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A Mandate Without Means:
Do Public Employees Enjoy First Amendment Protection?
Jan-Mitchell Zerrudo
Jan-Mitchell introduces a recent change in the Supreme Court's approach to First Amendment protection for government employees, taking particular exception to the Court's shift to a categorical exclusion of "job-related" speech, even when such speech touches upon matters of public concern. He further argues that the move away from the prior, case-by-case balancing test will now deprive

these public employees of constitutional protection from retaliation

by their government employers.

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A Mandate Without Means: Do Public Employees Enjoy First Amendment Protection?

Jan-Mitchell Zerrudo*

Introduction

When they drafted the First Amendment, America's founding fathers were no doubt aware that rights come with responsibilities. To establish a new country without oppression, citizens needed a resource to oppose and guard against governmental tyranny. To preserve this resource, citizens needed direct responsibility for its defense. This arrangement, which bonded citizens as both trustees and recipients of their desired freedoms, produced such a resource – the right to free speech.

Free speech equally affects both citizen and society. This balance is crucial when these interests become adversarial. Like most privileges, free speech is ultimately exploitable. When individuals invoke First Amendment protection for selfish or socially detrimental reasons, free speech may cause confusion, collapse, or even harm. This includes the realm of public services, where government entities must serve and maintain the citizenry's welfare. When lies or disclosures have the potential to undermine government operations, government entities can reasonably exercise some rights to restrict employee speech. But how does one balance opposing views when a governmental employer and employee clash over speech? Neither the individual's expression nor society's interests can triumph at the other's complete expense.

Through the case of *Garcetti v. Ceballos*, the following analysis will introduce the topic of public employee speech and evaluate the Supreme Court's recent change to its implementation. The relevant legal standard will

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be explained and summaries of related cases will illustrate its application. The Ceballos case will then be revisited to illustrate the Court's recent change in the prevailing legal standard. Careful analysis of the Ceballos ruling will demonstrate that protection of public employee speech should be considered on a case-by-case basis, rather than categorically placed beyond the scope of the First Amendment. The Ceballos Majority incorrectly distinguished employees from citizens, and by avoiding a case-specific analysis under the pre-existing legal standard, the Court rendered a necessary balancing test powerless, and unduly burdened public employees in the process.

BACKGROUND

Richard Ceballos served as a deputy district attorney for the Los Angeles County District Attorney's Office. During Ceballos' tenure at the Pomona branch, he worked as a calendar deputy who supervised other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending case. ¹ The defense attorney claimed that an important search warrant had been based upon an inaccurate affidavit.² The attorney requested a case review from Ceballos. Such a request was not atypical.³

Ceballos examined the affidavit in question, visited the location described, and determined that the affidavit did contain some serious misrepresentations.⁴ To investigate the inaccuracies, Ceballos phoned the deputy sheriff who had served as the warrant's affiant. When Ceballos did not receive a satisfactory explanation, he forwarded his findings to his supervisors,

¹ Garcetti v. Ceballos, 126 S. Ct. 1951, 1955 (2006).

² *Id*.

³ *Id.* Ceballos stated this himself.

⁴ Id. Ceballos believed that a "separate roadway" was instead called a "long driveway," and after concluding that certain parts of the roadway made it impossible to leave behind visible tire markings, he questioned the alleged trail between an abandoned truck and premises covered by the warrant.

⁵ The Merriam-Webster Online Dictionary defines "affiant" as "one who swears to an affidavit." Definition of "affiant," Merriam-Webster Online, http://www.merriamwebster.com/dictionary/affiant (last visited Dec. 5, 2006).

Thus, the phrase "warrant affiant" suggests one who swears to the facts presented to obtain the warrant.

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Frank Sundstedt and Carol Najera. 6 Ceballos also prepared a disposition memo, which explained his concerns and recommended a dismissal of the case.

After submitting this first memorandum to Sundstedt for review, Ceballos followed up with an additional memo about his second phone conversation with the warrant affiant. Ceballos then met with his supervisors and other parties to discuss the affidavit. The meeting allegedly grew heated as a lieutenant from the Sheriff's Department criticized Ceballos' handling of the case. Sundstedt decided to continue prosecuting the case, pending the outcome of the defense attorney's warrant challenge. Later, during the trial court's hearing on the matter, Ceballos was called as a defense witness to report his affidavit observations. Ultimately, the court rejected the warrant challenge.

Ceballos claimed that following these events he was subjected to retaliation on the job, in the form of: (1) a position reassignment from calendar deputy to trial deputy, (2) a courthouse transfer, and (3) a promotion denial. Ceballos filed an employee grievance, but it was denied. He then sued in the United States District Court for the Central District of California, alleging that his supervisors' retaliation against his first memo violated his First Amendment rights. Najera and Sundstedt contended that their actions were not retaliatory in nature, but instead reflected staffing needs. Moreover, they argued that the memo did not constitute protected speech for purposes of First Amendment protection. ¹⁰

The District Court agreed with Najera and Sundstedt, and granted their motion for summary judgment. ¹¹ The court ruled that Ceballos was not entitled

⁶ Ceballos, 126 S. Ct. at 1955.

⁷ *Id.* at 1956.

⁸ *Id.* Ceballos, Sundstedt, Najera, the warrant affiant, and other employees of the Los Angeles County Sheriff's Department (to which the affiant belonged) comprised the meeting's attendees.

⁹ *Id*.

 $^{^{10}}$ Id

¹¹ A "summary judgment" may be granted without trial, upon either party's motion, when the pleadings and evidence presented to the court show that the material facts are undisputed (i.e., "no genuine issues of material fact" exist), and the court determines that the moving party is entitled to judgment in its favor as a matter of law. Summary

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to First Amendment protection because the memo was written pursuant to employment duties. The Ninth Circuit Court of Appeals reversed this decision and held that the memo *did* constitute protected speech. The Court of Appeals ruled that the contents of Ceballos' memo addressed perceived governmental misconduct and therefore regarded a matter of public concern. After balancing the 'employee's interest in protecting his speech' and the 'employer's interest in promoting effective operations,' the court ruled in Ceballos' favor. The D.A.'s Office appealed this decision, and the United States Supreme Court granted certiorari.

LEGAL STANDARD

General Legal Standard

The United States Constitution protects words spoken by American citizens from certain forms of government censorship. The relevant portion of the First Amendment states, "Congress shall make no law ... abridging the freedom of speech..." Without this protection, democratic societies cannot function, as suppressed ideas would lead to diminished communication. Thus, exceptional conditions must exist before one's freedom of speech can be restricted. To ascertain whether or not public employee speech receives constitutional protection, a two-part test known as the *Pickering* test has been employed by the courts:

- 1. Is the employee speaking as a citizen on a matter of public concern?
- 2. Does the employer have adequate justification for treating the employee differently from any other member of the general public?

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judgment may be granted on all or part of the issues involved in the case. See, e.g., Findlaw's Legal Dictionary.

¹² Ceballos, 126 S. Ct. at 1956-57. The court added that even if the speech was initially eligible for constitutional defense, his asserted rights would still not be clearly established, which would preserve his supervisors' qualified immunity.

¹³ *Id*

¹⁴ U.S. Const. amend. I. The full text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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The first half of this test ascertains whether or not a public employee "[speaks] as a citizen on a matter of public concern." A negative answer would conclude the test because "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." A positive answer, however, presents a potential First Amendment violation. 17

The second half of the *Pickering* test directly balances the public employee's speech rights as a citizen against the employer's rights to restrict job performance as a supervising entity. A court must determine whether the employer possessed "adequate justification for treating the employee differently from any other member of the general public." ¹⁸ If the employer restricted speech to ensure "efficient" and "effective" job operations, the balance could tip in the employer's favor. 19 In the absence of such concerns, the employer will not possess "adequate justification" to restrict employee speech, because the constitutional rights that employees exercise as private citizens take precedence.²⁰ The balance would tip in the employee's favor, and the government employer would not be able to punish or restrict the employee's speech. 21

Application of Legal Standard

Pickering v. Board of Education

In 1964, voters in Will County, Illinois defeated the Board of Education's proposed tax for educational purposes. Later, the Board submitted a second tax increase proposal. Before the new vote was held, a local paper published articles credited to the District Teacher Organization. The articles

¹⁵ Ceballos, 126 S. Ct. at 1958.

¹⁶ *Id*.

¹⁷ *Id*.

¹⁸ *Id*. ¹⁹ *Id*.

²⁰ *Id*.

²¹Two additional points of clarity apply, should they prove relevant to a case: (1) it does not matter if a public employee's speech was expressed publicly or privately, and (2) it does not matter if the speech's substance concerned the public employee's job itself. See Garcetti v. Ceballos, 126 S. Ct. 1951, 1959 (2006) (quoting Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979)).

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supported the second tax increase, stating that its passage was needed to maintain quality education for district schoolchildren.²²

After voters again defeated the proposed tax rate increase, teacher Marvin Pickering wrote a letter to the newspaper's editor, which criticized both the School Board and the Superintendent. The letter questioned the Board's handling of bond proposals made prior to the tax issues as well as the Board's method of allocating financial resources between the athletic and educational programs in the schools. Pickering's letter also alleged that the Superintendent tried to prevent district teachers from opposing or criticizing the bond proposals. ²⁴

The School Board then dismissed Pickering for writing the letter to the newspaper. At the dismissal hearing, the Board argued that Pickering's letter improperly impugned both the Board and the school administration. The Board also contended that Pickering's statements damaged the professional reputations of Board members and school administrators, stood to disrupt faculty discipline, and would likely raise problems in the school environment and greater community at large. Further, the Board asserted that many of Pickering's statements were false. ²⁶

The Illinois Supreme Court heard the case to determine if substantial evidence supported the Board's position, and whether the Board could reasonably conclude that Pickering's letter was indeed detrimental (and therefore punishable). Ultimately, the state's high court rejected Pickering's First Amendment claim, on the basis that his acceptance of a teaching position forced him to refrain from commenting about school operations. The court reasoned that Pickering would have been free to write the letter were he not

²² Pickering v. Bd. of Educ., 391 U.S. 563, 565-66 (1968).

²³ *Id.* at 565-57. The bond proposals appear relevant because of their date proximity to the tax proposals. In February of 1961, the School Board proposed a bond issue that would raise \$4,875,000 to build two new schools. Voters defeated this proposal. In December of 1961, the School Board proposed another bond issue to build two new schools, which aimed to raise \$5,500,000. Voters supported this proposal. Both bond proposals were made in 1961, and both proposed tax increases were made in 1964.

²⁵ *Id.* at 567. The important features allegedly impugned were "the motives, honesty, integrity, truthfulness, responsibility and competence" of the administration and Board. ²⁶ *Id.* at 566-67.

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employed as a teacher, and instead had been speaking as a citizen. Pickering appealed this decision, and the United States Supreme Court granted certiorari.

The Supreme Court created a new two-part test in this case to determine whether Pickering's employee speech was protected. Against the assertion that citizens could relinquish their First Amendment rights during government employment, the Court ruled that this idea "proceed[ed] on a premise that has been unequivocally rejected in numerous prior decisions."²⁷ The Court recognized the need for "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs."²⁸ This language was the genesis for the two-part *Pickering* test previously presented. If Pickering was found to be a citizen commenting on a matter of "public concern," then his needs would be balanced against the needs of his employer.

Pickering's letter was then reviewed, and the Court determined that Pickering *did* speak as a citizen on a matter of public concern. The Court stated that the funding issue could not be left to the School Board alone and that the public must be allowed to contribute to the debate.²⁹ The Court added that Pickering's comments on spending allocations held no more weight than if other citizens offered similar comments.³⁰

With the first half of the test satisfied, the Court then focused on the Board's claim that the letter affected the school's operations, and thus merited disciplinary treatment. The Court found that Pickering's speech *did not* impede his performance as a teacher or interfere with the general operation of the

²⁹ *Id.* at 571. The Supreme Court's exact statement, in its entirety: "[T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive."

 $^{^{27}}$ Id. at 568. The Court cited Weiman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); and Keyishian v. Board of Regents, 385 U.S. 589 (1967). 28 Id.

³⁰ *Id.* at 572. The Supreme Court's statement, in its entirety: "[T]he amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer."

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school.³¹ The Board could not dismiss him in order to "maintain superiors' discipline or coworkers' harmony" because Pickering's statements were not directed toward anyone he would normally contact as a teacher.³² Additionally, "Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief," so his speech could not harm school operations by damaging professional reputations.³³ Lastly, because Pickering's letter was written and published after the second proposed tax increase was already defeated by voters, "it could, therefore, have had no effect on the ability of the school district to raise necessary revenue."³⁴

This allowed the Court to conclude that the school administration's interest in limiting Pickering's contributions to public debate did not greatly differ from its interest in limiting similar contributions by citizens at large. The Court held that in either case, the Board had no right to censor Pickering's speech under the circumstances presented.

Connick v. Myers

The *Pickering* test was also used in another case concerning employee speech within a district attorney's office. Sheila Myers served as an Assistant District Attorney under Harry Connick, the District Attorney of Orleans Parish in Louisiana. In this role, "Myers competently performed her responsibilities of trying criminal cases." In October 1980, Myers learned that she was to be transferred to prosecute cases in a different criminal court section. Myers strongly opposed the transfer, and she expressed this to Connick and several other supervisors. After her objections were received but not obliged, Myers then spoke with Assistant District Attorney Dennis Waldron. After Waldron suggested that "[Myers'] concerns were not shared by others in the office," Myers replied that she would conduct some research about the matter. Myers.

³¹ *Id.* at 572-73.

³² *Id.* at 569-70.

³³ *Id.* at 570-71.

³⁴ *Id.* at 571.

³⁵ *Id.* at 573.

³⁶ Connick v. Myers, 461 U.S. 138, 140 (1983).

³⁷ *Id*.

³⁸ *Id.* at 140-41.

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Myers then prepared, typed, and copied a questionnaire that aimed to solicit staff members' views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." Myers later met with Connick, who advised that she simply accept the transfer. After Connick left the office, Myers distributed her questionnaire to fifteen Assistant District Attorneys. 40

Shortly thereafter, ADA Waldron learned of Myers' survey distribution, and proceeded to phone Connick about the "mini-insurrection" being created in the office. 41 Connick returned and informed Myers that she was to be terminated for refusing her scheduled transfer. Connick also told Myers that the questionnaire distribution "was considered an act of insubordination," specifically with regard to the questions pertaining to worker confidence in superiors, and the questions that referenced pressure to work in political campaigns. 42

Myers then sued, arguing that Connick wrongfully terminated her employment and that her questionnaire constituted protected speech under the First Amendment. The district court concluded that Myers had not truly been terminated because of her refusal to transfer, but actually because of her questionnaire. The court agreed with Myers, finding that it was not "clearly demonstrated that the survey substantially interfered with the operations of the District Attorney's office." The court held that Myers' questionnaire "involved matters of public concern," specifically the question that addressed pressure to work in political campaigns. After the Fifth Circuit Court of Appeals affirmed this decision, Connick appealed, and the United States Supreme Court granted certiorari.

The Supreme Court applied the *Pickering* test. Recalling the district court's finding that Myers' questionnaire involved matters of public concern, and Connick's opposite belief that the survey only regarded "internal office matters," the Court suggested that the latter was more (but not completely)

³⁹ *Id.* at 141.

⁴⁰ *Id*.

⁴¹ *Id.* According to the Court, these were ADA Waldron's exact words.

 $^{^{42}}$ *Id*

⁴³ *Id.* at 142-43.

⁴⁴ *Id*.

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accurate.⁴⁵ The Court determined that all but one of Myers' survey questions – the question regarding pressure to work in political campaigns – failed to constitute matters of *public concern*. ⁴⁶ The Court also stated that Myers did not seek to inform the public about any failure by the District Attorney's Office to discharge its duties, nor did she seek to reveal any breach of public trust committed by Connick or other employees.⁴⁷ The Court stated: "[T]he questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo."

Had the Court's analysis ended there, Myers' speech would have likely failed the first half of the *Pickering* test. As reiterated by the Majority, federal courts are not the appropriate forum to resolve disputes regarding speech made solely upon matters of personal interest while at work.⁴⁹ But the Court held that Myers' eleventh survey question, regarding pressure placed on employees to work in political campaigns not of their choosing, *did* touch upon a matter of public concern because it had to do with "a coercion of belief in violation of fundamental constitutional rights."⁵⁰

Because this lone issue satisfied the first criterion of the *Pickering* test, the Court needed to determine if Connick justifiably dismissed Myers. The Court found that the questionnaire did not impede Myers from "performing her [usual job] responsibilities." However, the Court agreed with Connick's assertion that the questionnaire represented an "act of insubordination which interfered with working relationships," and ruled that employers need not "allow events to unfold to the extent that the disruption of the office and the

⁴⁵ *Id.* The Supreme Court stated: "Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of 'public concern,' as the term was used in *Pickering*. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission."

⁴⁶ *Id.* at 148. The Court specifically found the questions about supervisor confidence and grievance committees to be "mere extensions of Myers' dispute over her transfer to another section of the criminal court."

⁴⁷ *Id*.

⁴⁸ *Id*

⁴⁹ *Id.* at 147.

⁵⁰ *Id.* at 149.

⁵¹ *Id.* at 151.

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destruction of working relationships is manifest[ed] before taking action."⁵² Thus, because the speech satisfied only the first half of the *Pickering* test, the Court ruled that the Myers did not enjoy First Amendment protections for the questionnaire.⁵³

APPLICATION OF THE LEGAL STANDARD IN CEBALLOS

Majority Opinion

Returning to *Garcetti v. Ceballos*, the Supreme Court established new precedent rather than simply applying the *Pickering* test. The Court identified the two-part test as the relevant legal standard, but did not employ it immediately. Instead of determining whether or not Ceballos' memo involved a matter of *public concern* (and subsequently moving or not moving on to the second half of the *Pickering* test), the Court first explored the general reasons to balance speech interests between employee and employer. The Court then honed in on what it determined to be the case's controlling factor: namely, that "Ceballos'... expressions were made *pursuant to his duties* as a calendar deputy." stable of the case of the standard deputy."

Next, the Court proceeded to subject the speech to a formal two-part *Pickering* analysis, finding under the first prong that Ceballos spoke as a prosecutor responsible for advising supervisors about case options rather than a mere "citizen." In other words, his *status* and situation differentiated him from citizens whose similar speech would otherwise be afforded First Amendment protection. ⁵⁶ The Court presented this logic in the form of a categorical rule: "When public employees make statements pursuant to their *official duties*, the

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⁵² *Id.* at 152.

⁵³ *Id.* at 154. Further support of Connick's authority was lent when the Court recognized that "Question 10 [of Myers' survey], which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations."

⁵⁴ *Ceballos*, 126 S. Ct. at 1957-59. The Court also detailed the non-dispositive nature of certain aspects about Ceballos' memo. It was immaterial that Ceballos expressed his views inside his office, as opposed to expressing them publicly. And it was immaterial that Ceballos' memo concerned the subject matter of his employment.

⁵⁵ *Id.* at 1959-60 (emphasis added).

⁵⁶ *Id.* at 1960.

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employees are *not* speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Under this reasoning, a public employee "speaking pursuant to his official duties" could *never* satisfy the first prong of the *Pickering* test.

This conclusion that Ceballos was not speaking as a citizen made it unnecessary to subject his memo to the second half of the *Pickering* test. The Court did, however, expand on its reasoning concerning this new categorical rule. It stated that employees enjoy First Amendment protection when they make expressions outside the course of their regular job duties because citizens who do not work for the government have rights to engage in similar speech. Thus, employees may "write letters to local newspapers" or "discuss politics with co-workers," even when they are on the clock, because they are still speaking as ordinary citizens. 59

The Court clarified, however, that "when a public employee speaks pursuant to *employment responsibilities* ... there is no relevant analogue to speech by citizens who are not government employees." ⁶⁰ Under this logic, because a general citizen cannot readily comment on matters that fall within the exclusive job domain of public employees, such speech does *not* engender the same level of First Amendment protection as other forms of speech. Thus, the Court concluded that Ceballos was not entitled to constitutional protection for his memo, and his supervisors' reactions did not violate the First Amendment.

Dissenting Opinions

Justice Stevens' Dissent

Justice Stevens disagreed with the Majority's new categorical rule about employee statements made pursuant to official duties. He argued, "The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong." By making First Amendment consideration dependent on a speaker's job status, this rule unduly

⁶⁰ *Id.* (emphasis added).

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* at 1961.

⁵⁹ *Id*.

⁶¹ *Id.* at 1963 (Stevens, J., dissenting).

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jeopardized the protection of "unwelcome speech" that simply caused a supervisor discomfort. Geometric Stevens was concerned that the new rule created an illogical incentive for employees to "voice their concerns publicly [outside work] before talking frankly to their superiors" since 'citizen' speech would receive more First Amendment protection.

Justices Souter, Stevens and Ginsburg

Justice Stevens and Justice Ginsburg joined Justice Souter's dissent. The Justices recognized the government's need for discretion over employee speech, but argued that employees should always enjoy First Amendment consideration under the *Pickering* test. Justice Souter stated that concerns over safety threats and governmental misconduct overshadowed any desire for efficient work operations.⁶⁴ He argued that despite the government's legitimate concern about "statements too damaging to be justified," foremost consideration should be given to employee speech that touched upon matters of public concern, because "the First Amendment safeguard rests on the value of the public receiving the opinions and information that a public employee may disclose."

Justice Souter also disagreed that the public had any less interest in employee speech when "[employees] spoke as required on some subject at the core of their jobs." ⁶⁶ He argued that the Court should focus on the substance of

1a. at 1962.

⁶² Id. at 1962.

⁶³ *Id.* at 1963 (Souter, J., dissenting).

⁶⁴ *Id.* Justice Souter argued: "Private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."

⁶⁵ Id. at 1964.

⁶⁶ *Id.* at 1966. Justice Souter provided examples as to when the public's interest in hearing informed speech was important: "[W]hen a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)"

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the message rather than the occupational context of its delivery. He framed his point as follows:

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? ... Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? ...

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object ... to unite [m]y avocation and my vocation"; these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.⁶⁷

Therefore, First Amendment protection should not have been categorically denied to employee speech made pursuant to official duties, especially without the use of the *Pickering* test.

Justice Souter also disagreed with the Majority's interpretation of the circumstances under which the government should be entitled to promote its own policy and thus prohibit employees from expressing opposite views. He clarified that "some employees are hired to promote a particular policy by broadcasting a particular message set by the government, but not everyone working for the government is hired to speak from a government manifesto." 68

⁶⁷ *Id.* at 1965-66.

⁶⁸ *Id.* at 1969. Justice Souter continued: "There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract

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Lastly, Justice Souter disagreed with the Majority's assumption that various whistleblower laws would adequately and independently protect employee speech. He argued that "speech addressing official wrongdoing may well fall outside protected whistle-blowing" because of variations in local statutes and case law. Instead of leaving employee speech issues to these scattered laws, Justice Souter suggested that the Court simply adjust the *Pickering* two-part balancing test. Revising the legal standard to make it more rigorous in balancing employee and employer rights could curb fraudulent litigation and ensure that only qualified employee speech would be immune from employer restrictions.

Justice Brever's Dissent

In his own dissent, Justice Breyer also disagreed with the Majority's new categorical rule, as well as Justice Souter's proposal for more stringent application of the *Pickering* two-part test. Justice Breyer argued that special circumstances could mandate constitutional protection of speech (and thus the involvement of courts), which should supersede "the Majority's fears of department management by lawsuit." He recommended applying the original *Pickering* test *only* when employee speech was professional speech, because then "the Constitution mandates special protection." Justice Breyer gave the

point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case."

⁶⁹ For an interesting take on whistleblower laws and their implications for employee speech, see Michael C. Dorf, The Supreme Court Finds No First Amendment Protection for Government Employee Speech Pursuant to Official Duties (Jun. 5, 2006), http://writ.news.findlaw.com/dorf/20060605.html. Like this analysis, Dorf examines the Ceballos case, but his most notable contribution, regarding how to deal with internal whistleblowers, is a topic that merits discussion beyond the scope of this article.

⁷⁰ Ceballos, 126 S. Ct. at 1970-71 (Souter, J., dissenting). Justice Souter summarized his position: "Individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them."

⁷¹ *Id.* at 1967. Justice Souter recommended that "an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."

⁷² *Id.* at 1974 (Breyer, J., dissenting).

⁷³ *Id.* at 1975. Justice Breyer explained: "Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented,

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example of speech by lawyers, which "is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And when that is so, the government's own interest in forbidding that speech is diminished." In other words, Justice Breyer expressed the view that the *Pickering* test need only be applied in certain circumstances where special protection, such as attorney-client privilege, is warranted.

ANALYSIS

The *Ceballos* Court's new rule strictly classifies speakers as "employees," and not "citizens," if their statements are made pursuant to official duties. The Court technically filled a void in speech law. Prior to the holding in *Ceballos*, the Court only recognized that the First Amendment protected citizens "speaking as citizens." The Court also recognized that no constitutional authority protected employees "speaking as employees" but that the *Pickering* test might protect employees "speaking as citizens on issues of public concern." There was no guidance on protection afforded to employees "speaking as *employees* on issues of public concern."

The Supreme Court's solution was well intentioned, but the application was – and will continue to be – problematic. The Court aimed to reduce future litigation over public employee speech, but instead added more uncertainty to the debate over where "citizen" speech ends and where "employee" speech begins, thereby ensuring continuing employer-employee disagreements about censurable statements.

Legal Concerns

Using a Technicality to Avoid a Full Pickering Analysis

Analyzing the *Ceballos* opinion begins with the Court's particular application of the *Pickering* test. The Court should have subjected Ceballos'

the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Thus I would apply the *Pickering* balancing here."

⁷⁴ *Id.* at 1974. Justice Breyer further explained: "The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work."

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memo to this initial question: was Ceballos speaking as a *citizen* about a matter of *public* concern?

Instead, the Court narrowly and categorically excluded case-by-case examination of the speaker's *role*, declaring that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." A cursory analysis could suggest that this necessarily filled a void in the Court's speech classification system. But this change in focus proved even more significant through its direct impact on the *Pickering* test's first criterion. By categorizing Ceballos as one who did not technically speak as a *citizen*, the Court made it unnecessary to determine if his speech addressed matters of public concern.

In one sense, this development followed a useful pattern. When it initially developed *Pickering*'s first criterion, the Court deliberately paired the "public concern" condition with the "citizen status" requirement, to prevent disgruntled workers from besieging employers with endless, baseless charges of First Amendment violations.

However, requiring both "citizen status" and "public concern" was only designed to prevent frivolous litigation; this prerequisite was not to be used for preemptively screening out cases that raised valid speech concerns.

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⁷⁵ *Id.* at 1960.

⁷⁶ The term "cursory" is deliberately used here to emphasize that the classification aspect may appear irrelevant to some, but important to others. For example, the author of this article, belonging to the latter group, created a simple outline that identified two types of speakers ("citizens" and "employees"), two types of roles ("citizens" and "employees"), and two types of issues ("public concern" and "non-public concern)." Depending on the particular mix of speaker, role, and issue, the result would be "protected speech," "limitedly protected speech," or "not protected speech." For example, one who speaks as a "citizen," in the role of a "citizen," and about an issue of "public concern" would enjoy "protected speech," on the basis of the First Amendment. By contrast, one who speaks as an "employee," in the role of a "citizen," and about an issue "not of public concern" would enjoy "limitedly protected speech," with both the First Amendment and Pickering v. Board of Education respectively serving as the primary and secondary legal standards. Ultimately, six separate categories were produced, and the visual appearance of this scheme helped the author see how the Court's new categorical rule filled a jurisprudential "void." However, because the classification aspect is relatively inconsequential to the greater speech issues presented by Ceballos, one should only reference it as a matter of convenience, not necessity.

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Had his case reached the second *Pickering* test criterion involving "justifiable restriction," Ceballos arguably had a good chance of proving that his memo, which concerned a serious government mistake, outweighed his employer's interest in maintaining efficient operations. But by avoiding this issue, the Court seemingly preferred to sidestep *Pickering's* important second criterion.

Some might disagree with this notion that the Court purposely avoided a complete *Pickering* two-part analysis. At best, perhaps the Court simply practiced a stricter interpretation of the first criterion; at worst, it merely missed a chance to clarify a troubling area of speech law. These arguments stray from the key point: Ceballos' memo, which raised a significant First Amendment issue, should not have been prematurely dismissed by a blanket refusal to treat him with "citizen status."

Offering Moral Advice and Supporting a Backward Concept

To its credit, the *Ceballos* Court recognized concerns that its new categorical rule unfairly precluded employees from meeting the first *Pickering* criterion. If employees lost "citizen speaker" status when their speech was made pursuant to job duties, then employers would not have to worry about the *Pickering* two-part test, and could hypothetically restrict any worker speech subjectively deemed "inappropriate." Unfortunately, the Court's response to this scenario was more theoretical than practical.

Against the possibility that employers would exploit the categorical rule to overly restrict worker speech, the Court simply expressed faith that employers would exercise discretion when curbing employee expression. The Court reiterated that "public employers should, 'as a matter of good judgment,' be 'receptive to constructive criticism offered by their employees." While admirable that the Court used its high standing to comment on ethical expectations, this reliance on nonbinding morality fails to guarantee real protection of employee speech rights. By offering unenforceable advice instead of instructive commands, the Court acts analogous to the parent who instructs a child to avoid adult web sites, yet does nothing to safeguard or monitor the computer.

The Court then stated that workers enjoyed extra protection under various whistleblower laws. By acknowledging, however, that employees

⁷⁷ Ceballos, 126 S. Ct. at 1962 (quoting Connick, 461 U.S. at 149).

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operate under various labor codes, civil laws, and extra-constitutional provisions, the *Ceballos* Majority verified a major point from Justice Souter's dissent: a single, streamlined standard would better serve employee speech jurisprudence than myriad statutes and conflicting case law. If the Court wanted to mitigate the volume and difficulty of employee speech cases, then it logically should have *opposed* the use of disparate whistleblower laws on a case-by-case basis. By universally applying the *Pickering* test to any public employee case raising First Amendment concerns, the Court would not only save itself much time and energy, but also reassure employees that one's speech protection does not unfairly depend upon location.

Policy Concerns

Misunderstanding the Legal Standard's History & Broader Purpose

By categorically separating employee speech from citizen speech – and thereby leaving government employees at the mercy of their employers – the Court elevated the employer's authority above constitutional reach. This contradicts the balancing principle at the core of the *Pickering* test.

Recall the precedents established in *Pickering v. Board of Education* and *Connick v. Myers*. In *Pickering*, the Court sided with Pickering after determining that his employer *did not* have a substantial interest in restricting his speech. In *Myers*, the Court ruled against Myers after determining that her employer *did* have a substantial interest in restricting her speech. In both cases, the Court avoided speech "categorization" and instead sent a strong and clear message: when applying the *Pickering* test, employee rights deserved serious consideration, and the burden of proof remained with the employer to justify any restrictions on expression.

Given that the First Amendment expressly recognizes citizen speech rights and only implicitly suggests conditions for restricting those rights, employers – not employees – should have the burden of proving that a limit on employee speech accords with the Constitution. The *Ceballos* Court incorrectly stated that its holding was "supported by the emphasis of [the Court's] precedents affording employers sufficient discretion to manage their operations." This is directly contradicted by the outcomes of both *Pickering* and *Myers*. Further, the Court's approach distorted the legal standard's

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⁷⁸ Ceballos, 126 S. Ct. at 1960.

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functionality. The *Pickering* test is considered a "balancing" process not only because it weighs opposite speech interests, but also because it informally necessitates that both parties justify their positions. When employees prove that they spoke as citizens on issues of public concern, their half of the contribution has been made; it makes little sense to then require that employees additionally prove the non-disruptiveness of their speech. It is more sensible and *balanced* to ask employers to demonstrate the legitimate need to censure certain instances of employee speech.

Assuming That Speech Can Only Diminish Efficiency

The *Ceballos* Court recognized that government employers need some control over employees to efficiently run operations. The Court did not, however, adequately show that limitations on business-oriented speech will *always* promote efficiency. The Court correctly noted that "government offices could not function if every employment decision became a constitutional matter," and rightly recognized that employees could exploit their trusted societal positions to speak in ways that undermined governmental policies. But while these points addressed practical concerns, the Court did not hold that these concerns always exist or provide additional reasons for employers to restrict employee speech. This suggests that the Court viewed those two hypothetical reasons as sufficient proof that "more speech restrictions" produced "more employer efficiency."

This logic fails, however, if one merely considers the opposite extreme. Just as unchecked speech can unravel operations, the absence of speech can prevent entities from fulfilling portions of the governmental mandate in the first place. Thus, it is *not* necessarily the case that additional speech restrictions lead to the increased efficiency. The Court must find another justification for affording employers the categorical discretion to restrict employee speech.

The *Ceballos* Court should have addressed the fact that some government agencies must legally perform certain tasks in a manner that is as efficient as possible. This being the case, employers sometimes have a pressing need to place limits on speech in order to efficiently complete the job that is required of them by law. In Ceballos' case, a speech restriction actually

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⁷⁹ *Id.* at 1958 (quoting *Connick*, 461 U.S. at 143).

⁸⁰ *Id.* (quoting *Connick*, 461 U.S. at 143).

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increased *inefficiency*. Ceballos' job legally required him to check for errors during the course of ongoing prosecutions. If Ceballos neglected or ignored his duty, he would have performed his job inefficiently. Because the District Attorney's Office was legally bound to operate efficiently, its representatives – supervisors Sunstedt and Najera – should not have disciplined Ceballos for offering a corrective memo written just for that purpose.

Some might contend that the Court interpreted "efficiency" to reflect the employer's own understanding of that term. Given its forthright concern about the government's right to supervise and correct employee performance, the Court likely delivered its ruling with "administrative efficiency" in mind. Initially, this could appear acceptable because "efficient operations" usually indicate the correction of administrative problems (such as employee insubordination).

Valuing procedure over substance, however, demonstrates a narrow understanding of efficiency. If an employer's categorical right to restrict unwelcome speech supersedes an employee's legal obligation to perform a job thoroughly, then there exists no need to produce quality work. Under this logic, Ceballos would have worked more efficiently if he withheld his memo and spared his supervisors the extra work of disciplining him – notwithstanding the occupational requirement that he investigate and correct prosecutorial errors in good faith. This directly contradicts any reasonable understanding of "efficiency."

CONCLUSION

This article introduced the issue of public employee speech by first illustrating the application of the pre-existing legal standard as applied in *Pickering v. Board of Education* and *Connick v. Myers*. By identifying flawed arguments made when the *Ceballos* Majority altered that legal standard, this article further demonstrates that public employee speech should always receive the possibility – following a careful balance – of First Amendment protection.

The *Pickering* test exists because the First Amendment is imperfect. The "right to free speech" has constitutional authority, but cannot literally be claimed in an unchecked fashion. *Pickering*'s test recognized the needs of both employee and employer, and aimed to restrict only the narrowest kind of jobrelated speech, while leaving the public employee's liberty to speak out on issues of public concern intact whenever possible. This balancing process

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preserved the spirit of the First Amendment and gave it practical flexibility.

The *Ceballos* Court amended the *Pickering* test to exclude, as a class, public employees (acting within their job duties) from receiving First Amendment protection. The Court incorrectly assumed that this decision best served citizens' interests. Holding public employees punishable for words spoken on the job, even on matters of public concern, hardly represents what the founding fathers envisioned when they established the right to free speech.

On that note, the Court would be prudent to examine the broader constitutional implications of *Ceballos*. In the future, if the Court could divorce its focus from thematic concerns about "employer efficiency" and "speaker categories," and trace its way back to the heart of the First Amendment, then it might reach opposite conclusions and point society in the right direction. Otherwise, by legally thwarting one class of citizens from serving the public, the Court will find itself ultimately promoting tyranny, even if in a subtle form.

When citizens suddenly have their First Amendment protections rescinded by law, the resulting backlash or acceptance will reflect their true valuation of free speech. If public employees believe that employer necessities always trump individual liberties, then surrendering expressive liberty warrants additional speech restrictions. Conversely, if public employees believe that individual liberties always trump employer necessities, then insisting on free speech leads to inefficient public services, and warrants dismissals.

If citizens recognize that workers and employers have legitimate competing interests, and understand that public employees especially need free speech protections for their line of work, then the proper legal standard can reemerge to afford a constitutional right its due reverence and correct application. Whether this means disentangling the modified *Pickering* test, or creating a new methodology altogether, is immaterial. As long as the solution gives public employees the possible right to speak freely in any aspect of their jobs, then not even the subtlest tyranny – including that disguised in the form of unfounded and unreasonable Supreme Court precedent – can abridge the First Amendment or harm society's welfare. Ultimately, this would best allow the democratic spirit and goals from America's founding to persist through her future, for when laws rightly protect those who unite avocation and vocation to ensure public welfare, free speech simultaneously shines and strengthens. Thus, for those who respect its powerful nature and appreciate its empowering abilities, pursuing this end represents not just a right, but also a responsibility.