NOTES

Is Social Media the New Era's "Water Cooler"? #NotIfYouAreAGovernmentEmployee

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Current Free Speech doctrine does not sufficiently protect government employees' First Amendment rights. There are two major flaws in the test implemented by the Supreme Court in order to find whether the First Amendment protects an employee. First, the Garcetti test, where a government employee loses First Amendment protection if her speech is pursuant to her official duty, is inadequate, overbroad, and should be done away with completely – or at the least interpreted more narrowly. Secondly, the Pickering balancing test is less of a balancing and more of a prioritization of the government's interests and should be interpreted to harmonize both the employee and the government's interests.

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INTRODUCTION

"It would be a grave and ironic loss if the emergence of social media took us back to 1892 and Justice Holmes' view that people forfeit the First Amendment rights they enjoy in their private lives when they go to work for the government."[1]

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[1] Christopher Dunn, *Column: Social Media, Public Employees, and First Amendment (New York Law Journal)*, NYCLU (Apr. 3, 2013), http://www.nyclu.org/oped/column-social-media-public-employees-and-first-amendment-new-york-law-journal.

In 1892, Justice Oliver Wendell Holmes rendered his decision in the case of *McAuliffe v. Mayor of New Bedford*, in which he expressed his view that the free speech rights of government employees should be insignificant or nonexistent, namely that the petitioner in that case "may have a constitutional right to talk politics, but [had] no constitutional right to be a policeman."[2] It was impossible for him to predict that social media would revolutionize the way, manner, and audience of public employees' speech, specifically as it relates to criticism of their employers. The First Amendment was written for the purpose of limiting the government's ability to censor the people's speech and to promote democracy.[3] In practice, however, the First Amendment acts as a limit on government employees' speech, especially if their speech is expressed through social media.

Current free speech doctrine does not sufficiently protect government employees' First Amendment rights. In order for an employee's speech to be protected, it must pass a three part test: 1) the speech must not be made by a public employee "pursuant to their official duties;"[4] 2) the speech must be on a matter of "public concern;"[5] and 3) the employee's interest in the speech must outbalance the government's interest in censoring the speech.[6] There are two major flaws in the test implemented by the Supreme Court in order to find whether the First Amendment protects an employee. The first part of the test, implemented by *Garcetti v. Ceballos*, where the government employee loses First Amendment protection if her speech is pursuant to her official duty,[7] is inadequate, overbroad, and should be done away with completely—or at least be interpreted more narrowly. Secondly, the balancing test[8] materialized in *Pickering v. Board of Education*, currently gives too much weight to the government's interests and should be interpreted to harmonize both the employee and the government's interests.

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[2] McAuliffe v. City of New Bedford, 155 Mass. 216, 220 (1892).

[3] *Freedom of Speech and Freedom of Press*, LINCOLN.EDU, http://www.lincoln.edu/criminaljustice/hr/Speech.htm (last visited Feb. 11, 2015).

[4] Jilka, *infra* note 55.

[5] Bradley, *infra* note 64.

[6] Connick, *infra* note 72.

[7] *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[8] *See generally* Pickering v. Board of Ed. of Tp. High School Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968).

The case *Gresham v. Atlanta* is a model illustration of the problematic application of current free speech doctrine as it is relevant to social media.[9] In this case, Gresham, a law enforcement officer, complained on Facebook about the alleged unethical interference by a department investigator in an arrest she had made.[10] According to the decision, although Gresham's Facebook page was set to "private," her friends could potentially view her posts and "distribute the comment more broadly."[11] Using the *Pickering* analysis, the court reasoned that the plaintiff's speech was not one calculated to bring an issue of public concern to the attention of either her superior or the general population, but instead were comments made due to personal frustration.[12] Additionally, the court added that even if there were a stronger public interest in the employee's speech, the balance tilted in favor of the government despite the fact that there was no evidence of an actual disruption caused by the speech.[13] As a result, the content in the plaintiff's posting was not protected by the First Amendment.[14]

The problematic effects of current public employee speech doctrine stem directly from the improper balancing of free speech values that gave way to the drafting of the First Amendment in the first place. First, current doctrine undermines the value of democratic self-governance that is advanced by free speech.[15] According to Alexander Meiklejohn, "[p]olitical discussion assures that the citizens will have the necessary information to make the informed judgments (voting) on which a self-governing society is dependent."[16] If government employees cannot criticize their employer freely, whether

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[9] *See generally* Gresham v. Atlanta, 542 Fed App'x 817 (11th Cir. 2013).

[10] *Id.* at 818.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 820.

[14] *Id.*

[15] *Freedom of Expression*, *ACLU Briefing Paper Number 10*, THE LECTIC LAW LIBRARY, http://www.lectlaw.com/files/con01.htm (last visited Feb. 11, 2015) [hereinafter *Freedom of Expression*].

[16] *First Amendment Theories*, OKSTATE.EDU, http://media.okstate.edu/faculty/jsenat/jb3\163/theorists.html (last visited Feb. 11, 2015).

through social media or other sources, it will prevent whistleblowing, and corruption will be free-flowing.[17] In addition, the citizenry will not be able to hold government officials accountable for their actions or gather enough information to vote and elect their government.[18]

Furthermore, current doctrine ignores the free speech value of the marketplace of ideas.[19] This is the "notion that, with minimal government intervention—a laissez faire approach to the regulation of speech and expression—ideas, theories, propositions, and movements will succeed or fail on their own merits" because individuals have the ability to think about diverse propositions in an "open environment of deliberation and exchange" and ultimately uncover truth.[20] By silencing most public employee speech, current doctrine hinders the progression of ideas—both wrong and right ones.[21] As Justice Kennedy emphasized in his decision in *Ashcroft v. Free Speech Coalition*, "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[22] This freedom is exactly what is prevented when the marketplace of ideas is curtailed.

Lastly, by censoring public employee speech, the government is interfering with self-expression and personal autonomy.[23] The dignity and self-worth of individuals is placed at stake when they are prevented from expressing their thoughts, desires, and aspirations.[24] Freedom of expression allows individuals to fulfill their goals as human beings and should not be subordinate to any other goal—it is a

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[17] *See* J. Michael McGuinness, *Whistleblowing and Free Speech: Garcetti's Early Progeny and Shrinking Constitutional Rights of Public Employees*, 24 TOURO L. REV. 529, 540 (2008), http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1266&context=lawreview.

[18] *Freedom of Speech (1): Three Rationales*, NAHMOD LAW (Jan. 19, 2010, 11:35 AM), http://nahmodlaw.com/2010/01/19/an-introduction-to-freedom-of-speech/ [hereinafter *Freedom of Speech*].

[19] *See Marketplace of Ideas Theory*, U.S. CIVIL LIBERTIES (July 29, 2012, 3:01 PM), http://uscivilliberties.org/themes/4099-marketplace-of-ideas-theory.html.

[20] *Id.*

[21] *Id.*

[22] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002).

[23] *Freedom of Speech, supra* note 18.

[24] *Freedom of Expression*, *supra* note 15.

goal in itself.[25] Current First Amendment doctrine does not protect public employees from retaliation for talking about their concerns, issues, or even gripes relating to work with their peers or others on social media.[26]

So, what is to be done? Current doctrine, particularly the *Garcetti* test, should be done away with or at least broadened so that all speech does not meet a form of "strict in theory, fatal, in fact" fate.[27] In addition, the balancing test should be made into a true balancing test rather than a test that gives the government the presumptive benefit of the doubt.

Part I of this comment will discuss the evolution of social media and how it affects and promotes free speech values. Part II will discuss the current doctrine of First Amendment freedom of speech rights as it pertains to governmental employees. Part III argues that the *Garcetti v. Ceballos* test is chilling potentially important speech by making its test vague and overbroad, and discusses getting rid of this test altogether. Part IV focuses on the *Pickering* balancing test and how it is being wrongly applied to prioritize the interests of employers and, ultimately, ignore the interests of government employees and the public. It offers a potential solution by comparing current doctrine of public employee speech to that of private employees under the NRLA. Part V will offer some parting thoughts on the repercussions of current free speech doctrine for public employees and how the proposed solutions will subdue these repercussions.

I. SOCIAL MEDIA AND THE PROMOTION OF FREE SPEECH VALUES

A. *What is Social Media?*

"Social media, while susceptible to multiple definitions, can best be described as 'online communications in which individuals

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[25] *Id.*

[26] *See* Richard Renner, *Retaliation – Public Employees and First Amendment Rights*, WORKPLACEFAIRNESS.ORG, https://www.workplacefairness.org/retaliation-public-employees#1 (last visited Dec. 28, 2015).

[27] Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411, 2421 (2013).

shift fluidly and flexibly between the role of audience and author.'"[28] Social media encompasses most facets of social networking, in which members create online profiles that they use to "become part of an online community of people with common interests."[29] Via the Internet, "citizens can publicly speak by posting comments, tweets, and 'likes' to show their support for people, causes, and interests without physically appearing in a public location like a school board meeting or a public street."[30] Through status updates, "individuals may share and electronically document any aspect of life: relationships, emotions, social gatherings, educational achievements, life events, and, of course, work."[31]

Social media sites, such as Facebook, Twitter, and Instagram, have made the world a more accessible place and provided users with a larger audience to spread their message.[32] Many of these media have over 100 million active visitors per month.[33] Countless individuals use these forums to "complain about work and respond to colleagues' complaints."[34] In essence, social media has replaced the local bar as the new era's "water cooler."[35] The difference is, "Facebook, Twitter and other social media are water coolers with microphones that can amplify a whisper into a shout that's rebroadcast

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[28] Heather A. Morgan & Felicia A. Davis, *Social Media and Employment Law Summary of Key Cases and Legal Issues*, PAUL HASTINGS LLP (Mar. 2013), http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/aba_national_symposiumontechnologyinlaboremploymentlaw/10_socialmedia.authcheckdam.pdf.

[29] *Id.*

[30] Tanya M. Marcum & Sandra J. Perry, *When a Public Employer Doesn't Like What Its Employees "Like": Social Media and the First Amendment*, 65 LAB L.J. 1, 2 (2014).

[31] Christina Jaremus, *#Firedforfacebook: The Case for Greater Management Discretion in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 2 (2014-2015).

[32] Gregory A. Hearing & Brian C. Ussery, *The Times They Are A Changin': The Impact of Technology and Social Media on the Public Workplace*, Part I, 86 FLA. B. J. 35, 1 (2012).

[33] Ariana C. Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH L. J. 837, 838 (2012).

[34] *Id.*

[35] *Social Media as the New Water Cooler*, SFGATE.COM (Jan. 22, 2013), http://www.sfgate.com/opinion/editorials/article/Social-media-as-the-new-water-cooler-4215302.php.

in untold directions."[36] If you are an employee who is attempting to exercise his First Amendment rights to free speech, social media is ideal. It offers a platform for creativity, self-expression, and allows those who do not feel comfortable standing in front of an audience to share their views through a medium. Most importantly, however, social media allows the everyday citizen to share her perceptions with a massive audience—a privilege that was previously extended only to those with enough power to have access to traditional forms of media.[37] However, for the employer who would rather avoid criticism or negative public attention caused by employee speech, social media can be problematic.

B. *Social Media's Effects as the New "Water Cooler"*

Employee online venting and criticizing of their employer on social media not only allows the information to be more widespread than at the local water cooler, but also causes the speech itself to change. First, when one speaks with the computer as an intermediary, "the activity engaged in and speech made are often much more brazen and uninhibited than activity engaged in and speech made face-to-face."[38] In addition, everything that is posted is saved in cyberspace.[39] It is virtually impossible to erase one's electronic footprint "once a posting has gone viral and spread rapidly via the Internet."[40] This is particularly worrisome for employers who are aware that "an online posting can create a lingering public record online linking a company to the actions of an individual employee,"—even worse, it may bring on negative public attention or questions on how they conduct their affairs.[41] Finally, social media has muddled the waters between speech made in an individual capacity and speech made in one's capacity as an employee.[42] Because people often use

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[36] *Id.*

[37] *Social Media and Free Speech, The Good, The Bad, and the Ugly,* SOCIAL MEDIA TODAY (July 29, 2011), http://www.socialmediatoday.com/content/social-media-and-free-speech-good-bad-and-ugly.

[38] Jaremus, *supra* note 31, at 4.

[39] *Id.* at 5.

[40] *Id.*

[41] *Id.*

[42] Hearing & Ussery, *supra* note 32, at 38.

one account both to post about their personal life and to gripe about their employer, it is difficult to know where the line is drawn.

C. *Social Media and First Amendment Free Speech Values*

As applicable to government employees, the ability to speak about concerns and corruption inside a government entity can be key to the democratic self-governance of citizens. Social media has facilitated communication between the government employee and larger audiences on current issues that should concern the citizenry at large or, at the very least, her fellow employees.[43] This value represents a "commitment to republican government by allowing . . . whistleblowing and other valuable on-the-job speech that facilitate[s] the public's ability to hold the government politically accountable for its choices."[44] And who better to inform the public of the internal affairs of the government than someone who witnesses its day-to-day dealings and processes?

Social media promotes the "marketplace of ideas" theory by "articulat[ing] substantive ideas and criticisms concerning policies, practices, and current events that may be protected [in the workplace]," and sharing them with their fellow employees, supervisors, employers, or even the general public.[45] On the other hand, information and opinions shared through social media can "be childish, crude, immoral, disloyal or just an outlet for thought dreams to be seen."[46] Nevertheless, "even the most unpopular idea may contain some truth in it and may contribute to the advancement of knowledge."[47]

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[43] *Social Media 101*, UC SAN DIEGO UNIV. COMMC'NS & PUB. AFFAIRS, http://ucpa.ucsd.edu/resources/social/social-101/ (last visited on Feb. 11, 2015).

[44] Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 2 (2009).

[45] William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427, 428 (2013).

[46] *Id.*

[47] Raphael Cohen-Almagor, *Why Tolerate? Reflections on the Millian Truth Principle*, 25 PHILOSOPHIA 131, 131–32 (1997), http://www.academia.edu/1115793/Why_tolerate-reflections_on_Mills_truth_principle (last visited Dec. 28, 2015).

By hindering the unraveling of these values that are promoted by social media, free speech is chilled and censorship occurs.[48] In the context of social media speech, we might always ask ourselves: "Is the freedom vast and dangerous?"[49] The answer to this will likely be yes.[50] We might go on to ask "[m]ight we hurt ourselves, and others?"[51] Again, the answer will be yes.[52] But at the end of this inquiry, we must not forget that "we might also do some great good, might ignite revolutions of hope among the downtrodden and oppressed," and this value will far outweigh any of the negative consequences that the speech might implicate.[53]

II. CURRENT FIRST AMENDMENT DOCTRINE

Free speech doctrine has had copious breakthroughs since the first decision rendered in *McAuliffe v. Mayor of New Bedford*. Nevertheless, current doctrine is far from perfect. In 2006, the United States Supreme Court rendered a decision in *Garcetti v. Ceballos* that became the initial question affecting the freedom of speech of public employees.[54] In *Garcetti*, Richard Ceballos, a District Attorney in the Los Angeles District Attorney's Office, was in charge of supervising other lawyers.[55] A defense attorney contacted Ceballos with a concern that an affidavit used to obtain a warrant in a pending criminal case was faulty.[56] After further investigation, Ceballos determined that the affidavit had misrepresentations, and he later spoke to a sheriff who was not able to explain the inaccuracies in the affidavit.[57] As a result, he relayed his findings to his supervisors

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[48] Ronald B. Standler, *Heckler's Veto*, RBS2 (1999), http://www.rbs2.com/heckler.htm. (last visited on Feb. 11, 2015).

[49] Joy Pullman, *Can We Handle Social Media? Yes, If We Can Handle Self-Government,* AEI (May 10, 2011), http://www.aei.org/publication/can-we-handle-social-media-yes-if-we-can-handle-self-government/

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[55] Michael Jilka, *Garcetti v Ceballos and the Altered Landscape of the First Amendment Free Speech Claims*, 80 J. KAN. B.A. 32, 33 (2011); *see also Garcetti*, 547 U.S. at 410.

[56] *Garcetti*, 547 U.S. at 410.

[57] *Id.*

and wrote a memorandum in which he requested that the case be dropped.[58] After a meeting with the sheriff, Ceballos' supervisors, Ceballos, and other employees, Ceballos' supervisors decided to continue the prosecution.[59] He was reassigned from his calendar deputy position and denied a promotion; he claimed that these were retaliation for his memo.[60] The Court held that Ceballos was not entitled to First Amendment protection for his memo because he had written the memo pursuant to his employment duties.[61] In other words, "the Court formulated a new threshold rule to govern free speech claims: 'we hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'"[62]

Ultimately, the *Garcetti* rule means that a "public employer may discipline or discharge an employee for [speech pursuant to official duties] regardless of whether the employee's interest in making the speech outweighs management's interests and regardless of whether it was on a matter of public concern."[63] The case of *Bradley v. James* is illustrative of the *Garcetti* effect. There, a state university police officer alleged that his chief was intoxicated and disrupted the investigation of an incident in a student dormitory.[64] The court found that the officer's allegations were made pursuant to his official duties and were therefore not entitled to First Amendment protection.[65] Likewise, in *Green v. Barrett*, the Eleventh Circuit held that a prison guard's First Amendment rights were not protected when he reported a possible breach of prison security to an assistant superintendent as part of her official responsibilities.[66] The test is absolute, affording zero protection to those employees whose speech is "pursuant to their duties," and giving little to no exceptions, even when the speech could be in the public interest.

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58 *Id.*
59 *Id.*
60 Jilka, *supra* note 55, at 33; *see also Garcetti* , 547 U.S. at 410.
61 *Garcetti* , 547 U.S. at 410.
62 Jilka, *supra* note 55, at 33; *see also Garcetti* , 547 U.S. at 410.
63 *Id.*
64 Bradley v. James, 420 F. Supp. 2d 974, 975 (E.D. Ark. 2006).
65 *Id.*
66 Green v. Barrett, 226 F. App'x 883, 886 (11th Cir. 2007).

If the speech in question overcomes the *Garcetti* hurdle and passes on to the second facet of the doctrine's test, the court turns to *Pickering*.[67] If the employee's speech is not pursuant to an official duty, the next step of the inquiry is whether it is on a matter of a public concern.[68] If the speech is not on a matter of public concern, it is not protected.[69] In order to be a matter of public concern, a posting must be about a political or social subject or, at the very least, concerning a matter that spikes the interest of the general public.[70] For purposes of the *Pickering* test, it is irrelevant whether the post was controversial in nature or was made in private.[71] For example, the Court held in *Connick v. Meyers* that matters affecting personal concerns in a questionnaire distributed to employees throughout an office were not protected by the First Amendment.[72] In that case, Sheila Meyers, an assistant District Attorney for Orleans Parish, Louisiana, was transferred to a different department, which she had resisted in private conversations with her superior and the chief district attorney.[73] As a result, she distributed a questionnaire to her fellow employees asking their opinion on her superior's management practices.[74] The Court found that most questions on the questionnaire were not on any matters of "public concern"; rather, they were "questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court."[75] As a result, her First Amendment rights were not violated

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[67] Pickering v. Board of Ed. of Tp. High School Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968).

[68] Herbert, *supra* note 45, at 491.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Connick v. Meyers, 461 U.S. 138, 168 (1983).

[73] *Id.* at 140.

[74] *Id.*

[75] *Id.* at 147 (the court did note, however, that a question in Myers' questionnaire about whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates" did touch on a matter of public concern).

and "a federal court [was] not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[76]

On the other hand, in the case of *Mattingly v. Milligan* in the Eastern District of Arkansas, the plaintiff, Mattingly, succeeded on a claim that her First Amendment rights were violated when she was terminated, and that her speech was in fact of public concern.[77] Mattingly lamented via Facebook status the firing of nine of her coworkers at the County Clerk's Office when Milligan, the newly elected County Clerk, came into office.[78] After Milligan received numerous calls at his home complaining about the firings, he terminated Mattingly for the Facebook post.[79] The Court, analyzing the case under the *Pickering* layer of the doctrine, held that the plaintiff's Facebook post was on a matter of public concern, and, as such, was entitled First Amendment protection.[80] According to the Court, unlike in *Connick*, not only had the plaintiff criticized a public official in his capacity as a government employee, but the local media had covered the election, and concerned citizens had contacted Milligan about the firings.[81]

Finally, even if the Court finds that the employee spoke as a citizen, not as an employee, and spoke on a matter of public concern, she must surpass yet another barricade. The third step is to balance the interests of allowing the employee to speak out on such issues

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[76] *Id.*

[77] Mattingly v. Milligan, No. 4:11CV00215 JLH, 2011 WL 5184283, *6 (E.D. Ark. Nov. 1, 2011).

[78] *Id.* at *2.

[79] *Id.*

[80] *Id.*

[81] *Id.; Employee's Facebook Posts Protected by First Amendment*, DELAWARE EMPLOYMENT LAW BLOG, http://www.delawareemploymentlawblog.com/employees-facebook-posts-protected-by-first-amendment.html (last visited on Feb. 11, 2015) (Curiously, the Court avoided the *Garcetti* question altogether: whether the speech was made pursuant to Mattingly's duties as an employee. It is likely that if this question had been considered, Mattingly's speech would not have been protected by the First Amendment because "employee staffing and other, similar personnel decisions are usually considered internal, operational issues and speech about such issues are commonly found to be employee speech").

against "the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[82] Among the government's interests are "avoiding disruptions in regular operations, disharmony among co-workers, erosion of close working relationships requiring personal loyalty and confidentiality, impairment of discipline and supervisory control, and obstructions."[83] To illustrate, this vague and subjective third step was applied in *Fales v. Garst*—the Eighth Circuit held that although the education of special needs students is clearly a matter of public concern, a principal may lawfully discharge teachers for disobeying an order to cease talking about the subject.[84] The reasoning behind stripping this teacher of her First Amendment right to free speech was that the speech "resulted in school factions and disharmony among their co-workers and negatively impacted [the principal's] interest in efficiently administering the middle school."[85]

This disconcerting free speech doctrine raises the question: What would happen if *Pickering* was decided under current doctrine and in the context of social media? Particularly, what would the Court decide in a case of a high school teacher who wrote a post on a local newspaper's Facebook page criticizing how the Board of Education and the District Superintendent handled past proposals to raise new revenue for the schools? Realistically, were this issue to reach the Supreme Court, the teacher's speech would likely be protected—but not for the clarity of the doctrine or its impeccable fairness. Rather, because the facts are strikingly similar to *Pickering*, and the Court would want to maintain their legitimacy through *stare decisis*. The doctrine itself, however, when applied to any other instance but *Pickering*, muddles the waters of free speech and makes it difficult to predict what is and is not protected by the First Amendment. The two particular areas of the doctrine that have shown to be the most precarious are the *Garcetti* test and the *Pickering* balancing test.

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82 Herbert, *supra* note 43, at 493.

83 *Id.*

84 Fales v. Garst, 235 F.3d 1122, 1123 (8th Cir. 2001).

85 *Id.*

III. THE *GARCETTI* TEST CHILLS SPEECH WHILE THE COURT INTERPRETS IT SO BROADLY THAT IT IS VIRTUALLY IMPOSSIBLE TO OVERCOME.

A. *The Scope of* Garcetti

The *Garcetti* decision has "increasingly permit[ted] [the] government to control its employees' expression at work, characterizing this speech as the government's own that it has paid with a salary."[86] As a result of *Garcetti*, "most lawsuits brought by public employees contending that they were retaliated by their employers for their exercise of free speech have been won by the public employers."[87] In fact, lower courts have been granting summary judgment "in favor of employers at an unprecedented rate."[88] This means that if a public employee states her thoughts and opinions while at work, and her employer does not approve of these thoughts or opinions, she will probably be fired despite the "public interest" requirement and the *Pickering* balancing test. In most instances the Court does not even reach the question of whether speech is on a matter of public interest; the First Amendment would most likely not protect her.

For example, in *Nixon v. City of Houston*, a police officer criticized his department through media outlets while on duty and in his uniform.[89] The court found that the "officer's statements lacked a constitutional safeguard because they were made 'pursuant to his official duties and during the course of performing his job.'"[90] While *Nixon* does seem like a case that could have been decided either way, the scope of the ruling in *Garcetti* has much more far-reaching effects in its application.

In essence, the Court has decided that in spite of a public employee performing her "duties" efficiently, she is subject to being stripped of her First Amendment protections and exposed to an adverse employment action by the government. In a Seventh Circuit

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86 Norton, *supra* note 44, at 2.

87 Marcum, *supra* note 30, at 10.

88 Howard Kline, *Garcetti v. Ceballos: The Cost of Silencing Public Employees*, 28 J.L. & COM. 75, 83 (2009).

89 Thomas Keenan, *Circuit Court Interpretations of Garcetti v. Ceballos and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 854 (2011).

90 *Id.*

case, guards who protested against the mistreatment of prisoners were stripped of their First Amendment protections because their employing prison's General Orders required the exposure of such misconduct, making their speech pursuant to their job duty.[91] The Tenth Circuit mimicked the previous case by holding that a transplant coordinator who complained about the hospital's failure to reach its level of due care was not protected by the First Amendment, because the hospital that employed her had a policy that instructed employees to report instances of unsafe conduct.[92] As long as the speech can be described as part of the speaker's job, it will receive no protection, regardless of its value.

Additionally, "although most public employees are not officially assigned to engage in work-related social networking, the content of posts by employees [on social media] might lack any First Amendment protections."[93] In fact, since *Garcetti*, most courts have ruled that a post related to work duties is unprotected by the First Amendment "regardless of whether it was required by a job description or pursuant to an employer's directive."[94] For instance, in the case of *Graziosi v. City of Greenville*, Officer Graziosi criticized the police chief on Facebook for not sending a representative to the funeral of a fellow officer who was killed in the line of duty.[95] She made these posts both on her own Facebook page and on the mayor's Facebook page and was subsequently fired by the police department.[96] The court held that "it [was] evident that her post could be construed as an attack on [the Chief], and the other officers who were in charge now compared to the 'leaders' of before."[97] In addition, although "Graziosi's posting was not related to any official duty she had as a police officer, [it] was made as an employee of the GPD (Greenville Police Department) and not a citizen of the Greenville community," and as a result was not protected by the First Amendment.[98] It is clear then, that if a situation arose where a public employee used her

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91 *Id.*
92 *Id.*
93 Herbert, *supra* note 45, at 487.
94 *Id*. at 488.
95 Graziosi v. City of Greenville, 985 F. Supp. 2d 808, 811 (N.D. Miss. 2013).
96 *Id.*
97 *Id.*
98 *Id.* at 812.

personal computer, during non-working hours, to post a grievance about a discussion between her and her supervisor where the supervisor condemned her work habits and failure to provide adequate assistance to clients, it very well may not be protected under the First Amendment.[99] Although this similar situation was protected in *Hispanics United* in the private context, if applied to the public sphere, the employee will likely be discharged without any remedy.[100] More importantly, considering the wide latitude the courts have given the *Garcetti* test, it would likely be the case that even though this post was written during non-working hours on a personal Facebook account and was generic enough that it did not disseminate information that could prove harmful to the government entity, it would be considered "pursuant to the employees' official duties." The courts, with all the deference given to the government, would likely hold that even though this employee's job did not require postings of any sort as part of her official duties, since she was speaking about the job itself, the substance of the post was "in furtherance of her job duties."

B. *The* Garcetti *Test Compromises the Three Free Speech Values: Democratic Self-Governance, Self-Autonomy, and the Marketplace of Ideas*

1. DEMOCRATIC SELF-GOVERNANCE

The *Garcetti* trend "frustrates a meaningful commitment to republican government."[101] It allows officials to "punish, and thus deter, whistleblowing and other valuable on-the-job speech that would otherwise facilitate the public's ability to hold the government politically accountable for its choices."[102] The Seventh Circuit, for example, encountered a case where "police officers were reassigned

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[99] Hispanics United of Buffalo, No. 3-CA-27872 *(N.L.R.B. A.L.J. July 13, 2011) (NLRB found that employee's comments about fellow employee, including "*Lydia Cruz, a coworker feels that we don't help our clients enough at HUB[.] I about had it! My fellow coworkers how do u feel?" and "Tell her to come do [my] fucking job n c if I don't do enough, this is just dum[b]"*, did not justify discharge.*).

[100] Jaremus, *supra* note 31, at 11.

[101] Norton, *supra* note 44, at 2.

[102] *Id.*

after informing an assistant district attorney ("ADA") about allegations that the police chief and deputy chief had harbored an individual wanted on felony warrants."[103] The court held that the officers' speech was made pursuant to their official duties—specifically, the duty to inform the district attorney of any pertinent information relating to the case and, thus, was not protected by the First Amendment.[104] As the court emphasized, the officers were performing their duties admirably.[105]

Nevertheless, "although their demotion for truthfully reporting allegations of misconduct may be morally repugnant, after *Garcetti* it does not offend the First Amendment."[106] Correspondingly, the Third Circuit concluded, pursuant to *Garcetti,* that the First Amendment does not "protect internal reports of health and safety hazards––including elevated heavy metals levels—by state troopers and firearms instructors at the state's shooting range because the reports were made pursuant to their official duty to report operational problems and to maintain a safe worksite."[107]

Garcetti creates a catch twenty-two for public employees.[108] By speaking per prescribed job duties, an employee is forgoing First Amendment protections and may be fired for the speech, and by not speaking per prescribed job duties, the employee may be fired for simply not performing her job.[109]

For example in *Garcetti v. Ceballos*, Ceballos was fired for a memorandum he wrote in support of dropping a case in which a warrant was based on a misrepresented affidavit because his speech was "pursuant to his job duties."[110] Nevertheless, it is possible that if Ceballos did not report this faulty affidavit, and looked the other way, that he could have been fired for that too. After all, part of a

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[103] Morales v. Jones, 494 F.3d 590, 592 (7th Cir. 2007).

[104] *Id.* at 597.

[105] *Id.* at 599.

[106] *Id.*

[107] Norton, *supra* note 44, at 4; *see also* Foraker v. Chaffinch, 501 F.3d 231, 247 (3d Cir. 2007).

[108] Christine S. Totten, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under Garcetti v. Ceballos*, LEWIS & CLARK L. REV. 233, 248 (2008).

[109] Herbert, *supra* note 45, at 487.

[110] *Garcetti*, 547 U.S. at 410.

prosecutor's job performance requires prosecuting, but also ensuring that justice is achieved, even if that means refraining from prosecution by dismissing a meritless case.[111] Nevertheless, because the risk is less for not complaining than being a whistleblower, *Garcetti* encourages public employees to look the other way from corruption or unethical behavior, "limiting the public's access to information regarding the government's affairs," leading back to the problem of accountability.[112]

The *Garcetti* rule is defective because, by chilling public employee speech, it prevents objections from being aired and officials from being held accountable, which is imperative in creating exceptional leaders.[113] "As the public lacks reliable information and deliberative forums, citizens are less able to . . . participate in the expressive aspects of democratic life."[114] Because the First Amendment "is understood to protect the communicative processes necessary to disseminate the information and ideas required for citizens to vote in a fully informed and intelligent way," when speech is suppressed—particularly in a medium as important as social media—these democratic ideals are marred.[115]

2. SELF-AUTONOMY AND SELF-EXPRESSION

In addition, "pursuant official duties" that is the staple of *Garcetti*, is ambiguous and, thus, unpredictable to public employees who do not know whether what they say will be protected or not.[116] This is likely to chill speech, as the uncertainty about how broadly courts will interpret "pursuant to official duties" will make employees err on the side of silence. Those who want to avoid losing their

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[111] Cowles v. Brownell, 73 N.Y.2d 382, 387 (N.Y.1989).

[112] Beth Anne Roesler, *Garcetti v. Ceballos: Judicially Muzzling the Voices of Public Sector Employees*, 53 S. D. L. REV. 397, 424 (2008).

[113] Norton, *supra* note 44, at 2.

[114] Mike Annany & Daniel Kreiss, *A New Contract for the Press: Copyright, Public Journalism, and Self-Governance in a Digital Age*, https://danielkreiss.files.wordpress.com/2010/05/anannykreiss_contract.pdf (last visited on Feb. 11, 2015).

[115] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence,* 88 CALIF. L. REV. 2355, 2367 (2000).

[116] Herbert, *supra* note 45, at 487.

jobs are not likely to get involved in any criticism of their employer, despite its truth or importance.[117]

First, the Court in *Garcetti* failed to "articulate a 'comprehensive framework' for defining in future cases what constitutes an employees' official duties."[118] In addition, the courts relying on *Garcetti* have refused to rely on the content of job descriptions because oftentimes the employee's job description does not accurately describe her day-to-day activities.[119] Courts have been given free reign to interpret the test as broadly or narrowly as they decide.[120] In *Abdur-Rahman v. Walker*, for example, the county's sewer inspectors advised their supervisor that the county was complying with state and federal laws.[121] The inspectors were hired to formulate ordinances about the disposal of fat, oil, and grease, and to investigate the cases of sewer overflows.[122] Nevertheless, the Court held that "all of their speech 'owed its existence to those [official duties],'" despite the difference between reports that dealt specifically with sewer flows and those that dealt with noncompliance—none of the speech was protected by the First Amendment.[123] However, the court failed to recognize that the inspectors' investigation was not for the purpose of assessing compliance with state and federal law.[124]

Some courts have failed to recognize that "actions taken in the course of performing job duties are distinct from activities arising pursuant to official duties."[125] As a result, the two will be treated as one, and all criticism or speech on one's public employment will be silenced.[126] The *Pickering* test will be moot under this regime, as those who speak truthfully on a subject converging with their "job

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117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 Keenan, *supra* note 89, at 873; *see also* Abdur-Rahman v. Walker, 567 F.3d 1278, 1279 (11th Cir. 2009).

122 Abdur-Rahman, 567 F.3d at 1279-80.

123 *Id.*

124 *Id.*

125 J. Devoy, *Garcetti v Ceballos Potentially Subsumes Public Employees' First Amendment Rights*, THE LEGAL SATYRICON, https://randazza.wordpress.com/2010/03/30/garcetti-v-ceballos-potentially-subsumes-public-employees-first-amendment-rights/ (last visited on Feb. 11, 2015).

126 *Id.*

duties" will never be able to reach it and have the public importance of their speech assessed.[127]

3. MARKETPLACE OF IDEAS

Garcetti's ruling curtails public employee speech overall and interferes with the exchange of ideas between citizens and the uncovering of truth, ultimately affecting the "marketplace of ideas."[128] Public employees average more than 16 percent of the national workforce.[129] Because the doctrine does not provide them with a space to speak as government employees nor as individuals with respect to their public employee duties, "the vitality of our public discourse will suffer."[130]

The *Garcetti* test is particularly problematic in the arena of public employment because government employees are the individuals who are in the best position to inform the public of the events, people, and decisions of their government, whether these are good or bad.[131] Public employees have intimate knowledge of the duties they perform and there is "an enhanced value in allowing them to contribute to the 'marketplace' of ideas by speaking on matters of public concern related to their jobs."[132] The *Garcetti* majority made a gross mistake by automatically treating public employee speech made pursuant to that worker's official duties because they "ignored the theoretical foundations of government speech as exempt from First Amendment scrutiny only because of its instrumental value to the public as listeners."[133] As Judge Souter emphasized in his dissenting opinion in *Garcetti*, the fact that Ceballos was a public employee did not make his speech less valuable—it made it invaluable.[134]

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127 *Id.*

128 *Marketplace of Ideas Theory*, *supra* note 19.

129 Frances E. Faircloth, *Freedom of Speech and Government Employees: A Reasonable Test for the Digital Age*, 6 J. MARSHALL L.J. 55, 96 (2012).

130 *Id.*

131 Norton, *supra* note 44, at 31.

132 Keenan, *supra* note 89, at 868.

133 Norton, *supra* note 44, at 31.

134 *Id*; Garcetti v. Ceballos, 547 U.S. 410, 433 (2006) (Souter, J., dissenting)

C. *Overcoming the Great Wall of* Garcetti

The *Garcetti* rule should be eliminated, with the exception of employees who are hired specifically to speak for the government agency.[135] The government should have authority over the speech of "public employees that it has retained to deliver a particular viewpoint that is transparently governmental in origin, and, thus open to the public's meaningful credibility and accountability."[136]

For example, the employee in *Korb v. Raytheon* was not protected by the First Amendment—and rightfully not so.[137] In this case, the plaintiff, Korb, joined the executive board of the Committee for National Security ("CNS") as a spokesperson.[138] The CNS is a "nonprofit organization dedicated to informing the public about issues of national security and the prevention of nuclear war."[139] At a press conference, Korb was critical of increased defense spending and urged a scaling back of the 600-ship, 15-carrier group Navy supported by the Secretary of the Navy.[140] The court ruled that:

> . . . the public perception after the press conference was that a Raytheon lobbyist advocated a reduction in defense spending. Raytheon had a financial stake in not advocating that position. Therefore, it determined that Korb had lost his effectiveness as its spokesperson. There is no public policy prohibiting an employer from discharging an ineffective at-will employee. The fact that Korb's job duties included public speaking does not alter this rule.[141]

As a result, the government should be able to fire or discipline employees if they are hired "to deliver such a transparently governmental message who carries out her communicative duties in a way

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[135] *Id.* at 30.

[136] *Id.*

[137] Korb v. Raytheon, 410 Mass. 581, 585 (N.E 2d. 1991).

[138] Ronald B. Standler, *Freedom of Speech in the USA For Employees of Private Companies*, RBS2, http//www.rbs2.com/freespch.htm (last visited on Feb. 11, 2015).

[139] *Korb*, 410 Mass. at 581.

[140] Standler, *supra* note 138.

[141] *Korb*, 410 Mass. at 584.

that garbles, distorts, contradicts, or otherwise undermines that message."[142]

Unlike in *Korb*, where the plaintiff was hired to spread the message that CNS was intending to send to the public,[143] other public officials should not be assumed to be spokespeople by virtue of their position for their speech criticizing their employer. For example, a fire chief or police chief should not be terminated for speech uncovering corruption in their agency or department simply because it may be inferred that they speak on behalf of that department.[144] Although police and firefighter chiefs do, in fact, speak on behalf of their departments for purposes of their positions, the scope of their role is narrow and intended to communicate the basic information necessary to inform the public on events and happenings to ensure their safety. Unlike the plaintiff in *Korb*, a public official's spokesperson duties should not go as far as transmitting someone else's message to the public.

IV. THE *PICKERING* BALANCING TEST IS BEING WRONGLY APPLIED AND TILTS THE FAVOR TOWARDS EMPLOYERS' INTERESTS.

A. *When "Balance" Becomes Disproportion:* Pickering

The ideal goal upon which the *Pickering* balancing test was molded was to achieve "a balance between the [public employee], as a citizen, in commenting upon matters of public concern and interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[145] Nevertheless, this balance is not being achieved. In fact, when analyzing cases under this prong of the free speech doctrine, courts rarely give

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142 Standler, *supra* note 138.

143 *Korb*, 410 Mass. at 584.

144 *See* Editorial Board, *God, Gays, and the Atlanta Fire Department*, N.Y. TIMES (Jan. 13, 2015), http://www.nytimes.com/2015/01/13/opinion/god-gays-and-the-atlanta-fire-department.html?_r=0.

145 Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (And Vice Versa)*, 35 GA. L. REV. 939, 952 (2001).

any deference to the interests of the employee and the public's interest in hearing that employee speak, relying solely on the interests of the government to make their determination.[146]

Although *Graziosi v. City of Greenville* was decided on the *Garcetti* test, the court went on to analyze the case under the *Pickering* balancing standard.[147] The court held that even if Ms. Graziosi did speak on a matter of public interest, namely that the Police Chief did not send a representative to a fellow officer's funeral, "Ms. Graziosi's limited First Amendment interest d[id] not require Chief Cannon to 'tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.'"[148] It should be recognized that "the ability of a police department to maintain discipline and good working relationships amongst employees is a legitimate governmental interest."[149] Nevertheless, hearing a "buzz" or gossip around the department, as the Chief in *Graziosi* testified, does not rise to the level of destroying harmony or working relationships within the department.[150] In fact, it is inevitable that employees, regardless of the field of work or department, gossip about events or fellow employees and employers.[151] A mere "buzz" is not a compelling reason to curtail a public employee's First Amendment rights on an issue that was clearly in the public interest—otherwise there would have been no "buzz" in the first place.[152] Not only was the government given deference in this respect, but the court never even discussed the interests that weighed in favor of Graziosi's speech—they simply focused on the interests that weighed against it.[153] Under *Grazioci*'s interpretation of the balancing test, "Internet postings w[ill] be considered presumptively disruptive to the government's ability to provide efficient and effective services to the public due to their ability to go

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146 *Id.* at 941.

147 *Graziosi*, 985 F. Supp. 2d at 814.

148 *Id.*

149 *Id.* at 815. (citing *Gresham v. City of Atlanta,* 542 F. App'x 817 (11th Cir. 2013)).

150 *Id.* at 814.

151 *How to Deal with Office Gossip*, HOW STUFF WORKS, http://money.howstuffworks.com/how-to-deal-with-office-gossip.htm (last visited on Feb. 11, 2015).

152 Graziosi v. City of Greenville, 985 F. Supp. 2d 808, 814 (N.D. Miss. 2013).

153 *See id.*

viral," and the balance would be tipped in favor of the government even if the speech was made by the employee as a citizen on a matter of public interest.[154]

Additionally, "if the court finds that the employer reasonably believed the speech compromised these goals, the employee's speech is not protected by the First Amendment, and he or she is subject to appropriate discipline."[155] "Reasonably believe" is the epitome of a subjective test, and, when coupled with the deference the court is showing for the government's interests versus the interests of the employee, it shows to be disastrous for employees' free speech.[156]

B. Pickering *"balancing" is Lethal to Public Employee Speech and Makes Free Speech Values Obsolete.*

1. MARKETPLACE OF IDEAS

By tilting the balance of the *Pickering* test in favor of the government's interest, the courts are hindering open and free debate. For example, in its decision in *Graziosi*, the court made clear that the speech's forum was their main concern.[157] They stated that "Facebook, Twitter and the like seem to have a special power to bring an issue before the masses, especially when a story goes viral, and is on a sensitive subject such as the funeral of a fellow officer."[158] However, what the court did not take into consideration was that their decision has a damaging implication for free speech values. Social media embraces the marketplace theory because "it enables

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154 Jaremus, *supra* note 31, at 34.

155 *Beyond Garcetti: Public Employees and the Pickering-Connick Test*, THE LEGAL SATYRICON, http://randazza.wordpress.com/2010/06/28/beyond-garcetti-public-employees-and-the-pickering-connick-test/ (last visited on Feb. 11, 2015).

156 Jinkal Pujara, *A Critical Examination of the Current Framework for Public Employees' Speech Rights: Is Social Media Speech Taking Us Back to the Holmesian Era of Speech Protection?*, SETON HALL LAW REPOSITORY (MAY 1, 2013), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1291&context=student_scholarship.

157 Jaremus, *supra* note 31, at 34.

158 *Id.* at 34.

virtually anyone to contribute comments, thoughts, and ideas" to a particular conversation.[159]

Although the court would rather curtail speech that travels too far and wide, it does not recognize that this is the ideal situation for the marketplace of ideas. The farther the idea spreads, and to the most people, the better informed the public will be and the easier it will be to find the truth.[160] Additionally, social media is the most effective and least costly way to distribute information and ideas to the masses of people.[161] Anybody with an Internet connection can register a free account with a social media provider and proceed to share her thoughts with the rest of the online universe if she so chooses.[162] Social media reduces the barriers of who can enter into the marketplace of ideas, and where they can enter it.[163] The contributions on social media are global—social media knows no borders or distances; they result in the most diverse opinions the market could possibly offer.[164]

Although it could be argued that there are other media through which these ideas could be distributed, such as televisions or newspapers, that argument is ultimately ignoring the high barriers of entry. Mass media outlets, in the interest of time, efficiency, cost, and ratings are very specific as to what they publish and by whom.[165] Social media knows no such discrimination.

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159 Peter Maggiore, *Viewer Discretion Is Advised: Disconnects Between the Marketplace of Ideas and Social Media Used to Communicate Information During Emergencies and Public Health Crises*, 18 MICH. TELECOMM. TECH. L. REV. 627 (2012), http://www.mttlr.org/voleighteen/maggiore.pdf.

160 *See* Abrams v. United States, 250 U.S. 616, 830–31 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes can be safely carried out. That at any rate is the theory of our Constitution.")

161 *See generally* Mir Tajmul Hossain, Social Media Is a Cheap But Effective Way of Marketing, LINKEDIN (June 22, 2014), https://www.linkedin.com/pulse/20140622194829-221106729-social-media-is-a-cheap-but-effective-way-to-marketing.

162 Maggiore, *supra* note 159, at 642.

163 *Id.*

164 *Id.*

165 *Id.*

2. DEMOCRATIC SELF-GOVERNANCE AND SUPERIOR ACCOUNTABILITY

Although courts discount "disruption" as a negative thing and promote "harmony within the workplace," "a little disruption can be a good thing to uncover corruption and to promote self-autonomy and accountability."[166] In Justice Souter's dissent in *Garcetti*, he emphasized that there is a Congressional Concurrent Resolution that recognizes that public employees, despite their employment, maintain obligations as U.S. citizens that include "[p]ut[ting] loyalty to the highest moral principles and to country above loyalty to persons, party, or government department," and to "[e]xpose corruption wherever discovered."[167] Despite this resolution, which was written by Congress itself, employees are being punished for complying with their civic duty.

Additionally, giving the government's interests deference over employee's interest in speech promotes complacency both from the employee and the employer. On one hand, the "stream of disappointments and failed battles" will make employees satisfied with simply receiving a paycheck every week and "beat [them] into submission" to the point where they no longer complain nor care about the affairs of their government entity.[168] This creates an atmosphere where employees are not fulfilled and are not permitted to reach their full potential.[169] They will not criticize their employer—not because they do not believe that a certain subject is worthy of criticism, but "they've just been programmed to believe that raising issues is futile and therefore they are better off just staying under the radar in every way."[170]

On the other hand, supervisors will also become complacent. If a supervisor does not have to worry about an employee's complaints or concerns, she will never have to worry about her job either. As a result, a domino effect will take place, in which some will perform their duties poorly and others might engage in unethical behavior

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166 Totten, *supra* note 108, at 249.

167 Norton, *supra* note 44, at 249.

168 *Why Employees Don't Complain*, LANCE HAUN (April 5, 2011), http://lancehaun.com/why-employees-dont-complain/.

169 *Id.*

170 *Id.*

and corruption. Finally, if employers always come out on the winning end of the First Amendment question because all criticism or hurtful speech made against them is silenced, it will devalue the positive reviews that employees may give them because there will be no point of comparison. In essence, there will be no negative speech, there will either be positive speech or silence.

In Madison's *Memorial and Remonstrance Against Religious Assessments*, he argued that the Establishment of a Religion would simply "foster in those who still reject [the established religion], a suspicion that its friends are too conscious of its fallacies to trust it to its own merits."[171] In the same way here, the limiting of critical speech against the government undermines the integrity of that entity by making it appear as if it is not legitimate but for the chilling of this criticism.[172]

3. SELF-AUTONOMY AND EXPRESSION

The current interpretation of the *Pickering* balancing test is left to be open, broad, and subjective.[173] "Judges exercise substantial, if not unfettered, discretion in deciding this question, based on an individualized evaluation of both the quantity and quality of disruption."[174] Because there is no clear rule, it is difficult for individuals to predict what types of speech might cost them their employment and conform their behavior to those standards.[175] For example, two Tenth Circuit panels had polar opposite interpretations of almost identical cases in which police officers displayed signs on their yards favoring candidates in local elections.[176] While one panel held that the sign was not protected by the First Amendment "due to the danger that the public would come to doubt the impartiality of the

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171 James Madison, *Memorial and Remonstrance Against Religious Assessments*, UCHICAGO.EDU (June 20, 1785), http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

172 *See id.*

173 Wells, *supra* note 145, at 967.

174 *Id.*

175 *Id.*

176 *Id;* Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1272-74 (10th Cir. 1998); Cragg v. City of Osawatomie, 143 F.3d 1343, 1346-47 (10th Cir. 1998).

police," a second panel held that a similar sign was protected because there was little chance of disruption.[177]

This "reasonably disruptive standard" is a slippery slope in which all comments can be potentially described as disruptive. Relying on the public's reaction to an employee's speech is equivalent to permitting a "heckler's veto," which the Supreme Court has held to be an unconstitutional basis for restricting protected expression.[178] Under this balancing test, the manner or content of the employee's speech is irrelevant.[179] As long as the public has some sort of reaction to the speech, whether it be supporting it or disagreeing with it, it is likely that the employee will lose constitutional protection for this speech.[180] If, conversely, the public never learns about the speech or, for whatever reason, is not interested in it, the employee has more of a chance of obtaining First Amendment protection.[181] This defeats the entire purpose of free speech, because even if the speech is allowed to be said or posted on social media, it loses its intrinsic value if it is not communicated or heard by others.

While the courts believe that they are protecting the government through this interpretation of the balancing test and promoting its efficiency by chilling some types of speech, they are doing the exact opposite.[182] Justice Kennedy's majority decision in *Garcetti* "protects whistleblowers if they go to the press [with their concerns] but offers them no such protection if the employee goes directly to their supervisor."[183] This makes the government more inefficient and prevents public concerns from being aired up the chain of command.[184]

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177 Wells, *supra* note 145, at 968; Horstkoetter, 159 F.3d at 1272-74; Cragg, 143 F.3d at 1346-47.

178 Mary Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 201 B.Y.U. L. REV. 2117, 2156 (2011); *See* Edwards v. South Carolina, 372 U.S. 229 (1963).

179 *Id.*

180 *Id.*

181 *Id.*

182 Kline, *supra* note 88, at 84.

183 *Id.*

184 *Id.*

C. *Solving the* Pickering *"Balance" Problem*

The government's and the employee's interests should be given equal weight in the balancing test, rather than the government's interest receiving priority. The Court's current interpretation supports a subjective "reasonable belief" by an employer that speech by an employee would cause disruption or inefficiency as enough to tip the balance for the government.[185] This interpretation should be abolished altogether.[186] The latitude given to this deference is unfair and overbroad because the employer can manufacture a reasonable belief that "the government employees' speech affects morale in the workplace, fosters disharmony, impedes the employees' own ability to perform duties, or obstructs established working relationships" in order to fire him.[187]

Furthermore, the fact that the speech was expressed through social media, rather than through another medium, should not make the speech presumptively disruptive.[188] The test should "protect both employer and employee interests, instead of elevating one interest over the other"; this would "further equalize the employment relationship" rather than cause a divide between the employees and employers.[189]

Courts should revert to the old test, created in *Pickering*, in which there must be an actual showing of disruption or inefficiency by the employee before the employer can take an adverse employment action.[190] The *Pickering* requirement of "actual disruption" is not a perfect one, as it has a tendency to have a finding of disruption by an employee only after the disruption has actually occurred and the damage to the government entity is done. However, it is better to err on the side of protecting individual's Constitutional rights, both as citizens and employees, than to use a "subjective standard

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185 *Id.*

186 *Beyond Garcetti*, *supra* note 155.

187 Pujara, *supra* note 156.

188 *See Graziosi*, 985 F. Supp. 2d at 814.

189 Stephanie M. Merabet, *The Sword and Shield of Social Networking: Harming Employers' Goodwill Through Concerted Facebook Activity*, SUFFOLK U. L. REV. 1162, 1186 (2013).

190 *Id.*

that gives government employers the ability to make subjective decisions based on speculative belief as to the disruptive impact of employee speech."[191]

Nevertheless, in equalizing the weight of the employees' interests in their speech, the courts need to tread lightly. Although employees' interests should be taken into account, they should not automatically outweigh those of the employer on the majority of occasions—the balancing should not go as far as the National Labor Relations Act ("NLRA") has.

1. NLRA'S EXPANSIVE PROTECTION

The NLRA was enacted by Congress to guarantee basic employee rights to employees in the private sector.[192] Section 7 of the NLRA states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

As a result, it is illegal for an employer to fire an employee who has engaged in Section 7 protected activity.[193]

The problem arises in that NLRA cases allow employees to virtually get away with any speech at their employer's expense. There is nothing that employers can do to protect their online reputation "from the damaging public comments of irate employees, unless such comments are either threatening or outrageously egregious."[194] But, in practice, they cannot even protect themselves from this. Although, "in theory, it may be possible for an employee to lose the

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[191] *Id.*

[192] Jaremus, *supra* note 31, at 8.

[193] *Id.* at 10 (There are four elements that need to be established by the employee to prevail: 1) the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the NLRA; 2) the employer knew of the concerted nature of the employee's activity; 3) the concerted activity was protected by the NLRA; and 4) the discipline or discharge was motivated by the protected, concerted activity).

[194] Merabet, *supra* note 189, at 1177.

protections of the NLRA through necessary disparagement, in practice, the General Counsel has actually allowed the Facebook comments to go quite far."[195]

For example, photographs of an employer-sponsored sales event where an employee made sarcastic comments about the food, calling it, among other things, "stale and overcooked," was not disparaging of the employer's product and did not lose NLRA protection.[196] Additionally, it has been held that employees who use profane language to criticize one of the owners is protected by the NLRA when the profanity is intertwined with criticism pertaining to working conditions.[197]

In a case in which an employee spoke obscenities of his employer for not withholding the proper amount of taxes from his paychecks, the Board decided that the employee was protected by the NLRA.[198] Despite the profane words he used, the Board held that the purpose of the employee's conversation was to "seek and provide mutual support looking toward group action to encourage the employer to address problems in terms and conditions of employment, not to disparage its product or services or undermine its reputation."[199] In fact, the General Counsel has stated that even a "Facebook conversation in which an employee called her supervisor a 'dick' and a 'scumbag' did not raise to the level of disparagement that would lose protection of the act."[200]

Pursuant to this statement, an employee was protected by the NLRA when he called the owner of a company that employed him a "F'ing mother F'ing" and "F'ing crook" and an "a_hole," on social

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[195] Megan Marie Kosovich, *The NLRA vs. The First Amendment: Which One Helps the Employee Who Loves Social Media?*, SEATON HALL LAW EREPOSITORY (May 1, 2013), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1258&context=student_scholarship.

[196] *Id.* at 14.

[197] Michael Arnold, *NLRB Continues Aggressive Crackdown on Social Media Policies*, EMPLOYMENT MATTERS, (Sept. 3, 2014), http://www.employmentmattersblog.com/2014/09/nlrb-continues-aggressive-crackdown-on-social-media-policies/.

[198] *Id.*

[199] *Id.*

[200] Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PENN. J. OF BUS. LAW 957, 964 (2012).

media and added that "the manager was stupid, nobody liked him, and everyone talked about him behind his back."[201]

However, if this particular case had occurred in the public sphere, it would most surely not have First Amendment protection––and, in this case, it should not. The courts would likely hold that *Garcetti* applies because, in light of precedent, comments about supervision concerns can be interpreted to be "pursuant to job duties." Even if it was assumed that *Garcetti* did not apply, and even if it could be argued that these profane comments were in the "public interest," the government's interest in avoiding disruption and protecting the efficiency of the government entity would likely outweigh the employee's interest in disparaging his supervisor on social media. It might even be seen as a defamatory comment, which has no free speech value under First Amendment jurisprudence.[202] In this case, however, the courts would be correct.

Doctrine, whether public or private sector, cannot go as far as to allow employees to speak about their employers with blatant disrespect and minimize them in the eyes of the public because they are not happy with some aspect of their job. The NLRA leaves employers helpless to defend their legitimate business interest in their goodwill, while simultaneously rendering the NLRA ineffective.[203] While employers have to keep paying the salaries of employees who have publicly insulted their business, their hands are tied and resentment towards employees is built.[204] All in all, the NLRA ends up "embold[ing] bullies—not victims—by protecting disparaging remarks as if they contain something of value."[205]

On the other hand, although the NLRA is overbroad, it grants some protection to employees that the public sector does not, yet should. For example, if a government employee who was demoted criticized his supervisor's decisions on social media, where he is Facebook friends with his fellow employees, he would be protected by

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201 Ariana C. Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L. J. 837, 874 (2012).

202 LJM Cooray, *Freedom of Speech and Expression*, OUR CIVILISATION, http://www.ourcivilisation.com/cooray/rights/chap6.htm#6.3 (last visited on Feb. 11, 2015).

203 Merabet, *supra* note 189, at 1180.

204 *Id.*

205 *Id.*

the NLRA, but not the First Amendment. Under a First Amendment analysis, even though there are employee interests in obtaining his fellow employee's opinions through the post or in potentially getting an unjust demotion overturned by that supervisor's superiors, it will likely not be protected.

If this issue reached the Court, it would likely hold, under current doctrine, that the employee "reasonably believed" that the Facebook status could cause a disruption, namely that the rest of the employees might rise against the employer to prevent their own demotion, which they will be sure is imminent. Nevertheless, this same scenario under current NLRA law would be protected because it would be considered "protected concerted activity" where one employee is reaching out to other employees for mutual protection regarding job conditions.

In this situation, the NLRA would balance the interests of the employee and employer better than current First Amendment doctrine would. This is a contradiction in itself. The First Amendment was enacted to protect people from their government, and they are currently being protected from anybody but. Additionally, disruption is part of the process of making an injustice just. If, after investigation, there is a realization that there was no injustice, the post still has free speech value because it would have given the public another point of view, which they are free to disagree with and is consistent with the "marketplace of ideas" theory. In fact, they may even side with the supervisor. But no matter who they decide to support, it gives the employees, or the public for that matter, the ability to decide whether they are happy with those representing them in this particular government entity (in this case the supervisor) or not. If they are not, they have the power to petition for change. This is consistent with the ideas of self-democracy and political autonomy.

V. CONCLUSION

"As social media gives employees a platform to amplify their voice, it simultaneously enlarges the risk of undermining management's right to control its business."[206] In the public sphere, the current doctrine's response to social media's ability to spread speech is

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[206] Jaremus, *supra* note 31, at 41.

to, ultimately, silence it. Although this will be beneficial to government entities by protecting their images and maintaining harmony at work, the downfalls reflect not only on the employees, but on all American citizens. By upholding this doctrine, we are unintentionally discarding all of the free speech values that the Founders had in mind when they drafted the First Amendment. To avoid turning the free speech of government employees into an old and archaic notion, we should broaden the interpretation of the doctrine as a whole. However, we should keep in mind that extremes are not efficient and avoid going as far as prioritizing employee interests over all else, such as has been done under the NLRA. Taking this moderate approach will honor Justice Stevens' answer to the question, "Does the First Amendment protect employee speech?," to which he answered "sometimes"—not "never."[207]

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[207] Norton, *supra* note 44, at 67.