FREE SPEECH RIGHTS THAT WORK AT WORK: FROM THE FIRST AMENDMENT TO DUE PROCESS

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In the workplace, institutional context clearly affects the shape of constitutional rights. That is underscored by the U.S. Supreme Court's recent decision in Garcetti v. Ceballos. *In denying First Amendment protections to public employees when they speak in the course of doing their jobs,* Garcetti *gets it wrong; but the right answer to the* Garcetti *problem is not so obvious. This Article proposes a due process solution to the* Garcetti *problem that better accommodates the interests of employers and employees than any of the positions taken within the Court in* Garcetti. *Indeed, due process might provide a better framework for the larger universe of public employee free speech controversies. As compared to current law, with its all-or-nothing recourse to federal litigation, the broader but flatter protections of a due process approach would smooth out some of the troubling "cliff effects" and distortions that current doctrine creates; it would be more compatible with workplace structures and relationships; and it might afford more reliable free speech rights for employees. Whether the due process solution would work as hoped turns in part on whether it would prove too compatible with prevailing workplace norms and too deferential to managers to afford the protection that whistleblowers, dissenters, and the public need. This question echoes broader concerns about self-regulatory or reflexive models of modern law of which the due process solution is an example. The idea that institutions matter, and should affect the shape of constitutional rights, is likely to lead toward further institutional self-regulation. That is a perilous path unless we find ways of encouraging institutions to internalize public values and constitutional norms, while maintaining an external check on those institutions that reinforces rather than undermines effective self-regulation.*

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INTRODUCTION

First Amendment doctrine is often institutionally blind—surprisingly oblivious to institutional differences that seem to matter in the world.[1] But the workplace is an obvious and longstanding counterexample; it is undoubtedly a distinct "constitutional niche."[2] The civic and political importance of what happens in the workplace and the constitutional stake in employees' rights and freedoms at work are pervasively undervalued.[3] This is true in different ways in both the private sector (in which state action against employees is rare and constitutional rights are seldom implicated) and in the public sector (in which every reprimand, suspension, and termination is state action). The pervasiveness of state action in the public-sector workplace makes it a prolific source of constitutional disputes and doctrine, and an interesting laboratory in which to study the implications of taking institutions seriously for constitutional purposes.

The U.S. Supreme Court's recent decision in *Garcetti v. Ceballos*[4] highlights both the difficulty of applying First Amendment principles in the workplace setting and the Court's tendency to resolve doubts in that setting against employee rights. In eviscerating the free speech rights of public employees when they speak in the course of doing their jobs, *Garcetti* gets it wrong. But the right answer to the *Garcetti* problem is not so obvious, for the First Amendment is a bit of a square peg in a round hole here. The public clearly has an interest in hearing the speech that *Garcetti* leaves unprotected; but from the employee's standpoint, the problem in *Garcetti* is as much about defeated expectations as it is about lost liberties.

I propose a due process solution to the *Garcetti* problem that fits more comfortably with workplace structures. The due process solution is not merely

1. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).
2. As this symposium has now taught me to call it.
3. For some of my thoughts along these lines, see CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 103–39 (2003); Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990).
4. 126 S. Ct. 1951 (2006).

better than nothing for employees, which is what *Garcetti* prescribes; I believe it is better than the judicial remedy that the Court rejected. More tentatively, I suggest that due process law might provide a better framework for the larger universe of public employee free speech controversies outside of *Garcetti*. Transforming public employees' free speech claims from First Amendment rights into liberty interests protected by the Due Process Clause could afford a quicker and more accessible form of speech protection that actually works within the public-sector workplace. The fullest version of the due process solution would extend protection to categories of speech left unprotected not only by *Garcetti* but also by *Connick v. Myers*,[5] which confined the reach of the First Amendment to public employee speech on "matters of public concern."[6] The resulting regime would smooth out some of the troubling "cliff effects" and distortions that current doctrine creates within the workplace setting. These broader but flatter protections would be more compatible with workplace structures and relationships and might afford more reliable free speech rights for employees than current law with its reliance on federal litigation as the enforcement mechanism.

Whether the due process solution would work as hoped depends on the answers to some difficult questions that I only begin to explore here. Most important is the question whether a due process regime would prove too compatible with prevailing workplace norms and too deferential to managers to afford the protection that dissenters, whistleblowers, and the public need. This question echoes broader concerns about the kind of self-regulatory or reflexive models of modern law to which many legal scholars (including myself) are drawn, and of which the due process solution is an example. The idea that institutions do matter, and should affect the shape of constitutional rights, is likely to lead further down the road toward institutional self-regulation. That is a perilous path unless we find ways of encouraging institutions to internalize public values and constitutional norms, while maintaining an external check on those institutions that reinforces rather than undermines effective self-regulation.

I. A BRIEF SURVEY OF THE LANDSCAPE OF PUBLIC EMPLOYEE SPEECH RIGHTS

Public employees were once relegated to that black hole of constitutional law known as the rights-privileges distinction. As pithily expressed

5. 461 U.S. 138 (1983).
6. *Id.*

by Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[7] In a series of cases in the 1950s and 1960s, the rights-privileges doctrine largely gave way to the doctrine of "unconstitutional conditions," on the one hand, and the "new property" treatment of government entitlements, on the other hand.[8] The basic idea was simple: The government is not required to confer on individuals valuable entitlements such as welfare benefits, professional licenses, or employment. But when it does so, it may not withhold or take away those entitlements for unconstitutional reasons; nor, where the entitlements rise to the level of a property interest, may it take them away without due process of law. I have more to say below about the due process elements of this development. For now, let us focus on unconstitutional conditions, and particularly on the idea that the government may not condition an entitlement on the sacrifice of the freedom of speech protected by the First Amendment.

In public employment, the rights-privileges distinction finally bowed out, and First Amendment rights took center stage, in *Pickering v. Board of Education*[9] in 1968. Yet *Pickering* and its progeny did not bring the government workplace into anything like parity with the public square. As the Court explained:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[10]

With *Pickering*, public employees emerged from their constitutional black hole into a new constitutional niche.

The shape of that constitutional niche has been refined but has not varied much over the years.[11] Unlike ordinary citizens faced with government action, public employees are generally protected by the First Amendment against reprisals by the government employer only when

7. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892).
8. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
9. 391 U.S. 563 (1968).
10. *Id.* at 568.
11. For a brief review of the doctrine's development, see generally Estlund, *supra* note *, at 118–29.

they speak on "matters of public concern." This phrase from *Pickering* was plucked up and promoted to a threshold requirement for public employee speech in 1983 in *Connick v. Myers*.[12] Moreover, even when public employees do speak on matters of public concern, adverse government action based on that speech is not subjected to anything like strict scrutiny, nor is the government required to abide by content neutrality. Rather, the employee's interest in free speech is balanced against the managerial concerns of the government employer.[13] As the Court also made clear in *Connick*, this balancing test takes account of a wider range of government interests—for example, efficiency, morale, and discipline—and grants greater deference to employer fears and predictions about the consequences of speech than would normally be allowed in support of suppressing expression.[14] This, in a nutshell, is the *Connick-Pickering* analysis that prevails within the constitutional niche of the public-sector workplace.

The basic *Connick-Pickering* test seemed to provide the template for the full gamut of public employee free speech claims. But until 2004, all of the Supreme Court's basic public employee speech cases had come from a middle segment of what turns out to be a wider spectrum of potential controversies. All of the Court's cases involved employee speech that was work-related in some sense, by virtue of either its location or its content, but that was not part of the work itself. In the past two terms, however, the Court decided two cases, both from the Ninth Circuit, that outflanked standard public employee speech case law at each end of the spectrum. The *Garcetti* case, which is my main focus here, involved speech that is the job itself. In *City of San Diego v. Roe*,[15] decided per curiam in the prior term, the speech was off duty and not about the employer in any obvious way.

In *City of San Diego*, John Roe, a police officer, had made pornographic videos and sold them on eBay. His shtick was to appear in (and then partly, and crucially, out of) a generic police uniform, issuing and revoking traffic tickets in the course of sexual antics. When Roe's activities were discovered, his supervisors told him to stop. He failed to do so and was fired. The Supreme Court's per curiam decision (which I discuss in greater depth elsewhere[16]) contains both good news and bad news for public employees. The good news is that if an employee's speech is unrelated to the employment—if it takes place outside the workplace and its content is not

12. 461 U.S. 138, 146 (1983).
13. *Id.* at 150–54.
14. *Id.*
15. 543 U.S. 77 (2004) (per curiam).
16. *See* Estlund, *supra* note *, at 130–35.

related to the job—then the speech is not subject merely to the limited protections of the *Connick-Pickering* test but rather enjoys something like the full protection of the First Amendment. The employee's freedom of speech is apparently not confined to matters of public concern, and is more robust than the freedom afforded by the *Connick-Pickering* balancing test. This was one reading of the Court's rather confusing 1995 decision in *United States v. National Treasury Employees Union (NTEU)*,[17] but *City of San Diego* made this clear for the first time.

The bad news for employees lies in the Court's unanimous holding that Roe's pornographic videos were not unrelated to his employment, and therefore did not qualify for the broader and more robust protection. His use of a generic police uniform was sufficient to link his speech to the employment, for it "brought the mission of the employer and the professionalism of its officers into serious disrepute."[18] This meant that the speech was subject to the *Connick-Pickering* balancing test, under which the Court held unanimously, contrary to the Ninth Circuit, that Roe's pornographic videos were not speech on matters of public concern. So Roe's claim failed at the threshold, and the employer was not required to justify the discharge.

I have little more to say about this case here, but its good news does bear repeating: *City of San Diego*, and its reading of *NTEU*, appear to place an outer limit on the additional power of the government over the speech of its employees. While that outer limit is a bit further from the workplace than one might have expected, at some point along the spectrum of work-relatedness, the public employee apparently escapes the *Connick-Pickering* niche and recovers her freedom as a citizen vis-à-vis the government.

At the other end of the spectrum lie *Garcetti* and speech by which the employee performs the job itself. Richard Ceballos was a deputy district attorney who wrote a memo suggesting that an arresting police officer may have lied in an affidavit that was the basis for an arrest warrant. He wrote the memo (and subsequently testified under subpoena for the defense) as part of his job supervising the resulting prosecution; indeed, he believed he was professionally and legally obligated to raise these potentially exculpatory concerns. Yet he claimed to have suffered reprisals as a result of writing the memo. The question was whether the First Amendment protects public employee speech that is actually part of the employee's job performance. The Ninth Circuit had held that it did protect such

17. 513 U.S. 454 (1995). The ambiguities of this case are parsed in Estlund, *supra* note *, at 127–33.

18. *City of San Diego*, 543 U.S. at 81.

speech when its point was to reveal potential wrongdoing—to blow the whistle, in effect.[19] The Supreme Court, by a vote of 5–4, held to the contrary: "[W]hen 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."[20]

Garcetti was a closely watched case, partly because of its implications for public-sector whistleblowers, but partly because it hit especially close to home for court watchers—teachers, scholars, and lawyers—whose jobs consist almost entirely of speech. The meaning of *Garcetti* for teachers and scholars remains unresolved; the Court bracketed those issues as ones in which academic freedom may play a role. Those employees occupy the intersection of two constitutional niches: the workplace, in which institutional context operates to narrow and dilute employees' constitutional rights; and the academy, in which institutional context may either expand or contract the constitutional rights of individuals within those institutions depending on who is asserting academic freedom against whom. All we know for now is that the Court seems to have recognized that there are special complexities in the case of speech-that-is-the-job within educational institutions.

But *Garcetti* does appear to doom the claims of other employees like Ceballos who are required as part of their job, or even professionally obligated, to report mistakes or misconduct within the employing agency or on the part of others with whom the agency deals. After *Garcetti*, those employees are left to whatever protections the legislature or the agency itself decides to afford them; they have no First Amendment claim. In effect, *Garcetti* creates a new "free-fire zone" alongside that which *Connick* creates for speech that is not on matters of public concern.

Before examining *Garcetti* more closely, let us take out a compass and get our bearings. After this latest round of cases, we can now divide the landscape of public employee speech cases into four categories, each denominated in Diagram A by the case that governs its disposition. Furthest removed from the employment nexus is *NTEU* speech, which is off the job and unrelated to the employment. There are three subcategories of speech that is "related to the employment"—speech that is uttered at or otherwise related to work. First, there is *Pickering* speech that is on matters of public

19. Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004) (quoting Roth v. Veteran's Admin., 856 F.2d 1401, 1406 (9th Cir. 1988)).

20. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).

concern but is not actually part of the job performance. *Pickering* speech is subject to the balancing test. Second, there is *Connick* speech that is not on matters of public concern and is within *Connick*'s free-fire zone. Finally, there is *Garcetti* speech-that-is-the-job, which occupies its own free-fire zone.

DIAGRAM A

<table>
<tr><td>Speech →
↓</td><td colspan="3">Least ——— Job-relatedness ———→ Most
Is Unrelated to the Work (Neither at nor about work) | Is Related to the Work (Either at or about work) | Is the Work</td></tr>
<tr><td>Is on Matters of Public Concern</td><td rowspan="2">*NTEU* Speech: PROTECTED (Fully? More)</td><td>*Pickering* Speech: BALANCE</td><td rowspan="2">*Garcetti* Speech: UNPROTECTED (Except for teachers and scholars?)</td></tr>
<tr><td>Is *not* on Matters of Public Concern</td><td>*Connick* Speech: UNPROTECTED</td></tr>
</table>

These various distinctions create dramatic cliff effects: One may have a federal cause of action with all the bells and whistles or no recourse at all, depending on whether one's speech is held to be on a matter of public concern, or on whether the speech falls within one's job duties. I return below to this larger landscape and its cliffs and valleys. But first I turn to the fourth and most recently delineated category of public employee speech: *Garcetti* and speech-that-is-the-job.

II. GARCETTI AND SPEECH-THAT-IS-THE-JOB

The doctrinal hook for the *Garcetti* holding was *Pickering*'s reference to "the interests of the [employee], *as a citizen*, in commenting upon matters of public concern."[21] Of course, that clause was there all along, and was repeated in every one of the Court's public employee speech decisions. But *Garcetti* was the first time that the Court gave independent meaning to the phrase "as a citizen." In *Connick*, in which this same sentence from *Pickering* was

21. Pickering v. Bd. of Educ., 391 U.S. 568, 586 (1968) (emphasis added).

dissected and reshaped into the threshold "public concern" requirement, the focus was on the content and purpose of the speech. Before *Garcetti*, it was fair to assume that an employee spoke "as a citizen" whenever she spoke on matters of public concern. But *Garcetti* held otherwise: "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee."[22] So if *Connick* was the first shoe dropping, *Garcetti* was the second. To gain access to First Amendment protections, employees must now show both that they were speaking on matters of public concern, and that they were speaking as citizens rather than as employees.

But why are public employees not acting as citizens when they speak out about government misconduct, waste, or dishonesty in the course of doing their jobs? Many public employees enter public service out of a heightened sense of civic obligation; indeed, they are explicitly recruited on that basis. That would seem to make them citizens par excellence. Public employees themselves would seem to have at least as much interest in speaking up when their civic and professional obligations coincide as when they speak up extracurricularly.[23] For its part, the public has at least as much interest in hearing what public employees have to say when they speak as part of their jobs, with the responsibility and expertise that this generally entails.

It is tempting to conclude that the majority's reasons for denying employees' free speech interests in this context have less to do with the doctrine or the policies of the First Amendment than with mere managerial efficiency. The majority was intent upon giving government managers within this constitutional niche the discretion to manage employees, define their jobs, and evaluate their performance without the fear of federal court litigation hanging over them. But there are larger principles at work beneath the majority's deferential posture toward government managers (putting aside for the moment whether the majority sensibly applied those principles).

The government's ability to perform its functions—indeed, to carry out the will of the people—depends on the efficient operation of government agencies and on the productive job performance of its employees. That is roughly what the Court said in *Waters v. Churchill*[24] in addressing the

22. *Garcetti*, 126 S. Ct. at 1960.
23. *See* Estlund, *supra* note *, at 150–53.
24. 511 U.S. 661 (1994).

question: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?"[25] In response, the Court stated:

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.[26]

In other words, the government's power to regulate employee speech that detracts from its public mission is built into the employment contracts implicitly agreed to by public employees in accepting employment.

But more than contractual expectations, and more than efficiency, weigh in favor of broader governmental power over the speech of its employees than over the speech of other citizens. In a sense, democracy itself depends on public officials being empowered to direct and evaluate how employees perform their jobs. It is all well and good for voters to elect officials and express policy preferences, but those democratic processes do not amount to much unless those elected and appointed officials can implement those policies. And most policies can only be implemented through the words and actions of public employees. In the simplest and starkest terms, that is why the workplace cannot and should not be run like a public square.

Of course, democracy also depends on the freedom of expression about what happens within the government, and on government officials being held accountable for what they and their agencies do. Public employees are crucial sources of information about what agencies do, both within the government and for the voting public. That is a big part of why the rights-privileges doctrine deservedly met its demise, and why the government workplace was promoted from a constitutional black hole to a constitutional niche.

The *Garcetti* problem—that of how to treat speech by which an employee performs the job itself—arises at the point of greatest tension between these two ways of thinking about the relationship between employees' freedom of speech and employers' managerial power. And it is a genuine problem. On the one hand, relegating speech-that-is-the-job to the ordinary *Connick-Pickering* regime raises real concerns. Much of what

25. *Id.* at 671.
26. *Id.* at 674–75.

many public employees are hired to do is to communicate, and much of that communication is necessarily on matters of public concern; it is about whether and how an agency is carrying out its public mission. That would get it over the *Connick* threshold and into *Pickering*'s balancing test. To be sure, *Pickering* leaves a lot of room—perhaps too much room—for managerial discretion and for efficiency concerns. The balancing test can accommodate any legitimate concerns that public employers might want to rely upon in defending a speech-based decision. Still, under *Connick-Pickering*, many routine employment decisions that are based on employees' job performance might readily be recast and litigated as First Amendment cases in federal court. The dissenters in *Garcetti* sought to cabin this problem by narrowing the scope of the speech-that-is-the-job that would be protected.[27] But in narrowing the scope of protected speech to certain kinds of whistleblowing, the dissenters (like the Ninth Circuit judges below) would create new and difficult line-drawing problems. They would also create constitutional protections that overlap with, and to some degree render superfluous, a growing array of statutory protections, including whistleblower protections that seek to meet similar concerns. Allowing employees to bypass such statutory procedures, however reasonable and accessible, would hardly seem to encourage public employers to devise their own mechanisms for protecting employees who come forward with information or concerns.

On the other hand, it is terribly dissonant with First Amendment principles and policies to exclude this speech from the realm of the First Amendment altogether. The public's interest in hearing what employees have to say would seem to be only heightened in the *Garcetti* context, when the employee is especially likely to be speaking responsibly and knowledgably. The public employee, for his part, has an undiminished interest in the *Garcetti* context in having the liberty to speak without fear of government reprisals; indeed, that liberty interest is reinforced by the employee's reasonable expectations about what the job requires. The *Garcetti* majority manages to have it otherwise only by fiat—by declaring that the government employer effectively owns the speech by which the employee performs her job: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any

27. Indeed, Justice Breyer would have confined a ruling for Ceballos almost to the facts of the case. The employee would be protected only when he was obligated to speak both by professional ethics and by the U.S. Constitution itself (as in the case of Ceballos's disclosure of potentially exculpatory doubts about the prosecution's witnesses). *See Garcetti*, 126 S. Ct. at 1974–75 (Breyer, J., dissenting).

liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[28] But this sounds hollow when the employer has punished the employee for the very speech, and the very exercise of professional judgment, that it "commissioned."

The *Garcetti* ruling denigrates both the individual and the public interests in favor of public employers' interest in unfettered control over employees' job performance. This might make sense if we were willing to trust government managers to do the right thing—to manage and discipline employees strictly in the public interest but also to create whatever mechanisms are needed to encourage employees to disclose information that the public needs to evaluate the agency. But a government manager faces a conflict of interest in dealing with employees who speak out about wrongdoing inside the manager's own agency. Indeed, the *Garcetti* decision exacerbates this conflict by creating new openings for agencies to insulate themselves from accountability. *Garcetti* encourages public employers to redefine employees' jobs to include any potential criticism of the agency or its partners, not to increase accountability but opportunistically to shut down the threat of litigation. By broadly defining employees' jobs to include any sort of whistleblowing, yet failing to afford any recourse to the employee who is penalized for carrying out those job duties, public employers might game the system to the detriment of both employees and the public.

III. DISTINCTIVE FEATURES OF THE WORKPLACE AS A FIRST AMENDMENT NICHE

Before discussing my proposed solution to the *Garcetti* problem, I want to bring to the foreground two dimensions of the problem of public employee speech that give distinct shape to this constitutional niche: the contractual context in which the employee speaks and the employer responds to that speech; and the procedural implications of protecting the speech.

The fact that public employee speech takes place in the context of a contractual relationship sets the public workplace apart from most other settings in which the government seeks to restrain speech and in which the First Amendment may restrain government action. The Court has referred

28. *Id.* at 1960. The majority's reference to the "liberties the employee might have enjoyed as a private citizen" harkens to a recurring theme in the opinion that seems to hint at an analytic framework. On closer examination, it turns out to be rhetorical trope that begs the important questions. *See* Estlund, *supra* note *, at 144–49.

to the nature of the public employees' contract to explain much of the extra power that the government has to restrain their speech; employees who are hired to help a government agency accomplish its mission are deemed to accept limitations on speech that might interfere with that mission.[29]

But not everything in the public employees' contract necessarily shrinks their freedom of speech. In the *Garcetti* context, the contract—specifically, the employee's reasonable understanding of his job duties—arguably bolsters the employee's claim. The typical *Garcetti* claim involves an employee who was allegedly punished for doing the job he was hired to do—indeed, perhaps for doing the job too well—by honestly criticizing the performance of his superiors or other public officials. Since the job required the employee to speak up on matters of public concern, he should reasonably have expected not to be punished for doing exactly that. In other words, the claim rejected in *Garcetti* was as much about fairness, and about vindicating the employee's reasonable expectations about what the job required (and presumably therefore permitted him to do), as it was about his liberties. First Amendment doctrine, even the eminently flexible *Connick-Pickering* test, may not line up especially well with the reasonable expectations that arise out of the millions of employment relationships that it covers.

We have also seen that much of the majority's case against constitutional protection of *Garcetti* speech seems to turn on the unwieldy process by which that protection would presumably be enforced. The specter of federal litigation—its cost and burdens, the prospect of federal judges second-guessing state and local officials' personnel decisions, and the needless duplication of less intrusive statutory and contractual procedures—looms large in *Garcetti*. Unlike the administrative civil service and whistleblower protections, labor codes, professional codes, or other protections to which the majority pointed as alternatives, federal litigation is hardly custom-fitted to the institution of the workplace. It takes too long and costs too much to meet the needs of either the employer or the employee.

The problems with litigation are related to the contractual nature—or at least the relational nature—of employment. In the context of a working relationship whose very existence is usually in dispute, it is important to resolve the dispute in a timely manner. Most of these cases arise from termination of employment; reinstatement is a typical remedy when plaintiffs prevail, but restoration of the employment relationship becomes ever more difficult with time. Litigation is even more disruptive when the

29. *See supra* text accompanying notes 25–26.

employee remains on the job, as did Ceballos. And whether or not the employee remains on the job during litigation, the defendants and nearly all of the witnesses usually do. Litigation puts the entire workplace under stress, usually for an extended time.

The fear of opening the floodgates of litigation is based on the potential number of lawsuits as well as the burden of each one. This fear also stems from the fact that government workplaces consist of large networks of long-term contractual relationships (or relational contracts). Government managers and their many employees are in contact and communication with each other (and with the outside world, but especially with each other) for many hours each working day, day after day, often year after year. This contact and communication occurs within an instrumental and hierarchical organization in which any adverse action that public managers take against employees is state action. The number of potential disputes over speech alone is mind boggling. A decision like *Garcetti*, which has a big effect on the range and number of disputes that could end up in federal court, is inevitably decided against this backdrop.[30]

These two features of the problem of public employee speech—the contractual context and the unwieldiness of the litigation process—account for much of what is distinct about the workplace as an institutional context for speech disputes. These two features of the problem also suggest that the solution, at least to the *Garcetti* problem, may lie not squarely within free speech doctrine but rather in the quasi-contractual protections of due process. What is needed is "some kind of hearing"[31] for the employee whose reasonable expectations about what she is obligated, and therefore presumably permitted, to speak about as part of her job have been defeated. This is something that due process is well suited to provide.

30. The dissent in *Garcetti* pointed out that the Ninth Circuit's approach to these cases had apparently not produced a flood of lawsuits—about seventy in the courts of appeals, and about one hundred in the district courts in seventeen years. *See* 126 S. Ct. at 1968 (Souter, J., dissenting). But it is always difficult to know, based on available case statistics, how much of the iceberg one is seeing.

31. Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) ("The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."); *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270–75 (1975).

IV. A DUE PROCESS SOLUTION TO *GARCETTI*

The Due Process Clause protects, among other things, employees' reasonable expectations regarding their job security.[32] Employees whose jobs require the exercise and expression of judgment or the disclosure of information on matters of public concern should enjoy a reasonable expectation that they will not be penalized for expressing that judgment and disclosing that information in a responsible manner. That reasonable expectation—grounded partly in the nature of the job responsibilities as defined by the employer and partly in the policies of the First Amendment—should be protected against deprivation without due process of law through an administrative hearing on whether the employee was indeed subject to reprisals for speech on matters of public concern that was part of the conscientious performance of the job. If so, reasonably restorative remedies, such as reinstatement and backpay, should be awarded.

The doctrinal path to this result, which I first sketched elsewhere,[33] traverses well-trodden ground for most of its length. I begin with what is well established. Public employees who have a property interest in continued employment—who cannot be fired, for example, without just cause under applicable statutory or contractual requirements—cannot be deprived of that interest without due process of law.[34] A public employee has a "property interest" in employment if she has a reasonable expectation of continued employment based on substantive constraints on the government's discretion to terminate employment. The constraints on employer discretion may be found in a statute or a regulation, a written contract, an employee handbook or a statement of employer policy, or other "mutually explicit understandings" about continued employment.[35] The typical public employee due process claim rests on an express assurance that the employee can only be fired for good cause or for some specified set of reasons such as misconduct or unsatisfactory performance. A for-cause employee who claims that she was fired without adequate cause has the right to pretermination notice of the reasons for termination and an informal opportunity to respond, and a posttermination hearing before an impartial decisionmaker at which the employee may

32. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

33. Much of this Part tracks quite closely the analysis in Estlund, *supra* note *, at 155–68.

34. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

35. *Perry*, 408 U.S. at 601.

contest the decision with some form of judicial review.[36] An employee who prevails at the hearing is entitled to something like make-whole relief, such as reinstatement and backpay.[37]

For the for-cause employee, then, the *Garcetti* problem already has a due process solution, even after *Garcetti*. If the for-cause employee is found to have been fired for doing her job properly, and for speaking up as the job required, she should prevail in the good cause hearing and gain reinstatement and backpay. The employee's interest, as well as the public's interest in the employee's freedom to speak, are protected indirectly through job security and due process.[38]

But what about employees who are terminable at will and without cause? Under current law, those employees have no property interest in continued employment and therefore no right to due process in case of termination.[39] Or do they? As to employees whose jobs require them to speak on matters of public concern, their reasonable expectations regarding job security would seem to fall between "for cause" and employment at will. Even if the employer is generally free to discharge an employee at will and without cause, the terms of the employment arguably rule out certain reasons for discharge. If that is so, then even that narrow substantive constraint on the employer's discretion might seem to give rise to a limited property interest and a right to a hearing for the employee who claims to have been fired for the excluded reason, and to a remedy if he was.

This reasoning suggests the outlines of a due process solution to the *Garcetti* problem: When the government employer directs or encourages employees, as part of their job, to disclose or express their judgment about matters of public concern, it implicitly promises them that they will not be subject to reprisals for doing so in a conscientious manner. This implied promise should constrain employer discretion even in an otherwise at-will relationship, and should give rise to a limited property interest in employment. That, in turn, should trigger a right to an impartial hearing if the employee claims to have been fired in breach of the implied assurance—that is, for speaking on matters of public concern as part of the

36. *See Loudermill*, 470 U.S. 532. On the need for judicial review (though not a de novo trial), see Estlund, *supra* note *, at 158 & n.131.

37. The need for basic remedies along these lines is strongly implied by the due process cases. *See* Estlund, *supra* note *, at 157 & n.130.

38. *See* Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995).

39. This is true unless the government, in the course of termination, makes public charges that stigmatize the employee and damage his prospects for future employment. Such government actions implicate a liberty interest that triggers the right to a hearing to clear his name (but not to recover his job). *See infra* text accompanying notes 45–46.

conscientious performance of job duties assigned by the employer—and a restorative remedy if she prevails in the hearing. But a fair hearing does not mean a federal lawsuit. If the state provides a reasonable opportunity for a fair adversarial hearing on the merits of the relevant dispute before an impartial decisionmaker—through civil service laws, contractual grievance procedures, or whistleblower protection laws, for example—then the employee has gotten all that the U.S. Constitution guarantees her.

An employee seeking this hearing would have to make a preliminary showing that she was fired or otherwise penalized because of speech on matters of public concern that she uttered in the conscientious performance of her job. The employer might contest the employee's claim on several fronts; for example, by arguing that the speech in question was not on matters of public concern, by denying that protected speech was the basis for the job action,[40] or by contending that the speech, though on matters of public concern and uttered in the course of her job, constituted poor job performance.

The due process solution outlined above follows the basic logic of the job-as-property cases, but it diverges from existing case law in two respects. First, it requires the implication of a substantive constitutional term into the actual understanding or contract between the parties about the permissible reasons for discharge. Second, it requires that this single constraint on the permissible reasons for discharge be sufficient to trigger due process protections. In making both of these moves, I draw upon the Due Process Clause's protections of "liberty" as well as "property."

Current law finds a property interest in employment within the actual understanding of the parties about the permissible reasons for discharge. The proposed due process solution requires the implication of a promise not to punish the employee for speech on matters of public concern that is part of the competent and conscientious performance of the employee's job. This implied promise takes its content from the actual understanding of the employee's job duties, but it does not arise solely from an interpretation of the contract. Not every assigned job duty gives rise to a promise not to punish the employee for performing that duty conscientiously.[41]

40. The employer could claim that the employee's speech was not the reason she was fired, or could claim that they would have fired her anyway for another reason altogether. This would be a valid defense under the mixed-motive analysis of Mt. *Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

41. Such an interpretation might accord with an employee's actual expectations, but it is at odds with the presumption of employment at will, which governs in the absence of an explicit promise.

Rather, the implied promise arises from the convergence of legitimate employee expectations and the constitutional value of speech on matters of public concern. As such, this implied promise is not merely a default term; the employer should not be able to defeat the promise by expressly reserving the power to fire the employee for any reason or for no reason at all. In other words, the implied promise arises as a First Amendment gloss on the contract—one that both validates an employee's legitimate expectations and serves First Amendment values and the acknowledged public interest in the employee's right to speak up. The proposed injection of an implied First Amendment term into the contract, though not argued or rejected in *Garcetti*, is obviously in some tension with *Garcetti*'s denial of a substantive First Amendment right in the same circumstances. But, as we will see, that denial was based largely on concerns that do not arise with the due process version of the claim.

The proposed due process solution would require a second innovation as well. Under existing law, a property interest in one's job does not arise solely from a prohibition of one or more particular reasons for discharge, but only from a for-cause requirement or the equivalent.[42] The existing property branch of due process doctrine thus offers the framework, but falls short of affording protection for the kind of expectations at stake in *Garcetti*.

The gap might be filled by the Due Process Clause's protection of liberty. Indeed, it might seem logical to say that any public employee who claims she was fired on the basis of protected speech has a liberty interest at stake and the right to a due process hearing on that claim. Such a hearing would be a practical "prophylactic against [discharge] decisions improperly motivated by exercise of protected rights."[43] However, the Court rejected such a claim in *Board of Regents v. Roth*.[44] Under existing law, a public employee is deprived of a liberty interest within the meaning of the Due Process Clause only when the government's stated reason for adverse action imposes a stigma on the employee and impairs her standing in

42. While the case law is sketchy, it suggests that a property interest in employment arises only if substantive limitations on discharge are roughly equivalent to a for-cause requirement. The paradigm case clearly involves a for-cause requirement. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985) (finding a property interest based on a statute providing for continued employment "during good behavior and efficient service," and prohibiting dismissal "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office"). I have found no case recognizing a property interest in employment on the basis of a prohibition of one or a few substantive grounds for discharge, and only one case explicitly rejecting such a claim. *See* Garrow v. Gramm, 856 F.2d 203, 206–07 (D.C. Cir. 1988); Estlund, *supra* note *, at 159–60.

43. Roth v. Bd. of Regents of State Colls., 446 F.2d 806, 810 (7th Cir. 1971).

44. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 575 n.14 (1972).

the community or her future employment prospects.[45] In such a "stigma-plus"[46] case, the employee is entitled to a name-clearing hearing.

So under existing due process doctrine, an employer's promise, express or implied, that an employee will not be fired for speaking on matters of public concern in the conscientious performance of her job appears to give rise to neither a property interest nor a liberty interest so as to trigger due process requirements. My argument here is that it should. An employee's interest in not being fired for speaking on matters of public concern as part of her job combines elements of both property, in that it is based on a reasonable (though limited) expectation of continued employment, and liberty, in that it implicates her freedom of expression on the job. Even if it falls short of a freestanding First Amendment right, as *Garcetti* holds, it is a substantial interest for which due process provides the right sort of protection.

This hybrid property-liberty interest is in some ways analogous to the liberty interest that is implicated when an employee is fired from public employment for reasons that are stigmatizing. Both claims couple the tangible injury of the loss of a job (albeit not a job in which one has a property interest) with an intangible injury that raises constitutional concerns but does not rise to the level of a freestanding constitutional right. Neither injury alone triggers due process rights, but together they do (or should). In both cases, due process offers a sensible form of redress for a serious wrong that implicates constitutional concerns and would otherwise go unremedied. The Court has said that "'[l]iberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience.'"[47] The experience reflected in *Garcetti* has brought to light a new problem for which due process offers an apt solution.

To be sure, the Court has cautioned against pouring any and all substantial individual interests into the liberty vessel,[48] and has been rather inhospitable to recent efforts to expand the scope of protected liberty interests. In particular, the Court has been wary of efforts to use the Due Process Clause to impose affirmative obligations on the state or to create

45. *See id.* at 573; Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

46. It is called "stigma-plus" because the injury to reputation alone is insufficient without some additional tangible loss such as termination of employment. *See* Owen v. City of Independence, 445 U.S. 622, 633 n.13 (1980).

47. *Roth*, 408 U.S. at 571 (alteration in original) (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter dissenting)).

48. *See* Paul v. Davis, 424 U.S. 693, 698–99 (1976).

new substantive rights that are untethered to any specific textual guarantee.[49] The interest proposed here—the right not to be penalized for certain speech that is part of the conscientious performance of one's job—should raise neither of those particular hackles. It is in the nature of a negative right, and it is grounded in the First Amendment's protection of speech (even though *Garcetti* rejected the substantive First Amendment claim). Moreover, this hybrid property-liberty interest does not create a new source of tort-like liability. Like the property and liberty interests that have already been recognized in public employment, this interest is conditional in nature. If the conditions are found to have been met in a fair and adequate hearing—that is, if the employer is found to have had adequate cause to fire the employee based on her speech, or is found not to have acted on the basis of speech at all—then the employee has no substantive constitutional claim against the employer.[50]

Of course, the Court could still decide to reject the proposed due process claim, perhaps with a cursory citation of *Garcetti* as authority. What I argue here is not that the proposed due process solution is compelled by existing law or is likely to be accepted by the current Court, but rather that the doctrine contains the building blocks needed for its construction without having to demolish the surrounding structures. I also argue, and explain further below, that the due process solution would produce beneficial consequences for the affected individuals and institutions. For all these reasons, the due process solution might appeal to a future Court majority that harbors both misgivings about *Garcetti* and respect for stare decisis.

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49. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (rejecting a challenge to the state's ban on assisted suicide based on the claimed "right to die"); DeShaney v. Winnebago Co. Dep't of Soc. Servs., 489 U.S. 189, 196 (1988) (rejecting a § 1983 claim based on the state's failure to protect an endangered child). *But see* Lawrence v. Texas, 539 U.S. 558 (2003) (finding a right to engage in consensual homosexual activity within the substantive due process right of privacy).

50. This property-liberty interest is thus a hybrid of the two similarly conditional procedural interests already recognized in the employment setting: (1) a liberty interest for procedural due process purposes though not a substantive fundamental right, like the liberty interest in not being stigmatized in connection with discharge; and (2) a property interest for procedural due process purposes though not property of the sort that cannot be taken without just compensation, like the property interest in just-cause employment. In either case, the interest triggers the right to procedural due process; however, if the state shows through that process that the facts are as it claims—that the stigmatizing statements are true or that there was just cause for discharge—then the deprivation is lawful.

This proposal fits within a venerable tradition of crafting procedural solutions to First Amendment problems.[51] Some of those procedural solutions are prophylactic in nature; they aim to protect against the accidental suppression of speech that is in fact protected. This First Amendment due process tradition was reviewed by the plurality in *Waters v. Churchill*,[52] which adopted a procedural solution to a problem that can arise in an ordinary public employee speech case where the employer fires an employee for saying X (which would be unprotected, perhaps because X was not a matter of public concern), but the employee claims she actually said Y (which would be protected).[53] Under *Waters*, the court is to base its review on "the facts as the employer *reasonably* found them to be"; so if the employer conducted an investigation that was reasonable under the circumstances, its understanding of the facts is the operative one.[54] *Waters* thus extended to the at-will employee a smidgen of the prophylactic due process that the Court rejected in *Roth*. Before firing an employee for what might have been protected speech, the employer must conduct enough of an investigation to be reasonably certain that the speech was not protected.

It is not only on prophylactic grounds that the Court has relied on procedures to protect speech. In *Bush v. Lucas*,[55] the Court declined to extend to federal civil service employees a constitutional cause of action (a *Bivens* action[56]) analogous to that which state and local employees have under § 1983 and *Pickering*.[57] The plaintiff in *Bush v. Lucas* claimed (and the Court assumed) that he had been demoted on the basis of protected speech. Under federal civil service laws, he could have pursued that claim through "elaborate, comprehensive . . . procedures—administrative and judicial—by which improper action may be redressed."[58] Although the civil service

51. *See generally* Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) (reviewing the development and advocating the expansion of procedural protections of First Amendment rights).

52. 511 U.S. 661 (1994).

53. *Id.* at 669–71.

54. *Id.* at 677–78. The plurality chose a middle ground between Justice Stevens's more speech-protective approach (what matters is what the employee actually said as found by the reviewing court), *see id.* at 694–99 (Stevens, J., dissenting), and Justice Scalia's less speech-protective approach (what matters is what the employer believed was said), *see id.* at 686–94 (Scalia, J., concurring).

55. 462 U.S. 367 (1983).

56. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), recognized an implied right of action against the federal government that parallels § 1983's remedy against state and municipal actors.

57. *Bush*, 462 U.S. 367.

58. *Id.* at 385.

scheme provided more limited remedies than would a federal lawsuit,[59] the Court declined to imply a new right of action for a constitutional violation that was "fully cognizable" within the civil service system and subject to "meaningful remedies."[60] *Bush v. Lucas* reflects in part the Court's reluctance to imply rights of action against the federal government, particularly when the U.S. Congress has constructed "an elaborate remedial system . . . step by step, with careful attention to conflicting policy considerations."[61] But the important point here is the Court's conclusion that the administrative procedures and remedies of the civil service laws afford sufficient protection even for speech that is clearly protected by the First Amendment.

The procedural solution proffered here is neither a prophylactic in the face of factual uncertainty about whether the First Amendment is implicated, as in *Waters*, nor a substitute remedy for a recognized First Amendment violation, as in *Bush v. Lucas*. It serves instead as a supplement to the First Amendment—a practical way to fill a gap in protection that *Garcetti* deemed necessary in light of the cost of providing that protection. The speech in *Garcetti* is important enough to protect through a due process hearing, even though it was deemed too costly to protect through a full-blown federal lawsuit.

As compared to the judicial remedy rejected in *Garcetti*, the due process remedy would lower the temperature and the stakes in these disputes. It would afford reasonable protection to employees' freedom of speech in this context while softening both the impact of the law on employer discretion and the threat of proliferating litigation—concerns that were clearly operating in *Garcetti*. A due process hearing is less costly and disruptive, and generates more modest remedies. Accordingly, the shadow cast by the prospect of adjudication would be less burdensome. The due process approach reduces not only the cost and burden of adjudication but also the bite that the Constitution takes out of managerial discretion. The central issue in a hearing would be whether the employee was fired for speaking conscientiously in the performance of the job as the employer defined it (reasonably and in good faith). The proposed scheme would

59. Monetary relief was not fully compensatory in the civil service setting, and no punitive damages were available. *Id.* at 372–73.

60. *Id.* at 386. The Court reserved judgment on whether a *Bivens* remedy would be available for a First Amendment violation that could not be remedied under the civil service laws. *Id.* at 391 (Marshall, J., concurring).

61. *Id.* at 388. In that context, the Court found "special factors counselling hesitation" in implying an additional judicial remedy. *Id.* at 378–79 (citing *Bivens*, 403 U.S. at 396).

leave the employer largely free to define the job and to evaluate job performance, but would constrain its ability to penalize the employee for performing the job when that job performance takes the form of speech on matters of public concern.

The employer's ability to define the job might seem to invite manipulation of the scope of employees' freedom of expression about matters of public concern; but there is less to this concern than meets the eye (and less than there is under *Garcetti* itself). If the employer tried to avoid the administrative remedy by strategically denying that the speech at issue was within the employee's job duties, it would leave the employee free to sue under *Connick-Pickering*. If the employer were instead to claim strategically that the speech at issue *was* part of the employee's job performance—as *Garcetti* itself encourages the employer to do—the effect under the due process solution would be to land the employer in an administrative hearing rather than in *Garcetti*'s free-fire zone. The due process solution would reduce the incentive for strategic job descriptions and pleadings by reducing the cliff effects that *Garcetti* produced.

Pitfalls for employees remain within the administrative hearing process. Having conceded that the speech was uttered in the course of performing the job, the employer may still seek to define a "satisfactory" job performance so as to narrowly circumscribe the employee's freedom to disclose or discuss matters of public concern. For example, the district attorney might concede that Ceballos's memo was written in the course of his job as a prosecutor, thus steering the case into administrative channels, but he might then contend in the hearing that the memo violated a rule against controversial statements or criticism of police officers. Of course, the due process solution is designed to take account of the employer's need for discretion in prescribing and evaluating employees' job performance. But wholesale deference to the employer's definition of the job, and of the speech required by the job, might swallow up the protections that this hybrid regime aims to afford employee speech. At worst, it would collapse into the *Garcetti* rule that employee speech-that-is-the-job is altogether unprotected. This result can be avoided only if decisionmakers keep in mind the constitutional underpinnings of the employee's right to a hearing, and give bite to the First Amendment policies at stake. They must recognize that some rules and job requirements, such as a prohibition of criticism, are too far at odds with the basic commitments of democracy and free expression to pass muster.

In some cases, as in *Garcetti*, the constraints on employer discretion will line up rather neatly with the ethics and obligations of the employee's

profession, which ought to be implied into the contract of professional employees. On the other hand, there may be some employees whose on-duty speech should be subject to plenary managerial control, such as a public spokesperson for an agency or a high-level manager whose public pronouncements will inevitably be identified with the agency. In other words, sometimes the speech of the employee *is* effectively that of the government employer. But in most cases the risk that an individual's statements may be attributed to the agency can be folded into the issue before the factfinder: Did the employee suffer adverse action because of speech on matters of public concern that was uttered in the conscientious performance of her job as the employer legitimately defined it?

The due process solution also helps to solve the conundrum of how to encourage rather than discourage the institutionalization of internal criticism and disclosure. It is not so easy to craft legal doctrine that both encourages employers to create institutional mechanisms for internal criticism and disclosures, and encourages employees to use those mechanisms. This is because employers might be more inclined to create internal channels for dissent if that would secure immunity from liability; yet employees may be more willing to speak up if they enjoy legal protection in doing so.[62] So, for example, *Garcetti*'s rule of no protection for speech-that-is-the-job tends to encourage employers to rewrite job descriptions broadly to include as much potential dissenting speech as possible so as to put dissenters into *Garcetti*'s free-fire zone.[63] But the same rule might encourage employees to take their complaints and concerns directly to the public rather than to the employer through the prescribed channels.[64] They would thereby risk being deemed disruptive, and losing under *Pickering*'s balancing test; but at least they would surmount the *Garcetti* hurdle.

The due process approach might clear a path through this minefield by affording an intermediate remedy that both employers and employees could live with. The due process approach would encourage employers to

62. The problem of how to encourage employers to create, and employees to use, internal complaint mechanisms was addressed in the sexual harassment context in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The *Faragher-Ellerth* approach—an affirmative defense against some discriminatory harassment liability where the employer did act reasonably to redress alleged harassment internally but the employee did not—bears scrutiny in the whistleblowing context as well. I do not explore this further here. *See infra* note 66.

63. Garcetti v. Ceballos, 126 S. Ct. 1951, 1965 n.2 (2006) (Souter, J., dissenting). But it does not require them, in order to get the benefit of *Garcetti*, to provide any protection for employees who engage in that dissenting speech.

64. *Id.* at 1961.

incorporate internal criticism and disclosure into employees' job duties, for doing so would reduce the threat of federal litigation under *Pickering*, while still insuring accountability in a constitutionally adequate administrative hearing. Yet the due process approach should also encourage employees to speak up, pursuant to their job duties, through prescribed procedures; for any reprisals could then be challenged, not in a lawsuit, but in a fair, faster, and cheaper due process hearing in which the fact that the employees were doing their jobs as required would work in their favor.

V. EXTENDING THE DUE PROCESS SOLUTION BEYOND *GARCETTI*?

The due process solution to the *Garcetti* problem has much to recommend it. So much, in fact, that we should consider whether it could be a solution to the larger problem of public employee free speech rights. The difficult task of reconciling the competing demands of citizenship and work—of individual liberty and organizational efficacy—has preoccupied the Court not only in the *Garcetti* context but also across the full gamut of public employee speech cases. But the difficulty of this task has often seemed to stem as much from the unwieldy process by which employee free speech rights are enforced as from the substance of the problem. If it were not for the burdens imposed by federal litigation, the balance of interests in *Garcetti*, or even in *Connick*, might have been struck in favor of free speech. Yet even when employees have won their claims, one must wonder whether a federal lawsuit was really the best way of vindicating Marvin Pickering's right to sound off on school board priorities or Ardith McPherson's right to talk politics with her co-worker.[65] How many Pickerings and McPhersons are actually able to exercise their right to file a federal lawsuit against their employers? And at what cost both to them and to their employers? Might the legitimate interests of government employers and employees in these cases not be better served by a less costly, less time consuming, and more accessible process of dispute resolution that better fits into the routines and structures of the workplace?

We might do that by reconceiving the right at stake in all public employee free speech contests—including those involving *Garcetti* speech—as a liberty interest sufficient to trigger the protections of due process, rather

65. In *Rankin v. McPherson*, Ardith McPherson was overheard to say, after learning of the shooting of President Reagan and in the context of criticizing his policies, "If they go for him again, I hope they get him." 483 U.S. 378, 380 (1987). Her subsequent discharge was struck down as a violation of her free speech rights under *Connick-Pickering*. *Id.* at 392.

than as a freestanding First Amendment right.[66] Only when the employer failed to afford due process (including basic make-whole remedies) to the employee who claimed that her free speech rights were infringed would the employee have a constitutional cause of action. Would this make sense for the remaining categories of public employee speech?

It would not make sense, I believe, for *NTEU* speech—speech that occurs outside the workplace and is unrelated to the employment. The due process solution reflects in part a recognition of public managers' need for discretion in carrying out an agency's mission through its employees. But the employer has no legitimate need for discretion when it is leveraging its power as employer into power over aspects of the employee's civic and private life that are unrelated to the agency or its mission. These controversies are likely to be rare, as government employers do not often seek to regulate off-duty speech that is not about the job, the agency, or its mission. But when they do so, the full force of the First Amendment and the full *in terrorum* effect of federal court litigation should be brought to bear on them.[67]

But let us turn to the main run of *Connick-Pickering* cases—those involving speech that either takes place at work or is otherwise related to the work. That main run of cases is sharply divided by *Connick* and its threshold public concern requirement, but for the moment let us assume that this would be among the issues in the hearing. Should the existing First Amendment right to speak on matters of public concern, absent an overriding justification for suppression, be reconceived as a liberty interest that triggers the right to due process?

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66. Various other due process solutions are possible. If the only concern were to enhance employees' ability to enforce their rights, without regard to the burden on employers, we might supplement existing First Amendment remedies with due process rights. That is the argument rejected in *Roth*. *See supra* text accompanying notes 43–45. That supplemental due process remedy might be tweaked, and made more palatable to employers, by requiring election of remedies—either litigation or an administrative hearing but not both—or exhaustion of the administrative process prior to litigation. Alternatively, one might craft a due process solution in the form of an affirmative defense along the lines of *Faragher* in the sexual harassment context. *See supra* note 62. The employer could defeat an employee's First Amendment claim by showing that it had made available, and the employee had unreasonably failed to use, a constitutionally adequate administrative process and remedy. If we then overlay various possibilities for which categories of speech would be covered by each procedural requirement, the permutations quickly multiply. Lest the larger issues get lost in the details and procedural technicalities, I take up only one fairly stark form of the question—whether to replace the First Amendment remedy with a due process remedy.

67. The judicial remedy might usefully be reinforced by recognizing a parallel liberty interest in these cases, thus allowing the employee to pursue an administrative remedy if she wishes. But that should supplement and not replace the judicial remedy in the *NTEU* context.

There is some precedent for concluding that a due process hearing, along with administrative remedies, is adequate to protect the interests of the employee and of the public in these cases. Recall the Court's holding in *Bush v. Lucas*[68] that the federal civil service regime—with its just-cause standard, elaborate administrative hearing procedures including judicial review, and remedies that include reinstatement, backpay, and lost benefits—afforded adequate protection for the First Amendment rights of classified federal employees. The question at hand is whether to extend that substitution of remedies to other public employees by way of the Due Process Clause.

The Court has confronted an intriguingly parallel question in private-sector employment, and again affirmed the adequacy of the nonjudicial forum. In *Gilmer v. Interstate/Johnson Lane Corp.*,[69] the Court held that an employee's agreement to arbitrate rather than litigate future statutory employment claims was enforceable. Arbitration, where it meets basic standards of fairness, was deemed to offer a fair quid pro quo for employees—it trades off some of the formality and procedural safeguards of litigation for a process that is cheaper, faster, and presumably more likely to afford the employee some kind of hearing before an impartial decisionmaker.[70] The arbitral forum was held to be an adequate substitute for federal litigation even in the context of federal antidiscrimination claims, in which the public interest is well established.

Bush and *Gilmer* reflect parallel policy judgments within distinct legal contexts. In both settings, important employee rights in which the public has a large stake were deemed to be adequately safeguarded by a nonjudicial process that is less elaborate but purportedly more accessible and less costly than federal litigation. But the reaction to the two decisions has not been the same. *Gilmer*'s regime of mandatory arbitration has provoked a flood of controversy and critical commentary,[71] while there has been little controversy over the substitution of the civil service regime for First Amendment litigation in *Bush*. The explanation may lie partly in a rather romanticized

68. 462 U.S. 367 (1983).

69. 500 U.S. 20 (1991).

70. The arbitral forum must also make available the same remedies that would be available in court. That makes the quid pro quo of arbitration different from the quid pro quo entailed by substituting an administrative process and meaningful but less extensive remedies, as in *Bush v. Lucas*.

71. For a useful summary of the legal and empirical controversies after *Gilmer v. Interstate/Johnson Lane Corp.*, see Richard A. Bales, *Normative Consideration of Employment Arbitration at* Gilmer's *Quinceañera*, 81 TUL. L. REV. 331 (2006).

attachment to the federal judicial forum for discrimination claims.[72] But it also lies partly in the vagaries of the arbitration process that *Gilmer* approved. Mandatory arbitration agreements are almost always written unilaterally by employers and imposed on employees, subject to limited judicial oversight. While most arbitration schemes may be entirely fair, the Supreme Court has never said or done enough in *Gilmer* or since to ensure that arbitration procedures are sufficiently thorough and accessible and that arbitrators are sufficiently impartial and competent to replace the judicial forum. In other words, the law does not do enough to guarantee that the arbitration procedures imposed on employees as a condition of employment meet the standards of due process.[73] By contrast, the civil service institutions and processes that the Court approved in *Bush* were clearly delineated in legislation and regulations and have a long track record—proceedings are public, decisionmakers are publicly accountable, and decisions are subject to meaningful judicial review. Federal civil service proceedings do not have all the bells and whistles, and do not pack the same punch as litigation, but they represent the gold standard in administrative due process for employees.

So let me restate the question: Would an administrative hearing process along the basic lines of the civil service laws provide an adequate substitute for federal litigation—adequate protection for employee and public interests at a reasonable cost to employers—so as to justify replacing employees' First Amendment rights under *Connick-Pickering* with a liberty interest and a due process right?

Before answering this question, there is a lot we would want to know. For example, how much more accessible would the administrative forum be than the judicial forum? It is the promise of greater access that is supposed to offset the lesser impact of each federal lawsuit and maintain the overall salience of First Amendment policies within public employment. We have to assume that, as things stand, very few public employees who believe that their free speech rights have been infringed by their employers

72. I say "romanticized" because recent empirical studies indicate that plaintiffs lose an overwhelming percentage of those lawsuits, most without any hearing beyond a summary judgment motion. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEG. STUD. 429 (2004).

73. There is a separate question whether mandatory arbitration is subject to constitutional scrutiny under due process standards. For a brief discussion of this issue, see Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 409–11, 420 (2006).

ever sue, much less get some kind of hearing on their claim.[74] But it is not only those employees who file and prosecute lawsuits who benefit from the law's protections. The prospect of federal litigation casts a shadow over public employers' personnel decisions that may induce them to respect employees' speech rights or to settle claims on reasonable terms without a trial. On the other hand, the more certain prospect of a speedier administrative hearing would cast a shadow as well, perhaps a more distinct shadow than the random, lottery-like threat of litigation. Employees' readier and quicker access to a nonjudicial hearing process may make up for its less fearsome quality and produce a comparable deterrent effect as well as a more satisfactory means of dispute resolution for aggrieved individuals. Still, whether this is so is among the questions that need to be answered before pressing ahead with the wholesale conversion of First Amendment claims into liberty interests protected by due process.

Perhaps the most important question, though, is how good administrative decisionmakers are likely to be, as compared to federal courts, at finding the relevant facts and weighing the interests of speakers and listeners against the employer's interest in discipline or efficiency. Will they stand up for whistleblowers and dissenters against managers who have something to hide or who simply have an excessive appetite for control? While the experience of employees with First Amendment claims under the federal civil service laws, where these claims were channeled by *Bush v. Lucas*, would be instructive, it would be difficult to evaluate that experience and to extrapolate to the much larger and more varied universe of state and local employment.[75] The question is obviously crucial: If administrative hearings ended up serving as a rubberstamp for managers' decisions, they would not serve the First Amendment values and interests at stake. On the other hand, if administrative hearings did provide greater and speedier access to impartial

74. This is the case for employees who believe they have been subject to discrimination or harassment, for example. *See* Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC'Y REV. 875, 879–82 (1991). There is no obvious reason to believe that nascent free speech claims are more likely to turn into lawsuits.

75. Many small-state and local agencies might be hard pressed to create their own administrative processes to meet the demands of due process. Instead, each state, or a consortium of municipalities in each state, could establish administrative tribunals (or even arbitral tribunals) to hear these claims from different public agencies. If no administrative process were available, the question might be whether the right to bring a lawsuit in state court would satisfy due process requirements, or whether a federal lawsuit on the merits would be available to the employee by default.

factfinders with an appreciation for the values of free speech, then many employees might happily trade off the more remote prospect of a high-profile federal lawsuit and its attendant remedies.[76]

Shifting the locus of public employee free speech disputes from First Amendment litigation to due process hearings might have one more virtue from the standpoint of employees: It might allow for the reconsideration of *Connick* and its threshold public concern requirement. *Connick* has been criticized for calling upon federal courts to judge for the public what they are or should be concerned with, as well as for its stingy and skewed conception of matters of public concern.[77] But *Connick*, like *Garcetti*, reflects a deep undercurrent of concern about the burden of employee free speech claims on managerial discretion and judicial dockets. Both decisions create a First Amendment free-fire zone for a category of workplace disputes that seem likely to be especially common. That, after all, is one of the things that makes the workplace a distinctive institutional context for free speech disputes: It is a place where those disputes are likely to be very common indeed.

Recall the Court's holding in *Connick*:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, *a federal court is 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.[78]

But maybe an administrative hearing *is* the appropriate forum in which to review such a decision. Maybe the less burdensome machinery of due process would allow for a measure of protection for speech that does not cross the threshold for matters of public concern, much as it might recover a measure of protection for speech that *Garcetti* categorically excludes from the First Amendment.

The broad version of the due process solution would grant public employees a liberty interest in all speech that would be protected against state action in the public sphere generally—whether mere griping, speech on matters of personal interest, speech on public issues, speech on workplace

76. I recognize that some of my claims may seem to be in tension with each other—for example, the claims that due process hearings will be less costly to employers and that such hearings will be more accessible to employees and more frequent than litigation. I discuss this concern below. *See infra* p. 1494.

77. For my own critique, see Estlund, *supra* note 3.

78. Connick v. Myers, 461 U.S. 138, 147 (1983) (emphasis added).

issues, or speech-that-is-the-job. Under this regime, an employee who claims she was fired because of protected speech would be entitled to a hearing on whether the discharge was because of speech, and, if so, whether it was justified by legitimate managerial interests. If her claim was upheld, she would be entitled to reinstatement and backpay or the like. The greater the public importance of the employee's speech, the heavier the burden of justification on the employer.[79]

The appeal of a due process solution to the *Connick* problem depends largely on whether one regards *Connick* as a problem (as I do),[80] and on whether one views the doctrine of employment at will, with its tolerance of arbitrariness, as an anomaly and a threat to constitutional norms in the public sector (as I do).[81] The upshot of this solution would be the extension to all public employees of a form of partial just-cause protection: Where protected speech was the cause of a discharge, it would have to be justified. Thus, reframing the relevant free speech claim as a liberty interest under the Due Process Clause would reduce the cost of protecting a broader swath of speech. Without a rigid "public concern" test, the public would be its own judge of what it should be concerned about. And public employees would be freer—not as free as if they had full just-cause protection, but nonetheless freer—to speak out about whatever matters to them so long as they did their jobs and did not unduly interfere with their agencies' operations.

CONCLUSION

The broadest version of the due process solution would convert all public employee speech rights, including rights that were taken away in *Garcetti* and *Connick*, from First Amendment claims to liberty interests under the Due Process Clause. The public-sector workplace would remain a distinct constitutional niche—one in which individuals' free speech rights would be more readily outweighed by competing interests, and would be recognized and enforced in a less costly, less formal, and less powerful forum. But the substantive principles that would govern within the workplace niche would be less idiosyncratic than current law. The domain of employee speech would no longer be chopped up by the awkward and troubling doctrinal distinctions that *Garcetti* and *Connick* introduced to keep the threat of litigation in check and legitimate managerial discretion intact.

79. *Connick* calls for this sort of calibration even within the category of speech on matters of public concern. *See id.* at 150, 153–54.

80. *See* Estlund, *supra* note 3.

81. *See* Estlund, *supra* note 38.

The doctrinal distinctions between speech that is or is not on matters of public concern, or that is or is not uttered as part of the job performance, are often difficult to draw; yet they create dramatic cliff effects that induce predictable forms of opportunistic and strategic behavior.[82] The broad due process solution smoothes out most of those cliff effects and diffuses the rare lightning flash of litigation into a steadier, softer, and hopefully more illuminating light from a less remote source.

I am mindful of the tension between the claim that due process hearings will be less costly and less disruptive to employers than litigation and the claim that those hearings will be more accessible to employees (and thus presumably more frequent) than litigation. The same tension holds between my claims about the shadow cast over employer's personnel decisions by the prospect of litigation versus the prospect of an administrative challenge: Can the due process solution both impinge less on legitimate managerial discretion and produce a comparable inducement to fair treatment of employees? It might seem that I am trying to have it both ways. Of course, it is possible for a larger number of adjudications, each one of which is less costly and disruptive than litigation, to yield both lower costs for employers and greater access for employees. Whether that would be the case is an empirical question that may not be answerable and that I do not try to answer here. But my hopes for the mutual benefits of the due process solution do not rest on this arithmetic possibility; they rest on a more optimistic hypothesis. The greater predictability, frequency, and timeliness of due process challenges should induce employers to internalize the standard of conduct by which they would be judged in such a hearing. The due process solution could thus bring about fairer personnel practices that reflect greater receptivity to internal dissent and external disclosure. The result would be not only fewer controversies to adjudicate but also more accountable and transparent government agencies.

The due process approach to public employee speech rights is a move in the direction of what some legal theorists call "reflexive law."[83] Reflexive law works not by direct command but by shaping and channeling self-regulation and self-governance within institutions—by "encourag[ing] actors

82. A crucial distinction would remain between speech that is related to the employment by location or content and *NTEU* speech that is not. But that distinction seems fairly resistant to gamesmanship and does not create the kind of cliff effects that concern me here.

83. For an overview of the literature on reflexive law and the shift from regulation and adjudication to governance, with a particular focus on the law of the workplace, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

within subsystems to internalize the general norm."[84] But the due process approach also illuminates some of the ambiguities and potential weaknesses of this increasingly influential conception of law in modern society.

As compared to federal courts, administrative tribunals operate more seamlessly within or alongside the institutions whose decisions they review—they often represent the final step of an internal grievance process. That may allow those tribunals and their decisionmakers to better understand the particular institution or agency and its needs and functions. In the present context, it may allow them to develop norms of expressive freedom and of constrained managerial control that are better tailored to and more readily internalized by the institution than the decisions and doctrine that emerge from comparatively remote federal courts. But that same feature of administrative tribunals creates the risk that they will be too closely allied with the institution, its reigning managers, and its institutional culture. They may reflect rather than combat internal norms of silence and conformity. When the task at hand is the protection of dissenters, this dilemma is at the very heart of the matter.

These are the large concerns that lie behind the crucial unanswered question discussed above: How good will administrative decisionmakers be at weighing free speech concerns against managers' claims of institutional imperative? At a higher level of generality, this is the very question that most concerns skeptics of reflexive law generally. Reflexive approaches to regulation risk deferring too much to the autonomy of self-regulating institutions and perpetuating existing patterns and hierarchies that need disrupting from the outside.[85]

In the present context, the concept of due process of law offers a possible way out of this dilemma—or perhaps it is just a fudge. Due process requires an impartial decisionmaker, one who is not under the control of or directly allied with one party. So due process ideally requires administrative tribunals that operate alongside rather than directly within the agencies whose decisions they review—closer to the agency and its internal norms and needs than an independent judiciary, but outside of the managerial hierarchy. If that is not enough to ensure independence, in some contexts due process requires a meaningful opportunity for judicial review as a

84. Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384, 395–96 (2003) (discussing Gunther Teubner's account of reflexive law).

85. For a skeptical view of reflexive law and self-regulation in the context of workplace regulation, see Harry W. Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 471, 485–87 (Joanne Conaghan et al. eds., 2002).

check against unduly deferential administrative review. That should be the case here, where the risk of cooptation by managers poses such a direct threat to the public and individual interests at stake in free speech disputes.

Is that good enough? Good enough to actually free employees to speak out when it is important to them and the public that they do so? That is a high standard, and one that current law surely does not meet. But it is quite possible that a well-constructed due process regime could do a better job than the current judicial remedies of realizing public employees' freedom of expression when it matters. If so, that would count as a success for theories of reflexive law as well as for free speech and democratic self-governance.