their workplaces via exclusive bargaining agreements with unions representing their employees.[31] As intended, for those states that chose to require them, agency fees had long facilitated government entities' compelling interest in labor peace.[32]

Over thirty-five years later, the Supreme Court brought the issue of agency fees to the forefront in the dicta of two cases, *Knox v. SEIU, Local 1000*[33] and *Harris v. Quinn*.[34] The petitioners in *Knox* challenged the defendant union's imposition of a one-time "Emergency Temporary Assessment to Build a Political Fight Back Fund."[35] The Court found the fund, which was to be used for lobbying the California electorate on issues important to the union in upcoming elections, to be political in nature and therefore unconstitutional under *Abood*.[36] In *Harris v. Quinn,* the Court held in a 5-4 decision that the plaintiffs, home health care workers in Illinois, were not full-fledged state employees.[37] Unlike other public workers in Illinois, they could therefore not be compelled, under

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28. *See id.* at 217–23.

29. In contrast, states with right-to-work laws did not permit unions to require employees to pay dues in order to be members. *See Right to Work Laws*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/unions-right-to-work-laws (last visited Nov. 24, 2019).

30. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).

31. *Id.*

32. Brief for the States of N.Y., Alaska, Conn., Del., Haw., Iowa, Ky., Me., Md., Mass., Minn., N.J., N.M., N.C., Or., Pa., R.I., Vt., Va., and Wash., and the District of Columbia as Amici Curiae in Support of Respondents at 12, Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (discussing the states' experiences that "exclusive representation supported by agency fees can be an indispensable tool" in preventing the "devastating public-sector work stoppages that caused disruptions in critical government services").

33. 567 U.S. 298 (2012).

34. 134 S. Ct. 2618, 2638–44 (2014).

35. *Knox*, 567 U.S. at 304.

36. *See id.* at 315.

37. *See Harris*, 134 S. Ct. at 2644.

Abood's authority, to join and pay dues to the union that represented similarly situated state employees.[38]

While the two cases were decided on these respectively narrow grounds, Justice Alito's opinions raised the question of whether agency fees in general should be considered unconstitutionally compelled speech.[39] In *Knox*, he highlighted that the Court's past decisions authorizing unions to collect agency fees from nonmember employees and allowing them to operate through an opt-out system "approach, if they do not cross, the limit of the what the First Amendment can tolerate."[40] Justice Alito characterized these conditions as "substantial impingement[s]" on First Amendment rights and expressed concern with the extent of these infringements.[41]

In *Harris*, Justice Alito again highlighted portions of the reasoning in *Abood* as an "anomaly," questioning the conclusion that agency fees were necessary to maintain the state's interest in labor peace and suggesting they were not sufficiently narrowly tailored to that interest as to justify their significant intrusion on First Amendment rights.[42] Justice Alito further argued that *Abood* failed to take into account the differences between the nature of core union issues in the public sector and the private sector; in the former, he asserted, core union issues inherently are political ones.[43] Consequently, there is a significant conceptual difficulty in drawing a line between issues related to the union's role as a collective bargaining agent and its political activities.[44]

Contemporary critics pointed out how Justice Alito's musings appeared to run into conflict with Supreme Court precedent regarding employee speech protections under the First Amendment,[45] highlighting the opinion's inconsistency[46] and its incoher-

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38. *Id.* at 2638–44.
39. *Knox*, 567 U.S. at 313–14.
40. *Id.* at 314.
41. *Id.* at 317.
42. *Harris*, 134 S. Ct. at 2630–34.
43. *Id.* at 2632–33.
44. *See id.* at 2632.
45. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. Seiu, Local 1000, 98 CORNELL L. REV. 1023, 1065–67 (July 2013) (arguing in part that "[i]t appears that the only robust free speech rights government employees have is the right to refuse to support unions").
46. Catherine Fisk, Harris v. Quinn *Symposium: Court Departs from Federalism, First Amendment Jurisprudence*, SCOTUSBLOG (July 3, 2014, 10:28 AM), http://www.scotusblog.com/2014/07/harris-v-quinnsymposium-court-departs-from-federalism-first-amendment-jurisprudence/.

ence,[47] and called on the Court to explain its doctrinal asymmetries.[48]

In his majority opinion in *Janus*, Justice Alito tied together the threads of dicta from *Knox* and *Harris*. Justice Alito asserted that public sector union activity, in general and in this specific case, inherently implicates many political issues that are considered to be of public concern.[49] For example, petitioner Mark Janus was employed by the State of Illinois, which at the time of the ruling was suffering from severe budget problems, in part due to insufficiently funded public sector pensions.[50] Former Republican Governor Bruce Rauner and the state's public sector unions "disagree[d] sharply" as to how to appropriately resolve these issues.[51] Under Justice Alito's framing, this disagreement suggested that essential union matters like pension funding may ultimately be political disputes at their core. Furthermore, the majority asserted, union speech during the collective bargaining process can broach significant matters of public policy. As an example, Justice Alito pointed to the significant role public teachers' unions and their collective bargaining processes play in public discourse surrounding "fundamental questions of education policy."[52] Consequently, compelling employees to subsidize collective bargaining constituted compelled speech on matters "overwhelmingly of substantial public concern."[53] For the majority, the *Abood* rule authorizing agency fees, so long as they were not put to use toward political purposes, had proven to be unworkable.[54] Finally, the rule was formally overturned; under *Janus*, public sector unions can no longer require non-member public employees to pay agency fees for services rendered without running afoul of those employees' First Amendment rights.

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47. *See* Jason Walta, Harris v. Quinn *Symposium: Abood and the Limits of Cognitive Dissonance*, SCOTUSBLOG (July 1, 2014, 12:49 PM), http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-abood-and-the-limits-of-cognitive-dissonance/.

48. *See* Samuel Bagenstos, Harris v. Quinn *Symposium: The Coming Conflict in Public Employee Speech Law and the Immediate Risks to People with Disabilities*, SCOTUSBLOG (June 30, 2014, 9:46 PM), http://www.scotusblog.com/2014/06/harris-v-quinn-symposium-the-coming-conflict-in-public-employee-speech-law-and-the-immediate-risks-to-people-with-disabilities/.

49. *Janus*, 138 S. Ct. at 2475.

50. *Id.* at 2474–75.

51. *Id.* at 2475.

52. *Id.* at 2475–76.

53. *Id.* at 2476.

54. *Id.* at 2481–82.

B. Pickering *and its Successors*

In a separate line of cases originating with *Pickering v. Bd. of Educ.*,[55] the Supreme Court has shaped the contours of the free speech rights granted to individual public employees. Justices Alito and Kagan disagreed in their respective opinions about the influence the holding in *Janus* will have on this doctrine.

In *Pickering*, the plaintiff public school teacher was dismissed from his job for sending a letter to a local paper that was critical of the defendant Board of Education's approach to raising revenue.[56] The plaintiff challenged his dismissal, raising First and Fourteenth Amendment claims, and the Supreme Court ultimately found that his speech rights had been violated by the termination.[57] The Court maintained that public employees do not relinquish their First Amendment rights on matters of public concern merely by accepting public employment.[58] The Court also recognized, however, that the State's interest in regulating its employees' speech is different from its interest in regulating speech of the general public.[59] In so holding, the Court laid out a balancing test that lower courts must apply in assessing similar First Amendment claims asserted by public employees: When an employee argues that an adverse action taken against him violated his First Amendment rights, courts must balance the interest of employees and their rights as citizens to comment on issues of public concern against the needs of the employer to effectively administer public services.[60]

The *Pickering* Court highlighted the social value of the plaintiff's speech in this case, stating that "[t]eachers 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."[61] In this way, it recognized the "special contribution" to public discourse that public employees are uniquely capable of making.[62]

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55. 391 U.S. 563 (1968).
56. *Id.* at 563.
57. *Id.* at 565.
58. *Id.* at 568.
59. *Id.*
60. *See id.* ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").
61. *Id.* at 572.
62. Cynthia Estlund, *Harmonizing Work and Citizenship*, 2006 SUP. CT. REV. 115, 119 (2006).

In *Connick v. Myers*, the respondent, an assistant district attorney, faced an unwanted transfer to a different role.[63] In an attempt to avoid the transfer and communicate her displeasure with the proposed change, she solicited input from her coworkers on the office's transfer policy and other workplace conditions by way of a questionnaire.[64] She was later terminated and told that her distribution of the questionnaire constituted insubordination.[65] Although the respondent later filed suit alleging her First Amendment speech rights had been violated, the Court found that her distribution of the questionnaire could not possibly be construed as affecting a matter of public concern, and that consequently, the Court was not required to scrutinize the reasons for her discharge.[66]

Connick clarified that matters of personal interest—including most personnel issues—are not matters of public concern and therefore are not analyzed under the *Pickering* balancing test.[67] It thus established the question of whether the implicated speech was a matter of public concern as a threshold inquiry for undergoing the *Pickering* test.[68] The Court provided little guidance as to what should constitute a matter of public concern, only stating that the matter "must be determined by the content, form, and context of a given statement, as determined by the full record."[69]

In the respondent's case, the Court found that only one of the questions on her circulated questionnaire was a matter of public concern. The remaining questions did not concern the public and were instead extensions of her individual dispute over her transfer.[70] In the case of the single question that possibly implicated a matter of public concern—whether district attorneys were being pressured to support certain political campaigns—the Court found that posing the question had the potential to undermine office relations and her supervisor's authority, and that consequently, her termination did not violate her First Amendment rights.[71] The

63. Connick v. Myers, 461 U.S. 138, 140 (1983).
64. *Id.* at 141.
65. *Id.*
66. *Id.* at 146.
67. *Id.* at 147.
68. *Id.* ("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.").
69. *Id.* at 147–48.
70. *Id.* at 148.
71. *Id.* at 154.

Court refused to "constitutionalize the employee grievance" in the name of First Amendment protections.[72]

Garcetti v. Ceballos narrowed the scope of First Amendment-protected employee speech even further than *Connick* already had by erecting a critical distinction between speech an employee engages in as a citizen versus speech engaged in as an employee.[73] The Court held in *Garcetti* that statements made pursuant to an employee's official duties are not subject to the *Pickering* balancing test.[74] The respondent, another prosecutor, wrote a memo recommending dismissal of a case due to significant misrepresentations in an affidavit that had been used to execute a search warrant.[75] His superiors proceeded with the prosecution anyway, and tension arose between the parties.[76] Ceballos filed suit, alleging First and Fourteenth Amendment violations arising out of a series of actions he viewed as retaliatory.[77]

The Court again recognized the challenge of balancing public employees' protected speech rights against the need for government services to be provided efficiently, asserting that "[s]o long as employees are speaking as citizens about matters of public concern, they must face *only* those speech restrictions that are necessary for their employers to operate efficiently and effectively."[78] Nevertheless, the Court found that Ceballos was not speaking as a citizen for purposes of the First Amendment. It was not dispositive for the Court that Ceballos expressed his views in the office, nor was it dispositive that he was specifically speaking on the subject matter of his employment.[79] Ultimately, what mattered was that Ceballos, in writing the memo, was acting pursuant to his duties as an employee and therefore not subject to the *Pickering* balancing test.[80] The *Garcetti* Court thus erected a critical distinction between speech made as a citizen and speech made as an employee.[81]

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72. *Id.*
73. Garcetti v. Ceballos, 547 U.S. 410 (2006).
74. *Id.* at 421.
75. *Id.* at 413–15.
76. *Id.*
77. *Id.* at 415.
78. *Id.* at 419 (emphasis added).
79. *Id.* at 420–21.
80. *Id.* at 421–22.
81. *See* Estlund, *supra* note 62, at 116 for a thorough discussion of the *Garcetti* Court's construction of "spheres of citizenship and of employment."

C. *Doctrinal Conflict*

In each of the post-*Pickering* cases, the Court narrowed individual employee speech rights in the name of employer discretion and efficiency. While the Court has consistently recognized the challenging line-drawing problems presented by the holdings in these decisions, it has nevertheless upheld them, recognizing the validity of the competing interests at stake.[82]

This delineation is significantly more complicated in the wake of Justice Alito's majority opinion in *Janus*. Arguably, the expansive conception of matters of public concern that Justice Alito articulates in *Janus* creates space for significantly more litigants to meet the *Pickering* threshold inquiry. Justice Kagan raised precisely this point in her dissent:

> So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.[83]

Per Justice Kagan, the very activity that makes public employee union collective bargaining inherently political under Justice Alito's analysis would also be considered First Amendment-protected speech if it were to be raised in the context of an individual public employee speech claim analyzed under *Pickering*. Or, as law professor Catherine Fisk succinctly explained, "There is now a First Amendment right to refuse to engage in speech (paying union fees) where there is no First Amendment right to engage in the speech (about wages and benefits) that the person has a right not to subsidize."[84]

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82. For a thorough account of post-*Pickering* cases, *see* Joseph Oluwole, *On the Road to* Garcetti*: 'Unpick'ering* Pickering *and Its Progeny*, 36 CAP. U.L. REV. 967 (2008) (arguing that the Supreme Court's post-*Pickering* decisions have "regressively led to a quick ebb of free speech rights" and jurisprudence that strongly favors operational efficiency over the individual speech rights of employees).

83. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2496 (2018) (Kagan, J., dissenting).

84. Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2074–75 (2018).

II. THE SOCIAL VALUE OF PUBLIC EMPLOYEE SPEECH

In this section, I will discuss a key aspect of Justice Souter's dissent in *Garcetti* and how it highlights a longstanding view, on the Court and in First Amendment scholarship, of the unique value of public employee speech on workplace matters. The Court has articulated that principle and acknowledged its significance, but has not explicitly reflected that value in its balancing test for public employee speech on matters of public concern. I will conclude by highlighting the piecemeal solutions scholars have suggested as attempts to carve out areas of protected speech that merit heightened protection and by offering arguments as to why a more comprehensive solution to the problem of public employee speech rights post-*Janus* is preferable.

In his dissenting opinion in *Garcetti*, Justice Souter argued that the mere act of receiving a public paycheck does nothing to diminish the value of public employees' speech on public matters.[85] In fact, given that the First Amendment protects not only the individual speaking but the public's interest in that speech, the value of public employee speech on matters related to his official duties "may well be greater."[86] Consequently, Justice Souter would have rejected the categorical exclusion laid out by the majority in favor of an adjustment to the basic *Pickering* balancing test: "[A]n employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a *matter of unusual importance* and satisfies high standards of responsibility in the way he does it."[87]

While the *Garcetti* majority did not adopt Souter's proposed analytic framework, it acknowledged "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."[88] As law professor and labor and employment law scholar Cynthia Estlund notes, while the Court has been divided over whether individuals have a specific interest in protected speech, it has not been divided in its position over the value of that speech.[89] Indeed, the Court has consistently acknowledged the unique role of public servants commenting on matters of public concern, both before and after *Garcetti*.[90] Despite its apparent commitment to the social value of

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85. Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (Souter, J., dissenting).
86. *Id.* at 430–31.
87. *Id.* at 435 (emphasis added).
88. *Id.* at 419 (majority opinion).
89. Estlund, *supra* note 62, at 141–42.
90. *See* Waters v. Churchill, 511 U.S. 661, 674 (1994) (acknowledging that "[g]overnment employees are often in the best position to know what ails the agencies for

public employee speech, its own recognition of that value in *Garcetti* seems to be little more than "lip service."[91]

A. *Proposals for Protection*

In light of the apparent value of certain public employee speech, scholars and commentators have highlighted problems unique to specific categories of speech or speakers. They have proposed targeted solutions to confront these issues and to heighten speech protections in these tailored circumstances.

1. Whistleblowers & Leakers

Much has been written on the critical role whistleblowers play in American self-governance, and the Supreme Court itself has acknowledged their particular importance.[92] However, the Court has failed to recognize in a consistent, meaningful way the value of public employee speech to public discourse in its doctrine. In light of this failure, law professor Ronald Krotoszynski recently proposed creating a new category of speech, which he calls "whistleblowing speech."[93] Krotoszynski argues for adopting a "modified Hand formula"[94] in which a court would weigh the "gravity of the wrongdoing exposed by the government employee's whistleblowing speech" against the "probability of it being reported or discovered by another source."[95]

Similar arguments promote stronger First Amendment protections for government employees who leak confidential information obtained in the course of their official duties. Heidi Kitrosser, law professor and scholar of the law and policy of government secrecy, has suggested two standards for litigation against leakers.[96] The first, applied during criminal prosecutions or civil actions "with

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which they work" but holding that a government need only have a reasonable belief that an employee made a sufficiently disruptive statement); Lane v. Franks, 134 S. Ct. 2369, 2379 (2014) (holding that the First Amendment protects truthful sworn testimony, compelled by subpoena, that occurs outside of ordinary job responsibilities, asserting that "anyone who testifies in court bears an obligation to the court and society at large, to tell the truth").

91. Larry Spurgeon, *The Endangered Citizen Servant:* Garcetti *vs. the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405, 424–25 (2013).

92. *See Lane*, 134 S. Ct. at 2379.

93. Ronald J. Krotoszynski, *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 274 (2018).

94. *Id.* at 298.

95. *Id.* at 298 n.156.

96. Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1264 (2015).

substantial sanctions," would require the government to show that a leaker "lacked an objectively reasonable basis to believe that the public interest in disclosure outweighed identifiable national security harms."[97] The second, applied to actions with less severe sanctions, would require the government to show that "the leaker lacked an objectively substantial basis" to believe the same.[98]

2. Academic Freedom

The *Garcetti* majority opinion left open the possibility that its analysis may apply differently to cases involving academic speech related to scholarship or teaching.[99] Perhaps unsurprisingly, *Garcetti*'s application to academic speech has been a point of discussion and concern amongst legal academics.[100] In an effort to fill the gap the Supreme Court deliberately left open, law professor Joseph J. Martins proposes a modified balancing test that presumptively weighs in favor of public school professors.[101] In published commentary, practitioner Kimberly Gee proposes a modified *Hazelwood* test,[102] in which the school first conducts a forum analysis in order to determine whether the school intended the classroom to be an open or closed forum.[103] If it is determined that the forum is a closed one, the teacher would then be subjected to regulations that are "reasonably related to legitimate pedagogical interests."[104]

3. Law Enforcement Officers

Others have proposed law-enforcement specific protections. These arguments highlight the perverse incentives the *Garcetti* rule

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97. *Id.*

98. *Id.*

99. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

100. *See, e.g.*, Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009); *see also* Robert M. O'Neil et al., *Protecting an Independent Faculty Voice: Academic Freedom after* Garcetti v. Ceballos, 95 ACADEME 67 (Nov.–Dec. 2009).

101. Joseph J. Martins, *Tipping the* Pickering *Balance*, 25 CORNELL J.L. & PUB. POL'Y 649, 680 (2016).

102. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that students' rights were not violated when the school interfered with the paper's content without the student authors' and editors' consent because the school newspaper was not a public forum).

103. Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression,* 38 J.L. & EDUC. 409, 449 (2009).

104. *Id.* at 450

imposes on law enforcement officers, a class of employees from whom the public has a significant interest in hearing truthful accounts of misconduct or mismanagement.[105] For these reasons, professor Ann Hodges and independent practitioner Justin Pugh have suggested a return to the *Pickering* framework as it was applied pre-*Garcetti*.[106] Similarly, in a journal comment, student Lemay Diaz highlights the value to the public of truthful testimony provided by police officers and other law enforcement officials, and suggests that truthful testimony provided even in the course of one's official duties be considered protected citizen speech.[107]

4. Lawyers

Given lawyers' proximity to the judicial system and the public's interest in ethical, well-functioning courts, lawyers are arguably in the best position to inform the public about problems within the judiciary.[108] Consequently, law professor Terri Day has proposed reforming ethical restrictions on attorneys, noting that existing restrictions have a chilling effect on socially advantageous speech.[109]

Common to all of these proposals is the notion that specific types of public employee speech have unique value to public discourse, whether based upon situation- or profession-specific factors. The proposals for reform, however, range from ethical rule reform to abandoning *Garcetti* entirely. These disparate solutions to what appears to be a common underlying problem highlight the need for a more comprehensive rule change that can accommodate the fact-specific proposals in a holistic fashion.

III. A *PICKERING* TEST FOR THE POST-*JANUS* WORLD

In *Janus*, the Court broadened the scope of what constitutes a matter of public concern while weakening the citizen/employee distinction of *Garcetti*. In his majority opinion, Justice Alito did not appear concerned with this conflict, distinguishing *Pickering* from

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105. Ann Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 39 (June 2018).

106. *Id.* at 31.

107. Lemay Diaz, Comment, *Truthful Testimony as the "Quintessential Example of Speech as a Citizen": Why* Lane v. Franks *Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565, 566–67 (2016).

108. Terri Day, *Speak No Evil: Legal Ethics v. the First Amendment*, 32 J. LEGAL PROF. 161, 164 (2008).

109. *Id.* at 175.

Abood as an issue of scale.[110] For Justice Alito, it mattered greatly that cases decided under *Pickering* revolve around individual employment disputes, while *Janus* (and, by connection, *Abood*) dealt with blanket, employer-issued policies affecting many employees.[111] But this response assumes the existence of a line, determined by "scale," while providing lower courts with no reasonable way to discern where that line might be drawn. Furthermore, Justice Alito's strong emphasis on scale renders the *Garcetti* citizen/employee distinction nearly meaningless. The *Garcetti* distinction relies on the *role* of the speaker in determining whether the implicated speech is protected. If speech that is otherwise protected becomes unprotected merely when articulated collectively, the core protection is rather weak, indeed. The doctrinal uncertainty *Janus* creates calls for a new test–one that recognizes the unique category of citizen-as-public-employee and the special value this perspective brings.

In an attempt to offer such a comprehensive framework, I propose that the Supreme Court adopt a modified *Pickering* balancing test that highlights the public's interest, under the First Amendment, in the speech of public employees. This modified test should explicitly adopt a third factor to balance: the "social value" of the specific employee speech at issue and its benefit to public discourse. This factor would be of equal weight to the employee's right to comment on matters of public concern and the government's right to operate an effective and efficient workplace.

The Court has repeatedly articulated its commitment to the value of employee speech to the public and to civic discourse generally. Basic theories of representative democracy, citizenship, and equality support the Court's recognition of the public's interest in public employee speech and that speech's unique value to the public. The *Janus* dissent concludes with the notion that the First Amendment was meant to protect democratic governance, a point discussed at length in legal scholarship.[112] For example, law professor and noted First Amendment scholar Vincent Blasi famously promoted the important "checking value" that free speech has on

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110. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2472–73 (2018) ("Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. . . . When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk.").

111. *Id.* at 2457.

112. *Id.* at 2502 (Kagan, J., dissenting).

government functions.[113] More recently, law professor and workplace law expert Pauline Kim has written extensively on the public accountability value of employee speech.[114] Cynthia Estlund writes on the "civic significance of public employment,"[115] and professor Samuel Bagenstos argues there is social equality value to strong employee protections, including speech protections.[116] The significant public, social, and civic value of public employee speech has enjoyed longstanding constitutional, judicial, and scholarly support. Incorporating those principles into the *Pickering* balancing test as administered by an independent judiciary merely reflects those principles and furthers those goals.

Despite the theoretical foundations for the Court's recognition of the value of employee speech, the Court's actual implementation of those values has remained ambivalent, often buried in dicta.[117] Instituting this proposed test would give greater, more substantial weight to this important aspect of the First Amendment, creating space for more expansive employee speech protections. It would be consistent with the expanded scope of public concern in *Janus* and the weakened line between employee and citizen speech, but would still avoid the *Connick* Court's concern of constitutionalizing the employee grievance.[118]

This modified test is preferable to carving out the specific areas of heightened protection outlined in Section II because of its comprehensiveness. At the same time, it accommodates those areas and addresses those concerns. For example, consider a whistleblower employed by a government body who faces adverse action for raising concerns about official misconduct. The employee brings suit to object to that punishment. Nothing necessarily protects the employee from punishment beyond the piecemeal landscape of whistleblower protection statutes. Under the existing *Pickering* framework, a court could find that the government's interest in maintaining a secure workplace far exceeds the individual em-

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113. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527, 534 (1977).

114. Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 601 (2016).

115. Estlund, *supra* note 62, at 116–17.

116. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 225 (2013).

117. *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., 391 U.S. 563, 572 (1968) (suggesting that teachers are most likely to have "informed and definite" opinions about school expenditures and that it is accordingly "essential" that their free speech rights are preserved, but not discussing the value of their opinions further); Garcetti v. Ceballos, 547 U.S. 410, 428–29 (2006) (Souter, J., dissenting) (arguing that First Amendment protections for government employees regarding potential government misconduct "rests on something more" and is uniquely valuable).

118. *See supra* notes 70-72 and accompanying text.

ployee's right to that speech. But under the modified test and the third "social value" prong, courts could recognize the speech's significant value to the public, tipping the *Pickering* balance in favor of the discharged employee. The same goes for lawyers and law enforcement officers who publicize misconduct within their respective professions; the ability for courts to explicitly recognize the public value inherent to this speech would elevate these claims from routine employee/employer disputes to speech that serves the public good and emphasize that the speech should be protected as such.

Underlying each of those profession- or situation-specific proposals is a recognition of the potential for public interest in and social value of the speech at issue. This proposed test is therefore a more flexible solution than the piecemeal exceptions. It allows for the aforementioned and other fact-specific circumstances to be addressed, permits judicial discretion, and facilitates the development of a more consistent body of law.

Importantly, the test would not "constitutionalize the employee grievance."[119] Simple disputes over routine workplace matters specific to individuals are unlikely to have any cognizable public or social value. The proposed third *Pickering* prong, then, would not factor into a court's decision, and the court would proceed as it otherwise would by weighing employee rights against employer prerogative. Similarly, speech by a public employee in the workplace that arguably constitutes harassment or hate speech would be no more protected in this framework than in the existing *Pickering* framework, as such speech would have no social value or benefit to public discourse.

Reformulating this longstanding test naturally raises some concerns regarding implementation, judicial overreach, and Justice Alito's focus on the matter of scale. These concerns, however, are surmountable, and none outweigh the benefits of the proposed reformulated test.

The Supreme Court should explicitly adopt the modified three-prong *Pickering* test if given the opportunity. The test alone admittedly does not provide much guidance or structure to the lower courts that will be tasked with implementing it, but lower courts should be affirmatively given flexibility to provide content to the new "social value" prong. Flexibility is one of the key benefits of this test over other piecemeal solutions that have been proposed. Cases arising under workplace speech claims are very fact specific and require flexible solutions. In light of the need for specificity

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119. *Connick*, 461 U.S. at 154.

and flexibility, lower courts should be given freedom to develop the new social value prong, as they are the courts of first instance with direct access to the facts of a case. Lower courts would thus be able to tailor the new prong to the wide range of fact-specific cases while still upholding the Court's longstanding interest in the social value of public employee speech. In doing so, courts will develop a body of case law that gives content and shape to the category of what may constitute speech of such social value.

Concerns with lower courts' implementation of the revised test also suggest hesitation with judicial overreach and policymaking, as there may be risks inherent in setting judges free to evaluate the "social value" of speech with little guidance, oversight, or limitations. The majority opinion in *Garcetti* found existing "whistleblower protection laws and labor codes . . . available to those who seek to expose wrongdoing" to be satisfactory, offering sufficient protection for whistleblowing employees.[120] Heightened constitutional protection (which would presumably have been administered by the judiciary) was therefore not warranted. This was a poorly supported and shortsighted conclusion. The courts cannot reasonably defer to elected officials on speech claims that arise when those officials, or those subject to appointment or removal by elected officials, are operating in a managerial capacity. This is particularly true when the speech at issue reflects negatively on the government or individual implicated actors. There is apparent conflict between public officials' obligations to the public interest and their interest in self-preservation, career advancement, and reputation. It is unreasonable to expect government actors themselves to protect the public's interest in this way, and it is therefore appropriate to permit judicial intervention in the form of a judicially administered test to uphold these fundamental rights.

Even if one does not believe that public officials will face perverse incentives if left solely responsible for enacting and enforcing robust whistleblower protection laws, the existing web of statutory protections for whistleblowers is nonetheless insufficient to protect the broad range of socially valuable public employee speech. Much valuable speech falls outside of the scope of official whistleblowing "defined in the classic sense of exposing an official's fault to a third party or to the public," as Souter discusses in his *Garcetti* dissent.[121] In deciding that agency fees represent unconstitutionally compelled speech, the *Janus* majority opinion itself discusses the wide-ranging issues of public concern addressed in collective bargaining

120. *Garcetti*, 547 U.S. at 425.
121. *Id.* at 440 (Souter, J., dissenting).

agreements, including "sensitive political subjects" like "education, child welfare, healthcare, and minority rights."[122] Public employees may have unique insights into these issues by virtue of their proximity and access to civic institutions; their speech on such issues deserves protection beyond that afforded to whistleblowers as they are traditionally understood.

As previously discussed, Justice Alito relies heavily on the issue of scale in determining whether public employee union speech constitutes a matter of concern. It could be argued that the proposed test does not sufficiently respond to Justice Alito's concern with scale as a key fact distinguishing speech of public employee unions from individual claims, and thereby does little to resolve the line-drawing problem that Justice Alito's position creates. However, as discussed, Justice Alito's line is neither clear nor a given; if four Supreme Court justices expressed such vigorous dissent and confusion at the line, that delineation is arguably not intuitive. If scale considerations alone are not clear or sufficient, judges must be drawing on some other assessment in making their determinations as to what constitutes a matter of public concern. What this modified test provides, then, is a more concrete avenue through which judges can articulate the implicit but unstated assessments they are making when they designate topics as matters of public concern. Judges *should* be forced to articulate these processes of reasoning. This modified test provides a workable framework that forces them to do so explicitly.

CONCLUSION

Janus v. AFSCME Council 31 has thrown public employee First Amendment doctrine into disarray. By collapsing *Garcetti*'s citizen/employee speech distinction and broadening the scope of speech that addresses matters of public concern, the Supreme Court at best created confusion for the lower courts. At worst, it created Kagan's feared "unions-only" carve-out to employee speech protections. A clarification is therefore necessary—one that is consistent not only with the changes made in *Janus*, but also with the Court's longstanding recognition of the value of public employee speech to public discourse. A modified *Pickering* test that explicitly balances the public interest value of public employee speech would give the Court's seemingly disparate decisions some ideological

122. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2475–76 (2018).

consistency and, importantly, would reaffirm a respect for the critical role of First Amendment speech protections in democratic self-governance and the unique role of a public servant therein.