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Pro-whistleblower Reform in the Post-Garcetti Era

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NOTE

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Whistleblowers who expose government ineptitude, inefficiency, and corruption are valuable assets to a well-functioning democracy. Until recently, the Connick–Pickering *test governed public employee speech law; it gave First Amendment protection to government employees who spoke on matters of public concern—such as whistleblowers—so long as the government's administrative concerns did not outweigh the employees' free speech interests. The Supreme Court significantly curtailed the protection of such speech in its recent case,* Garcetti v. Ceballos. *This case created a categorical threshold requirement that afforded no protection to speech made as an employee rather than as a citizen.* Garcetti*'s problematic rule has forced courts to adopt odd exceptions; it has created perverse incentives and sits uncomfortably within established First Amendment doctrine. This Note encourages a move away from* Garcetti *by advocating for a tripartite balancing framework, whereby speech is sorted according to its importance rather than the speaker's role. In the case of whistleblowers, this system would help ensure that the government can only restrict speech by government employees exposing public wrongdoing under extraordinary circumstances. This framework is more compatible with the rest of First Amendment doctrine and ensures the protection of speech that is most valuable to society.*

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Introduction

In the modern administrative state, millions of citizens call the government "boss."[1] As such, the government assumes a dual role—employer and sovereign.[2] The practicalities of government employment vest the government-employer with far broader powers than those usually possessed by the government-sovereign.[3] Defining the scope of these extended powers is a difficult, ongoing task, particularly within the realm of the First Amendment.[4]

The Framers placed great weight on protecting freedom of speech. James Madison considered the First Amendment "the most valuable amendment [o]n the whole list."[5] This elevated praise recognizes its centrality in protecting the viability and vitality of democratic self-governance.[6] Accordingly, the First Amendment protects a symbiosis: as part of the polity, citizens seek to contribute important ideas to the public discourse, and, as a society, the community has a strong interest in receiving these ideas.[7] Yet the

1. *See* U.S. Census Bureau, *2011 Public Employment and Payroll Data: State Governments*, www2.census.gov/govs/apes/11stus.txt (last visited Mar. 31, 2013) (documenting over four million state government employees); U.S. Office of Pers. Mgmt., *Historical Federal Workforce Tables: Total Government Employment Since 1962*, http://www.opm.gov/feddata/historicaltables/totalgovernmentsince1962.asp (last visited Mar. 31, 2013) (revealing that the federal government has employed at least four million employees every year since 1962).

2. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 671–72 (1994).

3. *E.g.*, *id.* For a general critique of the assumption underlying this assertion, see Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 Wm. & Mary L. Rev. 1985 (2012) (arguing that the government-employer *should not* have greater powers to control its employees' speech than the government-sovereign typically has over its citizenry).

4. *Cf.* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1765 (2004) ("The history of the First Amendment is the history of its boundaries.").

5. 1 Annals of Cong. 784 (1789) (Joseph Gales ed., 1834) (statement of Mr. Tucker); *see also id.* at 451 (statement of Mr. Madison) ("The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (asserting that the right to free speech "lies at the foundation of a free society").

6. *E.g.*, John Stuart Mill, On Liberty 32–72 (AUK Publishers, 2011) (1859); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle of American government."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

7. *See* San Diego v. Roe, 543 U.S. 77, 82 (2004).

First Amendment's concerns sometimes conflict with the government's interest in operating an efficient workplace.[8] The government must avoid workplace disruption, promote employee morale, and discipline those who undermine the integrity of the workplace and agency.[9] The history of public employee speech law, then, is one of an uneasy and constantly shifting relationship between protecting the employee's speech and the government-employer's administrative concerns.

There is no single definition of a whistleblower, and it takes on different contours in different contexts.[10] However, it appears that the term enjoys an expansive definition in public employee speech law, where it is "defined in the classic sense of exposing an official's fault to a third party or to the public."[11] That is, a whistleblower is a public employee who, after learning of governmental misfeasance or nonfeasance, discloses this knowledge internally—through formal or informal channels—or publicly. This Note adopts this denotation.

Whistleblower speech is critically important because it helps ensure a well-functioning democracy.[12] Government officials are responsible to, and representative of, the public. When they misappropriate resources or engage in misconduct, they undercut the public interest. But such misdoings must be known for them to be punished and corrected. Since "[g]overnment employees are often in the best position to know what ails the agencies for

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8. Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. Rev. 893, 894–95 (2005).

9. David L. Hudson Jr., First Amendment Center, Balancing Act: Public Employees and Free Speech 3 (2002), *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.PublicEmployees.pdf.

10. Definitions differ both on what kinds of conduct whistleblowers expose and on whether they require that the employees disclose the information to an official organization. *Compare* Black's Law Dictionary (9th ed. 2009) (defining a whistleblower as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency"), *and* 15 U.S.C. § 78u-6(a)(6) (Supp. IV 2010) ("The term 'whistleblower' means any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . ."), *with* Walton v. Dep't of Agric., 230 F.3d 1383, at *3 (Fed. Cir. 2000) (per curiam) ("'Whistleblowing' is defined as the disclosure of information by an employee or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety."), *and* Joan Corbo, Note, Kraus v. New Rochelle Hosp. Medical Ctr.*: Are Whistleblowers Finally Getting the Protection They Need?*, 12 Hofstra Lab. L.J. 141, 141 (1994) ("[A] whistleblower is defined as someone 'who, believing that the public interest overrides the interest of the organization he serves, publicly "blows the whistle" if the organization is involved in corrupt, illegal, fraudulent, or harmful activity.'" (quoting Lois A. Lofgren, Comment, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoings of Employers?*, 38 San Diego L. Rev. 316, 316 (1993))).

11. Garcetti v. Ceballos, 547 U.S. 410, 440 (2006) (Souter, J., dissenting).

12. *See* Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (alteration in original) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)) (internal quotation marks omitted)).

which they work,"[13] society disproportionately relies on them to ensure quality in government.[14] Nonetheless, the specter of termination threatens to suppress this type of speech and deprive the public of information that is critical to a well-organized democracy.[15] It also threatens to undermine public confidence in the government's integrity.[16]

Originally, government employees had no special First Amendment protections.[17] But beginning in 1968, the Supreme Court charted a new direction for public employee speech law. In two landmark decisions, the Court enunciated a new balancing regime—the *Connick–Pickering* test—which balances the interests of the public employee, as a citizen commenting on matters of public concern, against the interests of the State, as an employer, in promoting efficiency in public service.[18]

The *Connick–Pickering* formulation recognizes that government employees are valuable assets to public discourse[19] and that the threat of termination poses a significant risk of chilling speech.[20] Since the First Amendment is a testament to a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,"[21] the Court concluded that those interests should only be

13. Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion); *see also* Diane Norcross, Comment, *Separating the Employee from the Citizen: The Social Science Implications of* Garcetti v. Ceballos, 40 U. BALT. L. REV. 543, 571 (2011) ("[P]ublic employees, particularly whistleblowers . . . are the best suited, in behavior as much as in position, to pursue the government's interests of office morale and efficiency.").

14. *See* Press Release, Am. Fed'n of State, Cnty. & Mun. Emps., *Supreme Court to Public Employees: 'Your Conscience or Your Job'* (May 30, 2006), http://www.afscme.org/news/pressroom/press-releases/2006/supreme-court-to-public-employeesyour-conscience-or-your-job ("If we are serious as a society about achieving accountability and openness in government, we must hold public officials responsible for their actions. That means we ought to protect rank-and-file public employees who are courageous enough to risk their own careers to speak out about possible violations of the law or ethical breaches.").

15. *See* City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam); *Waters*, 511 U.S. at 674 ("[P]ublic debate may gain much from [government employees'] informed opinions.").

16. *Cf.* H.R. 67, 111th Cong. § 101(1) (2009) (finding that government entities that violate "whistleblower protection laws . . . undermine the confidence of the American people in the Government").

17. As Justice Holmes explained in 1892, "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech . . . . The servant cannot complain, as he takes the employment on the terms which are offered him." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

18. Connick v. Myers, 461 U.S. 138, 150–52 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

19. Garcetti v. Ceballos, 547 U.S. 410, 433 (2006) (Souter, J., dissenting).

20. *Pickering*, 391 U.S. at 574; *see also* Howard Kline, Note and Comment, Garcetti v. Ceballos*: The Cost of Silencing Public Employees*, 28 J.L. & COM. 75, 77 (2009) ("*Garcetti* has deterred millions of public employees from speaking out on government waste, fraud and corruption.").

21. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also Connick*, 461 U.S. at 145 ("The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (internal quotation marks omitted)).

compromised when outweighed by countervailing governmental concerns.[22]

In 2006, however, the Court significantly changed the *Connick–Pickering* framework in *Garcetti v. Ceballos*.[23] There, the Court enunciated a new threshold requirement: an employee's speech must be made in his capacity as a citizen, rather than as an employee speaking pursuant to his official duties, in order to proceed to the *Connick–Pickering* framework.[24] Therefore, courts are directed to initially scrutinize whether the employee was speaking pursuant to official duties. If so, the employee spoke in an official capacity—not as a citizen—and is categorically denied First Amendment protection for his statements.

This doctrinal shift was ill-advised. Over half a century ago, Justice Frankfurter's concurring opinion in *Dennis v. United States* persuasively argued that balancing inquiries are the only sufficient way to evaluate First Amendment claims because absolute rules would be insufficiently flexible to serve the Amendment's policy rationale.[25] In most areas of First Amendment jurisprudence, Justice Frankfurter's approach has generally carried the day,[26] but his words of warning, unfortunately, have proved prescient in *Garcetti*'s wake.

The theoretical concerns have manifested. *Garcetti* has produced general confusion in the lower courts.[27] It has the potential to generate anomalous results.[28] And, most saliently, its inflexibility has forced courts to plug *Garcetti*'s doctrinal holes with exceptions.[29] The recent circuit split between the Second and D.C. Circuits highlights numerous problems regarding *Garcetti*'s applicability.

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22. *See Pickering*, 391 U.S. at 568.

23. 547 U.S. 410.

24. *Garcetti*, 547 U.S. at 421.

25. 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).

26. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 779 (2001) (noting that many First Amendment decisions are "loaded with the rhetoric of balancing").

27. *See* Petition for Writ of Certiorari at 22, Bowie v. Maddox, 132 S. Ct. 1636 (2012) (No. 11-670), 2011 WL 5999532, at *22 (2011) ("In the five years since *Garcetti*, the courts of appeals have used widely varying approaches to distinguish public employees' speech as citizens from their speech pursuant to official duties."); Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 Notre Dame L. Rev. 841, 847–60 (2011) (cataloguing the various approaches utilized by circuit courts in undertaking the scope of employment inquiry under *Garcetti*); Tyler Wiese, Note, *Seeing Through the Smoke: "Official Duties" in the Wake of* Garcetti v. Ceballos, 25 ABA J. Lab. & Emp. L. 509, 515–16 (2010) ("The federal appellate courts have struggled with giving meaning to the category of 'official duties.' A survey of these courts reveals two general strains of analysis . . . ." (footnote omitted)).

28. For example, Judge Flaum of the Seventh Circuit noted such a possibility: "We recognize the oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected. . . . [Nevertheless,] *Garcetti* established just such a framework, and we are obliged to apply it." Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007).

29. *See* Jackler v. Byrne, 658 F.3d 225, 240–42 (2d Cir. 2011) (creating a "civilian analogue" exception to *Garcetti*'s categorical rule), *cert. denied*, 132 S. Ct. 1634 (2012).

This Note argues that *Garcetti* went too far in creating an inflexible threshold requirement for First Amendment protection of public employee speech. Instead, a tiered balancing test is a more appropriate approach for addressing the issue of public employee speech while remaining faithful to traditional First Amendment concerns. Part I criticizes *Garcetti*'s categorical rule because it fails to protect important whistleblowing, creates perverse incentives, and is doctrinally inconsistent. Part II offers a new analytical framework for analyzing public employee speech law that addresses the concerns of *Garcetti* without sacrificing the ultimate backstop protecting the First Amendment rights of public employees. Specifically, Part II proposes a three-tiered balancing scheme, which gives speech varying levels of protection based on its importance to the public.

I. *Garcetti* and First Amendment Fundamentals

Garcetti fundamentally changed the established public speech law analysis by inserting a threshold inquiry into what had primarily been a fluid balancing framework. Commentators have thoroughly criticized the decision.[30] Nonetheless, its problematic implications are only starting to come to fruition in lower courts.

Section I.A discusses the relevant history and legal standards deployed in cases involving public employee speech. Section I.B then criticizes the Supreme Court's recent decision in *Garcetti*. This Section uses the Second and D.C. Circuits' conflicting decisions in *Jackler v. Byrne*[31] and *Bowie v. Maddox*[32] as vehicles for exposing *Garcetti*'s troubling implications. Section I.C discusses perverse incentives stemming from *Garcetti*. Finally, Section I.D argues that *Garcetti* took a misguided doctrinal step that makes public employee speech an anomaly within First Amendment jurisprudence. In sum, the decision's flaws call for a post-*Garcetti* reconceptualization of the public speech framework.

A. *The Ongoing Debate over Public Employee Speech Law*

Public employee speech law has fully passed through three phases.[33] In the first phase, which lasted until the 1950s, the Supreme Court gave no protection to government employees on the theory that public employment is a privilege, not a right.[34] In the second phase, the Court tempered its

30. *E.g.*, Jeffrey W. Stempel, *The Worst Supreme Court Case Ever? Identifying, Assessing, and Exploring Low Moments of the High Court*, 12 Nev. L.J. 516, 523 (2012) (selecting *Garcetti* as the worst Supreme Court decision in history). *But see* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. Pa. J. Const. L. 631, 652–54 (2012).

31. *Jackler*, 658 F.3d 225.

32. 642 F.3d 1122 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012).

33. Lara Geer Farley, Comment, *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights*, 46 Washburn L.J. 603, 609 (2007); Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 Calif. L. Rev. 1109, 1112 (1988).

34. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

earlier approach and recognized that public employees could not have their speech rights curtailed for "patently arbitrary or discriminatory" purposes.[35]

It was not until the third phase that the Court began to seriously protect public employees' free speech rights.[36] The *Pickering v. Board of Education* Court found that Marvin Pickering, a schoolteacher who wrote a letter to his local newspaper condemning the local school board's financial activities, had a free speech interest that outweighed the government's interest in efficiency.[37] The government argued that Pickering's letter "unjustifiably impugned the [school board's] 'motives, honesty, integrity, truthfulness, responsibility and competence,'" which in turn adversely affected the board's professional reputation, disrupted faculty discipline, and sowed controversy and dissent among the district's employees.[38] The Court found that these concerns were overblown and posited that Pickering's letter did little to impede or interfere with the operations of the district's schools.[39] The Court then concluded that the public's interest in unhampered discussion on matters of public importance outweighed the government's concerns.[40] In doing so, it suggested a framework where the public employee's right to free speech must be balanced against the government's legitimate concerns as an employer.[41] Only if the government's concerns outweighed the employee's interests could the government discipline the employee for his speech.

After *Pickering*, the government could generally limit an employee's speech for administrative reasons,[42] but whistleblowing was largely protected. Statements that impaired discipline or harmony among coworkers, compromised working relationships, impeded the performance of the speaker's job duties, or interfered with the organization's regular operations were entitled to less protection.[43] The countervailing concerns were "the employee's interests in communicating, and the interests of the community in receiving, information 'on matters of public importance.'"[44] Specifically,

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35. Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

36. *See* Wiese, *supra* note 27, at 511 ("In *Pickering*, the Supreme Court built a true foundation of First Amendment protections for public employees.").

37. 391 U.S. 563, 568–73 (1968).

38. *Pickering*, 391 U.S. at 566–67.

39. *Id.* at 572–73.

40. *See id.* at 573–74.

41. *Id.* at 568–73.

42. *See, e.g.*, Sullivan v. Ramirez, 360 F.3d 692, 697–98 (7th Cir. 2004) (noting that the government has an "interest as an employer in providing effective and efficient services" to the public).

43. Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570–73).

44. O'Connor v. Steeves, 994 F.2d 905, 915 (1st Cir. 1993) (quoting *Pickering*, 391 U.S. at 573).

courts were unsympathetic to employees who made statements out of vindictive or retributive interests,[45] but courts suggested that employees' altruistic statements that were made more out of civic obligation than personal interest had greater First Amendment value.[46] Speech that exposed misconduct or abuse by public officials "occup[ied] 'the highest rung in the hierarchy of First Amendment values'" and was thus entitled to the most protection.[47]

Fifteen years later, in *Connick v. Myers*, the Supreme Court clarified the decision in *Pickering* and held that a case only advanced to the balancing analysis if the employee spoke on a matter of public concern.[48] The result was a four-step test. A court confronted with a public employee speech claim would ask whether (1) the employee spoke as a citizen on a matter of public concern, (2) the individual's speech interest outweighed the government's interest in efficient administration, (3) the government responded with a retaliatory employment action, and (4) the government would not have taken the same action if the speech had not occurred.[49]

The courts struck this balance for decades under *Connick* and *Pickering* and refused to adopt any framework that reached a conclusion before analyzing the speech's content.[50] This balancing test reflects the well-entrenched notion that "the core value of the Free Speech Clause of the First Amendment . . . [is] '[t]he public interest in having free and unhindered debate on matters of public importance.'"[51] But the test also recognizes that this value must be counterbalanced against the government's responsibility as an employer and provider of public services, and, consequently, the government's need to deliver those services effectively and efficiently.[52] Under this system, public employees enjoyed their most robust speech rights to date.

What might be coined the "fourth era" of public employee speech law began with *Garcetti*, where the Court scaled back such protection by narrowing the applicability of the *Connick–Pickering* test. Richard Ceballos was

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45. *See, e.g.*, Lighton v. Univ. of Utah, 209 F.3d 1213, 1225 (10th Cir. 2000); Versarge v. Township of Clinton, 984 F.2d 1359, 1366 (3d Cir. 1993).

46. *See, e.g.*, *O'Connor*, 994 F.2d at 915–16.

47. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)); *accord* Lindsey v. City of Orrick, 491 F.3d 892, 902 (8th Cir. 2007) ("[S]peech alleging illegal misconduct by public officials occupies the highest rung of First Amendment hierarchy." (quoting Hall v. Mo. Highway & Transp. Comm'n, 235 F.3d 1065, 1068 (8th Cir. 2000)) (internal quotation marks omitted)); Swinefold v. Snyder Cnty., Pa., 15 F.3d 1258, 1274 (3d Cir. 1994) ("Speech involving government impropriety occupies the highest rung of First Amendment protection.").

48. 461 U.S. 138, 140, 145–46 (1983).

49. Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1338–39 (10th Cir. 2000).

50. *See, e.g.*, Fairley v. Andrews, 430 F. Supp. 2d 786, 795 (N.D. Ill. 2006) (utilizing the core *Connick–Pickering* framework on May 4, 2006—twenty-six days before the *Garcetti* decision).

51. Love-Lane v. Martin, 355 F.3d 766, 783–84 (4th Cir. 2004) (third alteration in original) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 573–74 (1968)).

52. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

a deputy district attorney in Los Angeles, California.[53] Ceballos discovered what he believed to be inaccuracies in an affidavit.[54] Despite Ceballos's vigorous internal opposition (both at meetings and in memoranda), the district attorney proceeded with the prosecution, and Ceballos was called as a witness for the defense to testify against the government.[55] He later brought suit, claiming that his employer retaliated against him for his dissention and testimony by reassigning and relocating him, as well as denying him a promotion.[56] The district court held that Ceballos was not entitled to First Amendment protection because he had voiced his concerns as an employee rather than as a citizen.[57] The Ninth Circuit reversed based on *Pickering*.[58]

The Supreme Court reversed the Ninth Circuit's decision. In doing so, it added a new element to the old standard: the *Garcetti* Court held that the First Amendment did not protect employees who spoke within the scope of their official duties (often including comments made internally).[59] Any claims predicated on speech pursuant to an employee's official duties would therefore not be analyzed under the *Connick–Pickering* analysis.[60] The government-employer can now restrict employee speech in these contexts without any limit.

One of the most important changes that *Garcetti* made was shifting the initial analytical locus from the content of the speech to the role of the speaker.[61] Previously, *Connick* required a content-driven inquiry, as it forced a court to determine whether the employee's speech touched on a matter of public concern.[62] In contrast, *Garcetti*'s threshold requirement is driven by the role of the individual.[63] By demanding an inquiry into whether an employee's speech was made pursuant to official duties, *Garcetti* identifies a large swath of speech where the government's interest in efficiency automatically outweighs the value of employee speech,[64] without regard to content—a result that was explicitly avoided by the *Pickering* era courts.[65] The ramifications, as discussed in the following Sections, are unfortunate.

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53. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

54. *Id.* at 413–14.

55. *Id.* at 414–15.

56. *Id.* at 415.

57. *Id.*

58. *Id.*

59. *See id.* at 424; *id.* at 427 (Stevens, J., dissenting).

60. *See id.* at 421 (majority opinion).

61. Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007) (per curiam) ("Under *Garcetti*, we must shift our focus from the content of the speech to the role the speaker occupied . . . .").

62. *See* Connick v. Myers, 461 U.S. 138, 147–48 (1983).

63. *See Garcetti*, 547 U.S. at 421.

64. *See id.*

65. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968) (declining to "lay down a general standard" as infeasible and inappropriate); *see also* Elizabeth M. Ellis, Note, Garcetti v. Ceballos*: Public Employees Left to Decide "Your Conscience or Your Job"*, 41 IND. L. REV. 187, 209 (2008) (positing that the *Pickering* Court "acknowledged that First Amendment claims are

B. Garcetti*'s Shortcomings*

The "fourth era" of public employee speech law has scaled back protections for public employees, which is particularly troublesome in the whistleblowing context. To remedy this situation, some courts have resorted to crafting exceptions. But such exceptions only serve to undermine the categorical rule and exacerbate *Garcetti*'s problematic outcomes. A current split between the D.C. and Second Circuits perfectly illustrates these two concerns. Section I.B.1 uses the D.C. Circuit's decision in *Bowie v. Maddox* to illuminate the difficulties whistleblowers face in *Garcetti*'s wake. Section I.B.2 considers the Second Circuit's decision in *Jackler v. Byrne*, which, on similar facts, diverged from *Bowie*, but argues that this decision is also flawed.

1. An Inescapable Predicament for Whistleblowers

Garcetti's categorical rule leaves certain whistleblowing outside the scope of the First Amendment's protections. The exclusion of such actions is particularly disconcerting since "a core concern of the [F]irst [A]mendment is the protection of the 'whistle-blower' attempting to expose government corruption."[66]

The D.C. Circuit's decision in *Bowie v. Maddox* underscores *Garcetti*'s problematic implications for whistleblowers. David M. Bowie[67] worked in the District of Columbia's Office of the Inspector General ("OIG").[68] Allegedly due to FBI Assistant Director Jimmy C. Carter's[69] instructions, the OIG terminated Emanuel Johnson, Bowie's long-time colleague.[70] In the ensuing employment discrimination suit, Bowie, citing "misstatements of facts," refused to sign an affidavit in support of the OIG's defense.[71] Soon after, Bowie's performance reviews began to deteriorate (previously, the reviews

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inherently fact sensitive and are thus better suited to a balancing of the interests . . . [rather than] a per se rule").

66. Oladeinde v. City of Birmingham, 230 F.3d 1275, 1292 (11th Cir. 2000) (quoting Bryson v. City of Waycross, 888 F.2d 1562, 1566 (11th Cir. 1989)) (internal quotation marks omitted); *see also* Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 748 (9th Cir. 2001) (noting that "the public's interest in learning about illegal conduct by public officials" is one matter "at the core of First Amendment protection"); Johnson v. Multnomah Cnty., Or., 48 F.3d 420, 425 (9th Cir. 1995) ("The guarantees of the First Amendment 'share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.' Therefore, we have stated that the misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern." (citation omitted) (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983))).

67. Not to be confused with the British rock musician David R. Bowie.

68. Bowie v. Maddox, 642 F.3d 1122, 1126 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012).

69. Not to be confused with former president of the United States Jimmy E. Carter, Jr.

70. *Bowie*, 642 F.3d at 1126.

71. *Id.* at 1127 (internal quotation marks omitted).

had been "top-notch"), he was removed from a high-profile assignment, and he was passed over for a promotion.[72] Within two years, Bowie was terminated.[73] He filed suit in April 2003, but the district court granted summary judgment against his First Amendment claim because it found that his speech was not protected under *Garcetti*.[74]

The D.C. Circuit affirmed the district court's dismissal.[75] The court found that Bowie's refusal to sign the letter was within the scope of his employment: OIG attorneys gave the affidavit to Bowie, Bowie revised it on a timetable approved by the general counsel, and it stated on the signature block that he was "Assistant Inspector General for Investigations."[76] The appellate panel agreed with the district court's application of *Garcetti*.[77]

The plain repercussions of this decision are troubling. *Bowie* makes clear that the First Amendment will not protect a government agent who refuses to file a false writing when ordered to do so by his superior. This puts the employee between the proverbial rock and a hard place: the employee can remain silent, thereby failing to comply with often-applicable legal, professional, and ethical duties, or risk backlash from the employer.[78] As Justice Stevens lamented in his *Garcetti* dissent, this is a situation that employees often face.[79] *Garcetti*'s categorical rule, which excludes a large amount of speech made by government employees from First Amendment protection, will cause many public employees to either cover up potential government misconduct or face unprotected retaliatory employment action.[80]

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72. *Id.*

73. *Id.*

74. *Id.* at 1127–28.

75. *See id.* at 1134.

76. *Id.* at 1133–34 (internal quotation marks omitted).

77. *Id.*

78. Early commentators counseled against an expansive construction of *Garcetti* to avoid this precise situation. *See, e.g.*, Ellis, *supra* note 65, at 209–10. Furthermore, failure to comply with these duties can produce significant consequences. Obviously, violation of legal duties can carry civil or criminal penalties. But professional and ethical canons can also carry potent ramifications. *See, e.g.*, CAL. BUS. & PROF. CODE § 2220 (West 2012 & Supp. 2013) (vesting state medical board with authority to discipline doctors who violate professional requirements); CAL. BUS. & PROF. CODE § 6077 (West 2003) (providing for attorney discipline by state bar for willful breach of rules of professional conduct).

79. *See* Garcetti v. Ceballos, 547 U.S. 410, 426 n.* (2006) (Stevens, J., dissenting); *see also* Christine A. Wardell, *Introduction*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES § 14:1 (Jeffrey M. Kaplan & Joseph E. Murphy eds., 2012) ("It is virtually impossible to develop reliable empirical evidence regarding the frequency with which whistleblowers actually suffer retribution, but it can and does occur. Indeed, the popular perception is that retribution against whistleblowers is common.").

80. This scenario has been described as placing public employees "on the horns of a dilemma," where the employees, no matter which course of action they select, are "gored" by the results. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 279 (2006) (quoting Brief of Ass'n of Deputy District Attorneys & California Prosecutors Ass'n as *Amici Curiae* in Support of Respondent at 2, *Garcetti*, 126 S. Ct. 1951 (No. 04-473), 2005 WL 1767121, at *2) (internal quotation marks omitted).

The doctrine harms the public as well. As previously noted, the public has a strong interest in maintaining a robust exchange of ideas free from government interference.[81] The First Amendment's protections become more salient when they implicate particularly valuable and sensitive speech. This includes speech revealing potential unlawful conduct, corruption, discrimination, misconduct, wastefulness, inefficiency, or wrongdoing by government agencies or employees, which is inherently of public concern[82]—the kind of speech at issue in *Bowie*.[83] *Bowie* could have a chilling effect on the speech of public employees who, if they are aware of the decision, decide that they cannot afford to lose their jobs.[84]

Beyond actual harm done to individuals and society, *Bowie* promulgates the wrong message: "The federal appeals court is literally saying that it is more important that managers can control their employees than it is that employees can be honest in official investigations."[85]

Indeed, while the previous balancing standard would have allowed this outcome in certain circumstances,[86] *Bowie* proves that *Garcetti* categorically mandates it. Implicit in this doctrinal shift, then, is the elevation of the speaker's role over any other countervailing considerations. This does not just supplement the *Pickering* line of cases; it obliterates it.[87] This unfairly places public employees in an unwinnable situation, damages the public marketplace of ideas, and improperly prioritizes First Amendment policy objectives.

2. Unmanageable Exceptions

Although confronted with similar facts, the Second Circuit avoided *Bowie*'s harsh results in *Jackler v. Byrne*.[88] Jason Jackler was a police officer in

81. *See, e.g.*, N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008).

82. *See, e.g.*, Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 925–26 (9th Cir. 2004).

83. Bowie v. Maddox, 642 F.3d 1122, 1126 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012).

84. The obvious counterargument is that *Bowie* actually incentivizes employees to publicly air their grievances, so a fear of a chilling effect is unwarranted or speculative. However, this scenario presents its own problems. *See infra* Section I.C.

85. Richard Renner, *Supreme Court Ducks Conflict on* Garcetti, Whistleblower Protection Blog (Feb. 27, 2012), http://www.whistleblowersblog.org/2012/02/articles/whistleblowers-government-empl/supreme-court-ducks-conflict-on-garcetti/.

86. *E.g.*, Barry v. Luzerne Cnty., 447 F. Supp. 2d 438, 449 (M.D. Pa. 2006) (concluding that the government's interest in efficient investigation into a prison escape outweighed an individual's First Amendment rights); *see also* Hoover v. Morales, 164 F.3d 221, 226 (5th Cir. 1998) ("We may safely assume that there will be occasions when the State's interest in efficient delivery of public services will be [sufficiently] hindered by a state employee . . . [to justify] curtail[ing] that employee's speech.").

87. *See* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting) ("Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.").

88. 658 F.3d 225 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1634 (2012).

Middletown, New York, who observed a fellow officer punch a suspect who had been detained in a police car.[89] In response to the ensuing excessive force complaint, Jackler filed a one-page report corroborating the allegations contained in the civilian complaint.[90] Police supervisors then met with Jackler and tried to coerce him into withdrawing his report and refiling a new one containing "false, incomplete[,] and misleading information" to "conceal the illegal actions and misconduct" of the arresting officer.[91] Jackler refused.[92] In retaliation, the Board of Police Commissioners dismissed Jackler.[93]

Like Richard Ceballos and David Bowie before him, Jackler faced the seemingly insurmountable hurdle of having to argue that his refusal to file a false report (at the direction of his superior officer) about events that took place on duty and pursuant to official policy was outside the scope of his official obligations.[94] Somewhat surprisingly, the Second Circuit sided with Jackler.[95]

The Second Circuit reached this decision by elevating the analytical import of a so-called "civilian analogue." The Second Circuit first enunciated the legal force of the civilian analogue in *Weintraub v. Board of Education*, where the court found that a teacher's complaint, filed with the union, was made pursuant to his employment duties since, in part, there was "no relevant citizen analogue" to that channel of speech.[96] That is to say, a union grievance was a unique process that existed only due to the teacher's public-employee status; therefore, there was no relevant civilian analogue.[97]

In essence, *Weintraub*'s civilian-analogue inquiry directed a court to examine the speech in question and determine whether a private citizen could have acted in the same way. An ordinary private citizen could not file a grievance with the union for public school teachers, but, as the *Jackler* court pointed out, a private individual would be barred by law from retracting a truthful statement and replacing it with a false one in a police investigation.[98]

Until *Jackler*, however, a lack of civilian analogue had only been used to buttress the conclusion that an employee spoke within the scope of his employment; the presence of a civilian analogue had never justified the position that the employee was automatically speaking as a citizen.[99] Thus, *Jackler*

89. *Jackler*, 658 F.3d at 230–31.

90. *Id.* at 231.

91. *Id.* at 231–32 (internal quotation marks omitted).

92. *Id.*

93. *Id.*

94. *See id.* at 232.

95. *Id.* at 244–45.

96. 593 F.3d 196, 198–99, 203–04 (2d Cir. 2010).

97. *See Weintraub*, 593 F.3d at 204.

98. *Jackler*, 658 F.3d at 240.

99. *See* Caroline A. Flynn, Note, *Policeman, Citizen, or Both? A Civilian Analogue Exception to* Garcetti v. Ceballos, 111 Mich. L. Rev. 759, 779 (2013).

broke new ground when it concluded that the speech at issue was not undertaken pursuant to a public employee's official duties if it had a "civilian analogue."

As an initial matter, *Jackler*'s civilian analogue exception does not flow from *Garcetti*.[100] *Garcetti*'s passing reference to civilian analogues does not lead to the conclusion that any speech containing such an analogue is protected by the First Amendment; the critical inquiry is whether the speech "was performed 'pursuant to . . . official duties.' "[101] While *Bowie* problematically forces employees to confront an impossible decision, it is more faithful to the rule announced in *Garcetti*.

Furthermore, *Jackler*'s exception is unmanageable in its own right.[102] Put bluntly, the civilian-analogue exception "is about as useful as a mosquito net made of chicken wire."[103] The D.C. Circuit found the standard particularly susceptible to a line-drawing problem: "All official speech, viewed at a sufficient level of abstraction, has a civilian analogue."[104] As a result, the Second Circuit's approach has the potential to seriously undermine *Garcetti*'s categorical nature. Since all speech, aptly construed, could have a civilian analogue, any statement could be subject to the exception endorsed in *Jackler*.[105]

The Second Circuit's manufactured exception underscores a deeper, more critical failing of *Garcetti*. *Garcetti* forces employees to make impossible decisions.[106] Courts are then inclined to create "dubious interpretation[s] of *Garcetti*" to escape these problematic outcomes.[107] These exceptions are undesirable in their own right. Unconditional exceptions, such as the one employed in *Jackler*, realize Justice Frankfurter's warning that "[a]bsolute

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100. Bowie v. Maddox, 653 F.3d 45, 47–48 (D.C. Cir. 2011) (order denying petition for rehearing) ("The Second Circuit gets *Garcetti* backwards."); Chatel v. Carney, No. 10-cv-576-PB, 2012 WL 1439051, at *6 n.6 (D.N.H. Apr. 26, 2012) ("Even if *Jackler* were analogous to this case, it is not binding precedent on this court and I would decline to follow it because it is unpersuasive. In addition, other courts have cast doubt on the Second Circuit's analysis in *Jackler*."). Even commentators who advocate for the adoption of *Jackler*'s civilian analogue test admit that it "does not follow from a strict interpretation of *Garcetti*." Flynn, *supra* note 98, at 762.

101. *Bowie*, 653 F.3d at 48 (alteration in original) (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

102. For a defense of *Jackler*'s civilian-analogue exception, see Flynn, *supra* note 98, at 778–87.

103. *Bowie*, 653 F.3d at 48.

104. *Id.*

105. For instance, *Garcetti*, at the very least, is clear that a prosecutor's internal protests over the contents of an affidavit are within the scope of employment. But it would be possible to construe a civilian analogue by noting the possibility of a private employee who felt similarly bound by ethical or professional duties to voice concerns about an office report. Thus, the *Bowie* court implied that *Jackler*'s exception, while cabining itself semantically, imposed no real limits on courts and could plausibly be read to exempt the situation that the Supreme Court explicitly found to be within the scope of employment in *Garcetti*. *See Bowie*, 653 F.3d at 48.

106. *See supra* note 80.

107. *Bowie*, 653 F.3d at 48.

rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."[108]

The civilian-analogue exception may only be the first step in this process of corroding *Garcetti*'s categorical rule. For example, the Second Circuit failed to detail why speech with a civilian-analogue exception should be exempt but speech pursuant to a professional or ethical obligation should not. Surely, there are instances where a professional code of conduct will bind a government employee without a civilian analogue. In such a case, neither *Garcetti* nor *Jackler* would provide a remedy for the employee, and the employee would remain unprotected. This omission creates an imbalance in protection where those who take actions with civilian analogues are given additional protection over those who remain faithful to professional and ethical obligations without such analogues.[109]

In the alternative, courts could respond like the Second Circuit in *Jackler* and create more exceptions. If courts were to fashion additional exceptions, they would begin to hollow out *Garcetti* from within, undermining one of the primary purposes of a categorical rule: to increase predictability and consistency.[110] A categorical rule riddled with amorphous exceptions, such as a civilian analogue, quickly loses its ability to be consistently applied and, as a product of exceptions continuing to spring up, also forfeits any semblance of predictability.[111]

The decisions reached in *Bowie* and *Jackler* underscore a number of problems with *Garcetti*'s categorical rule.[112] Even *Bowie* admitted that *Garcetti* forces courts to take unsympathetic positions.[113] Ironically, courts find themselves in a situation similar to the employees at issue; both are confronted with circumstances where each alternative is objectionable. Application of the rule under *Bowie* is unfair to the employee and deprives

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108. Dennis v. United States, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring); *see also* David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 Va. L. Rev. 1521, 1536 (1992) ("[T]he categorical method comes to admit exceptions . . . .").

109. For example, it seems plausible that government prosecutors could be retaliated against for making required *Brady* disclosures during a criminal prosecution. *See* Krystal LoPilato, Recent Case, Garcetti v. Ceballos*: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 Berkeley J. Emp. & Lab. L. 537, 544 (2006).

110. *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1262 (2008).

111. Some have questioned whether *Garcetti*'s categorical rule—even free from exceptions—provides predictability. *E.g.*, Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 Wm. & Mary Bill Rts. J. 1173, 1194–98 (2007).

112. It should also be noted that because the Supreme Court has denied certiorari to both *Jackler* and *Bowie*, Byrne v. Jackler, 132 S. Ct. 1634 (2012) (mem.), *denying cert. to* 658 F.3d 225 (2d Cir. 2011); Bowie v. Maddox, 132 S. Ct. 1636 (2012) (mem.), *denying cert. to* 642 F.3d 1122 (D.C. Cir. 2011), there is an additional problem of geographic nonuniformity, *see* Renner, *supra* note 85.

113. *See* Bowie v. Maddox, 653 F.3d 45, 48 (D.C. Cir. 2011) (order denying petition for rehearing).

society of valuable information, but *Jackler*'s exception is only an ill-conceived stopgap. When either outcome is deeply problematic, the standard itself is flawed.

C. Garcetti *Also Creates Perverse Incentives*

Jackler and *Bowie* expose deep flaws stemming from a disagreement regarding *Garcetti*'s "scope of employment" requirement. However, *Garcetti*'s categorical rule also produces additional difficulties not implicated in those cases. First, *Garcetti* encourages employees to voice their concerns publicly, which undermines the Court's efficiency rationale. Second, *Garcetti* enables the public employer to use internal reporting requirements as a mechanism for controlling or terminating potential whistleblowers.

One of *Garcetti*'s major deficiencies is that it incentivizes employees to publicly voice their concerns before they utilize internal channels of communication. Both the majority and dissenters in *Garcetti* acknowledged this point.[114] After *Garcetti*, an employee will typically not be entitled to First Amendment protection if he utilizes internal channels to voice his concerns.[115] Nonetheless, employers set up internal channels of communication, in large part, to allow employees to discover official misconduct and deal with it efficiently without creating an unnecessary public uproar. Therefore, it is paradoxical to incentivize employees to act outside of these mechanisms. This only creates fodder for scandal rather than efficiently remedying wrongdoing or incompetence. This significantly undermines the administrative efficiency of an organization—as resources will continually need to be diverted to deal with additional issues, such as public relations—which was one of the central justifications for *Garcetti*'s categorical rule.[116]

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114. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006); *id.* at 427 (Stevens, J., dissenting). Additionally, other courts and commentators have discussed the problem extensively. *E.g.*, Barclay v. Michalsky, 493 F. Supp. 2d 269, 276 n.4 (D. Conn. 2007); Jenny Mendelsohn, Note, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 WASH. U. GLOB. STUD. L. REV. 723, 729 (2009). Years before *Garcetti*, the Ninth Circuit rejected as "absurd" a First Amendment regime that hinged its applicability, at least in part, on the identity and size of the audience: "[I]n a good-faith whistleblowing context, the breadth of one's audience is irrelevant. It would be absurd to extend First Amendment protection only to those whistleblowers who immediately appear on the local news." Hufford v. McEnaney, 249 F.3d 1142, 1150 (9th Cir. 2001).

115. *E.g.*, Weintraub v. Bd. of Educ., 593 F.3d 196, 204–05 (2d Cir. 2010) (determining that a teacher is not entitled to First Amendment protection when filing a union grievance because that is a channel of communication uniquely available to public school teachers via an agreement with their employer); *see also* Fergus v. City of N.Y., No. 11 Civ. 2419(WHP), 2011 WL 5007000, at *4 n.2 (S.D.N.Y. Oct. 14, 2011) (holding that a doctor's complaints to her superior about an echocardiogram backlog were pursuant to her employment but then musing that had she written a letter to the editor, "she would have a stronger case"); David L. Hudson Jr., *The* Garcetti *Effect*, ABA J., Jan. 2008, at 16–17 (suggesting that public employees who go public tend to survive *Garcetti*).

116. *E.g.*, Kline, *supra* note 20, at 83–84.

Garcetti also allows government employers to use the employees' official duties as a mechanism for suppressing speech. For example, many government employees are required to report misconduct.[117] This imposes a catch-22 for employees. If an employee complies with his official duty to report misconduct, the First Amendment will not protect the statements included in his report. Consequently, the employer can terminate him without repercussions or threaten to do so to suppress the allegations. In the alternative, if the employee does not make the required reports, the employer has legitimate grounds to terminate him. Thus, to minimize liability and exposure, public employers are incentivized to include reporting requirements within the scope of an employee's official duties, which can be wielded against the employee regardless of whether he complies with the agency's policy.

D. *A Doctrinal Outlier in First Amendment Jurisprudence*

Besides the practical implications discussed above, *Garcetti* also presents a theoretical difficulty. Under the *Connick–Pickering* rule, the Court pursued a generally ad hoc approach—aside from requiring that the speech touch on a matter of public importance[118]—that has since been displaced by *Garcetti*'s categorical approach.[119] "Categorical balancing"—arriving at a general rule for all cases by abstractly weighing the overarching policy concerns[120]—is not a stranger to First Amendment law. Public employee speech law, however, is theoretically dissimilar to other kinds of speech subject to categorical rules. Therefore, as a matter of doctrinal consistency, it should be analyzed under a more holistic balancing regime.

A decision to adopt a categorical balancing regime is derivative of a distinct policy choice that the excluded speech has little to no First Amendment value.[121] This is reflected in the areas in which the Court has exercised

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117. *E.g.*, ARS Directive 461.5(9), Misconduct, Discipline, and Adverse Action (U.S.D.A. 1993), *available at* http://www.afm.ars.usda.gov/ppweb/PDF/461-05.pdf; Internal Revenue Serv., Internal Revenue Manual § 39.1.1.2.1(1) (2012), *available at* http://www.irs.gov/irm/part39/irm_39-001-001.html.

118. *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. Rich. L. Rev. 561, 566–67 (2008) (describing the *Garcetti* dissenters as attempting to "retain the *Pickering–Connick* ad hoc balancing test").

119. *See id.* at 569 ("In ruling that the job-required speech of public employees is not protected from employer discipline by the First Amendment, the Court used what has evolved into a conventional approach: categorical balancing." (footnote omitted)).

120. Professor Nahmod defines categorical balancing in the following manner: "What the Court does when it balances categorically is weigh what it considers to be the relevant interests, social and individual, at a fairly high level of generality, and then by balancing those interests, arrive at a generally applicable rule to be applied in later cases without further balancing." Nahmod, *supra* note 118, at 570. Therefore, the *Garcetti* Court weighed the potential value of speech made within the scope of employment and determined that it was unworthy of First Amendment protection. *See id.* at 569–73.

121. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such

categorical balancing to restrict rather than expand the First Amendment's protections. For example, the Court has excluded fighting words,[122] obscenity,[123] and, more recently, child pornography[124] from First Amendment protection. As the Court in *New York v. Ferber* observed, wholesale rejection of certain kinds of speech is predicated on the notion that "within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[125]

As discussed at length above, this is simply not the case with public employee speech law.[126] Categorical balancing is inappropriate for public employee speech because the fundamental policy rationales that underscore the law's treatment of obscenity, fighting words, and child pornography are lacking in this context.

II. A Better Framework to Protect Public Employee Speech

Erwin Chemerinsky described the Supreme Court's 2005 Term as "a tough year for freedom of speech."[127] As the preceding Section indicated, *Garcetti*'s categorical threshold was a bridge too far. A different balancing regime would eliminate some of *Garcetti*'s troubling implications and also remove a doctrinal anomaly from the body of First Amendment law. A complete return to *Connick–Pickering*, however, is also imprudent. Part II instead argues in favor of a tiered, balancing framework, analogous to the process used in equal protection analysis, since such a test would more faithfully and effectively apply the First Amendment within the practical realities of the administrative state.

This new rule would use *Connick*'s matter-of-public-importance inquiry as a sorting mechanism rather than a dispositive filter. In the lowest tier, speech that did not touch on a matter of public importance would force the government to articulate a legitimate administrative interest for its actions. Next, speech on matters of ordinary public importance would be subjected to a classic *Connick–Pickering* test. Additionally, in the top tier, speech regarding matters of *unusual* public importance would force the government to prove that its interests substantially outweigh the employee's First Amendment concerns.

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slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

122. *Id.* at 572.

123. *E.g.*, Roth v. United States, 354 U.S. 476, 485 (1957).

124. 458 U.S. 747, 764 (1982).

125. *Ferber*, 458 U.S. at 763–64; *accord Chaplinsky*, 313 U.S. at 571–72; *Roth*, 354 U.S. at 484 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

126. *See supra* Introduction and Section I.B.1 (describing and explaining the heightened importance and First Amendment value of government whistleblowing).

127. Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 Green Bag 2d 335, 340 (2006).

Section II.A sets out three levels of public importance within the First Amendment analysis. It goes on to argue that this three-tiered framework better embodies the policies underlying the First Amendment without sacrificing the practicalities of the administrative state. Section II.B then applies the new framework counterfactually to explain how it resolves the difficulties illuminated in Part I while remaining faithful to the relevant policy objectives discussed throughout this Note.

A. *A Tiered Framework*

This Note proposes an initial, trifurcated sorting inquiry. It argues that a three-tiered analytical framework will resolve most of the major complications that *Garcetti*'s categorical rule produced. Section II.A.1 asserts that courts should initially determine into which of three categories the speech in question falls: speech that does not touch on a matter of public concern; speech regarding a matter of "ordinary" public concern; or speech pertaining to a matter of "substantial" public concern. Section II.A.2 contends that applying a different level of scrutiny to each category will allow courts to better resolve the challenges created by public employee speech. Specifically, courts should evaluate speech that involves purely private matters under a rational basis standard. Speech regarding matters of ordinary public concern should be evaluated according to the *Connick–Pickering* framework. And speech involving matters of substantial public concern should be presumptively protected until the government can show that it has a substantial interest that significantly outweighs the employee and the public's interest in the employee's speech.

1. Three Levels of Speech

As explained in Part I, a categorical rule based on the role of the speaker is undesirable. Instead, as earlier cases recognized, the proper emphasis is on the public importance of the speech at issue.[128] *Connick* recognized a dichotomy in speech: speech either touched on a matter of public concern or it did not.[129] Public importance, however, at least in the arena of public employee speech, is not dichromatic. Some courts appear to have discerned at least three levels of importance: (1) speech that does not touch on matters of public concern, (2) speech that touches on matters of ordinary public concern, and (3) speech that touches on matters of substantial public concern. This hierarchy reflects accepted echelons of importance and assists in the administration of public employee speech cases; any rule predicated on filtering speech by its public importance should reflect this reality.

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128. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983).

129. *Id.* at 147–48. This conceptualization of speech is found in other areas of First Amendment law, such as defamation. *E.g.*, Miles v. Ramsey, 31 F. Supp. 2d 869, 875 (D. Colo. 1998).

The first category of speech fails to touch on matters of public concern. Its existence is well established.[130] In essence, case law distinguishes speech based on whether it relates to "political, social, or other concern to the community."[131] For example, purely personal concerns, such as complaining about an employer's internal sick leave policy[132] or long hours and limited vacation time,[133] are not considered matters of public concern.

Other speech does relate to political, social, or other community concerns. As a general principle, "speech . . . concern[ing] 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of [F]irst [A]mendment protection."[134]

Speech touching on a matter of public concern can be further subdivided based on whether the speech involves a matter of substantial or only ordinary public concern.[135] But the precise contours of this distinction are still ill formed.[136] Courts have begun to explore the differences by distinctly classifying certain kinds of speech. For instance, at least one court has found that the public has a substantial concern in speech discussing the compensation of public officers and the relationship between unions and elected officials.[137] Likewise, racial discrimination in public schools[138] and actual wrongdoing or breach of public trust by public officials[139] are considered matters of substantial public concern. Justice Souter's *Garcetti* dissent also

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130. *E.g.*, Leon Friedman, *First Amendment Retaliation*, *in* 2 Practising Law Institute, 22nd Annual Section 1983 Civil Rights Litigation 797, 810–16 (2005) (collecting cases where courts found that the speech did not touch on matters of public concern).

131. *Connick*, 461 U.S. at 146.

132. Crain v. Bd. of Police Comm'rs, 920 F.2d 1402, 1411 (8th Cir. 1990).

133. Johnson v. Elizabethtown, 800 F.2d 404, 406 (4th Cir. 1986).

134. McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

135. Joseph O. Oluwole, *The* Pickering *Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 Duq. L. Rev. 133, 167 (2008) (differentiating matters of public concern and substantial matters of public concern); *see also* Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 195 (4th Cir. 1994) ("When an employee's speech substantially involves matters of public concern . . . the state must make a stronger showing of disruption in order to prevail."). As an aside, Oluwole's article actually posits that three categories of speech exist: public concern, substantial public concern, and inherent public concern. Oluwole, *supra* at 167. However, as he admits, the Supreme Court has not articulated a standard for inherent matters of public concern. *Id.* This Note considers the difference semantic. Both "substantial matters of public concern" and "inherent matters of public concern" refer to speech concerning issues that are especially sensitive to the public. Unless and until courts create a more tangible distinction between the two, it is more prudent to simply recognize a category of speech that is extraordinarily important.

136. Indeed, the Supreme Court has acknowledged that the entire realm of "public concern" is amorphous. Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011).

137. *McKinley*, 705 F.2d at 1114.

138. Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004).

139. Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1018 (7th Cir. 1997); *see also* United States v. Richey, 924 F.2d 857, 866 (9th Cir. 2001) (Reinhardt, J., dissenting) ("[T]he operations of the courts and the judicial conduct of judges are matters of utmost public concern."

identified official dishonesty, deliberately unconstitutional action, other serious wrongdoing, and threats to health and safety as matters of unusual public concern.[140] The logical extrapolation is that speech concerning either society's most salient issues or the fundamental integrity of government is set apart from most statements of public interest.

This category of speech is distinct from speech of ordinary public concern. Speech can assist the public in making informed decisions of social significance—and therefore of public concern—without touching on a matter of significant public importance. The breadth of the category that pertains to matters of ordinary public concern is undeniably broader than that of the category in which the concern is substantial. The former category includes employment policies restricting speech,[141] public health and safety violations at public work sites,[142] written policies for police departments,[143] and investigatory protocol of local police departments,[144] among other types of speech.

The case law thus demonstrates that speech has been categorized into three distinct levels of importance. This categorization should be reflected in a content-based analysis. A failure to do so undervalues speech that implicates the First Amendment's core concerns but overvalues speech that, while important, is not integral to the functioning of a democratic society. As the previously cited cases indicate, some courts have recognized that the government has a higher burden when public-employee speech implicates matters of substantial public concern. A formal structure would ensure that the most important speech is given utmost protection.[145] Accordingly, speech should be filtered into three preliminary categories of public importance, and the relevant category should dictate the ultimate burden and degree of scrutiny.

However, this Note's test also preserves a more structured inquiry, which should help ameliorate concerns over consistent application inherent in unbridled balancing. Furthermore, it is unlikely that this test sacrifices much predictability, given that the Court's current categorical rule has

(quoting Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978)) (internal quotation marks omitted)).

140. Garcetti v. Ceballos, 547 U.S. 410, 435 (2006) (Souter, J., dissenting); *see also* Jefferies v. Harleston, 820 F. Supp. 741, 743 (S.D.N.Y. 1993) (noting that courts require a more rigorous showing by the government when "a public employee's speech substantially involves matters of public concern").

141. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1206 (10th Cir. 2007).

142. Considine v. Bd. of Cnty. Comm'rs, 910 F.2d 695, 700 (10th Cir. 1990).

143. Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995).

144. Gustafson v. Jones, 117 F.3d 1015, 1019 (7th Cir. 1997).

145. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted)).

proven confusing and difficult to apply among the circuit courts.[146] In essence, this Note's proposal attempts to strike a more appropriate balance between necessary flexibility and practical administrability.

This rule also helps harmonize public-employee speech law within First Amendment jurisprudence. Courts, to an extent, have recognized three levels of public importance for speech, and the proposed rule mirrors the divisions in this area of law. By reflecting the preexisting distinctions, the rule resolves doctrinal inconsistency—if courts recognize three levels of importance, the threshold inquiry should sort into three categories rather than two. As a result, this Note's proposed rule rejects *Connick*'s bifurcated filtering process and replaces it with trifurcated sorting.

2. Weighing the Speech's Content

The preceding Section answers the question of why a three-tiered approach is appropriate, but it leaves open what standards and burdens courts should apply to speech in those three tiers and why. As a general matter, it makes sense that three categories—once distinguished on an axis of importance—should be given differing standards of protection (since *Connick* established that this should be the operative preliminary concern[147]). This Section begins by laying out the various standards applied to speech filtered into each category and then posits that these standards reflect the underlying policy goals of the First Amendment.

The first kind of speech is that which does not touch on a matter of public concern. Under *Connick*, courts categorically denied this speech any protection when it was made by a public employee.[148] This determination was rooted in the Court's belief that the fundamental concern implicated in the arena of public employee speech was balancing the inherent tension between government offices' paralysis if every employment decision were to become a constitutional matter against the employees' ability to participate in public affairs.[149] Consequently, if an employee's speech did not address a matter of public concern, then the First Amendment's concerns would not be implicated on the employee's behalf, and there would be no colorable claim.[150] This result raises an important point: the speech increasingly implicates the First Amendment as it touches on subjects more central to the functioning of a democratic society.[151]

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146. *See supra* note 27 and accompanying text. Furthermore, "[i]f federal judges cannot agree on the meaning and scope of the *Garcetti* rule . . . . it does suggest that it is not a good doctrinal choice. Given the confusion in the circuits, *Garcetti* has turned out to be a bad thing in terms of First Amendment values." Roosevelt, *supra* note 30, at 648.

147. *See* Connick v. Myers, 461 U.S. 138, 145–46 (1983).

148. *Id.* at 146–47.

149. *Id.* at 142–49.

150. *Id.* at 146.

151. *See id.*; *see also, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

Under this Note's proposal, the government would still bear the minimal burden of demonstrating that it had a legitimate and rational administrative interest justifying its conduct.[152] To afford no protection to even wholly private speech would be unwise; the First Amendment "presumptively protect[s] *all* speech against government interference, leaving it to the government to demonstrate . . . [the] need to remove some speech from protection."[153] As a methodological matter, then, it makes little sense to automatically deprive speech of protection before any countervailing interest is even discussed. Thus, an employee's speech would not be devoid of protection, but the government would bear a low burden to establish that its interests outweigh those of the employee. As every case has noted, the government-employer must be able to conduct its business free from constitutional protection for each and every statement made by its employees.[154] Such a standard would allow the government to continue acting as an employer while ensuring that the First Amendment is not presumptively dismissed.

The intermediate level of scrutiny, which applies to speech on matters of ordinary public concern, would leave the *Connick–Pickering* test unaltered. As described in previous Sections, *Garcetti*'s categorical threshold is problematic. And, in most circumstances, the *Connick–Pickering* test ably balances First Amendment concerns with the needs of government entities. This balancing is sensible for several reasons. First, it readily responds on a case-by-case basis to the specific challenges (for both the government and the employee).[155] It also enables courts to weigh the government's concerns, within justifiable limitations.[156] And, most importantly, it recognizes the value of public-employee speech to the community, even when it is made pursuant to official duties.[157] In this way, courts could give due deference to both administrative and First Amendment concerns when matters of public concern are involved.

Only the most important and salient speech—what this Note has labeled speech on a matter of substantial public concern—would be subject to heightened scrutiny under the three-tiered approach. Matters of substantial

152. This standard parallels, in many ways, the familiar rational basis review used under the Fourteenth Amendment. *E.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–16 (1993). It is similar in form and rationale. Just as the Equal Protection Clause's concerns are less implicated by nonsuspect classifications, *id.* at 313, the First Amendment's concerns are not strongly implicated by speech involving matters of private concern, *e.g.*, *Connick*, 461 U.S. at 147.

153. United States v. Alvarez, 617 F.3d 1198, 1205 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012); *accord* 281 Care Comm. v. Arneson, 638 F.3d 621, 636 (8th Cir. 2011); United States v. Perelman, 658 F.3d 1134, 1138 (9th Cir. 2011), *amended by* 695 F.3d 866 (9th Cir. 2012).

154. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

155. Norcross, *supra* note 13, at 572.

156. *Id.*

157. *See* City of San Diego v. Roe, 543 U.S. 77, 82 (2004).

public concern would receive the most stringent First Amendment protections.[158] In these circumstances, the government would carry a higher burden: its interests must substantially outweigh both the public and private interests in free speech.

In areas of particularly important speech, administrative interests should not overcome the employee's First Amendment protection—that "eternal bulwark against tyranny and dictatorship"[159]—except in the rarest of circumstances and for the weightiest of societal considerations.[160] This resembles the Equal Protection Clause's strict scrutiny standard.[161] Strict scrutiny is invoked in equal protection analysis "[i]f the disputed classification affects a fundamental right or is an inherently suspicious classification."[162] Likewise, when the First Amendment's core concerns are involved, courts should immediately be cautious of the government's attempt to restrict or suppress the speech. This standard intentionally tips the balance in favor of the employee's speech, which is particularly appropriate because when "balancing competing interests, it is scarcely surprising that reasonable persons will disagree with the ultimate balance struck in specific cases."[163] In cases involving the core concerns of free speech, the First Amendment should be less flexible.[164] Thus, the standard is tilted toward the employee unless and until the government proffers exceptional circumstances that justify overriding the presumption in favor of freedom of speech.

Public sector whistleblowers do not fall into this realm of heightened scrutiny *per se*;[165] courts must first assess the content of the speech itself. However, whistleblowers, by definition, expose governmental misfeasance or

158. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

159. Herbert Brownell Jr., *Freedom and Responsibility of the Press in a Free Country*, 24 Fordham L. Rev. 178, 178 (1955).

160. *See* Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency"*, 23 Ohio N.U. L. Rev. 17, 21 (1996) (arguing that whistleblowing speech "[b]y definition . . . should not be chilled 'in the name of efficiency'" (quoting Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994))).

161. Strict scrutiny requires that the government show that its act was narrowly tailored to address a compelling interest. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Similarly, to significantly exceed the importance of a substantial matter of public concern, the government would need to proffer a truly compelling interest that animated its decision.

162. Student Doe v. Pennsylvania, 593 F. Supp. 54, 57 (E.D. Pa. 1984).

163. Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 Tex. Tech L. Rev. 5, 30 (1999).

164. *See* Connick v. Myers, 461 U.S. 138, 145 (1983). And judicial intervention is particularly appropriate when the First Amendment's protection of free expression is at issue. Vanasco v. Schwartz, 401 F. Supp. 87, 99 (E.D.N.Y. & S.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976).

165. To do so would be equivalent to assigning a level of protection to speech based on the speaker's role (a "whistleblower") rather than assessing the speech's importance in its own right. This is one of the very follies that has rendered *Garcetti* so untenable. *See supra* notes 61–65, 85–87, and accompanying text.

nonfeasance.[166] Since governmental inefficiency and wrongdoing are matters of public concern,[167] it would seem that whistleblowers almost always speak on at least a matter of ordinary public concern. Whether the speech implicated matters of substantial public importance would depend on the specific facts of the case.[168]

The result would be that courts must first determine into which of the three categories of public concern the speech falls. In doing so, courts ask whether the speech concerns " 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government [because such speech] merits the highest degree of [F]irst [A]mendment protection."[169] After sorting, the government would need to proffer a legitimate administrative rationale if the speech did not involve matters of public importance; sufficient justification that outweighed the employee's First Amendment interests if it did touch upon a matter of ordinary public concern; and significant governmental concerns that substantially outweighed the citizen's First Amendment protection if it involved a matter of substantial public concern. This framework would ensure that the government can function correctly while still protecting one of the most fundamental rights afforded American citizens.

B. *The Framework Applied: Resolving* Garcetti*'s Practical Difficulties*

The tripartite framework that this Note proposes resolves many of the quandaries produced by *Garcetti*. This Section applies the framework to scenarios involving public-employee speech and suggests that it would produce results more in line with First Amendment doctrine and policy objectives.

An apt starting point is the difficulty presented by *Bowie* and *Jackler*. In *Jackler*, the officer refused to withdraw his statement on severe police misconduct (excessive force),[170] and the inspector in *Bowie* did the same

166. *See supra* note 11 and accompanying text.

167. Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 926 (9th Cir. 2004).

168. For example, statements of a state's lieutenant governor that expose widespread election fraud and bribery committed by the governor's office would undoubtedly be matters of substantial public concern, given that they expose serious breaches of the public's trust, corruption, and crime. *See* Garcetti v. Ceballos, 547 U.S. 410, 435 (2006) (Souter, J., dissenting) (characterizing "official dishonesty, deliberately unconstitutional action, [and] other serious wrongdoing" as "matters of unusual importance"). However, if the same lieutenant governor notified a state advocacy group that the governor's office was unnecessarily spending lavishly on travel for its members, the speech would likely touch only on matters of ordinary public concern since it predominantly pertained to inefficiency and wastefulness (but failed to fundamentally undermine governmental integrity). *See supra* note 143 and accompanying text. This distinction is further explored *infra* in Section II.B.

169. McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

170. Jackler v. Byrne, 658 F.3d 225, 231 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1634 (2012).

with his statement on alleged racial discrimination in the workplace.[171]

Under the tripartite framework, the first step would be to determine the importance of the speech at issue. A hypothetical *Bowie* court would likely categorize the speech—raising concerns of racial discrimination in a public office—as involving a matter of substantial public concern.[172] Likewise, a court would likely conclude that Jackler's report of coerced fraud by the police was also exceptionally important.[173]

As a result, the government would be required to demonstrate that it had significant interests that substantially outweighed the employee's First Amendment protections. Almost undoubtedly, the government would not be able to carry its burden because "[i]t would be inappropriate for the department to seek to conceal such claims, or to require [the individual] to withdraw a truthful claim, or to seek to conceal a witnessing officer's corroboration of the events alleged in such a claim."[174] Such actions would not sufficiently advance *proper* performance of governmental functions so as to significantly outweigh (or outweigh at all) the employee's substantial First Amendment's concerns.[175]

As a preliminary matter, this result is sound. It would protect whistleblowers, who serve important functions in contributing to public discourse and promoting government efficiency and fidelity, against retaliatory employment action. The government would face a steep burden, which would ensure that this speech would be protected except in exceptional cases where the government possessed countervailing interests of remarkable importance, such as national security.[176]

The most important facet of this analysis, however, is not what a court would do but what a court would not do. A court would not be forced to engage in a scope-of-employment inquiry that forces it to categorically deny protection to an employee, no matter how valuable his speech was, if the statement were made pursuant to official duties. This would allow the court

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171. Bowie v. Maddox, 642 F.3d 1122, 1126–27 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012).

172. *See* Levinson, *supra* note 160, at 63–66 (arguing that whistleblowing speech, generally, should be afforded stringent protection); *cf.* Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004) (finding that racial discrimination in public schools was of significant public concern).

173. *See Jackler*, 658 F.3d at 236 ("Exposure of official misconduct, especially within the police department, is generally of great consequence to the public." (quoting Branton v. City of Dallas, 272 F.3d 730, 740 (5th Cir. 2001)) (internal quotation marks omitted)); *cf.* United States v. Smith, 123 F.3d 140, 150 (3d Cir. 1997) (positing that it is of "significant public interest" to investigate allegations of "government misconduct" in a case where newspapers sought access to certain court records).

174. *Jackler*, 658 F.3d at 242.

175. *Id.*

176. National security is used as an example because it has long been held to be one of the government's most compelling interests, *e.g.*, United States v. Aref, 533 F.3d 72, 76 (2d Cir. 2008), *aff'd*, 285 F. App'x 784 (2d Cir. 2008); Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 509 n.9 (9th Cir. 1988), but it is by no means the only sufficient interest.

to directly respond to the relevant interests[177] instead of being forced to ignore them on a threshold determination that has no bearing on the value of the speech. It would not deter the employee from voicing his concern through the appropriate, efficient internal channels. And it would not reward a government employer for manipulating an employee's official duties against him. Thus, this analysis would ensure that the First Amendment is always considered before its concerns are dismissed and that employers, as well as employees, are not incentivized to undercut the administrative interests that *Garcetti* sought to protect.

Additionally, this Note's framework provides a satisfactory answer to the scenario that the *Garcetti* majority posed, in which a public employee writes a nondisruptive memorandum littered with errors but that addresses an issue of ordinary public concern.[178] The concern is that the employer will be unable to terminate the employee for his sub-par work product.[179] However, this scenario is deceptively easy. This Note's scheme would quickly dispose of the employee's claim. The Court has repeatedly held that erroneous statements frustrate First Amendment values.[180] Accordingly, courts would assign very little value to an employee's speech that is riddled with misstatements and mistakes. But, on the other side of the balancing test applied to this category of speech, the government would have a great interest in ensuring that its employees produced high-quality, accurate work product. As such, the government would often have little difficulty defending an adverse employment action on that basis.

Lastly, the *Garcetti* Court, in part, created the categorical scope-of-employment rule to ensure that some speech would not be subject to constitutional protection and, therefore, potential litigation.[181] This "floodgates" fear is dubious since *Connick–Pickering* itself did not create an excessive caseload.[182] Furthermore, while this new framework would expand constitutional protections—even to matters that do not implicate public concern—the government's burden would remain minimal in certain cases. Indeed, it should not cost the government excessive effort to articulate a legitimate administrative rationale.[183] The fear of floodgates is overrated.

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177. *See supra* Section I.C.

178. *E.g.*, Roosevelt, *supra* note 30, at 652. Specifically, Roosevelt suggested that Richard Ceballos's memo, which his superiors ultimately determined to have reached the incorrect conclusion, was an exemplar of a memo addressing a matter of public concern and was nondisruptive but riddled with errors that presented a circumstance the *Connick–Pickering* test was ill-equipped to dispose of. *Id.*

179. *Id.*

180. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

181. Garcetti v. Ceballos, 547 U.S. 410, 420–21, 423 (2006).

182. *Id.* at 435 (Souter, J., dissenting).

183. *See, e.g.*, Walker v. Bain, 257 F.3d 660, 668 (6th Cir. 2001).

The folly of this concern is illustrated by the following example: A public employee discuses wholly personal matters with a group of coworkers; the gossip, naturally, distracts other employees from their work for a considerable amount of time. The employee is subsequently terminated. In the ensuing suit, a court would sort this type of speech into the least protected category (since the matter does not concern anything of public importance); the employer would only need to articulate a legitimate basis to satisfy the standard. For example, the employer could easily show that the speech distracted employees from their work, which led to inefficiency in the workplace. Employees, consequently, would not be incentivized to bring frivolous suits, and employers would not be required to expend significant resources defending a multitude of suits based on relatively unimportant speech. Conversely, any costs that *Garcetti* would save come at too high a price: valuable First Amendment protection.

Conclusion

The Supreme Court's decision in *Garcetti* has spawned a number of problems. As evidenced by *Jackler* and *Bowie*, lower courts continue to work out these difficulties. This Note proposes a new, tripartite framework that would abandon *Garcetti*'s threshold requirement that an employee not speak pursuant to official duties; instead, a court would initially sort the speech into one of three tiers based on the public interest involved. A court would accomplish this sorting by determining to what degree the speech is needed or appropriate to enable the general public to make informed decisions about the operation of its government. After sorting, the government would need to proffer a legitimate administrative rationale if the speech did not involve matters of public importance; sufficient justification that outweighed the employee's First Amendment interests if it did touch upon a matter of ordinary public concern; and significant governmental concerns that substantially outweighed the citizen's First Amendment protection if it involved a matter of substantial public concern.

This framework is a reaction to the Supreme Court's misguided decision in *Garcetti*, which forces public employees and courts to choose between undesirable and inescapable alternatives, creates perverse incentives for employers and employees alike, and is out of step with First Amendment doctrine. Instead, this Note's framework reprioritizes the protection of speech, regardless of the speaker's role. It rejects categorical dismissal of certain speech and ensures that contributions to the marketplace of ideas are afforded adequate protection.