

become increasingly necessary not only to vindicate constitutionally protected rights, but also to increase accountability in light of the spread of extreme deprivation as an ordinary tool of incarceration. Federal courts first need to resolve the tension within the framework of *Turner* and *Johnson* by moving beyond the dichotomy that hinges on the meaning of proper incarceration. They then should focus on promoting accountability for increasingly severe restrictions on constitutionally protected rights. Unfortunately, *Banks* accomplished neither goal and represents the further retreat of constitutional protections from prisons.

2. *Public Employee Speech*. — Management of speech within government institutions has historically supplied abundant material for a “first amendment nightmare.”¹ The Supreme Court initially afforded no constitutional protection to public employees dismissed for speaking in an unwelcome fashion,² later forbade the government from conditioning employment on the surrender of constitutional rights that it could not abridge directly,³ and then announced in 1968 that the “problem in any case” is to balance the employee’s interest in commenting upon matters of public concern against the state’s interest in providing efficient public service.⁴ Last Term, in *Garcetti v. Ceballos*,⁵ the Supreme Court held that when public employees make statements pursuant to their duties, they receive no First Amendment protection from discipline at the hands of their employers.⁶ This decision may allay employers’ fears of judicial interference, yet the Court’s per se rule departs from precedent in ways that fail to advance — and may even harm — the important interests at stake. Rather than eradicate First Amendment protection for speech uttered in the course of official duties, the Court should have preserved the traditional balancing of interests in those limited circumstances in which employee speech is mandated by constitutional canons or professional codes of ethics. Recognizing that an individual may be compelled to speak in such

Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385 (2001).

¹ Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1768 (1987).

² From the end of the nineteenth century to the middle of the twentieth century, the Court considered government employment not a right but a privilege, a distinction Oliver Wendell Holmes captured in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892). According to Holmes, a policeman fired for political activity “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id.* at 517. For a Supreme Court case echoing this reasoning, see *Adler v. Board of Education*, 342 U.S. 485 (1952).

³ See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967).

⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁵ 126 S. Ct. 1951 (2006).

⁶ *Id.* at 1960.

situations would establish appropriate boundaries for judicial inquiry, protect significant speech, and promote efficient administration.

In February 2000, Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, investigated a claim that inaccuracies plagued an affidavit used to obtain a critical search warrant.⁷ Ceballos found serious misrepresentations by the affiant, a deputy sheriff.⁸ Ceballos prepared a disposition memorandum recommending dismissal of the case.⁹ Although supervisors apparently shared Ceballos's concerns,¹⁰ they decided to proceed with the prosecution pending the outcome of a defense motion to challenge the warrant.¹¹ Ceballos informed defense counsel that he believed the affidavit contained false statements, and defense counsel subpoenaed him to testify at the motion hearing.¹² Ceballos told his supervisor that *Brady v. Maryland*¹³ compelled him to turn over his memorandum to the defense.¹⁴ At his supervisor's direction, Ceballos provided defense counsel with a redacted version of his memorandum and gave truncated testimony that did not reveal his conclusions.¹⁵ After the court denied the defense motion, Ceballos was demoted, given a less desirable caseload, and transferred to a distant office.¹⁶

Ceballos sued his supervisors at the district attorney's office under 42 U.S.C. § 1983, alleging that his employer's actions constituted retaliation for engaging in speech protected by the First and Fourteenth Amendments.¹⁷ The district court granted summary judgment for the defendants.¹⁸ The court recognized that Ceballos's speech related to police misconduct, "a matter of great political and social concern to the community,"¹⁹ and acknowledged that Ceballos "was complying with his (and the government's) duties under the due process clause of the Fifth and Fourteenth Amendments not to introduce or rely on evi-

⁷ *Id.* at 1955. Ceballos reviewed these claims pursuant to his supervisory responsibilities over the deputy district attorney handling the case. *Ceballos v. Garcetti*, 361 F.3d 1168, 1170-71 (9th Cir. 2004).

⁸ *Garcetti*, 126 S. Ct. at 1955. For example, what was described as a long driveway leading to the suspect's house was in fact a publicly accessible street. *Id.*

⁹ *Id.*

¹⁰ See *Ceballos v. Garcetti*, No. CV 00-11106 AHM, slip op. at 3 (C.D. Cal. Jan. 30, 2002) (stating that supervisors "agreed there was a problem with the case").

¹¹ *Garcetti*, 126 S. Ct. at 1956.

¹² *Ceballos*, 361 F.3d at 1171.

¹³ 373 U.S. 83 (1963).

¹⁴ *Ceballos*, 361 F.3d at 1168.

¹⁵ *Garcetti*, 126 S. Ct. at 1972 (Souter, J., dissenting).

¹⁶ *Id.* at 1972 n.14.

¹⁷ *Ceballos v. Garcetti*, No. CV 00-11106 AHM, slip op. at 4-5 (C.D. Cal. Jan. 30, 2002). Ceballos sought lost wages, compensatory damages, and injunctive relief. *Ceballos*, 361 F.3d at 1172.

¹⁸ *Ceballos*, No. CV 00-11106 AHM, slip op. at 11.

¹⁹ *Id.* at 9.

dence known to be false.”²⁰ Nevertheless, the court found persuasive three opinions from other circuits holding that speech produced as part of an employee’s job is not a matter of public concern and therefore does not receive First Amendment protection.²¹

The Ninth Circuit reversed. The appeals court evaluated Ceballos’s First Amendment claim under a two-step test that emerged from the Supreme Court’s decisions in *Connick v. Myers*²² and *Pickering v. Board of Education*.²³ First, the court asked whether the speech related to a matter of public concern.²⁴ The court found that Ceballos spoke “to bring wrongdoing to light”²⁵ and deemed speech concerning public corruption and misconduct to be “inherently a matter of public concern.”²⁶ The court thus proceeded to the *Pickering* balancing test and determined that Ceballos’s First Amendment interest in speaking on this matter of public concern outweighed any countervailing government interest in workplace efficiency.²⁷

The Supreme Court reversed and remanded. Writing for the Court, Justice Kennedy²⁸ held that the First Amendment did not protect Ceballos from employer discipline because he spoke as an employee and not as a citizen when he wrote his memorandum.²⁹ Noting that the “government as employer indeed has far broader powers than does the government as sovereign,”³⁰ the majority held that “while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievances.’”³¹ The Court found dispositive that Ceballos’s “expressions were made pursuant to his duties as a calendar deputy.”³² The Court held 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.”³³ Therefore, Ceballos was not speaking as

²⁰ *Id.* at 11.

²¹ *See id.* at 10 (summarizing cases).

²² 461 U.S. 138 (1983).

²³ 391 U.S. 563 (1968).

²⁴ *Ceballos v. Garcetti*, F.3d 1168, 1173 (9th Cir. 2004) (citing *Connick*, 461 U.S. at 148 n.7).

²⁵ *Id.* at 1174.

²⁶ *Id.* at 1178.

²⁷ *Id.* at 1180. Judge O’Scannlain concurred specially, arguing that circuit precedent should be overturned because it failed to distinguish between an “employee’s viewpoint-laden personal speech and his or her ordinary job-related speech.” *Id.* at 1187 (O’Scannlain, J., concurring).

²⁸ Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Kennedy.

²⁹ *Garcetti*, 126 S. Ct. at 1960.

³⁰ *Id.* at 1958 (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)) (internal quotation mark omitted).

³¹ *Id.* at 1959 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

³² *Id.* at 1959–60 (emphasis added).

³³ *Id.* at 1960.

a citizen when he wrote his memorandum and, accordingly, was not entitled to First Amendment protection.³⁴

The majority emphasized the need to “promote the employer’s mission.”³⁵ To uphold the court of appeals decision would, the Court feared, undermine managerial discretion and “commit . . . courts to a new, permanent, and intrusive role.”³⁶ The Court expressed confidence that public employees are sufficiently shielded by “legislative enactments — such as whistle-blower protection laws and labor codes.”³⁷

Justice Stevens dissented. He refused to embrace the majority’s rule that the First Amendment never “protects a government employee from discipline based on speech made pursuant to the employee’s official duties.”³⁸ Instead, Justice Stevens argued that the First Amendment “[s]ometimes” protects such speech,³⁹ and, because public employees remain citizens while in the office, he rejected “the notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment.”⁴⁰

Justice Souter also dissented,⁴¹ arguing for First Amendment protection when private and public interests in addressing official wrongdoing and threats to health and safety outweigh the government’s interest in efficient policy implementation.⁴² Observing that citizens likely place a high value on the right to speak about the very public issues they confront every day — and about which they are probably well informed — Justice Souter saw ample reason to perform the *Pickering* balancing test in such cases.⁴³ Justice Souter also rejected the majority’s reasoning that whistleblowers are already protected by statutes, maintaining that “statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.”⁴⁴

Justice Breyer dissented separately. He was dissatisfied that the majority would never reach the *Pickering* balancing test in cases in which public employees speak on matters of public concern while performing official duties, and he also expressed concern that Justice

³⁴ See *id.* at 1958–62.

³⁵ *Id.* at 1960.

³⁶ *Id.* at 1961.

³⁷ *Id.* at 1962.

³⁸ *Id.* (Stevens, J., dissenting) (quoting *id.* at 1955 (majority opinion)) (internal quotation mark omitted).

³⁹ *Id.*

⁴⁰ *Id.* at 1963.

⁴¹ Justices Stevens and Ginsburg joined Justice Souter.

⁴² *Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting).

⁴³ See *id.*

⁴⁴ *Id.* at 1970 (citing DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING* 67–75, 281–307 (2d ed. 2004)).

Souter would impose such a test — and the concomitant litigation costs — any time a public employee spoke on matters of “unusual importance.”⁴⁵ Justice Breyer instead argued for the application of the *Pickering* balancing test only when a public employee is compelled by both constitutional and professional obligations to make statements involving matters of public concern in the course of performing ordinary job duties.⁴⁶ These constitutional and professional obligations would provide “administrable standards” that would both protect important speech and prevent “management by lawsuit.”⁴⁷

Although *Garcetti* aimed to provide clarity and limit judicial interference in government operations, the rule that the Court established is troubling because it deviates from precedent in ways that may thwart the interests of the individual speaker, the public, and the state employer. If constitutional or professional mandates were sufficient to trigger the traditional balancing test, the Court could simultaneously afford government employers the clear constitutional boundaries they need to manage their operations and protect speech that is important to the individual speaker, valuable to the public, and compatible with the government’s overall aims.

Historically, courts have paid close attention to the nature of the employee’s statements and the context in which they arose when considering whether the First Amendment protects speech by government employees that touches on matters of public concern.⁴⁸ Such an analysis would have revealed that Ceballos delivered a well-founded, professionally informed opinion to members of a law enforcement community still reeling from the Rampart scandal, in which Los Angeles police officers planted evidence and committed perjury to obtain convictions of innocent people.⁴⁹ Yet the *Garcetti* Court eschewed analysis of content and context, sidestepping the difficulties inherent in the “delicate balancing of the competing interests surrounding [public employee] speech and its consequences”⁵⁰ by adopting a per se rule. Prior Courts had found such balancing difficult but necessary, given the significant interests at stake.⁵¹ In considering these competing interests, previous decisions achieved only an uneasy balance that often shifted

⁴⁵ *Id.* at 1975 (Breyer, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1974.

⁴⁸ See, e.g., *Connick v. Myers*, 461 U.S. 138, 150, 153 (1983).

⁴⁹ Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 549 (2001).

⁵⁰ *Garcetti*, 126 S. Ct. at 1961.

⁵¹ On one side of the scale sits freedom of speech, the “guardian of our democracy.” *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). Against that bulwark weighs the recognition that “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Connick*, 461 U.S. at 146.

depending on the particulars of the conflict.⁵² Yet those precedents did not carelessly or accidentally apply the process of calibration and recalibration of state and employee interests that the *Garcetti* Court appears to have permanently resolved in the employer's favor. Rather, *Pickering* recognized "the enormous variety of fact situations" in which public employee speech might generate reprisals and thus found it neither "appropriate [nor] feasible to attempt to lay down a general standard against which all such statements may be judged."⁵³

The *Garcetti* majority not only formulated such a "general standard," but it did so by misconstruing the phrase "as a citizen" within the public concern requirement advanced in *Pickering* and *Connick*. The operative phrase originated in *Pickering*, in which the Court weighed the State's interests against the employee's interest "as a citizen, in commenting upon matters of a public concern."⁵⁴ This language reappeared in *Connick* when the Court contrasted situations in which a person speaks "as a citizen" with situations in which an employee speaks "upon matters only of personal interest."⁵⁵ *Connick* held that although most questions on an intraoffice survey distributed by an assistant district attorney merited no First Amendment protection, a question asking whether employees had been pressured to support political campaigns did touch on a matter of public concern.⁵⁶ This distinction did not turn on whether the survey was distributed pursuant to the attorney's duties. Rather, the attorney spoke as an employee when the subject was internal office matters and as a citizen when the issue was a matter of public concern. Thus, in both *Pickering* and *Connick*, the phrase "as a citizen" operated not independently but rather as a marker present when employees spoke on issues of public concern. Yet *Garcetti* isolated the words "as a citizen" and made them determinative: henceforth, public employees speaking "pursuant to official duties" will not be speaking "as citizens for First Amendment purposes."⁵⁷ They therefore merit no First Amendment protection, regardless of how profoundly their speech might impact matters of public concern.⁵⁸

⁵² Compare, e.g., *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (holding that First Amendment protection extended to a schoolteacher who complained to her principal about school desegregation efforts), with *Brown v. Glines*, 444 U.S. 348 (1980) (holding that Air Force commanders do not violate First Amendment rights of servicemembers by requiring them to obtain approval prior to circulating petitions).

⁵³ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968).

⁵⁴ *Id.* at 568.

⁵⁵ *Connick*, 461 U.S. at 147.

⁵⁶ *Id.* at 149.

⁵⁷ *Garcetti*, 126 S. Ct. at 1960.

⁵⁸ See *id.* This shift may reflect a desire to help employers and courts escape the vagaries of the public concern requirement. Although *Connick* established the public concern prong as a gatekeeper that precedes any First Amendment balancing, the decision gave little indication as to

The rule that emerged in *Garcetti* failed to advance the employee's interest in speaking, the wider public interest in hearing such speech, or the government's interest in efficient administration. By contrast, a rule that recognizes an employee's constitutional and professional obligations would accommodate the viewpoint of the speaker, the best interests of the public, and the needs of the government employer. "[A] government paycheck does nothing to eliminate the value to an individual of speaking on public matters,"⁵⁹ and the presence of constitutional or professional duties may dramatically amplify the value of the speech to the speaker because failure to speak could expose the employee to civil liability, disciplinary action at the hands of a professional board, or both. Ceballos's case well demonstrates the problem of the public employee caught "on the horns of a dilemma."⁶⁰ While constitutional and professional obligations compel a prosecutor to disclose exculpatory evidence, supervisors apply tremendous pressure to garner convictions.⁶¹ Left unprotected, prosecutors will be forced to choose between the Constitution and career prospects. Either way, the public attorney will likely be gored.

Nor was Ceballos the sole interested party: "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."⁶² Although Ceballos did not write to a newspaper as the government employee did in *Pickering*, he did try to disseminate his information to the most relevant members of the public: the defendants, the defense counsel, and the court handling the criminal case. These attempts to challenge an affidavit containing "serious misrepresentations made to other institutions of government" implicate what Professor Vincent Blasi calls the "checking value" of free speech: its ability to check public officials' abuse of power.⁶³ To best protect the public from such abuse, Blasi argues that "speech critical of public officials by those persons in the best position to know what they are talking about — namely, government employees —

the size or shape of that gate. *Connick* suggested that "any matter of political, social, or other concern to the community" could qualify, provided the inquiry recognized the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 146, 149. With generous understatement, the Court later acknowledged that "the boundaries of the public concern test are not well-defined." *City of San Diego v. Roe*, 125 S. Ct. 521, 525 (2004) (per curiam).

⁵⁹ *Garcetti*, 126 S. Ct. at 1964 (Souter, J., dissenting).

⁶⁰ Brief of Ass'n of Deputy Dist. Attorneys & Cal. Prosecutors Ass'n as Amici Curiae in Support of Respondent at 2, *Garcetti*, 126 S. Ct. 1951 (No. 04-473), 2005 WL 1767121.

⁶¹ *Id.*

⁶² *Garcetti*, 126 S. Ct. at 1959 (quoting *Roe*, 125 S. Ct. at 525) (internal quotation mark omitted).

⁶³ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527, 534.

would seem to deserve special protection.”⁶⁴ Yet *Garcetti*, paradoxically, affords these employees diminished protection and thus reduces their ability to serve the public’s interest in thwarting corruption, incompetence, and waste.

The *Garcetti* Court’s rule purports to protect this public interest but creates a perverse incentive: government employees lose protection when fulfilling job-related duties but retain protection when speaking directly to the media. This option appears undesirable for both an employee hoping to return to work and the institution shoved into the spotlight. In addition, questions arise regarding how viable *Pickering* protection remains, even for a government employee who speaks publicly, given recent moves to tighten government security such as the announcement that government sources may be prosecuted for leaks to the media.⁶⁵ As one commentator laments, “where public disclosure of alleged government wrongdoing is so fraught with risk of sanction — and is very unlikely to be deemed constitutionally protected — the possibility of internal grievance was just about the only modest fallback option for a sincere and well-motivated whistleblower.”⁶⁶

Garcetti severely limits the option of internal dissent to ensure that government organizations “operate efficiently.”⁶⁷ However, the Court’s narrow vision of efficiency ironically undermines this very interest. Efficiency is defined by actions “productive of desired effects,”⁶⁸ and proper analysis of government efficiency should be informed by the organization’s original purpose and ultimate goals. Under this view, democratic theory and organizational studies both suggest that free speech may actually *enhance* efficiency by facilitating the flow of information and improving decisionmaking. John Stuart Mill recognized long ago that the leader who has “sought for objections and difficulties, instead of avoiding them,” will demonstrate better judgment than “any person, or any multitude, who [has] not gone through a similar process.”⁶⁹ Experts studying political and organizational operations

⁶⁴ *Id.* at 634.

⁶⁵ Dan Eggen, *White House Trains Efforts on Media Leaks: Sources, Reporters Could Be Prosecuted*, WASH. POST, Mar. 5, 2006, at A1 (reporting plans to “target[] journalists and their possible government sources”).

⁶⁶ Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com> (June 1, 2006, 11:34 EST) (emphasis omitted).

⁶⁷ *Garcetti*, 126 S. Ct. at 1958.

⁶⁸ Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/efficient> (last visited Oct. 15, 2006); *cf.* Post, *supra* note 1, at 1769–70 (“A government institution’s interest in internally regulating speech is therefore its interest in the attainment of the very purposes for which it has been established . . .”).

⁶⁹ JOHN STUART MILL, *ON LIBERTY* 20 (Elizabeth Rappaport ed., Hackett Publ’g Co. 1978) (1859); *see also* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (“Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant

from the escalation of the Vietnam War⁷⁰ to the Columbia space shuttle disaster⁷¹ have found that inside government institutions, “pressures for uniformity and loyalty can build up within groups to the point where they seriously interfere with both cognitive efficiency and moral judgment.”⁷² To prevent such catastrophes and improve overall administration, effective leaders must “seek [dissent] out in their organizations.”⁷³ Yet such a search will bear less fruit if employees know that voicing critical opinions may allow their bosses to retaliate with impunity.

The advantages of encouraging employees’ critical speech might suggest that widespread application of the *Pickering* balancing test would be in order. However, *Garcetti* also addressed a second potential source of inefficiency: the “inevitable disruption [from] the looming threat of First Amendment litigation arising from any allegedly adverse employment decision” linked to job-related speech.⁷⁴ Unfortunately, early results suggest *Garcetti* will not provide sufficient clarity to preempt such actions. Litigants in several subsequent cases have already clashed over whether employees were speaking pursuant to job duties,⁷⁵ and a district court has warned that “many courts will struggle to define the breadth of *Garcetti* and its impact on First Amendment jurisprudence.”⁷⁶

Courts could provide more clarity and simultaneously protect more valuable speech if a First Amendment claim existed — and balancing was required — if and only if a public employee’s job-related speech were mandated by either the Constitution or a professional code of

to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.”).

⁷⁰ See IRVING L. JANIS, *GROUPTHINK* 97–130 (1982) (describing how the Vietnam War escalated in part due to a failure of Cabinet members to engage in critical discourse).

⁷¹ See MICHAEL ROBERTO, *WHY GREAT LEADERS DON’T TAKE YES FOR AN ANSWER* 36, 84 (2005) (describing how managers of the Columbia space shuttle program failed to elicit critical feedback from engineers).

⁷² Philip Tetlock et al., *Assessing Political Group Dynamics: A Test of the Groupthink Model*, 63 *J. PERSONALITY & SOC. PSYCHOL.* 403, 403 (1992).

⁷³ ROBERTO, *supra* note 71, at 84 (emphasis omitted).

⁷⁴ Petition for Writ of Certiorari, *Garcetti*, 126 S. Ct. 1951 (No. 04-473), 2004 WL 2260964, at *18. Although one might question how often workers might attempt to “constitutionalize” garden-variety employee grievances, the mere threat that such claims could survive summary judgment might well prevent employers from taking appropriate disciplinary actions against wayward employees.

⁷⁵ See, e.g., *Kodrea v. City of Kokomo*, No. 1:04-CV-1843-LJM-WTL, 2006 WL 1750071, at *8 (S.D. Ind. June 22, 2006) (distinguishing *Garcetti* because in the instant case a factual dispute existed about whether an employee’s complaints about coworkers’ alleged manipulation of hours worked were made pursuant to his ordinary duties).

⁷⁶ *Hailey v. City of Camden*, No. 01-3967, 2006 WL 1875402, at *16 (D.N.J. July 5, 2006).

ethics.⁷⁷ Unlike Justice Breyer's approach, which would require both constitutional *and* professional mandates and thus could lead to scenarios in which the Constitution compelled speech but denied the speaker protection, the approach offered here would find a constitutional mandate sufficient, in and of itself, to require the traditional balancing between the speaker's and the employer's interests.

Offering constitutional protection based on professional canons may appear less theoretically satisfying, but courts and scholars have recognized the distinctive import of speech related to professional codes.⁷⁸ Acknowledging this import here would advance both individual and institutional interests. A professional caught between fealty to her employer and the obligation to observe broader professional norms would not be left to face the dilemma unprotected. At the same time, an employer could rely on the "objective specificity and public availability" of the codes to demarcate the zones of potential judicial involvement.⁷⁹ Taken together, these previously established standards would prevent unworthy claims from surviving summary judgment and also provide administrable standards for courts to apply when legitimate claims arise.

The resulting regime would not protect every utterance made by a public employee. Yet the suggested standards do offer significant advantages over both the previous regime and the *Garcetti* rule. Whereas the old uncertainty of the public concern requirement might have left government employers wary of imposing necessary discipline, the proposed standards would give supervisors the ability to administer government institutions within clear constitutional boundaries. Whereas the *Garcetti* formula would sacrifice job-related speech, the proposed rule would protect significant speech uttered by well-informed sources. It would not leave employees with the unpalatable

⁷⁷ Job-related speech that did not meet these requirements would then be subject to the *Garcetti* rule, protected only by statutory shields or the employer's "sound judgment." *Garcetti*, 126 S. Ct. at 1962. For example, a prosecutor compelled by *Brady v. Maryland*, 373 U.S. 83 (1963), to turn over exculpatory evidence would be protected. A doctor would receive protection if she followed the American Medical Association's Code of Ethics mandate to report impaired, incompetent, or unethical colleagues and told a supervisor of a drunken physician's botched operation. See AM. MED. ASS'N, CODE OF MEDICAL ETHICS, at xiv (2004–2005 ed.) ("A physician shall . . . strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities."); see also Ctr. for the Study of Ethics in the Professions at the Ill. Inst. of Tech., Codes of Ethics Online, <http://ethics.iit.edu/codes/coe.html> (last visited Oct. 15, 2006) (collecting professional codes). Yet if the same doctor told her boss she would not operate on female soldiers because she believed women should not be allowed into combat, she could be disciplined without constitutional repercussions because such speech was not mandated by a constitutional obligation or professional code.

⁷⁸ See, e.g., *Garcetti*, 126 S. Ct. at 1974 (Breyer, J., dissenting) (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001); *Polk County v. Dodson*, 454 U.S. 312, 321 (1981); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 172 (1996)).

⁷⁹ *Id.*

and unproductive options of going public or staying silent. Finally, the approach offered recognizes the dilemma faced by an individual who finds that her office operates in a manner that violates either the Constitution or her professional ethical code. When a government entity's actions contravene these canons, the Court would do well to protect, rather than abandon, the public servant torn by dual loyalties yet compelled to speak.

3. *Campaign Finance Regulation*. — More than thirty years ago, in the landmark case of *Buckley v. Valeo*,¹ the Supreme Court considered the constitutionality of legislatively enacted campaign finance regulation. In *Buckley*, the Court split the difference² and created a bipartite classification that exists to this day. Balancing Congress's legitimate regulatory interests³ against the constitutional speech rights of political participants, the Court held that the regulation of campaign contributions was permissible, while the regulation of campaign expenditures was not.⁴ The response to *Buckley* was almost universally negative: the academy despised the decision,⁵ and, for at least the last ten years, a majority of the Justices on the Court have wanted to overturn it.⁶ But *Buckley* has endured.

Last Term, in *Randall v. Sorrell*,⁷ the newly constituted Roberts Court reconsidered this redheaded stepchild of Supreme Court jurisprudence. With six Justices filing opinions in a contentious decision, the Justices could only agree to an affirmation of *Buckley*'s core holding. However, hidden beneath the surface of this seeming non-event was a potentially important development: the Supreme Court's most emphatic embrace yet of its role in protecting the structural integrity of

¹ 424 U.S. 1 (1976) (per curiam).

² Judge J. Harvie Wilkinson III recently described the Rehnquist Court's jurisprudence using this phrase. See J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969 (2006). Although *Buckley* was decided by the Burger Court and thus is not discussed by Judge Wilkinson, the concept of "splitting the difference in result" can also be applied to *Buckley*. See *id.* at 1972–75.

³ The Court recognized as a legitimate regulatory interest the need to prevent corruption and its appearance. *Buckley*, 424 U.S. at 25. Although the definition of corruption has expanded since *Buckley*, see *McConnell v. FEC*, 540 U.S. 93, 152 (2003), the Court has never explicitly recognized another legitimate legislative interest in campaign finance cases.

⁴ *Buckley*, 424 U.S. at 23.

⁵ See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 513 (2d ed. 2002) (detailing the academy's "tremendous criticism" of *Buckley*).

⁶ See *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604 (1996). In *Colorado I*, five Justices believed that *Buckley* should be overturned. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas believed that regulation of neither contributions nor expenditures should be allowed, see *id.* at 635–36 (Thomas, J., concurring in the judgment and dissenting in part), and Justices Stevens and Ginsburg believed that regulation of both contributions and expenditures was constitutional, see *id.* at 648–50 (Stevens, J., dissenting). Since neither side could attract five Justices, the case was narrowly decided, upholding *Buckley*.

⁷ 126 S. Ct. 2479 (2006).