Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism

Charles W. "Rocky" Rhodes
PUBLIC EMPLOYEE SPEECH RIGHTS FALL PREY TO AN EMERGING DOCTRINAL FORMALISM

Charles W. "Rocky" Rhodes*

Long live formalism. It is what makes a government a government of laws and not of men.¹

Despite this toast from Justice Scalia in 1997, formalism's use in constitutional discourse had waned considerably in the decades since the New Deal. The pre-New Deal Court's formalism preference, evident in its rule-based categorical distinctions between "commerce" and "manufacture,"² or between the separate spheres of the police power and unconstitutional infringements on liberty,³ had been replaced by formalism's antithesis, a more standard-like balancing, in much of constitutional doctrine.⁴ Indeed, at the time of his formalism tribute, Justice Scalia was one of only two committed formalists on the Court (although two other Justices demonstrated varied levels of formalistic leanings).⁵

But with the arrival of two new Justices during the October 2005 Term, formalism may indeed rise again to leave its mark on certain aspects of constitutional doctrine. Although it is obviously too early to draw firm conclusions, as Chief Justice Roberts and Justice Alito sat together on only thirty-six cases in their last Term, statistical analyses of the Term show a high level of agreement between the new Justices.⁶

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² United States v. E.C. Knight Co., 156 U.S. 1, 12–17 (1895).


addition, these same studies revealed that Chief Justice Roberts and Justice Alito frequently agreed with the Court’s two committed formalists, Justices Scalia and Thomas. These four Justices, combined with Justice Kennedy, who often adheres to formalism’s precepts in certain doctrinal areas, may end up ensuring that formalism is indeed a long-lived jurisprudential methodology, particularly in free speech, federalism, and some constitutional criminal procedure decisions.

One illustration from the October 2005 Term is *Garcetti v. Ceballos.* Justice Kennedy’s opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, held that public employees’ speech “pursuant to their official duties” merits no constitutional protection at all from employer discipline, irrespective of the speech’s importance. This dispositive categorization of on-the-job speech as either “official duty” speech or “unofficial” speech is representative of formal juristic reasoning, viewing the judiciary’s role as merely analytically ascertaining the appropriate classification that then establishes whether any constitutional protection is to be afforded.

In this Article, I highlight *Garcetti*’s formalism and its implications. In Part I, I provide a short overview of formalism, discussing its vices and virtues. Part II then relates prior public employee speech jurisprudence as a contrast to the formalistic approach employed in *Garcetti.* I next discuss the difficulties of *Garcetti*’s approach in Part III, concluding that the Court’s use of rule-based adjudication in this particular context indicates a misguided preference for formalism. I conclude in Part IV by considering the extent to which *Garcetti* and other recent decisions signify the beginning of a modern era of constitutional formalism.

### I. A PRIMER ON FORMALISM

My references to “formalism” in this Article describe a jurisprudential philosophy that depends on an analytic methodology to formulate categorical rules from background policies that then govern future controversies. Formalism is both analytic and positivist in that it combines “a focus on certain, predictable treatment of existing positive law with an insistence on logical rule application.” Thus, a formalist prefers rules over standards—and the more clear-cut the rule, the better.

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9 Id. at 1960.
10 See id. at 1960–61.
11 See *infra* notes 15–29 and accompanying text.
12 See *infra* notes 30–152 and accompanying text.
13 See *infra* notes 153–210 and accompanying text.
14 See *infra* notes 211–21 and accompanying text.
15 KELSO & KELSO, *supra* note 5, § 3.1.
The formalist’s predilection for rules is perceived to be advantageous in ensuring predictability, uniformity, and transparency, as well as in limiting future judicial discretion. These benefits arise because the given rule’s application to a particular situation is supposed to be an analytical (or, to some, even a mechanical) process. When initially formulated, the rule should encapsulate the underlying policies in such a manner that allows the rule to act independently in future applications. The rule thereafter governs exclusively, even when the result obtained does not serve the original underlying policies that supported the rule’s formulation. The formalist believes any such over- and under-inclusiveness inherent in the rule is outweighed by providing a transparent methodology for reaching judicial holdings predictable to actors in advance of their conduct.

Modern constitutional formalists also praise the capacity of rules to constrain judicial discretion. Rules require the judiciary to maintain a limited role, without expressing “political or policy preferences” best left to the other branches of government. Avoiding the appearance of policymaking, it is contended, assists in preserving judicial legitimacy, ensuring that the Court exercises legal judgment, not disguised politics. Modern constitutional formalism is accordingly sometimes described as “democratic formalism” because one of its overarching purposes is “to ensure that judgments are made by those with a superior democratic pedigree.”

Not everyone is enamored with formalism, of course. Many contend that its advantages are illusory at best. While principles of judicial restraint may be served by interpreting constitutional provisions as “very specific, rule-like prohibitions,” such “rules cannot be judicially extended or modified to adapt to everchanging situations.” This difficulty is compounded because a court framing a rule decides a particular case or controversy with limited ability to predict how its decision will impact future cases. Rules are based on generalizations, which are all invalid to
some degree, so “perfect justice can only be achieved if courts are unconstrained by such imperfect generalizations.”

The formalist’s rules, then, have both advantages and disadvantages. No “sensible person” should thus suppose, as Judge Posner remarked, “that rules are always superior to standards, or vice versa.”

Even committed formalists like Justice Scalia admit a flexible standard is sometimes necessary.

Formalists, however, demonstrate a meta-preference for adopting rules as a normative choice, even when the employment of a standard may be more beneficial under the particular circumstances. A formalist typically defaults to a rule, eschewing an evaluation of the relative advantages and disadvantages of a standard in that situation, unless no workable rule is apparent. Such a commitment to employing rules for the sake of rules whenever possible is sometimes troubling, especially when the adopted rules do not work properly. A vague rule in one of the innumerable areas in which the query is a matter of degree invites arbitrary decision-making and ultimate failure.

This may indeed be the fate of the Garcetti distinction between “official duty” speech and “unofficial” speech developed in contravention of the Court’s prior public employee speech jurisprudence.

II. PUBLIC EMPLOYEE SPEECH RIGHTS FROM PICKERING TO GARCETTI

Justice Holmes famously remarked during his state judicial tenure that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

This viewpoint expressed the unchallenged dogma of that era—a public employee had no basis to object to restrictions placed on the exercise of constitutional rights as a condition of employment. Over time, however, a new vision emerged.

A. The Initial Pillars: Pickering and Connick

Constitutional protection for public employee speech originated in Pickering v. Board of Education. Under its reasoning, public employees do not surrender


26 Scalia, The Rule of Law, supra note 19, at 1177.


28 Scalia, The Rule of Law, supra note 19, at 1187.

29 Cf. Estin v. Estin, 334 U.S. 541, 541 (1948) (“[T]he eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree.”).


31 391 U.S. 563 (1968). Before Pickering, the Court had protected public employees’ associational rights under the First Amendment in a series of cases challenging loyalty oaths.
their precious First Amendment rights by virtue of government employment, even though the State’s interests as an employer “differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” As a result, the judiciary should “arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

This balance at first was ad hoc and fact dependent. *Pickering* explained that only “general lines” should be articulated for analyzing the competing interests as it was neither “appropriate [n]or feasible to attempt to lay down a general standard.” The Court examined several considerations that it determined were controlling in *Pickering*, including the impact of the speech on working relationships, the harm caused by the speech, the public’s interest in the speech, and the employee’s relationship to that issue. The Court first reasoned that the school teacher’s letter to the editor, which blasted the school board both for allocating excessive funds to athletic programs and for muting criticism of its proposals, was not directed toward a colleague and thus did not compromise close working relationships. Moreover, no evidence existed that the letter was actually detrimental or caused any public outcry. On the other hand, the letter addressed a legitimate matter of public concern within the expertise of teachers, the most likely members of the community “to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent.” Because such expertise was “vital to informed decision-making by the electorate,” the Court held in favor of the teacher, concluding that “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public.”

This broad balancing standard continued to govern the Court’s evaluation of public employee speech claims over the next fifteen years. Based on its holding in

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32 *Pickering*, 391 U.S. at 568.
33 Id.
34 Id. at 569.
35 See id. at 570–72. The Court cautioned that other factors might be controlling in other situations, due to “the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal.” *Id.* at 569.
36 Id. at 569–70.
37 Id. at 570–71.
38 Id. at 571–72.
39 Id. at 572.
40 Id. at 573.
Pickering, the Court concluded in Perry v. Sindermann that a junior college professor’s criticisms of the Board of Regents in his capacity as president of the Texas Junior College Teachers Association was not a permissible basis for his dismissal. Mount Healthy City School District Board of Education v. Doyle subsequently outlined a burden-shifting scheme for analyzing whether a public school teacher’s termination was predicated on his protected public speech belittling the political motivations behind the school board’s implementation of a dress code. In Givhan v. Western Line Consolidated School District, the Court explained that free speech protection under Pickering was not lost when public employees “communicate[d] privately with [their] employer[s]” instead of spreading their views publicly. In all these decisions, the Court adhered to the relatively ad hoc balancing considerations announced in Pickering, merely providing additional guidance on their application under the circumstances presented.

In Connick v. Myers, however, the Court remolded the Pickering balance to require a public concern analysis as a prerequisite to weighing the individual and governmental interests at stake. After being informed she would be transferred to a different division, Myers, an assistant district attorney in New Orleans, prepared a questionnaire soliciting the views of co-workers concerning the office's transfer

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41 408 U.S. 593 (1972).
42 Id. at 594–98. Because the district court had granted summary judgment to the Regents without the “full exploration” of the free speech issue, the Court remanded the case for consideration of whether his dismissal was in fact predicated on his exercise of protected First Amendment rights. Id. at 598.
44 Id. at 281–87. Because Pickering’s constitutional protection “is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct,” the Court reasoned that the employee must first show that his constitutionally protected conduct was a substantial or motivating factor for the adverse employment action before the burden shifts to the employer to demonstrate that it would have undertaken the same action “in the absence of the protected conduct.” Id. at 285–87. Because the lower courts had not applied this standard, the case was remanded for further proceedings. Id. at 287.
46 Id. at 415–16. Bessie Givhan, a junior high school teacher, was dismissed after complaining to her principal regarding school employment policies and practices that she believed were racially discriminatory. Id. at 412–13. The district court ordered her reinstatement after a bench trial, finding that her dismissal violated her First Amendment rights. Id. at 413. Yet the court of appeals reversed solely on the ground “that private expression by a public employee is not constitutionally protected.” Id. (quoting Ayers v. W. Line Consol. Sch. Dist., 555 F.2d 1309, 1318 (5th Cir. 1977)). The Supreme Court, though, disagreed that private employee speech fell entirely outside the ambit of the First Amendment, although it recognized “the Pickering balance . . . may involve different considerations in private expression,” especially as a result of the threat to an “employing agency’s institutional efficiency” during confrontations with an immediate supervisor. Id. at 415 & n.4.
48 Id. at 146.
policy, morale, confidence in supervisors, and other similar matters. Upon distributing this questionnaire to fifteen other attorneys, she was fired for insubordination. The Court viewed the Pickering right as limited to a public employee’s comments “as a citizen” on “matters of public concern,” reasoning that this limitation “reflect[ed] both the historical evolution of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.” The Court accordingly determined that if the questionnaire did not constitute “speech on a matter of public concern,” the district attorney’s office had carte blanche to manage its office without judicial oversight. The Court envisioned its role as “merely ensuring that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.”

The public concern query, the Court continued, depended on “the content, form, and context of a given statement, as revealed by the whole record.” Employing this analysis, the Court determined that Myers’s questions regarding office morale, the need for a grievance committee, and her co-workers’ trust in their supervisors were mere “employee grievances” not entitled to any constitutional protection from disciplinary actions. According to the majority, the only limited matter of public concern was whether the district attorney’s office pressured its employees to participate in political campaigns. But this “limited First Amendment interest” did not require the district attorney to “tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.”

The Pickering ad hoc guidelines thus evolved into a multi-step tiered balancing standard after Connick. First, only public employee speech “as a citizen” regarding “matters of public concern” had any possibility of protection from employer discipline. Assuming the employee’s speech satisfied this requirement, the next step consisted of balancing the state’s interests in providing efficient governmental services against the individual and public interests in the speech at issue. If the speech

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49 Id. at 140–41.
50 Id. at 141.
51 Id. at 143 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).
52 Id. (citations omitted).
53 Id. at 146.
54 Id. at 147.
55 Id. at 147–48 (citation omitted).
56 Id. at 147.
57 Id. at 148–49.
58 Id. at 154. The Court cautioned, however, that a greater showing of actual disruption would be necessary if the speech addressed a more pressing issue of public concern. See id. at 152.
59 Id. at 147.
was protected, the final inquiry was whether the speech was the basis for the adverse employment action, which allowed the government to attempt to establish that it would have undertaken the same action irrespective of the employee’s protected speech.\(^{61}\)

One issue the Court had not resolved, however, was the meaning of its statement that the speech had to be “as a citizen.” The lower courts soon tackled this issue on their own and developed a consistent governing legal standard, even though the indeterminancy of a standard occasionally led to conflicting results.

**B. Lower Courts and Job-Related Speech**

Almost contemporaneously with *Connick*, the Seventh Circuit, sitting en banc, considered whether speech related to governmental employment duties could be protected from retaliatory discipline under *Pickering*.\(^{62}\) Although the court determined that expression related to “peculiarly internal matters of governmental employment” was not ipso facto outside First Amendment protection, the court cautioned that the nature of such communications was nevertheless highly relevant to the *Pickering* balance.\(^{63}\) Speech related to “the substantive work to be performed,” the Seventh Circuit reasoned, implicated the state’s capacity as an employer to evaluate the employee’s job performance, and frequently fell outside the ambit of the public’s interest.\(^{64}\) Under this presumption, plaintiffs frequently lost cases in which their comments were made as part of their job, though a variety of rationales were employed depending on the facts and circumstances of the particular case.

1. A Matter of Public Concern

The initial hurdle for plaintiffs whose expression related to their employment duties was establishing that their speech embraced a matter of public concern.\(^{65}\) As *Connick* explained, protected speech must address a “matter of political, social, or other concern to the community,” whereas speech “as an employee upon matters only of personal interest” was not protected from an employer’s ire.\(^ {66} \) In those instances in which the discourse was only of personal concern to the employee, or was merely an employment gripe, the government prevailed.

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\(^{62}\) *Egger v. Phillips*, 710 F.2d 292, 316–23 (7th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 918 (1983), *overruled in part on other grounds* by *Feit v. Ward*, 886 F.2d 848, 851–56 (7th Cir. 1989). *Connick* was released slightly before *Egger*. *See id.* at 294 n.*. Although the Seventh Circuit did not revise its opinion to incorporate *Connick*’s holding, *Egger* noted that *Connick* “provides additional support for our decision.” *Id.*

\(^{63}\) *Id.* at 316.

\(^{64}\) *Id.*


\(^{66}\) *Id.*
For example, criticisms of co-workers' office misbehavior or their personal habits or traits, personal disputes with superiors, disciplinary actions meted out by superiors to subordinates, and complaints about staffing, promotions, salaries, and other employment policies were not typically considered to be matters of public concern by the courts. Such cases differentiated the classic "employee beef" from those remarks enriching the public's repository of knowledge regarding governmental operations. The key was whether the expression was made primarily in the speaker's capacity as an employee or as a citizen. Speech as an employee, being preoccupied with the employee's own circumstances, was not a matter of public concern, whereas speech as a citizen, addressing the functioning of the government on a broader civic basis, was.

This same focus on the primary purpose of the expression was also apparent in decisions considering a public employee's internal written or oral reports made pursuant to his or her official job duties. A standard memo or other writing that was a routine requirement of the job was not typically deemed commentary by citizens on matters of public concern under the Connick analysis. Courts usually reached a

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67 See, e.g., Barnes v. Small, 840 F.2d 972, 982–83 (D.C. Cir. 1988) (holding employee's discharge for writing letters alleging misbehavior by other office employees did not violate his free speech rights); Egger, 710 F.2d at 317.

68 See, e.g., Sparr v. Ward, 306 F.3d 589, 594–95 (8th Cir. 2002) (concluding employee's claims of harassment against a superior were not a matter of public concern when the charges predominantly appeared concerned with protecting her position); Gillum v. City of Kerrville, 3 F.3d 117, 121 (5th Cir. 1993) (holding police officer's complaints regarding his role in an internal investigation of his police chief were not protected from retaliation), cert. denied, 510 U.S. 1072 (1994).

69 See, e.g., Holland v. Rimmer, 25 F.3d 1251, 1255–56 (4th Cir. 1994) (determining agency director's discipline of subordinates was not a matter of public concern).

70 See, e.g., Tuttle v. Mo. Dep't of Agric., 172 F.3d 1025, 1034 (8th Cir. 1999) (holding employee's speech to superior about how company cutbacks would affect workers in his position did not satisfy the public concern requirement), cert. denied, 528 U.S. 877 (1999).


72 Cf. Sparr, 306 F.3d at 594–95 (concluding employee's memorandum was primarily motivated by concerns regarding protecting her job in course of disagreement with her supervisor rather than an expression of public concern about alleged harassment and mismanagement); Gillum, 3 F.3d at 121 (holding that although a violation of the law by a police chief was an issue of public concern, the police officer's dispute with his superiors predominantly concerned his role in an ongoing investigation); Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362–63 (5th Cir. 1986) (finding that a police captain's personal notebook with criticisms of his chief during a governmental investigation regarding the captain's harassment and favoritism in dealing with lower level employees merely constituted speech as part of a personal employment dispute rather than as a citizen on a matter of public concern), cert. denied, 479 U.S. 1064 (1987).

73 See, e.g., Gonzalez v. City of Chicago, 239 F.3d 939, 941 (7th Cir. 2001) (holding investigator's daily reports regarding police misconduct not speech 'as a citizen' on a matter
similar result for written reports specifically requested by a supervisor, oral conversations pursuant to specific supervisor approval, or written correspondence that appeared to articulate the employer’s viewpoint. Due to the government’s power to disseminate its own message when spending public funds to promote its policies, it could generally regulate the speech of its employees performing specifically assigned tasks. Under the Connick content/form/context analysis, such speech was in the form of a routine report, the content was specified or authorized by the employer, and the speech was made in the context of the employee’s typical job duties. Thus, in these cases, the employee was “acting entirely in an employment capacity” as he or she could have been fired for not speaking.

Yet only expression the court determined to be “purely job-related,” without any type of public motivation, and made internally as required by official job duties, came within this prohibition. Even though the “rote, routine discharge of an assigned duty” typically was not a matter of public concern, the courts viewed this as a guideline rather than a prophylactic rule. Simply because an employee’s job

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See, e.g., Buazard v. Meridith, 172 F.3d 546, 548–49 (8th Cir. 1999) (holding reports written by assistant chief of police at direction of his superior regarding the firings of two officers were an expression of a police officer rather than a concerned citizen).

See, e.g., Thomson v. Scheid, 977 F.2d 1017, 1021 (6th Cir. 1992) (concluding investigator’s oral discussions with his superiors about office procedures before he contacted federal officials with his supervisor’s approval were not citizen speech), cert. denied, 508 U.S. 910 (1993).

See, e.g., Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d 814, 817–18 (5th Cir. 2000) (relying on fact that memos from principal to school board were on school letterhead and signed in principal’s official capacity to support conclusion that her speech was not protected); Youker v. Schoenenberger, 22 F.3d 163, 166–67 (7th Cir. 1994) (holding that letter signed with stamped signature of employee’s boss was not protected speech when it was deemed to represent official position of tax assessor’s office rather than employee’s own views).

See, e.g., Urofsky v. Gilmore, 216 F.3d 401, 416 (4th Cir. 2000) (holding state could limit access to lewd materials on computers it owned).

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74 E.g., Buazard v. Meridith, 172 F.3d 546, 548–49 (8th Cir. 1999)
75 See, e.g., Thomson v. Scheid, 977 F.2d 1017, 1021 (6th Cir. 1992)
76 See, e.g., Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d 814, 817–18 (5th Cir. 2000)
77 See, e.g., Urofsky v. Gilmore, 216 F.3d 401, 416 (4th Cir. 2000)
78 Gonzalez, 239 F.3d at 941.
79 Id. at 941–42.
80 See, e.g., Buazard v. Meridith, 172 F.3d 546, 548–49 (8th Cir. 1999).
82 See, e.g., Gonzalez, 239 F.3d at 941–42; Oladeinde v. City of Birmingham, 230 F.3d
responsibilities might partially "overlap with motivations of a well-meaning citizen" did not preclude the existence of citizen speech. When the employee attempted to expose improper occurrences discovered while performing official duties, prepared reports voluntarily regarding issues of civic concern, or otherwise attempted to sufficiently inform an issue in order to assist the public in evaluating governmental conduct, the employee's speech met the public concern standard.

Such lower court decisions appeared to be supported by Connick. Connick's public concern analysis highlighted that Myers's questionnaire did not inform the community that the district attorney's office was not satisfying its obligations, bring to the public's attention any "wrongdoing or breach of public trust," or attempt to otherwise evaluate the district attorney's performance "as an elected official." These gaps appeared to be the key in Connick, not an exclusive focus on whether the expression was made in the scope of official duties. Indeed, in an earlier case in an analogous context, the Supreme Court acknowledged that a governmental employee's comments may be expressed simultaneously in both an employment and

1275, 1292 (11th Cir. 2000); Morris v. Crow, 142 F.3d 1379, 1382 (11th Cir. 1998); Cahill v. O'Donnell, 75 F. Supp. 2d 264, 273 (S.D.N.Y. 1999).

83 Delgado, 282 F.3d at 519.

84 See, e.g., Gonzalez, 239 F.3d at 941 (reasoning in dictum that investigator would have First Amendment right to expose a police cover-up because doing so "would be acting beyond his employment capacity"); Cahill, 75 F. Supp. 2d at 273 (suggesting that bringing to the public's attention a cover-up or institutional problems would be protected speech).

85 See, e.g., Morris, 142 F.3d at 1382 (opining that voluntary reports of public employees may constitute citizen speech); Hulbert v. Wilhelm, 120 F.3d 648, 653–54 (7th Cir. 1997) (protecting a county land management administrator's reports regarding wrongdoing in other government departments).

86 See, e.g., Branton v. City of Dallas, 272 F.3d 730, 740–41 (5th Cir. 2001) (determining an Internal Affairs officer's statements to an assistant city manager regarding alleged dishonest testimony of another police officer at a disciplinary hearing were matters of public concern despite the fact her position required her to report false testimony at official hearings); Oladeinde, 230 F.3d at 1292 (holding observations made in course of work as police officer involved matters of public concern when the officer's purpose was to illuminate possible governmental wrongdoing); Lee v. Nicholl, 197 F.3d 1291, 1295 (10th Cir. 1999) (concluding memo discussing traffic safety at a particular intersection authored by a highway department employee sufficiently informed the issue as to constitute a matter of public concern); Warnock v. Pecos County, 116 F.3d 776, 780–81 (5th Cir. 1997) (holding auditor, like other employees hired to make disinterested criticism of government, did not lose First Amendment protection when addressing a matter of public interest when his speech was discretionary and primarily made as an interested citizen); Kincade v. City of Blue Springs, 64 F.3d 389, 396–97 (8th Cir. 1995) (holding city engineer performing assigned work duty of advising board of alderman on construction and development projects was nevertheless speaking on a matter of public concern when he was not merely conveying information on behalf of others, but was articulating his own personal beliefs regarding wasteful expenditures and the potential dangers from the structural inadequacies of an ongoing dam project), cert. denied, 517 U.S. 1166 (1996).

citizen capacity.\textsuperscript{88} Thus, expressive activities within an employee's responsibilities still constituted a form of protected "political" speech when primarily designed to advocate governmental reform, criticize governmental policies, or otherwise inform the community on civic matters.

This approach is exemplified by the contrast between \textit{Morris v. Crow}\textsuperscript{89} and \textit{Taylor v. Keith}.\textsuperscript{90} \textit{Morris} held that an accident investigator's report regarding a traffic accident was not speech as a citizen on a matter of public concern when prepared under his "official and customary duties."\textsuperscript{91} The court reasoned that there was nothing in the record demonstrating that the investigator intended to expose any wrongdoing or do anything else other than his job of accurately reporting the accident's cause.\textsuperscript{92} On the other hand, \textit{Taylor} involved a police officer asserting in a written report and in oral comments to a supervisor that a fellow officer appeared to have a penchant for employing excessive force.\textsuperscript{93} His comments involved more than merely performing his own job duties—he was also trying to protect the community at large from a potentially rogue officer. Thus, his report incorporated protected statements made as a citizen on a matter of public concern.\textsuperscript{94}

Although this standard was fact-dependent and not always predictable, it served the value of providing employees that reported governmental corruption or wrongdoing discovered in the course of their employment duties some protection from retaliation. On the other side of the balance, because the employee's speech only merited safeguarding when the employee was intending to inform the public discourse, the government still had the leeway to conduct an efficient operation and dismiss incessant whiners and needlers. In addition, the government could also still transfer, discipline, or terminate whistleblowing employees under the balancing prong when necessary for effective governmental functioning.

2. The \textit{Pickering} Balance

If the employee cleared the public concern hurdle, the analysis proceeded to balance the state's interest in promoting efficient public services against the public and employee's interests in the speech.\textsuperscript{95} In job-related speech claims, the employer frequently possessed several potential weighty interests that were often dispositive.

\textsuperscript{88} See \textit{City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n}, 429 U.S. 167, 176 n.11 (1976) (noting teacher addressing an open board of education meeting "spoke both as an employee and a citizen exercising First Amendment rights").

\textsuperscript{89} 142 F.3d 1379.

\textsuperscript{90} 338 F.3d 639 (6th Cir. 2003).

\textsuperscript{91} \textit{Morris}, 142 F.3d at 1382.

\textsuperscript{92} \textit{Id}.

\textsuperscript{93} \textit{Taylor}, 338 F.3d at 645–46.

\textsuperscript{94} \textit{Id}.

All employers, including public employers, must assess the quality of their employees' job performance. When employee performance is inadequate, employers need to take corrective action for the good of the institution. Thus, if the employee's speech indicated his incompetence or unfitness for the assigned work responsibilities, the government employer's interest in efficiently providing services to the public routinely outweighed the expressive rights at issue. As one illustration, when a fire marshal submitted an arson report that omitted some standard analyses that contradicted his stated opinions, this suggested he was either incompetent or untrustworthy, both of which constituted strong grounds for dismissal.

In other situations, the employee's expression incorporated insubordinate, disruptive conduct providing a basis for discipline. For example, when a police officer refused a superior's demand to provide him with further information regarding an investigation before taking the matter to the district attorney, the insubordinate disruption to the efficient operation of law enforcement efforts outweighed the officer's free speech interest. Although employees had the right to speak out against their public employers' activities, employees did not have the right to refuse to cooperate or perform assigned, lawful duties in protest.

Likewise, employees lost free speech protection when they caused actual disruption to their office's efficient operations. Although criticism of an institution must typically be tolerated, criticism of co-workers with whom the employee had a close working relationship often generated the type of friction that the employer would be authorized to snuff out despite the employee's expressive rights. In some circumstances, the very manner of the speech established its disruptiveness. For instance, a security guard's comments at a maximum security prison regarding insufficient security personnel addressed a matter of public concern, yet her profanity-laced outburst regarding the security shortage in front of prisoners as the evening meal began

97 Egger, 710 F.2d at 317–18.
98 See Koch, 847 F.2d at 1450 (finding an official fire marshal report that omitted laboratory analysis suggesting possible accidental cause of the fire rather than concluding arson as opined in report was speech illustrative of either incompetence or untrustworthiness).
99 Oladeinde v. City of Birmingham, 230 F.3d 1275, 1293–94 (11th Cir. 2000); accord Berry v. Bailey, 726 F.2d 670, 676 (11th Cir. 1984) (holding deputy sheriff's refusal to dismiss charges against politically connected citizens was not protected speech because such statements "took place on the job and concerned Berry's performance of his official duties" and "threaten[ed] office discipline and harmony in the day-to-day close working relationships with immediate superiors necessary for efficient office functioning").
101 Koch, 847 F.2d at 1451–52.
was not only disruptive but potentially endangered both staff and inmates. In such cases, the employer’s interest clearly exceeded the relevant free speech interests.

Policy-making or other high-ranking government employees had even less of a shield. An inverse relationship existed, according to the Supreme Court, between the level of the employee’s authority or public contact and the constitutional protection afforded to his or her statements. For similar reasons authorizing politically motivated terminations of public officials either formulating or providing advice on policy matters, government employers retained substantial discretion in personnel decisions based on the speech of high-ranking employees. The government’s strong interest in the allegiance of high-level subordinates necessary to the efficient provision of governmental services typically trumped the expressive rights of the employee and the public.

Under the predominant standard before Garcetti, then, employees had a number of hurdles to overcome before triumphing on a retaliation claim for job-required or

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102 Cygan v. Wis. Dep’t of Corr., 388 F.3d 1092, 1101 (7th Cir. 2004).
103 Rankin v. McPherson, 483 U.S. 378, 390–91 (1987). In Rankin, a data entry clerk in the constable’s office, in the course of a discussion with her co-worker boyfriend on President Ronald Reagan’s policies on the day he had been shot, remarked that “if they go for him again, I hope they get him.” Id. at 380–81. In finding her speech protected by the First Amendment, the Court reasoned that, in cases where “an employee serves no confidential, policy-making, or public contact role, the danger to the agency’s successful functioning from that employee’s private speech is minimal.” Id. at 390–91.
106 See, e.g., Pool v. VanRheen, 297 F.3d 899, 908–09 (9th Cir. 2002) (noting government’s interest in preventing disruption is “magnified” for criticisms by a high ranking employee, such as a law enforcement commander reporting only to the sheriff); Bonds, 207 F.3d at 981–82 (holding governmental efficiency and workplace harmony interests authorized rescinding an offer to employee for a policy-making position based on his critical public comments regarding his prior governmental employer); Lewis v. Cowen, 165 F.3d 154, 164–65 (2d Cir. 1999) (holding lottery unit head could be terminated for refusing direct order to publicly support changes to lottery because of strong governmental interest in allegiance of high-level subordinates), cert. denied, 528 U.S. 823 (1999); Moran v. Washington, 147 F.3d 839, 849–50 (9th Cir. 1998) (concluding deputy commissioner’s responsibility to develop and implement community outreach program weighed against her free speech rights to denounce plan); Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 994 (5th Cir. 1992) (en banc) (Barksdale, J., plurality) (noting that policy-making or confidential employees’ First Amendment rights are more easily outweighed in the Pickering balance), cert. denied, 504 U.S. 941 (1992).
employment-related speech. While employees might clear some of these obstacles, they infrequently were able to surmount all of them and prevail on their claim. Victorious plaintiffs typically engaged in classic "whistle-blowing activities" in which a lower ranking employee established that he or she was disciplined for bringing to light public improprieties discovered and published as part of his or her job duties. In these situations, the courts often reasoned that the key aspect of any "as a citizen" requirement was whether the employee was motivated partially by a purpose to expose governmental faults rather than merely personal concerns regarding either working conditions or routine performance of job duties. A potential drawback, however, was that in most of these cases the employer could not prevail on a motion for summary judgment or a motion to dismiss, especially in cases in which the purpose of the speech was uncertain or the extent of any disruption controverted. But it seemed that the fundamental democratic value of expression at least tolerated such costs to ensure that true political speech, even when made on the job, was not silenced. Or at least that was the common understanding before Garcetti.

C. Garcetti v. Ceballos

Garcetti rejected any First Amendment protection from employer discipline for speech made pursuant to an employee's official duties. Eschewing the prevailing balancing standard governing such claims, the Court adopted a new categorical rule banning any constitutional safeguards.

The underlying dispute arose when Richard Ceballos, a deputy district attorney in Los Angeles County, was denied a promotion and reassigned to another position

107 See, e.g., Feldman v. Phila. Hous. Auth., 43 F.3d 823, 829–31 (3d Cir. 1994) (holding housing authority's internal audit director's detailed reports regarding governmental waste, inefficiency, and criminal activity required by his job responsibilities were protected speech); Rookard v. Health & Hosps. Corp., 710 F.2d 41, 46 (2d Cir. 1983) (holding nursing director's discharge for performing her duty to complain to inspector general about corrupt nursing practices at municipal hospital violated her constitutional rights).

108 See, e.g., Rodgers v. Banks, 344 F.3d 587, 599 (6th Cir. 2003); Guilloty Perez v. Pierluisi, 339 F.3d 43, 51–54 (1st Cir. 2003); Taylor v. Keith, 338 F.3d 639, 644–46 (6th Cir. 2003); Baldassare v. New Jersey, 250 F.3d 188, 196–97 (3d Cir. 2001); Dill v. City of Edmond, 155 F.3d 1193, 1202 (10th Cir. 1998). While Baldassare reasoned that its focus on the motivation of the employee and the value of the speech erased any distinction between an employee's expression "as an employee" or "as a citizen," 250 F.3d at 197, its result could also be defended under the same rationale employed by the other circuits.


111 Id. at 1961.
in a different courthouse shortly after authoring a memorandum and testifying in a pending criminal case that an affidavit supporting a search warrant contained critical misrepresentations. A defense attorney had requested that Ceballos review the questionable affidavit, which Ceballos agreed to do. After undertaking his investigation, Ceballos told his supervisors that the affidavit included false and misleading statements, and he prepared a disposition memorandum recommending dismissing the case. A meeting followed between the district attorney’s office and the sheriff’s department, which “allegedly became heated” as law enforcement personnel questioned Ceballos’s conclusions. Ceballos’s superiors subsequently elected to proceed with the prosecution. During a preliminary hearing, the defense called Ceballos as a witness, but, despite his testimony, the trial court overruled the defense’s challenge to the warrant. Thereafter, Ceballos claimed he endured retaliatory employment practices, which he alleged violated his First and Fourteenth Amendment rights.

The district court dismissed Ceballos’s claims on summary judgment based on various immunity grounds, but the court of appeals reversed. The Ninth Circuit reasoned that Ceballos’s disposition memorandum was “inherently a matter of public concern” when it was intended to expose wrongdoing and misconduct by other governmental employees. The mere fact that the memorandum was written in furtherance of Ceballos’s employment duties was not dispositive, the appellate court determined, when his whistle-blowing activities were “important to the orderly functioning of the democratic process.”

But according to the Supreme Court, the “controlling factor” was indeed that Ceballos’s “expressions were made pursuant to his duties as a calendar deputy.” In such situations, “when public employees make statements pursuant to their official duties,” the Court held that “the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

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112 Id. at 1955–56.
113 Id. at 1955.
114 Id. at 1955–56.
115 Id. at 1956.
116 Id.
117 Id.
118 Id.
119 Ceballos v. Garcetti, 361 F.3d 1168, 1170 (9th Cir. 2004), rev’d, 126 S. Ct. 1951.
120 Id. at 1174.
121 Id. at 1175–77. Judge O'Scannlain concurred specially, agreeing that prior Ninth Circuit precedent compelled the result, but urging that the court’s prior cases protecting routine, required, and job-related expression were erroneous. Id. at 1185 (O'Scannlain, J., concurring).
122 Garcetti, 126 S. Ct. at 1959–60.
123 Id. at 1960.
The Court's proffered rationales for this new prophylactic rule were somewhat wanting. The Court first discounted any possibility that "official duty" speech could be made both as part of the job and as a citizen on a matter of public concern—the personal motivation of Ceballos was deemed irrelevant since "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee."124 Because his speech owed its existence to his daily professional responsibilities and activities, the Court reasoned the district attorney's office had absolute discretion to discipline him based on his speech's content.125 Yet this reasoning cannot be reconciled with City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,126 which was ignored by the majority despite Justice Souter's protest.127 In that case, the Court had explained that speech could be made "both as an employee and a citizen exercising First Amendment rights,"128 a view incompatible with Garcetti's rigid categorization scheme between citizen speech and official duty speech.

The Court next opined that its result comported with its prior precedents' emphasis on the "societal value of employee speech," as employees still retained potential protection for "contributions to the civic discourse."129 This suggests that the policy supporting governmental employee speech rights is satisfied when employees have the opportunity to participate in public debate. However, this suggestion is severely under-inclusive in light of the Court's prior decisions. Although the Court had occasionally highlighted the loss to the public dialogue if governmental employee speech was silenced,130 the Court had never before held that public discourse was a necessary prerequisite for constitutional protection. Quite the contrary, the Court had previously protected employee speech made exclusively within the confines of the governmental office,131 and Garcetti indicated that such precedents still controlled.132 Thus, the Court's doctrine established a broader public policy supporting employee free speech rights apart from merely "participating in public debate."133

In a similar vein, the Court constructed a false analogy to the extent it urged its result was consistent with the underpinning theory of granting similar protections.

124 Id.
125 Id.
127 Garcetti, 126 S. Ct. at 1964–65 (Souter, J., dissenting).
128 Madison Joint Sch. Dist. No. 8, 429 U.S. at 176 n.11.
132 Garcetti, 126 S. Ct. at 1959 ("That Ceballos expressed his views inside the office, rather than publicly, is not dispositive.").
133 Id. at 1960.
to public employee speech and non-public employee speech. The Court speculated that public employees making statements outside the scope of their official duties are granted First Amendment protection because that is the same kind of conduct engaged in by private citizens, although no similar "relevant analogue" to non-public employees exists when public employees speak pursuant to their employment duties. But a critical difference always exists between any speech of a public employee and a private employee. If I was to be misguided enough to write a letter to the editor of the local newspaper with inflammatory accusations against my private law school employer similar to the letter Pickering authored, the First Amendment would not protect my job. While I certainly could not be censured by the government for my letter, I could be fired by my employer without implicating the Constitution, as the required state action would be absent. In contrast, the First Amendment protected Pickering both from censorship and from retaliatory discipline by his public employer. Thus, from a constitutional perspective, the protection public employees enjoy from employer retaliation for their speech is never analogous to private citizen speech. As a result, any comparison between public and non-public employee constitutional speech rights is perilous—the government simply does not "constitutionally have the complete freedom of action enjoyed by a private employer." The Court also highlighted "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing." But the scope of the First Amendment should not be limited merely because some state and federal statutes—subject to repeal or amendment—may afford similar protection. And in any event, as Justice Souter's dissent established, the various state and federal whistle-blower provisions create merely a "patchwork" protection rather than a robust, generally applicable public employee speech guarantee similar to the First Amendment. Thus, most of the Court's purported "rationales" for its decision are easily dismissed as either inconsistent with prior precedent or overstated. Two remain that are more substantial. First, the Court emphasized the heightened interests of employers in regulating an employee's work speech to ensure the efficient promotion of the public mission. Second, the Court indicated that judicial intervention to balance

134 Id. at 1960–61.
135 Id. at 1961.
136 See, e.g., The Civil Rights Cases, 109 U.S. 3, 11–17 (1883). While it is possible I might have some contractual or statutory protection (just as public employees sometimes have), the United States Constitution would offer no refuge.
139 Garcetti, 126 S. Ct. at 1962.
140 See Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996).
142 Id. at 1960 (majority opinion).
the competing governmental and individual interests was "inconsistent with sound
principles of federalism and the separation of powers." \(^{143}\)

Employers do retain a heightened interest in regulating expression related to
internal matters of governmental employment to ensure accuracy, efficient job per-
formance, and a collegial, productive work environment. Indeed, these strong gov-
ernmental interests had been safeguarded by the lower courts' application of the
*Pickering* balance for decades before *Garcetti*. \(^{144}\) As discussed previously, the em-
ployer prevailed in the vast majority of the cases involving expressive commentary
within the employee's professional duties, often as a result of the employer's unique
interests in this context. \(^{145}\) Thus, there is no disputing the powerful governmental
interests at stake.

But what is disputable is whether these interests required an absolute prophylactic
rule or could instead be accommodated by the balancing standard employed by the
lower courts before *Garcetti*. In other words, the real issue in *Garcetti* was not
whether the government possesses a vital interest in employee speech made as part
of the job—there is no dispute that it does—but whether that interest should bar any
possibility of free speech rights instead of continuing to be an often dispositive factor
in the balancing equation. The conflicting opinions in *Garcetti* can thus be synopsized
in terms of whether a rule or standard is more appropriate in this situation.

The majority indicated that its rule was preferable under federalism and separation
of powers principles. \(^{146}\) The Court opined that the judiciary would be intruding on
the state, local, and federal executive spheres through "oversight of communications
between and among government employees and their superiors in the course of offi-
cial business." \(^{147}\) According to the Court, the appropriate level of deference neces-
sitated judicial non-intervention in the daily conduct of governmental operations. \(^{148}\)

Yet curiously, the Court indicated that such deference was not warranted regarding
public employers' descriptions of an employee's duties. \(^{149}\) Although the Court
refused to announce a framework for defining the scope of an employee's occupa-
tional responsibilities, it rejected any suggestion that employers can rely on "excess-
sively broad job descriptions" to limit free speech rights. \(^{150}\) The Court proclaimed
that a listing of a particular task in a formal job description, which often does not
resemble the employee's actual duties, is "neither necessary nor sufficient" to con-
stitute official duty unprotected speech. \(^{151}\) Instead, the query "is a practical one." \(^{152}\)

\(^{143}\) *Id.* at 1961.

\(^{144}\) *See supra* Part II.B.

\(^{145}\) *See supra* Part II.B.

\(^{146}\) *Garcetti*, 126 S. Ct. at 1961.

\(^{147}\) *Id.*

\(^{148}\) *See id.*

\(^{149}\) *Id.* at 1961–62.

\(^{150}\) *Id.* at 1961.

\(^{151}\) *Id.* at 1962.

\(^{152}\) *Id.* at 1961.
By entrusting the underlying classification to a "practical" judicial query, however, the Court undercut the stated advantages to its prophylactic rule. While the virtues of rule-based adjudication were thus abridged, the Court nevertheless adhered to a categorical distinction. Favoring such a rule, even when its advantages were not apparent under the circumstances, is the hallmark of formalism.

III. GARCETTI'S MISGUIDED FORMALISM

The individualized circumstances surrounding a particular case sometimes favor adopting a rule and sometimes support announcing a standard. Rules are preferable when the decision must be applied by numerous actors facing common or frequent situations, predictable future outcomes are critical, the court has the necessary information to produce a workable rule, and the rule may assist the judiciary from succumbing to political pressure. On the other hand, rules may be hazardous when these circumstances do not exist, especially when the court lacks the necessary information to produce a workable rule that will ensure predictability in future decisions.

The desirability of the categorical rule adopted in Garcetti is not apparent under these case-by-case factors. Rather, these criteria indicate that the preferable course of action would have been to retain the standard the lower courts had been following for decades, while perhaps re-emphasizing the importance of the government's interest in this particular context.

A. The Infinite Variety of Public Employee Speech Cases

Public employee speech cases defy simple rule-based categorization because of the almost limitless circumstances in which they arise. As Pickering cautioned, rules are unavailing as there are an “enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal.” The Supreme Court’s decisions since that time have only confirmed the prescience of this original caution. The Court has addressed employee speech rights arising from writing and publishing a letter to the editor, orally providing the substance of an internal school memorandum to a local radio station, privately complaining of racial discrimination to a superior, preparing an internal office questionnaire regarding employee morale, expressing to a co-worker hope for a successful presidential...

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116 See id.
118 Id. at 569-72.
assassination,\textsuperscript{160} accepting honoraria for articles and speaking engagements,\textsuperscript{161} and selling sexually explicit videotapes on eBay.\textsuperscript{162}

And that is merely a slice from those cases that reached the pinnacle of the judicial system, without even mentioning the hundreds of other situations confronted in the lower federal courts over the last forty years. A sampling of only a handful of these decisions from the last three years include a college basketball coach fired for complaining about social opportunities for his players in Arkansas during a press conference discussing recruiting,\textsuperscript{163} a public school teacher terminated for belonging to a group advocating sexual relationships between men and boys,\textsuperscript{164} university students and teachers barred from contacting prospective athletes regarding a school mascot controversy,\textsuperscript{165} and police officers and fire fighters discharged for entering a racist parade float mocking African Americans.\textsuperscript{166} Such an endless variety of scenarios precludes any contention that these cases involve "common" situations. Instead, there is a need for flexibility to account properly for the vast disparities in these cases.

The Court would likely respond that it did not attempt to adopt a rule for all these situations but merely for those cases in which the employee's expression is made as part of his or her professional duties. Yet the difficulty here is that this category may still be exceedingly broad. Indeed, a relatively expansive interpretation has been favored so far by two circuit courts. These courts held that a borough manager was acting within the scope of his official duties when he relayed employee complaints to the borough council,\textsuperscript{167} and that an on-duty, uniformed police officer was within her professional responsibilities when telling her superiors after a meeting that she disagreed with the police chief's plan.\textsuperscript{168} Thus, the Court's rule still might cover a myriad of circumstances.

I say "might cover" advisedly, which segues into another problem with the Court's rule—it has not truly assisted predictability. Although the result may be predictable in cases in which it is undisputed that the speech was made pursuant to the employee's official duties, the Court has merely shifted the uncertainty to the scope of the underlying categorization. Rather than the relatively stable balancing

\textsuperscript{163} Richardson v. Sugg, 448 F.3d 1046, 1062–63 (8th Cir. 2006).
\textsuperscript{165} Crue v. Aiken, 370 F.3d 668, 678 (7th Cir. 2004).
\textsuperscript{166} Locurto v. Giuliani, 447 F.3d 159, 178–83 (2d Cir. 2006).
\textsuperscript{167} Hill v. Borough of Kutztown, 455 F.3d 225, 242 (3d Cir. 2006).
\textsuperscript{168} Mills v. City of Evansville, 452 F.3d 646, 648 (7th Cir. 2006). The Seventh Circuit reached the opposite conclusion just one month later in Fuerst v. Clarke, 454 F.3d 770 (7th Cir. 2006), holding that the deputy sheriff's duties at issue did not include commenting on the sheriff's decision to hire a public relations officer, a statement which was made in his capacity as a union representative. Id. at 774.
process that had become familiar in these cases, the lower courts are now confronted with an inexact classification prerequisite that is already generating unpredictable results.

B. The Indeterminancy of the Garcetti Rule

The core advantage of rules is predictability. If a rule does not provide predictability, it is not of much value. Although the Garcetti rule superficially promotes predictability by adopting a categorical prerequisite to the balancing process, its distinction between “official duty” and non-official public employee speech is not self-evident.

The Court’s discussion offers little illumination. The Court did not even provide consistent terminology for the classification it was creating. While most of the Court’s references to the classification employed either the terms “official,” “professional,” “employment,” “job,” or “assigned” to modify either “duties,” “responsibilities,” “activities,” “communications,” or “capacity,” the Court alternatively described the category as encompassing an employee’s “work product” or communications between employees “in the course of official business.” These various shades indicate different potential meanings, and it is not clear which one the Court intended, especially because it declined to specify the appropriate framework. Instead, the Court merely cautioned that the inquiry “is a practical one” that is not necessarily controlled by a written job description.

But a “practical” query, without any guiding standard, and based on conflicting underlying policies, does not assist predictability. A hypothetical illustrates the difficulty. Suppose Agent X is employed by the FBI as an investigator in a special unit that does not routinely investigate other members of the Bureau. However, Agent X’s observations while performing his job duties make him suspicious that another agent is engaging in unlawful activity. On his own, he undertakes a preliminary investigation that confirms his suspicions and then decides that he needs to report the other agent’s activities. Indeed, like all federal employees, he is required to “disclose waste, fraud, abuse, and corruption to appropriate authorities.” Does he have any First Amendment protection if he does so? Does it depend on whom he informs? Would he have any protection if he went public? If you were his attorney, what would you say?

The only honest answer would be, “Gee, X, I have no idea.” The first predicament would be to articulate some standard to guide the query before even trying to answer his questions. At least three very different approaches are feasible.

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170 Id. at 1960–61.
171 Id. at 1961–62.
The first possibility would be to interpret *Garcetti* narrowly—in its own terms, to speech that "the employer itself has commissioned or created." Ceballos had to prepare a disposition memo in every case recommending how to proceed in accordance with his duties as a deputy district attorney. If he had not produced his memorandum, he certainly could have been disciplined. As a result, he likewise is subject to discipline for the memo’s contents. Under this view, though, only speech that is *required* by the job would be outside the ambit of the *Pickering/Connick* balance. If an employee has discretion whether to make the comments or pursue the investigation, the *Garcetti* bar would not apply. Thus, for instance, an athletic director reporting on his own initiative an investigation about a hazing incident involving football players would not be speaking pursuant to his "official duties."

Employing this narrow approach, which has been favored by some courts, Agent X probably would not be speaking pursuant to his "official duties" in reporting his concerns about the other agent. Agent X undertook the investigation on his own initiative rather than as part of the daily tasks he was to perform in his special unit. The only remaining issue is the general federal employee duty to disclose "abuse." Because this is an "excessively broad job description[]" applying to all federal employees, this regulation might fall within the Court’s caution regarding "[f]ormal job descriptions" not being controlling. On the other hand, it is possible that in this particular instance (as X is an FBI agent), this general duty applies with special force to him (especially if specific FBI regulations supplement the general command), making it a requirement of his job to report any unlawful activity at the risk of termination. In any event, the resolution of Agent X’s claim would depend on his punishment for not speaking to his superiors.

Although this narrow approach has several advantages, as it comports with *Garcetti*’s holding (and most pre-*Garcetti* lower court decisions), offers a relatively

174 *See* id.
175 *Cf.* id. ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”).
176 *See* Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 167 n.3 (2d Cir. 2006) (concluding, while *Garcetti* was pending, that *Garcetti*’s holding would not impact the case as the athletic director’s investigation and reports regarding hazing incident were “not made strictly pursuant to his duties as a public employee”); *cert. denied*, 127 S. Ct. 382 (2006).
177 *See*, e.g., id.; Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006) (“If the public employee’s *speech* was required by his or her job, then *Garcetti* applies and the statements are not protected speech. If the speech, however, is not specifically job-related, then the statements are reviewed under a traditional *Connick* analysis.”); *cf.* Kodrea v. City of Kokomo, 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (holding fact issue existed regarding whether supervisor of seasonal employees had an official duty to report employee misconduct when it was not part of the "core function" of his position).
definitive standard, and corresponds with *Garcetti*’s employer-created speech rationale, it may conflict with another concern the Court articulated. The Court feared committing the judiciary to an “intrusive role” overseeing “communications between and among government employees and their superiors in the course of official business.”179 Due to this concern, other courts have adopted a broader definition, categorizing any employee expression related to the tasks performed on the job as official duty speech.180

Under this broad approach, Agent X’s report would not be safeguarded by the First Amendment because it addressed matters that he investigated while he was employed by the government. It would not matter whether he made the report privately to his superior or publicly—the speech would be pursuant to his “official duties” when it concerned his daily investigative tasks.181

While this view would generate a clear holding in Agent X’s case, its application in other contexts would be troublesome, especially considering *Garcetti*’s reliance on *Givhan*.182 *Givhan* protected a public school teacher’s complaints to her principal regarding the school’s racial discrimination in hiring teachers,183 which suggests that teachers act outside their job responsibilities when commenting on hiring decisions. The conflicting results between Agent X’s hypothetical case and *Givhan* depend on different conceptions of the “practical” inquiry into the daily tasks of the employee in each situation. The resolution of this query is not always evident. As an illustration, would it be within the daily duties of a nuclear scientist employed by the government to complain about a colleague’s handling of radioactive materials?184 The answer would depend on the “practical” view as to what a nuclear scientist does, which is not readily apparent. Thus, this approach would not necessarily assist predictability.

Moreover, this standard is likely too encompassing in light of other aspects of *Garcetti*. The Court assumed that if Ceballos had “gone public” with his concerns, his speech would have received some First Amendment protection.185 This indicates that Agent X’s report deserves some constitutional protection if made publicly, which would contravene the expected result under an analysis merely predicated on speech related to the tasks that the employee performs on a daily basis.

179  *Id.* at 1961.
180  See Boykin v. City of Baton Rouge, 439 F. Supp. 2d 605, 609–11 (M.D. La. 2006) (holding diversification report of human resources director was speech within his official duties even though it was made public).
182  Cf. *id.* at 1959.
184  *See Garcetti*, 126 S. Ct. at 1968 (Souter, J., dissenting).
185  See *id.* at 1961 (majority opinion). Additionally, Justice Kennedy’s majority opinion did not challenge the assertion in Justice Souter’s dissent that the Ninth Circuit on remand could consider whether other public speech Ceballos made regarding his concerns, such as a talk to the Mexican-American Bar Association, satisfied the *Pickering/Connick* standard. See *id.* at 1972–73 (Souter, J., dissenting).
A compromise position between the narrow and broad views might analyze whether disciplining the employee would silence his or her ability to participate in public affairs. This approach finds support in the Court’s assertion that the “theoretical underpinnings” for public employee speech rights hinge upon an “analogue to speech by citizens who are not government employees.” Such a comparison would consider whether the employee’s speech is similar to non-public employee expression regarding the government.

In Agent X’s case, the determination would focus on whether a private citizen could engage in similar speech reporting observations about an agent’s questionable behavior. A private citizen witnessing an agent’s suspicious conduct might inform the media, his or her legislator, the President, or perhaps a United States Attorney. So if Agent X makes a similar report to the public, or to an agency or official outside his chain of command, he will be speaking as a citizen rather than merely as an employee, implicating First Amendment protections.

On the other hand, if Agent X reports to his immediate supervisor or within his chain of command, this theory contends he will be communicating as an employee because citizens who are not government employees do not engage in this type of speech. But there is an obvious snag here, highlighting the peril in comparing the disparate speech rights of public employees and private citizens. Isn’t it somewhat likely that a private citizen would indeed make a report of suspicious agent behavior to the FBI director? Or perhaps to the local FBI supervisor? Because citizens can make this type of report, shouldn’t Agent X likewise be protected if he reports to the director or his local supervisor? But if that is the case, shouldn’t Ceballos’s communications to his superiors in his disposition memorandum regarding police misconduct also be protected? Or is the dispositive difference merely a matter of form, as a citizen could not have written a disposition memorandum, but could have informed higher ranking district attorneys in some other fashion?

Such questions, concerning a fairly routine retaliation scenario, cannot be answered with certainty, which is supposed to be the very hallmark of formalism. Agent X has no guidance on how to proceed, much less make an accurate prediction of the final result. It is not even certain which general approach should be employed, as all of them have problems and are plagued with uncertainty.

And it only gets worse if we apply the Court’s “official duty” categorization to other situations that have arisen in past cases. What happens if an employee is retaliated against for truthfully testifying—as his or her job requires—during a trial?

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186 Id. at 1961 (majority opinion).
187 Cf. Freitag v. Ayers, 468 F.3d 528, 545–46 (9th Cir. 2006) (holding that, while female correctional officer’s complaints regarding inmate sexual harassment to her superiors were within her job responsibilities, her letters to a state senator and an independent state agency were outside her official duties because the right to make such complaints was “guaranteed to any citizen in a democratic society”).
or perhaps in front of an administrative board? Is an employee, who makes a report of sexual harassment or racial discrimination in accordance with a public employer's mandatory policy, speaking as an employee or a citizen? Is a court administrator who complains internally of a judge denying opportunities to those not working on the judicial re-election campaign provided any protection by the First Amendment? What about a public employee using a grievance committee to air complaints regarding politically motivated and allegedly corrupt promotions in the department? How about a public employee reporting a theft to the police, or a county employee reporting the illegal burning of toxic materials by another county department to the state?

In all of these pre-Garcetti cases, the courts concluded that the employees' expression addressed a matter of public concern and the analysis proceeded to the Pickering balance. Now matters are more confused. The prerequisite question of whether citizen speech is at issue is highly uncertain, even before reaching the balancing process. Garcetti has merely compounded existing problems, not assisted predictability. In many cases, public employers' motions for summary judgment predicated on Garcetti's principles are being denied as the courts reason that fact-finding is necessary to make the practical inquiry it counsels. This result will only become more prevalent when the judicial system disposes of the pending cases in which the plaintiffs admitted or alleged before Garcetti's issuance that their speech was made pursuant to their official employment duties.

Properly formulated rules often do assist predictability. But when the application of the rule depends on an underlying categorization that is more ambiguous than the prior standard, the rule cannot serve its purposes.

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190 Cf., e.g., Hensley v. Horne, 297 F.3d 344 (4th Cir. 2002); Wilson v. UT Health Ctr., 973 F.2d 1263 (5th Cir. 1992), cert. denied, 507 U.S. 1004 (1993).
192 Cf. Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990).
194 Cf. Hulbert v. Wilhelm, 120 F.3d 648 (7th Cir. 1997).
196 Cf. Garcetti v. Ceballos, 126 S. Ct. 1951, 1961 (2006) (noting Ceballos conceded he authored his disposition memo pursuant to his employment duties); Hill v. Borough of Kutztown, 455 F.3d 225, 242 (3d Cir. 2006) (relying on allegations of borough manager that he was acting within the scope of his official duties).
C. Minimal Information for Rule Formulation

The underlying categorization difficulty stems in large measure from the Court's lack of information to formulate a meaningful topology. A clear, preexisting legal analogy does not exist to assist in classifying a public employee's speech as either made within or outside his or her official duties. As a result, the Court struggled to provide any meaningful guidance when a survey of the varied duties of federal and state officers without briefing on the issue would have stretched the Court's institutional resources and surpassed its appropriate judicial function.

The Court's restraint in not formulating the underlying standard when the issue had not been raised in the case is understandable. As the new Chief Justice remarked, "If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more." Nonetheless, a tension exists between a minimalistic adjudicative philosophy and formalism. A formalist's rules must apply to all, not merely the litigants before the Court. But in some cases, such as Garcetti, the Court does not have the resources to establish a framework for applying its rule that will achieve the benefits of predictability, certainty, and transparency that are the hallmarks of analytic positivist reasoning. In such situations, the Court should at least consider the effect its rule would have on previously decided cases to evaluate the likelihood

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197 A public employee's official duties are relevant in other areas of the law, but the underlying policies are so removed that it is hard to draw a comparison. For example, official duties are relevant to immunity issues, such as those arising under the federal officer removal statute, which authorizes federal officers to remove certain state court actions related to the performance or discharge of their official duties. See 28 U.S.C. § 1442 (2000). Although some potentially relevant case law exists under this statute, see, e.g., Maryland v. Soper (No. 2), 270 U.S. 36, 39–44 (1926) (holding four federal prohibition agents were not in the course of their official duties when they allegedly testified falsely to the state coroner about a mortally injured man they discovered in the road while they were driving to report an illegal still to their superior), the policy here is to protect federal officers from state courts by having official immunity decisions tried in federal court. See Jefferson County v. Acker, 527 U.S. 423, 431 (1999).


that benefits from rule-based adjudication may accrue in the future. Without the necessary information regarding its impact, the formulation of a rule is hazardous.

The Court became ensnared in this trap in *Garcetti*. An analysis of earlier public employee speech decisions reveals their variety and the difficulties the Court’s new classification scheme will cause. The Court should have acknowledged this concern and realized that a rule would do more harm than good, especially because a rule here is not necessary for judicial independence.

**D. Politics and Judicial Restraint**

Rules can be beneficial in insulating the judiciary from politics and ensuring judicial restraint. A rule is frequently envisioned as the product of reasoned judgment rather than mere judicial will. Due to the analytical or mechanical process in applying the rule in future cases, judges can maintain that even controversial decisions were preordained and not a substitution of their desires for the will of the people. Rules also typically countenance a more limited judicial role in relationship to the democratically elected branches by providing predictable up-front guidance. Yet these benefits are not apparent in all cases, including those involving public employee expressive activity.

Public employee speech cases rarely involve the public controversy prevalent in other constitutional areas. Instead, such speech usually receives little or no public attention. And in those few instances when public employee speech has raised the community’s ire, such reaction is frequently a relevant factor in the *Pickering* balance due to its impact on the efficient provision of governmental services. For example, the courts should consider the public’s outrage over a school teacher advocating sexual relationships between men and boys, as this impacts the teacher’s effectiveness in the classroom. Likewise, a community’s concerns when police officers publicly lampoon minority citizens affects the department’s mission to serve and protect the entire community. Rules cannot serve to sequester the judiciary from such public outcry when these concerns properly inform the analysis.

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199 See *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990) (noting the Court’s “duty, in deciding [a] case, to consider whether our decision will create litigation and uncertainty” in other situations that would arise in the future).

200 See supra Part III.B.

201 See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 380–91 (1987) (plaintiff’s speech in controversy was made to a sympathetic co-worker in an office with only one other person in the room); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570–71 (1968) (plaintiff’s opinion letter to the newspaper received little to no reaction except from the school board that fired him).


Even if the judiciary desired insulation from political pressure, *Garcetti*’s rule does not advance this purpose. Instead, *Garcetti* removes certain on-the-job speech from any First Amendment protection. Because such speech made pursuant to work duties is typically much less likely to receive public attention, the Court’s rule has done just the opposite of establishing a protective judicial shield. Instead, the Court’s rule precludes judicial involvement in those types of cases in which the public is typically indifferent and inserts the judiciary into more public disputes under a balancing standard that requires weighing of competing interests.

*Garcetti*’s rule also does not fit within the prototypical judicial restraint model. The essential premise of judicial restraint is that the power of unelected judges in a democratic society must be tethered in favor of those persons accountable to the electorate. As a result, the judiciary should tread cautiously when overriding the decisions of popularly elected officials, whether in the legislative or executive branch.

But many public employee speech cases do not involve popularly elected officials, especially in those situations in which the employee speaks pursuant to his or her job duties. Rather, a governmental bureaucrat or lower-level official is making at least the initial and often the final disciplinary determination. Because these individuals are not subject to electoral accountability, the political process does not afford a practical remedy. The judiciary’s involvement in these cases simply does

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206 See, e.g., *Garcetti*, 126 S. Ct. at 1972 & n.14 (Souter, J., dissenting); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 362–64 (5th Cir. 2000).

207 Although there is a possibility that the electorate will hold an elected official accountable for the actions of an unelected official subject to his or her control, this occurs infrequently and usually only in cases of extreme misconduct or ineptitude rather than when a whistle-blower is disciplined.
not interfere with the expressed will of the people to the same extent as invalidating actions by legislators and policymaking executive officials.

All of this leads to the conclusion that *Garcetti* adopted a prophylactic rule in a situation in which the individualized circumstances supporting rule-based adjudication were missing. In the absence of the case-specific benefits for employing a rule, the decision can only be justified under a meta-preference for rules over standards. Such a preference, as discussed previously, is associated with the formalistic style of judicial reasoning, as is *Garcetti*’s underlying categorization scheme. *Garcetti* is thus best understood as a product of formalistic constitutional interpretation.

IV. A MODERN ERA OF CONSTITUTIONAL FORMALISM?

Does *Garcetti*’s preference for a rule, when case-specific factors favored a standard, indicate the beginnings of a modern era of constitutional formalism? Obviously, one case does not signify an era. But hints from the October 2005 Term, as well as the Justices’ earlier writings, portend the emergence of five votes employing formalism’s precepts in certain areas of constitutional discourse.

Justices Scalia and Thomas are committed formalists, indicating a preference for rules across all aspects of the Court’s constitutional doctrine. Both frequently extol the virtues of rules, especially the judicial restraint inherent in rule-based adjudication. Both Justices would undoubtedly welcome a new era of constitutional formalism founded on principles of originalism and restraint.

Although the extent of their conviction is still uncertain, Chief Justice Roberts and Justice Alito also appear to be attracted to formalism. In the closely divided opinions from the October 2005 Term, these two Justices frequently joined Justices Scalia and Thomas in adopting positions consistent with formalism’s principles.
Assuming this trend continues, committed formalists will occupy four seats on the Roberts Court.

Of course, four votes is not enough, as the Four Horsemen discovered during the New Deal, and this potential formalism bloc will need another vote. The most likely source for the vote on the current Court is Justice Kennedy, the author of *Garcetti*, who has demonstrated some affinity for formalism in certain areas of constitutional law. However, in other doctrinal areas, Justice Kennedy has disavowed formalism's precepts. Thus, Justice Kennedy might be described as a "doctrinal formalist" who favors formalism when interpreting certain specific constitutional guarantees.

For example, Justice Kennedy has been particularly enamored of formalism in the free speech context, *Garcetti* being merely the most recent of many examples of Justice Kennedy favoring categorical rules in this area. State sovereignty and dissenting) (employing similar formalistic arguments regarding scope of Geneva Convention); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2678–82 (2006) (holding failure to notify a foreign national’s consulate of arrest does not require suppression under the exclusionary rule as it was unlikely that the remedial purposes of the rule would be served with any frequency); *Rapanos v. United States*, 126 S. Ct. 2208, 2220–26 (2006) (Scalia, J., plurality) (adopting formalistic perspective on statutory construction issue in the Clean Water Act); *Samson v. California*, 126 S. Ct. 2193, 2198–2202 (2006) (upholding the constitutionality of all suspicionless searches of parolees); *Hudson v. Michigan*, 126 S. Ct. 2159, 2163–68 (2006) (holding exclusionary rule inapplicable to knock-and-announce violations). *But see* *Jones v. Flowers*, 126 S. Ct. 1708 (2006) (holding, in an opinion by Chief Justice Roberts over the dissent of Justice Thomas, that the circumstances of the particular case must be examined to ascertain if due process requires additional efforts to inform the property owner when a tax sale notice is returned unclaimed).

See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 214–38 (1993) (discussing the frequent dissents of the Court’s four most conservative Justices during the New Deal era).

The departure of one or more Justices on the Court would obviously create a different dynamic.

See KELSO & KELSO, supra note 5, § 12.A.1 (describing Justice Kennedy as a natural law judge with an affinity for the formalist style of interpretation).


federalism are other doctrinal areas in which Justice Kennedy typically expresses a formalism preference. On the other hand, Justice Kennedy’s substantive due process decisions are often the antithesis of formalism. Thus, it appears that Justice Kennedy believes that certain clauses of the Constitution countenance a formalistic perspective, whereas others do not. In those doctrinal areas in which Kennedy’s formalism preference dovetails with the judicial philosophy of the formalism four, the Roberts Court may presage a rebirth of at least a limited constitutional formalism that could be termed “doctrinal formalism.”

This doctrinal formalism may even extend to other areas outside Justice Kennedy’s preferences. In certain criminal procedure decisions, Justices Stevens, Souter, and Ginsburg have joined Justices Scalia and Thomas in adopting a formalistic perspective to vindicate the rights of criminal defendants. Although these other Justices are not themselves committed formalists, they are not opposed to rule-based adjudication when it comports with their more instrumentalist philosophy.

Formalism may thus indeed be long lived on the Roberts Court, though it will not be the pre-New Deal Court’s pervasive formalism predicated on natural law precepts. Instead, it appears that a more limited doctrinal formalism in certain contexts is emerging that formulates rules designed in part to further judicial deference to the political institution perceived to be in the best position to make the underlying judgment. This emerging doctrinal formalism is evident in Garcetti, which sacrificed the traditional balancing of public employee speech rights and governmental interests in favor of a rule which purports to defer to the other governmental institutions. Yet in adopting this rule, the Garcetti Court unwittingly demonstrated the potential dangers of formalism’s meta-preference for analytical adjudication.


