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ERIC MARSHALL
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ABOUT THE AUTHOR: Eric Marshall received his J.D. from New York Law School in May of 2012.

Navigating the shoals of the standard articulated by the Supreme Court in Garcetti v. Ceballos . . . *has proven to be tricky business.*[1]

I. INTRODUCTION

The U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*[2] significantly impacted the landscape of public workplace free speech jurisprudence.[3] This is particularly true for the nation's millions of unionized public sector workers, such as its public school teachers, who have collectively bargained to have grievance procedures available to them for lodging complaints with their employers.[4] In 1987, the Court had announced,

> It is well settled that public school teachers . . . do not check their First Amendment rights at the schoolhouse door when they enter public employment. Nonetheless, it is also true that a public employer has a distinct interest in regulating the speech of its employees in order to ensure and promote the "efficiency of the public services it performs."[5]

For more than forty years—from *Pickering v. Board of Education*[6] until *Garcetti*—courts balanced these competing interests by analyzing whether the subject matter of the speech addressed a "matter of public concern." While the Court in *Pickering* made reference to the public employee/private citizen distinction, it was not a dispositive focus of that holding or of the cases that followed.[7] By contrast, the phrase "matter of public concern" appears in each of the three substantive sections, Parts II through IV, of the *Pickering* decision. Thus the focus of the decision was on the public interest

1. Decotiis v. Whittemore, 635 F.3d 22, 26 (1st Cir. 2011).

2. 547 U.S. 410 (2006). As discussed below, the Supreme Court in *Garcetti* ruled that public employees do not enjoy First Amendment free speech protection when speaking pursuant to their official duties and not as citizens. *Id.* at 421.

3. According to WestLaw, as of January 25, 2013, *Garcetti* had been cited by courts 1875 times in cases around the country. Of those, it was cited positively in 1773, or 94.5% of the cases; courts declined to extend it in twelve cases, or 0.6% of the cases. In May 2012, the Connecticut Supreme Court issued its decision in *Schumann v. Dianon Systems*, 43 A.3d 111 (Conn. 2012), which extended *Garcetti* into the private sector as well.

4. *See* Steven Greenhouse, *Union Membership in U.S. Fell to 70-Year Low Last Year*, N.Y. Times, Jan. 21, 2011, http://www.nytimes.com/2011/01/22/business/22union.html (citing Bureau of Labor Statistics reporting a total of 7.6 million public sector union members in the United States in 2010).

5. Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 162 (2d Cir. 2006) (quoting Rankin v. McPherson, 483 U.S. 378, 384 (1987)); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

6. 391 U.S. 563 (1968).

7. *Id.* at 568 ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."). In fact, the term "citizen" appears in the *Pickering* decision only twice, both times attached to the phrase "commenting upon matters of public concern," and both in the initial substantive section (Part II) of the decision. *See also* Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011).

aspect of the statement, as the Court—in what has come to be called the "*Pickering* Test"—balanced "the interests of the teacher, as a citizen, in commenting on matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[8] As the Second Circuit noted in *Jackler v. Byrne*, however, the Supreme Court in *Garcetti* "parsed" the analysis "into separate questions as to (1) whether the subject of the employee's speech was a matter of public concern and (2) whether the employee spoke 'as a citizen' rather than solely as an employee."[9]

This note explains that in *Garcetti*, by giving determinative effect to the "as a citizen" element, the Court introduced a threshold step in the analysis of workplace speech. Now, before courts may engage in a *Pickering* analysis[10] (i.e., determining whether the employee spoke as a citizen on a matter of public concern and then balancing the relevant competing interests)[11] courts must first determine whether the plaintiff was speaking as a private citizen or as a public employee.[12] If the court finds that the employee was speaking as a citizen, it proceeds to examine whether the speech was on a matter of public concern.[13] However, if the court finds that the employee was speaking as a public employee, the analysis ends and the plaintiff loses summarily.[14]

8. *Pickering*, 391 U.S. at 568.

9. 658 F.3d at 235. While the Court in *Garcetti* did not directly specify why it found it necessary to focus on the "citizen" element, it did suggest a rationale when it instructed that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what that employer itself has commissioned or created." Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

10. Following *Pickering*, courts considered: (1) whether the employee was speaking on a matter of public concern; (2) whether the employee's speech was a motivating factor in the employer's adverse employment action; and (3) how to balance the competing interests of the employee's right to speak on matters of public interest and concern with the employer's interest in "promoting the efficiency of the public service it performs through its employees." This test is commonly referred to as the *Pickering* Balancing Test. Public Employment Law Press, *Essentials of the* "Pickering *Balancing Test,"* N.Y. Pub. Pers. Law (Jan 4. 2010), http://publicpersonnellaw.blogspot.com/2010/01/essentials-of-pickering-balancing-test.html (quoting *Pickering*, 391 U.S. at 568).

11. "To constitute speech on a matter of public concern, an employee's expression must 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Jackler*, 658 F.3d at 236 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

12. *Garcetti*, 547 U.S. at 423. In introducing this "status" consideration, the Court in *Garcetti,* however, mischaracterizes the initial *Pickering* inquiry as concerning the status of the speaker when the speech in question was made. ("*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Id.*). In fact, there is no mention in *Pickering* of such a dispositive consideration of status. Indeed, *Pickering* was not so construed until *Garcetti*. Additionally, courts are divided as to whether this is a question of fact or of law. *Compare Jackler*, 658 F.3d at 237 (holding that the determination of "whether the employee spoke solely as an employee and not as a citizen is also largely a question of law for the court") *with* Jackson v. Jimino, 506 F. Supp. 2d 105, 116 (N.D.N.Y. 2007) (holding that the determination of whether a plaintiff was speaking pursuant to official duties is a question of fact).

13. *Garcetti*, 547 U.S. at 423.

14. *Id.*

Courts, including the Second Circuit in *Weintraub v. Board of Education*, have answered the first question by determining whether the employee's speech has a "relevant analogue to citizen speech."[15] In a case of first impression, the Second Circuit in *Weintraub* determined that the filing of a workplace grievance in accordance with the employee's union contract had no citizen analogue and therefore was an "official duty" of a New York City public school teacher and not protected by the First Amendment under *Garcetti*.[16] In *Weintraub III*, the Second Circuit, expressly following *Garcetti*'s analytical bifurcation, asserted that, if it found that Weintraub either did not speak as a citizen or did not speak on a matter of public concern, Weintraub would have no First Amendment protection against employer retaliation.[17] The court therefore held that "Weintraub, by filing a grievance with his union to complain about his supervisor's failure to discipline a child in his classroom, was speaking pursuant to his official duties and thus not as a citizen."[18]

This holding presents a new legal problem: union grievances filed by public employees are now categorically excluded from First Amendment protection. And one result of *Weintraub III*, as Judge Calabresi observed in dissent, is that public employees now have the incentive to take workplace concerns directly to the public rather than raising them internally with their employer to avoid generating unnecessary public alarm.[19]

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15. *See, e.g.*, Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010); *Jackler*, 658 F.3d at 241; Spencer v. City of New York, No. 06 CV 2852(KMW), 2012 WL 2866263 (S.D.N.Y. July 12, 2012); Whitehead v. City of New York, No. 12 Civ. 0951(ILG)(VVP), 2012 WL 4858989 (E.D.N.Y. Oct. 15, 2012); Fahs Constr. Grp., Inc. v. Gray, No. 3:10–cv–0129 (GTS/DEP), 2012 WL 6097293 (N.D.N.Y. Dec. 7, 2012); Matthews v. Lynch, No. 3:07–cv–739 (WWE), 2011 WL 1363783 (D. Conn. Apr. 11, 2011).

16. Weintraub v. Bd. of Educ., 593 F.3d 196, 198 (2d Cir. 2010) [hereinafter *Weintraub III*]. Throughout this note the following additional abbreviations are used: Weintraub v. Bd. of Educ., 423 F. Supp. 2d 38 (E.D.N.Y. 2006) (*Weintraub I*); Weintraub v. Bd. of Educ., 489 F. Supp. 2d 209 (E.D.N.Y. 2007) (*Weintraub II*). When referring to the whole group of these cases the generic abbreviation *Weintraub* is used.

17. *Weintraub III*, 593 F.3d at 201.

18. *Id.*

19. *Id.* at 207 (Calabresi, J., dissenting). Notably, Justice Stevens makes essentially the same point in his dissent in *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006). For a more in-depth discussion of the public policy implications of the line of post-*Garcetti* cases, see Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y 45, 81 (2007) (arguing that if employees "speak only publicly, they essentially forfeit their ability to stay in their jobs, first because they become pariahs, and second, because they have refused to use the employer's internal mechanisms for complaint (mechanisms which, if used, would eliminate their First Amendment rights)); Raj Chohan, *Tenth Circuit Interpretations of* Garcetti*: Limits on First Amendment Protections for Whistle-Blowers*, 85 Denv. L. Rev. 573, 594 (2008) (arguing that *Garcetti* "appears to have created a perverse incentive that encourages government employees to take their problems first to the media, or any authority outside of the employee's immediate chain of command"); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: the Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. Pub. Int. L.J. 209, 227 (2008) ("As post-*Garcetti* cases demonstrate, the *Garcetti* decision has significant implications for school employees, especially in the limits it places on reporting troublesome practices in school systems."); Christine Elzer, Note, *The "Official Duties" Puzzle: Lower Courts' Struggle with First Amendment Protection for Public Employees After*

This note argues that *Garcetti* is inapposite in cases concerning otherwise protected activity because the public employee/private citizen status distinction should be irrelevant in instances where: (a) *Garcetti* would protect the private citizen; (b) various federal, state and local laws protect the public employee; and (c) the speech in question addressed a matter of public concern. Specifically, this note posits that the filing of a union grievance—an otherwise legally protected activity[20]—should not constitute a public employee's "official duty" for purposes of a First Amendment analysis of public workplace speech. In so doing, this note endeavors to rescue the union grievance, a category of speech in which thousands of public employees engage every year, from the over-broad reach of *Garcetti*.

Part II of this note briefly explains the purpose and importance of union grievances. Part III presents the legal evolution of public workplace speech jurisprudence under the First Amendment, beginning in 1968 with the Supreme Court's decision in *Pickering* and concluding in 2010 with the Second Circuit's decision in *Weintraub III*. Part IV examines the application of *Garcetti* in the years since its issuance in 2006, focusing specifically on two discrete, though interconnected, doctrinal elements: Part IV.A argues that *Garcetti*'s "citizen analogue" requirement should be inapplicable in a workplace speech analysis involving union grievance cases. Part IV.B focuses on the "official duties" analysis employed by the *Garcetti* Court and connects that analysis to *Weintraub*, arguing that the filing of a union grievance should not constitute an employee's "official duty" because such conduct is: (1) a right held by the employee, to be exercised, or not, at that employee's discretion and (2) a legally protected activity under federal, state, and local law. Part V briefly concludes by proposing a new workplace speech test that both incorporates the relevant considerations of *Pickering*, the Ninth Circuit's decision in *Garcetti*, and a district court case from Michigan, *Montle v. Westwood Heights School District*,[21] and that excludes *Garcetti*'s "public citizen" threshold criterion from consideration.

II. THE PURPOSE AND IMPORTANCE OF UNION GRIEVANCES

A. Union Grievances and Rights Under Collective Bargaining Agreements

The union grievance is, and has long been, an integral part of the labor-management relationship in the unionized workplace, and a fundamental component of collective bargaining—and collective bargaining agreements—because it affords the employee the opportunity to complain, formally to her employer, about her workplace conditions through a channel not under the employer's control. Moreover,

Garcetti v. Ceballos, 69 U. Pitt. L. Rev. 367 (2007) (arguing that "public employees are better off ignoring internal grievance procedures and running straight to high government officials or the media with any complaints they might have").

20. *See infra* note 157 and accompanying text.

21. 437 F. Supp. 2d 652 (E.D. Mich. 2006) (introducing into the workplace speech analysis a practical consideration of whether the speech in question actually caused disruption); *id.* at 656. The Supreme Court in *Garcetti* had alluded to this consideration without specifically identifying it. *See Garcetti*, 547 U.S. at 422–23.

it allows her to do so free of employer retaliation. The vast majority of union contracts contain mechanisms, agreed upon by the employer and the union during the collective bargaining process, for the resolution of employee grievances concerning the terms and conditions of their work and workplace.[22]

"Collective bargaining is not confined to the periodic negotiations that lead to a written contract, but is a day-to-day process in which the grievance procedure plays a very important role. 'The grievance procedure is, in other words, a part of the continuous collective bargaining process.'"[23] It is the product of negotiations between the employer and the employee's authorized labor union and is codified in the parties' collective bargaining agreement.

The most common union contract grievance procedures define a "grievance" as any claim of violation, misapplication or misinterpretation of the parties' collective bargaining agreement and lay out a multi-stage procedure for its resolution.[24] Typically, this procedure ends with the parties submitting their dispute to binding arbitration by a neutral third-party arbitrator whose authority is limited to the interpretation of the collective bargaining agreement consistent with the generally accepted canons of contract interpretation.[25] In other words, the employer does not finally determine whether its own conduct—or that of an employee—violated the terms of the collective bargaining agreement. This method of workplace dispute resolution has been the part of our national labor relations policy for decades.

A decade after passage of the National Labor Relations Act,[26] the President's National Labor-Management Conference of 1945 issued a report to the President which asserted:

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22. *See* Elkouri & Elkouri: How Arbitration Works 10 (Alan Miles Ruben ed., 6th ed. 2003) (citing a study by the Bureau of National Affairs, published in 1995, which surveyed 400 contracts and reported that eighty percent contained provisions for the arbitration of disputes involving interpretation or application of the contract). One provision reported in the 1995 study is the "Safety & Health" article in the New York City teachers' contract at the center of *Weintraub*, *available at* http://www.uft.org/files/contract_pdfs/teachers-contract-2007-2009.pdf.

23. Elkouri & Elkouri, *supra* note 22, at 198 (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), one of the cases from the *Steelworkers Trilogy* in which the Supreme Court articulated a preference for arbitration over litigation in resolving workplace disputes).

24. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (holding that public employees are minimally entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story").

25. *See generally* Elkouri & Elkouri, *supra* note 22; Labor Arbitration: A Practical Guide for Advocates (Max Zimny et al. eds., 1990); Robert V. Massey, History of Arbitration and Grievance Arbitration in the United States, *available at* http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003 (last visited Feb. 1, 2013); Mark M. Grossman, The Question of Arbitrability: Challenges to the Arbitrator's Jurisdiction and Authority (1984). The scope of an arbitrator's authority in adjudicating labor disputes arising from collective bargaining agreements "is confined to interpretation and application" of those agreements, and while the arbitrator may "look for guidance from many sources," the award must "draw[] its essence from the collective bargaining agreement." Steelworkers v. Enter. Wheel & Car Co., 363 U.S. 593, 597 (1960).

26. *See* 29 U.S.C. §§ 151–169 (2006).

> Collective bargaining on wages, hours, and working conditions is required by law. It is approved by the public. It is and must be accepted by employers, employees, and their representatives in every instance where workers choose to organize to bargain collectively on questions of wages, hours, and working conditions.[27]

The Conference further recommended:

> Collective bargaining agreements should contain provisions that grievances and disputes involving the interpretation or application of the terms of the agreement are to be settled without resort to strikes, lock-outs, or other interruptions to normal operations by an effective grievance procedure with arbitration as its final step.[28]

B. Legal Protections Afforded to the Filing of Union Grievances

An employee's right to file a contract grievance is protected by both state and federal labor laws. Formalized grievance procedures adopted by employers are supposed to be more efficient, less expensive, and more amicable than traditional litigation in judicial forums; they discourage self-help and minimize disruption to the business operation.[29]

In the private sector, section 203(d) of the Labor Management Relations Act provides that "[f]inal adjustment [of employee grievances] by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Section 158(a)(1) makes it an unfair labor practice—i.e., a violation of the Act—for an employer to "interfere with, restrain or coerce" employees exercising their rights under the Act.[30] In addition, section 158(a)(4) makes it an unfair labor practice for an employer to "discharge or otherwise discriminate" against an employer for filing charges under the Act.[31]

In New York, public employees are guaranteed the right to file grievances in the Public Employees' Fair Employment Act, commonly referred to as the Taylor Law.[32]

27. *See* Walter Park Stacy, U.S. Dep't of Labor, The President's National Labor-Management Conference: Summary and Committee Reports 52 (1946), *available at* http://hdl.handle.net/2027/uiug.30112018113362 (last visited Feb. 1, 2013).

28. *Id.* at 45–46. The Conference went on to recommend specific standards for an effective grievance procedure. These include: clear statement of the successive steps and methods of presentation and appeal, design to facilitate expeditious settlement, adequate stated time limits for both presentation of grievances and rendering of decisions, final appeal heard by impartial arbitrator who would issue binding decision. *Id.*

29. Elkouri & Elkouri, *supra* note 22, at 11.

30. 29 U.S.C. § 158 (2006).

31. *Id.*

32. *See* N.Y. Civ. Serv. §§ 203, 204, 208, 209-a. In addition, N.Y.C. Admin. Code § 12-312(d) makes waiver of alternative tribunals, administrative or judicial, a condition precedent for the invocation of grievance arbitration. Jerome Lefkowitz, *The Legal Framework of Labor Arbitration in the Public Sector, in* Labor Arbitration, *supra* note 25.

In addition, New York Labor Law expressly prohibits retaliatory action by employers against employees who complain about workplace conditions or employer practices.[33]

III. FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEE SPEECH

The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech" and the Supreme Court has held that "[n]either the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[34] Since 1968, First Amendment workplace free speech jurisprudence has been anchored by *Pickering v. Board of Education*.

A. Pickering *Establishes the Two-Part Inquiry for Public Employee Speech*

In *Pickering*, an Illinois public school teacher wrote a letter to the editor of a local newspaper criticizing the way in which the school district's board of education and superintendent handled proposals to raise revenue for the school.[35] As a consequence of the letter, the school district terminated Pickering's employment.[36] Pickering challenged the termination in state court claiming a violation of the First Amendment.[37] Ultimately, the U.S. Supreme Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[38]

In arriving at this conclusion, the Court employed a two-step inquiry to determine whether a public employee's speech is constitutionally protected: the first step asks whether the employee was speaking as a citizen on a matter of public concern.[39] As noted above, however, the Court focused its first-step analysis on the

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33. N.Y. Lab. § 740 et seq. (McKinney 2011). Specifically, § 740(2) provides, in pertinent part:

> An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following: (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud; (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

34. Givhan v. W. Line Cons. Sch. Dist., 439 U.S. 410 (1979).

35. Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).

36. *Id.*

37. *Id.* at 566–68.

38. *Id.* at 574.

39. *Id.* at 569–72. In dicta, the Court made passing reference to the status of the employee, whether as a private citizen or public employee, at the time the speech was made. This consideration was not dispositive

"matter of public concern" element and not on the "citizen" element. If it is determined that the employee is speaking as a citizen on a matter of public concern, the second step examines whether the government employer had adequate justification for treating the employee differently from other private citizens.[40] In other words, the second step of the *Pickering* Test balances the interests of the employee in speaking out on a public issue against the employer's interests in the efficient operation of its public service.[41]

In *Givhan v. Western Line Consolidated School District*, the Supreme Court clarified the reach of *Pickering*, holding that First Amendment protection extends to private conversations between employees and their employers.[42] The Court rejected the Fifth Circuit's reading that *Pickering* stood for the proposition that "private expression by a public employee is not constitutionally protected"[43] and held that it was "unable to agree that private expression of one's views is beyond constitutional protection."[44]

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in this case, however, and the Court did not say how analysis of that status is to be conducted, or what factors are to be considered, although it did provide some guidance. Specifically, the Court held that

> [Pickering's] statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

Id. at 569–70.

40. *Id.*

41. *Id.* at 568; *see also* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

42. Givhan v. W. Line Cons. Sch. Dist., 439 U.S. 410, 413 (1979).

43. *Id.*

44. *Id.* In a germane footnote, the Court observed that,

> [a]lthough the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally."

Id. at 415 n.4 (quoting *Pickering*, 391 U.S. at 572–73). The Court further asserted that

> [p]rivate expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Id.

The Supreme Court further developed this post-*Pickering* analysis in *Connick v. Myers*, where the Court considered whether a questionnaire about employee confidence in particular superiors addressed a matter of public or private concern.[45] The Court, asserting that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record," found the question addressed only private concerns, and held that private concerns are unprotected.[46]

From *Pickering* until *Garcetti,* the First Amendment analysis of workplace speech analysis began with a consideration of the subject matter of the speech by asking specifically whether it addressed a matter of public concern.[47] If it did, the courts balanced the government's interest in the smooth, efficient operation of its public service against the employee's interest in speaking freely on a public issue. *Garcetti* changed all that with its imposition of threshold criterion for protection.

B. Garcetti *Introduces Standard for Determining Status of Speaker*

Little changed in workplace speech jurisprudence over the two decades after *Connick*. Then in 2006, the Supreme Court substantively altered the workplace speech analysis in *Garcetti v. Ceballos*. For the first time, the Court focused on the "citizen" element of *Pickering*'s "as a citizen on a matter of public concern" analysis, establishing a dispositive threshold inquiry. In this case, the Court introduced a test for determining whether the speech was on a matter of public concern that required inquiry into the status of the speaker at the time the speech was made: whether the speech was made "pursuant to" the employee's "official duties."

In *Garcetti*, Richard Ceballos, an experienced deputy district attorney in the Los Angeles County District Attorney's Office, was informed by a defense attorney that an affidavit used by law enforcement to obtain a search warrant and arrest the attorney's client contained inaccuracies, and asked to review the case.[48] Ceballos determined that the affidavit did contain "serious misrepresentations"[49] and communicated these findings to his supervisors. He followed that discussion with a disposition memorandum, explaining his concerns and recommending dismissal of the case.[50] However, despite Ceballos's concerns, his supervisors opted to proceed

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

46. *Id.* at 147–48.

47. The Court in *Pickering* referred to "[t]he public interest in having free and unhindered debate on matters of public importance" as "the core value of the Free Speech Clause of the First Amendment." *Pickering*, 391 U.S. at 573. Similarly, Justice Souter in his dissent in *Garcetti* described the "First Amendment safeguard" as resting on "the value to the public of receiving the opinions and information that a public employee may disclose" because they "'are often in the best position to know what ails the agencies for which they work.'" Garcetti v. Ceballos, 547 U.S. 410, 429 (quoting Waters v. Churchill, 511 U.S. 661 (1994)).

48. *Garcetti*, 547 U.S. at 410, 413–14 (2006).

49. *Id.* at 413.

50. *Id.* at 414.

with the case. Ceballos was then called as a witness for the defense.[51] Following his testimony, Ceballos claimed that "he was subjected to a series of retaliatory employment actions."[52] Ceballos brought suit in the U.S. District Court for the Central District of California alleging that the district attorney, Gil Garcetti, and two of Ceballos's supervisors violated his First and Fourteenth Amendment rights by retaliating against him for writing his memo.[53]

The district court found that because Ceballos wrote the memo "pursuant to his employment duties . . . he was not entitled to First Amendment protection for the memo's contents."[54] The Court of Appeals for the Ninth Circuit reversed, holding that "'Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment.'"[55] The court of appeals based this conclusion on an analysis of *Pickering* and its progeny, as well as its finding that Ceballos's memo, "which recited what he thought to be governmental misconduct, was 'inherently a matter of public concern.'"[56] The court of appeals "concluded that Ceballos' memo satisfied the public-concern requirement," and "proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it," finding in Ceballos's favor.[57]

The Supreme Court reversed, in a five-to-four decision, holding 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."[58] The Court found that Ceballos had not spoken as a citizen when he wrote his memo. Instead, "[w]hen he . . . performed the tasks he was paid to perform, Ceballos acted as a government employee."[59] The Court concluded that the court of appeals failed to consider whether Ceballos's speech was made in his capacity as a private citizen.[60] In so doing, the Court introduced a new threshold inquiry into public workplace speech analyses: whether the plaintiff was speaking as a private citizen at the time the speech in question was made.[61]

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51. *Id.*

52. *Id.* at 415.

53. *Id.*

54. *Id.*

55. *Id.* (quoting Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004)).

56. *Id.* at 416; Connick v. Myers, 461 U.S. 138 (1983) ("*Pickering*, its antecedents and progeny, lead us to conclude that if [the speech in question] cannot fairly be characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [the employee's] discharge.").

57. *Garcetti*, 547 U.S. at 416.

58. *Id.* at 421.

59. *Id.* at 422.

60. *Id.* at 416.

61. *Id.*

The decision produced three separate dissents. For Justice Stevens, "[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."[62] He further noted that in *Givhan*, the Court was silent on the question of whether Givhan's speech was made pursuant to her job duties, demonstrating, for Justice Stevens, "that the point was immaterial."[63]

Justice Souter, who was joined in his dissent by Justices Stevens and Ginsburg, stated:

> [P]rivate and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[64]

Justice Souter's analysis emphasizes the balancing of interests between public employee and government employer, protecting the workplace speech "on a significant public issue" unless that speech is "too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit."[65] Like Justice Stevens, Justice Souter rejected the status assessment as a dispositive inquiry: "there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him."[66] Furthermore, Justice Stevens rejected the "official duties" test as unjustified, noting that "[t]here is no adequate justification for the majority's line categorically denying Pickering protection to any speech uttered 'pursuant to . . . official duties.'"[67] Justice Souter also asserted that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor."[68]

Justice Breyer found this list too limiting. He recognized the need to afford government employers "sufficient discretion to manage their operations," but found the majority's categorical denial of protection to any speech uttered pursuant to the speaker's official duties to be "too absolute."[69] Instead, Justice Breyer would return to the *Pickering* standard[70] and concluded, "[T]he First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1)

62. *Id.* at 427.

63. *Id.* Justice Stevens also points out the perversity of "fashion[ing] a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors." *Id.*

64. *Id.* at 428.

65. *Id.*

66. *Id.* at 428–29.

67. *Id.* at 429.

68. *Id.* at 435.

69. *Id.* at 446.

70. *Id.*

involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties."[71]

C. Weintraub III *Expressly Implicates the Union Grievance*

The impact of *Garcetti*, particularly in its prescription of a new threshold inquiry, was seen almost immediately in the context of the union grievance. While *Garcetti* had arguably provided the theoretical underpinning linking the union grievance to "official duties," it was not until *Weintraub v. Board of Education* that this link was expressly articulated. *Weintraub* was a case of first impression regarding whether the filing of a union contract grievance constitutes speech protected by the First Amendment, and is thus an important case in the evolving jurisprudence of workplace speech.[72]

In *Weintraub III*, the Second Circuit held that a public school teacher's filing of a grievance—in accordance with his collective bargaining agreement—regarding the school administration's lack of response to a school safety issue that arose in his classroom did not constitute protected speech under the First Amendment.[73] In so holding, the court determined that David Weintraub was acting as a public employee performing his "official duties" rather than as a private citizen when he filed his grievance.[74] The court justified this conclusion by noting that "Weintraub's grievance was 'pursuant to' his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' as a public school teacher—namely, to maintain classroom discipline, which is an indispensible prerequisite to effective teaching and classroom learning."[75]

But, as discussed in Part IV below, that explains only why the *subject* of Weintraub's grievance touched upon his official duties. It does not elucidate why the filing of a grievance is itself an official duty of a teacher. Likewise, the court's conclusion that "Weintraub spoke pursuant to his job duties . . . [because] the speech took the form of an employee grievance, for which there is no relevant citizen analogue" does not answer the fundamental question: Why is the filing of a grievance an "official duty" of a teacher? The "citizen analogue" rationale leads to the conclusion that only public employees file grievances[76]—it does not reach the necessary

71. *Id.* at 449.

72. *Weintraub III*, 593 F.3d 196 (2d Cir. 2010); *see also supra* text accompanying note 12. In *Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010), decided exactly three weeks earlier, the court found that the union grievance in question did not address a matter of public concern and so the court never reached the question of whether it was made pursuant to the employee's official duties.

73. *Weintraub III*, 593 F.3d at 201. The current version of the New York City teachers' contract is available at http://www.uft.org/files/contract_pdfs/teachers-contract-2007-2009_0.pdf. Article XXII contains the grievance procedure. The germane language therein is the same as it was at all times referred to herein.

74. The court also alluded to certain public policy rationales for its restrictive interpretation of the First Amendment. *See Weintraub III*, 593 F.3d at 201 ("The Supreme Court's employee-speech jurisprudence reflects 'the common sense realization[s] that government offices could not function if every employment decision became a constitutional matter.'") (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)).

75. *Weintraub III*, 593 F.3d at 203.

76. *See id.*

conclusion that it is an employee's "official duty" to file a grievance. In addition, the court did not define the critical term of its new calculus, "official duties," as applied to a public school teacher.

David Weintraub was an untenured fifth-grade teacher in Brooklyn, New York, when, on November 6, 1998, a student threw a book at Weintraub during class.[77] Weintraub immediately sent the student to the assistant principal, Douglas Goodman, for discipline.[78] Goodman promptly returned the student to Weintraub's classroom without explanation.[79] Upset at Goodman's refusal to discipline the student and concerned about safety in his classroom, Weintraub spoke with Goodman and with his colleagues.[80] Unsatisfied with their response, Weintraub filed a grievance with his union, the United Federation of Teachers.[81] On July 19, 1999, the superintendent terminated Weintraub's employment without explanation.[82]

In July 2000, Weintraub sued the New York City Board of Education, Goodman, and several others in the U.S. District Court for the Eastern District of New York, claiming, among other things, retaliatory adverse employment action in violation of his First Amendment rights based on the grievance filing.[83] On April 28, 2006, the district court denied the defendants' motion for summary judgment with respect to the First Amendment claim, reasoning, in accordance with *Pickering*, that the content of Weintraub's speech—classroom discipline—related to a matter of public concern[84] in part because Weintraub's primary motivation was a concern for safety rather than

77. *Id.* at 198. Such misconduct is labeled "Seriously Disruptive Behavior" by the New York City Department of Education in its Disciplinary Code and warrants a range of possible disciplinary responses from admonishment by the teacher to suspension by the superintendent, including reprimand by the assistant principal and removal from the classroom by the teacher. Furthermore, the Code provides that "[r]emoved students *will be sent* to a location within the school where they will be provided with continued educational services." N.Y. City Dep't of Educ., Citywide Standards of Intervention and Discipline Measures: The Discipline Code and Bill of Students Rights and Responsibilities, K-12, at 13 (2012), *available at* http://schools.nyc.gov/NR/rdonlyres/F7DA5E8D-C065-44FF-A16F-55F491C0B9E7/0/DiscCode20122013FINAL.pdf (emphasis added).

78. *Weintraub III*, 593 F.3d at 198–99.

79. *Id.* The next school day, the same student again threw a book at Weintraub, who again sent the student to Goodman for discipline. Goodman again returned the student to Weintraub's classroom.

80. *Id.*

81. *Weintraub I*, 423 F. Supp. 2d 38, 42 (E.D.N.Y. 2006).

82. *Id.* at 46.

83. The district court pointed out that "Weintraub faced increasingly serious charges, which were each successively determined unfounded, after speaking to Goodman about Goodman's failure to discipline the student." *Id.* at 52–53.

84. *Id.* at 51. Weintraub had previously sought judicial review of his termination in state court, claiming that the termination was retaliation for his having served the board with a notice of claim related to his 1999 arrest. *Id.* at 48. The court, however, found that Weintraub was "unable to generate any evidence that his termination was retaliatory." *Id.* However, the district court rejected the defendants' argument in *Weintraub I* that the adverse finding in that proceeding collaterally estopped Weintraub from litigating his claim before the district court. The district court held that "preclusive effect is not given to the issue litigated in the Article 78 proceeding because the issue that was in question at [that] proceeding is distinct from the issues presented to this court." *Id.*

personal gain. Therefore, the court held his speech, in the form of the grievance, to be protected by the First Amendment.[85]

On May 29, 2007, the defendants moved for reconsideration in light of the *Garcetti* decision, which had been issued one year earlier.[86] Applying *Garcetti*'s "pursuant to official duties" standard, the district court concluded that the First Amendment did not protect a union grievance because, in filing the grievance, Weintraub was speaking as an employee "proceeding through official channels to complain about unsatisfactory working conditions."[87] The district court held that it was compelled by *Garcetti* to find that the filing of the grievance is "no longer [a] viable bas[i]s for a First Amendment retaliation claim."[88] At the same time, the court acknowledged that the Second Circuit had not yet addressed this issue and that it might reasonably conclude that "while Weintraub's act of sending the book-throwing student to Goodman for discipline was clearly required by his official duties, his duties as a teacher did not *require* him to take any further steps such as . . . commencing a dispute-resolution proceeding."[89]

The Second Circuit did not so conclude, however. On November 25, 2008, the Second Circuit, in a two-to-one decision affirmed that the district court's decision that Weintraub's filing of a grievance was made pursuant to Weintraub's official duties and therefore was not protected by the First Amendment.[90]

IV. *GARCETTI* IN APPLICATION: THE CITIZEN ANALOGUE AND OFFICIAL DUTIES ANALYSES

Following *Weintraub III* in 2010, the U.S. District Court for the Southern District of New York noted in *Adams v. New York State Education Department* that "[a]pplying *Garcetti*, the Second Circuit has declared that 'speech can be made "pursuant to" a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer.'"[91] This raises two questions about how the First Amendment applies to the filing of a union grievance by public employees: (1) What determines an employee's "official duties"?; and (2) how can the filing of a union grievance constitute an employee's "official duty"?

85. *Id.* at 52.

86. *Weintraub II*, 489 F. Supp. 2d 209, 212 (E.D.N.Y. 2007).

87. *Weintraub III*, 593 F.3d 196, 200 (2d Cir. 2010).

88. *Weintraub II*, 489 F. Supp. 2d at 215.

89. *Id.* at 222.

90. *Id.* at 206. The court did so expressly by following *Garcetti*, but without addressing the possibility raised by the district court. On October 18, 2010, the Supreme Court denied Weintraub's petition for a writ of certiorari. Weintraub v. Bd. of Educ., 131 S. Ct. 444 (2010).

91. Adams v. N.Y. State Educ. Dep't, 752 F. Supp. 2d 420, 427, 462 (S.D.N.Y. 2010) (quoting *Weintraub III*, 593 F.3d at 203) (emphasis added).

Where, or at least how, an "official duties" determination fits into the analysis was left unclear in *Garcetti*. The *Garcetti* court did not provide an explicit framework for determining which expressions should be granted First Amendment protection and which should not. In his dissent in *Weintraub III*, Judge Calabresi, distinguishing *Garcetti*, noted that "[t]he memo that Ceballos wrote was not merely related to his job duties, but rather it was the very thing he was paid by the Los Angeles County District Attorney's Office to do."[92] The same cannot be said for Weintraub's grievance filing. Indeed, as Judge Calabresi pointed out, the Board of Education "did not in any way depend on Weintraub bringing union grievances or refraining from bringing them."[93] On the contrary, Judge Calabresi asserted that he doubts "that most employers would view union activity as something that their employees do *for the employer's benefit*," noting the "distinct irony in the idea that unions, which so many employers seek to exclude from the workplace, are somehow transmuted into entities that 'promote the employer's mission'" when filing grievances.[94]

In *Garcetti*, the official duties determination was made pursuant to an assessment of whether there existed a "citizen analogue" to the form of speech in question. This led the Supreme Court to a conclusion about the status of the employee at the time the speech was made: private citizen or public employee.

A. The Form of the Workplace Speech: The Citizen Analogue to a Union Grievance

Although the *Pickering* Court referenced the private citizen versus public employee distinction, the genesis of the *Garcetti* Court's determination of whether the speaker was speaking as a private citizen at the time the speech was made is the Court's decision in *Connick v. Myers*. The *Garcetti* Court expressly observed that "*Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker 'as a citizen upon matters of public concern.'"[95] The Court based this conclusion about *Connick* on its interpretation of a single sentence 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.[96]

92. *Weintraub III*, 593 F.3d at 208.

93. *Id.*

94. *Id.* at 209.

95. Garcetti v. Ceballos, 547 U.S. 410, 416 (2006) (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983)).

96. *Connick*, 461 U.S. at 147.

However, the *Garcetti* Court's emphasis on the "citizen" piece of that statement is not supported by the text or context of the *Connick* decision.[97] The Court in *Connick* drew that distinction to highlight the nature of the interest at stake—personal versus public—not the status of the speaker. Indeed, the Court in *Connick* focused entirely on whether the speech in question addressed a matter of public concern and did not inquire into the speaker's status as a citizen.[98]

This status determination in *Garcetti* was made by assessing whether the speaker was speaking pursuant to his official duties at the time the speech in question was made.[99] This was a dispositive determination for the Court because "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."[100] However, "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees."[101] This "citizen analogue" thus became a determinative indicator of speaker status in the workplace speech analysis.

But Ceballos's situation was fundamentally different from that of Pickering, Givhan, and Weintraub in ways that call for a different legal analysis—one that considers the form of the speech and, in addition, that does not rely on the existence of a "citizen analogue" to such speech, as the Court did in *Garcetti*.[102] First, in writing the memo to his supervisor regarding a case his office was handling, Ceballos was performing work he was paid to do; in asserting their complaints, the other four plaintiffs were not.[103] Second, in Weintraub's case the speech took the form of a union grievance and, when an employee files a grievance, he is not speaking *for* the employer; he is speaking for himself *to* the employer, invoking the rights accorded to him by his union contract and protected by law for the reasons discussed earlier in Part II.B. Weintraub's situation is thus factually distinguishable from *Garcetti*—

97. *Id.* at 147–48. This is notwithstanding the Court's announcement in *Connick* that

> [a]lthough today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.

Id. at 154.

98. *Id.* at 148–50.

99. *Garcetti*, 547 U.S. at 421.

100. *Id.* at 423.

101. *Id.* at 424.

102. *Id.*

103. *See* Part III *infra*. The Court in *Garcetti* implies the importance of this point to its analysis ("Ceballos wrote his disposition memo because that is part of what he . . . was employed to do."). *Garcetti*, 547 U.S. at 421.

indeed, from all of the aforementioned cases—and therefore calls for a legal analysis that accounts for the form of the speech but does not require the "citizen analogue."

Judging from its treatment by the lower courts, this "citizen analogue" rationale is one of the seemingly less controversial aspects of the Court's decision in *Garcetti*.[104] But this note argues that this rationale is one of *Garcetti*'s great red herrings and should be inapplicable in workplace speech cases involving speech in the form of union grievances, i.e., those cases where the *form* of the speech is legally protected by labor law regardless of its subject. The citizen analogue inquiry is the doctrinal manifestation in *Garcetti* of the Court's new focus on the "citizen" element of "speaking as a citizen on a matter of public concern."

The "citizen analogue" as an independent consideration in the analysis took hold after *Garcetti*. In *Foley v. Town of Randolph*, for example, the court focused on the context of a fireman-employee's speech complaining about fire department resources, delivered in uniform at a press conference convened by the fire marshal at the scene of a fire, though the court conceded "neither of these factors is dispositive."[105] Ultimately, the court ruled against the employee, finding "no relevant analogue" to citizen speech to speaking at a press conference.[106] But speaking at a press conference is very different from filing a contract grievance, and not just because Foley was being paid to speak, but because he was speaking *for*, not *to*, his employer, as is the case with a union grievance. Furthermore, the First Circuit in *Foley* articulated something of a bright-line rule when it noted that "the fact that Foley was ostensibly evaluated on whether he '[i]nteracts well with the media' suggests that speaking to the press is a duty he 'actually [was] expected to perform.'"[107]

Similarly, sixteen months later, in *Jackler v. Byrne*, the Second Circuit applied the "citizen analogue" analysis as a determinative factor in a workplace speech case.[108] In *Jackler*, the court found that the plaintiff, a probationary police officer, had suffered retaliation for refusing to make false statements concerning a civilian claim of police brutality against his colleagues. The court agreed with the plaintiff that *Garcetti* and *Weintraub* were not dispositive in precluding First Amendment protection on the grounds that the citizen analogue requirement was satisfied and because *Garcetti* and

104. *See, e.g.*, Decotiis v. Whittemore, 635 F.3d 22, 34 (1st Cir. 2011); Foley v. Town of Randolph, 598 F.3d 1, 7 (1st Cir. 2010); *Weintraub III*, 593 F.3d 196, 198 (2d Cir. 2010); Boyce v. Andrew, 510 F.3d 1333, 1345 (11th Cir. 2007); Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006). *But see Weintraub III*, 593 F.3d at 206 (Calabresi, J., dissenting) ("The idea that the existence of citizen analogues is a prerequisite for suit seems contradicted by *Garcetti*'s statement that the fact that a public employee 'expressed his views inside his office, rather than publicly, is not dispositive.'").

105. Foley, 598 F.3d at 7.

106. *Id.* (quoting *Garcetti*, 547 U.S. at 424).

107. *Foley*, 598 F.3d at 7.

108. 658 F.3d 225, 241 (2d Cir. 2011). *But see* Bowie v. Maddox, 642 F.3d 1122 (D.C. Cir. 2011) (applying *Garcetti* in case of former FBI agent fired for refusing to give false testimony against a colleague). On February 27, 2012, the U.S. Supreme Court denied certiorari in both cases. *See* Byrne v. Jackler, 132 S. Ct. 1634 (2012); Bowie v. Maddox, 132 S. Ct. 1636 (2012).

Weintraub did not preclude First Amendment protection for *refusing* to speak *falsely*.[109] The court thus distinguished Ceballos's affirmative speech from Jackler's affirmative *refusal* to speak.[110] Consistent with its decision in *Weintraub III*, the Second Circuit in *Jackler* again applied a citizen analogue analysis, reaffirming that Weintraub's grievance had "no relevant analogue to citizen speech,"[111] but finding that Jackler's refusal to speak, in effect, did have an analogue.[112]

When a public employee possesses information on a matter of public concern, the public has an interest in disclosure of that information and the status of the speaker, whether as a public employee or private citizen, when disclosing that information should not supersede that interest. With regard to union grievances, it should not matter whether the public has an analogous mechanism for communicating the information that is the subject of a union grievance filed by a public employee. If the subject of the speech addresses a matter of public concern, the court should disregard the fact that the speech is made in the form of a grievance and focus instead on balancing the public's right to receive such information with the rights of the public employer in the efficient operation of the services it provides.

B. The Subject Matter of the Workplace Speech: Pursuant to Official Duties

A linchpin of the "citizen analogue" inquiry is the inscrutable, inchoate concept of "official duties." Breaking from the *Pickering* inquiry, the Supreme Court in *Garcetti* announced that speech made "pursuant to" a public employee's "official duties" was categorically unprotected by the First Amendment because the employee was not speaking in his capacity as a citizen.[113] In other words, if the speech by a

109. *Jackler*, 658 F.3d at 234–37.

110. *Id.* at 232.

111. *Id.* at 238 (quoting *Weintraub III*, 593 F.3d 196, 203 (2d Cir. 2010)).

112. *Jackle*r, 658 F.3d at 241 ("[A] citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false."). Ultimately, the court found Jackler's refusal to recant his honest testimony and replace it with false testimony to have a "clear civilian analogue" and that he was "not simply doing his job." The court asserted that "it is clear that the First Amendment protects the rights of a citizen to refuse to retract a report to the police that he believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report with the police." *Id.* at 241–42.

113. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). The Court began its analysis with the premise: "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418. It added a second premise: "Public employees . . . often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* at 418–19. The Court continued its analysis by noting that "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict . . . the liberties employees enjoy in their capacities as private citizens." *Id.* at 419. The Court concluded that its task is "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Id.* at 420. Finally, and most apropos to the focus of this note, the Court asserted that "[u]nderlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.* (citing Connick v. Myers, 461 U.S. 138, 154 (1983)).

public employee is pursuant to her official duties, the court no longer reaches the question of whether her speech addressed a matter of public concern. This official duties inquiry reduces the scope of First Amendment protection for public employees. But by failing to define its two key terms—"pursuant to" and "official duties"—the Court provided little guidance to the lower courts in administering this new test,[114] which has led to conflicting opinions.[115]

Weintraub is one such example. The Second Circuit in *Weintraub III* professes to be following *Garcetti*, but in doing so the court in fact employs language both semantically distinct from that in *Garcetti* and undefined at key points in its decision. For instance, the Second Circuit's "in furtherance of core duties" standard in *Weintraub III* was not the standard employed by the court in *Garcetti*.[116] "In furtherance of" and "pursuant to" are not synonymous.[117] In addition, the court does not define what it means by Weintraub's "core duties."[118] It also fails to explain whether "core duties" are synonymous with or distinct from "official duties" (the *Garcetti* term) or perhaps are a subset of them. If they are distinct, then the *Garcetti* analysis does not apply. While it is unclear whether these semantic differences would

114. To further confuse matters, at others points in the decision the Court claims to be restricting speech that "*owes its existence to a public employee's professional responsibilities.*" *Garcetti*, 547 U.S. at 421 (emphasis added).

115. *See* Lindsey v. Orrick, 491 F.3d 892, 897–98 (8th Cir. 2007); Mills v. City of Evansville, 452 F.3d 66, 647–48 (7th Cir. 2006); Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006); Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006); Jackson v. Jimino, 506 F. Supp. 2d 105, 109–10 (N.D.N.Y. 2007); Barclay v. Michalsky, 451 F. Supp. 2d 386, 394–99 (D. Conn. 2006). *Compare* Gonzales v. City of Chicago, 239 F.3d 939 (7th Cir. 2001) *with* Delgado v. Jones, 95 F. App'x 185 (7th Cir. 2004). *See also* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 Educ. L. Rep. 357, 358–59 (2011) ("Most circuits have impermissibly read the *Garcetti* rule to impose a much broader exemption that the Court recognized, and that this misapplication stems from a failure of these lower courts to recognize the restrictive function of the words 'pursuant to' in the context of the facts before the *Garcetti* Court."); Chohan, *supra* note 19, at 575 n.26 ("*Garcetti* is overly broad, lacks predictability, and leaves too much speech unprotected. . . . Predictably, different courts have taken different approaches to this analysis.") (citing Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp. 2d 905, 929 (2006)); Elzer, *supra* note 19, at 367 ("The Court's failure to articulate an 'official duties' test has caused lower courts to interpret *Garcetti* in many different, and sometimes conflicting, ways.").

116. *Garcetti*, 547 U.S. at 421 (emphasis added).

117. "Pursuant to" is defined as "in carrying out; in conformity with; according to." *Pursuant to—Definition and More*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/pursuant%20to (last visited Mar. 23, 2013). "Furtherance" is defined as "the act of furthering; advancement." *Furtherance—Definition and More*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/furtherance (last visited Mar. 23, 2013). "Duty" is defined, in relevant part, as "obligatory tasks, conduct, service, or functions that arise from one's position." *Duty—Definition and More*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/duty (last visited Mar. 23, 2013).

118. This particular confusion has arisen in other circuits as well. *See, e.g.*, Trigillo v. Snyder, 547 F.3d 826 (7th Cir. 2008). In *Trigillo*, the Seventh Circuit announced that "[b]efore *Garcetti*, we held that speech consistent with an employee's general duties, but not part of her 'core functions,' deserved constitutional protection. But *Garcetti* required us to abandon this proposition." *Id.* at 829 (citations omitted).

lead to a different result, the undefined doctrinal terms have resulted in loose and inconsistent applications by courts.

In *Brammer-Hoelter v. Twin Peaks Charter Academy*, for example, the Tenth Circuit held that speech made pursuant to "official duties" may "concern[] an unusual aspect of an employee's job that is not part of his everyday functions."[119] The court applied a five-step *Garcetti/Pickering* analysis,[120] and found that some of the teachers' numerous grievances were not made pursuant to their official duties because, for example, some of the speech in question "occurred after hours and outside the Academy[,] . . . [and] the discussions included ordinary citizens . . . who were not employed by the Academy."[121] "[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties."[122] By equating "pursuant to" with "reasonably contributes to" and "facilitates," the court arguably greatly broadened the scope of the *Garcetti* First Amendment protection exclusion.

Furthermore, the *Brammer-Hoelter* court asserted that "not all speech that occurs at work is made pursuant to an employee's official duties. Nor is all speech about the subject matter of an employee's work necessarily made pursuant to the employee's official duties."[123] Where the teachers lodged their complaints formally with the school's board of education pursuant to the board's policy and direction, the court found that, since the teachers "were encouraged to present their view to improve the [school] and did so in the form of complaints and grievances to the Board," the court "cannot deem such a generalized grievance policy to be an official duty without

119. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) (citing Battle v. Bd. of Regents, 468 F.3d 755, 761 n.6 (11th Cir. 2006)).

120. The court held that:

> [f]irst, the court must determine whether the employee speaks "pursuant to [his] official duties." If the employee speaks pursuant to his official duties, then there is no constitutional protection because the restriction on speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created." Second, if an employee does not speak pursuant to his official duties, but instead speaks as a citizen, the court must determine whether the subject of the speech is a matter of public concern. If the speech is not a matter of public concern, then the speech is unprotected and the inquiry ends. Third, if the employee speaks as a citizen on a matter of public concern, the court must determine "whether the employee's interest in commenting on the issue outweighs the interest of the state as employer." Fourth, assuming the employee's interest outweighs that of the employer, the employee must show that his speech was a "substantial factor or a motivating factor in a detrimental employment decision." Finally, if the employee establishes that his speech was such a factor, "the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech."

Brammer-Hoelter, 492 F.3d at 1202–03 (citations omitted).

121. *Id.* at 1205. The court lists twelve grievances, but it is clear from that list that the court focused only on the subject of those grievances and not at all on the form or forum in which they were communicated.

122. *Id.* at 1203.

123. *Id.* at 1204 (citations omitted).

eviscerating *Garcetti* and the general constitutional principle that 'public employees do not surrender all their First Amendment rights by reason of their employment.'"[124] Moreover, according to the First Circuit in *Decotiis*, the *Brammer-Hoelter* court held "that the teachers' speech was citizen speech because it occurred after hours and outside of the workplace, the teachers 'had no supervisory responsibility and no duty to report with regard to any of the problems being discussed,' and the discussion included members of the public."[125]

Most of the same could be said about David Weintraub's speech. Union grievances are typically filed after hours and Weintraub owed no duty to his employer to file the grievance. But that did not seem to influence the decision in *Weintraub*. The district court in its first decision, *Weintraub I*, concluded that the court "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[126] But the court then concluded that "it is clear that Weintraub's . . . filing the formal grievance [is] not protected speech under the *Garcetti* Court's interpretation of the First Amendment."[127] The district court, upon reconsideration following the *Garcetti* opinion, in *Weintraub II*, noted that

> the general principle running through [the] cases applying *Garcetti* to similar situations is that, when a public employee airs a complaint or grievance, or expresses concern about misconduct, to his or her immediate supervisor or pursuant to *a clear duty to report imposed by law or employer policy*, he or she is speaking as an employee and not as a citizen.[128]

However, this does not apply to contract grievances because an employee is never compelled to file a grievance.[129]

Additionally, the district court continued that "[i]f, however, the employee goes outside of the established institutional channels in order to express a complaint or concern, the employee is speaking as a citizen, and the speech is protected."[130] But

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124. *Id.* at 1204 (citing Garcetti v. Ceballos, 547 U.S. 410, 417 (2006)).

125. Decotiis v. Whittemore, 635 F.3d 22, 33 n.12 (1st Cir. 2011).

126. *Weintraub I*, 423 F. Supp. 2d 38, 50 (E.D.N.Y. 2006) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968)).

127. *Weintraub II*, 489 F. Supp. 2d 209, 219 (E.D.N.Y. 2007).

128. *Id* (emphasis added). The court here appears to be using the term "grievance" in a colloquial sense as opposed to the term of art in a labor setting where it refers, as in *Weintraub*, specifically to a formal part of a collectively bargained employment dispute resolution procedure. *See* Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 Indus. Rel. L.J. 523 (1987).

129. New York State's Taylor Law, for example, speaks in terms of employee "rights," not "obligations." Specifically, section 203 guarantees public employees "the right to . . . the administration of grievances arising" under a collective bargaining agreement. N.Y. Civ. Serv. Law § 203 (McKinney 2011).

130. *Weintraub II*, 489 F. Supp. 2d at 219.

the court does not define what it means by "institutional channels."[131] Regardless, a collectively bargained grievance procedure, negotiated in accordance with, and protected by, applicable labor law, is not an "institutional channel."[132] Instead, it is a dispute resolution mechanism mutually agreed upon by the employer and the union—an external organization independent from the employer.[133] Indeed, although the lack of a citizen analogue should not preclude First Amendment protection, for a range of workplace-related disputes, the contract grievance is often the *only* option available to an employee to get to an arbiter outside of the workplace.[134] In *Weintraub*, the district court confuses "institutional channels," which implies unilateral employer-created policies and mechanisms associated with the employer organization, with "official channels," which more broadly suggests a formally sanctioned collectively bargained mechanism.[135]

This confusion is highlighted by the district court's description of the grievance procedure as "a formal dispute-resolution process *put in place by his employer*."[136] In fact, in the case of *Weintraub* the grievance procedure is a mandatory subject of bargaining that was negotiated by the union with the city of New York.[137] It would violate New York's Public Employees' Fair Employment Act for a public employer to unilaterally institute a grievance procedure for unionized employees without negotiation with a duly certified union.[138] The court of appeals picks up on and develops this confusion

131. This omission has created further confusion in the courts. *See, e.g.*, Stahura-Uhl v. Iroquois Cent. Sch. Dist., 836 F. Supp. 2d 132, 141–42 ("As several courts in this Circuit have noted, this factor . . . appears to be interchangeably referred to as the 'relevant analogue' or 'institutional channels' factor.").

132. Section 158(a)(2) of the National Labor Relations Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158 (2006).

133. "Institutional" suggests some practice or thing associated with or connected to an institution. *Institutional—Definitions and More*, Merriam-Dictionary, http://www.merriam-webster.com/dictionary/institutional (last visited Mar. 23, 2013). "Official" suggests a practice or thing formally sanctioned. *Official—Definitions and More*, Merriam-Dictionary, http://www.merriam-webster.com/dictionary/official (last visited Mar. 23, 2013). A collective bargaining agreement, including its grievance provisions, is no more associated with an "institutional" employer than it is with a labor union, which exists wholly independent of, and external to, the institution for which its members work.

134. *See generally* 20 Richard A. Lord, Williston on Contracts § 55:61 (4th ed. 2011) ("The general rule is that an employee covered by a collective bargaining agreement providing for arbitration of grievances may not maintain a civil action for damages in the case of an alleged breach of the agreement, but must instead look to the union for a remedy provided by the contractual grievance procedure.") (citations omitted).

135. *Weintraub II*, 489 F. Supp. 2d at 219–20; *see also* Jackler v. Byrne, 658 F.3d 225, 232 (2d Cir. 2011).

136. *Weintraub II*, 489 F. Supp. 2d at 220 (emphasis added).

137. New York State Public Employment Relations Board, Mandatory/Non-mandatory Subjects of Negotiation 93 (2009) ("Grievance procedures are terms and conditions of employment and, thus, mandatorily negotiable.").

138. N.Y. Civ. Serv. Law § 209-a(1)(d) (McKinney 2011) ("It shall be an improper practice for public employer [sic] or its agents deliberately . . . (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees . . . ."). This is true for all public sector unions in New York State, in accordance with the Taylor Law.

in *Weintraub III*. Its description of a union grievance as an "internal communication"[139] is "dubious," as Judge Calabresi observes in his dissenting opinion.[140] As Judge Calabresi also correctly notes, the United Federation of Teachers is an external body[141] and the filing of a contractual grievance is a protected activity under municipal, state, and federal labor laws.[142] Furthermore, grievance procedures do not constitute internal school policy, are not subject to employer discretion, and are not considered a management right.[143] Therefore, they cannot be considered either institutional or internal to the place of government employment. If the activity is itself legally protected against adverse employment consequences, then no retaliatory consequences should follow the engagement in such activity. Reading the First Amendment as not protecting the filing of union grievances effectively results in an end-run around those labor laws and the protections they provide for such activity.

Moreover, Judge Calabresi highlights a critical distinction unaddressed by the majority, noting that he

> take[s] it as a given that Weintraub's duties entailed informing the school administration of violent incidents, such as those at the root of this case, as a means of facilitating the school's disciplinary apparatus. This justifies the district court's holding that Weintraub's comments to his supervisor were not protected. *But grieving the administration's response through his union is quite another matter.*[144]

Indeed, the majority never states *why*, by filing a grievance, Weintraub was speaking pursuant to his official duties apart from finding that no citizen analogue existed. The district court stated that "Weintraub's conversations with other teachers about his conflict with Goodman . . . are clearly not within the scope of his employment duties."[145] The court concluded that, "when speaking to his co-workers about his concerns regarding school safety and Goodman's handling of the book-throwing incidents, Weintraub was speaking as a citizen rather than as an employee."[146] But the court fails to explain why it considers his conversations with his colleagues as materially different and distinct from his conversation with Goodman, which it found to be within the scope of his duties. The only apparent distinction is that

139. *Weintraub III*, 593 F.3d 196, 206 n.2 (2d Cir. 2011).

140. *Id.* at 206 (Calabresi, J., dissenting).

141. *Id.*

142. *See infra* text accompanying note 157.

143. See the New York City teachers' collective bargaining agreement. Contract, United Federation of Teachers 2007–2009 (2007), *available at* http://www.uft.org/files/contract_pdfs/teachers-contract-2007-2009_0.pdf. Article XXII contains the grievance procedure.

144. *Weintraub III*, 593 F.3d at 208 (emphasis added).

145. *Weintraub II*, 489 F. Supp. 2d 209, 220 (E.D.N.Y. 2007). Indeed, it is not at all clear why filing a grievance about school safety is "clearly" within a teacher's "official duties" while conferring with colleagues about school safety is not.

146. *Id.*

Weintraub believed that Goodman, his supervisor, could do something about the problem and that his colleagues could not.

As a matter of public policy, this is problematic because of the disincentive it creates. Finding its hands tied, the district court concluded:

> [t]hough it questions the wisdom of a constitutional policy that disincentivizes public employees from bringing serious misconduct and abuse to the attention of their superiors, while perversely encouraging them to take every internal conflict to the highest levels of governmental oversight, this [c]ourt must nevertheless apply the *Garcetti* rule in good faith until the Supreme Court sees fit to revisit the issue.[147]

In summarizing the then-current state of the circuit courts on the question, the district court observed that "a substantial ground for difference of opinion may exist" because

> while Weintraub's act of sending the book-throwing student to Goodman for discipline was clearly required by his official duties, his duties as a teacher did not require him to take any further steps such as approaching Goodman about the situation or commencing a dispute-resolution proceeding. The supererogatory nature of those subsequent actions may prove sufficient to sustain the view that Weintraub was not acting pursuant to any duty when he performed those actions, and that his speech was therefore protected.[148]

This is relevant because, as the court of appeals noted, quoting *Garcetti*, the "proper inquiry" into whether Weintraub was acting pursuant to his official duties "is a practical one."[149] The Court in *Garcetti* equated such duties with those the "employee actually is expected to perform."[150] But despite this fundamental recognition of the distinction between form and subject, the district court found Weintraub's speech unprotected.

C. Conflation of the Form and Subject Matter Analyses in Workplace Speech Cases: The Union Grievance

A concurrent problem contributing to, and arguably underpinning, the union-grievance-as-official-duties canard is the apparent confusion of the form (union grievance/citizen analogue requirement) and subject matter (private vs. public interest/"pursuant to official duties" requirement) of the employee speech in judicial analysis. Judging from *Pickering* and its progeny, there is no dispute that the subject matter of the employee speech—specifically, whether it addresses a matter of public concern—is a fundamental part of the First Amendment analysis.[151] Indeed, it constitutes the

147. *Id.*

148. *Id.* at 222.

149. *Weintraub III*, 593 F.3d 196, 202 (2d Cir. 2010) (quoting Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)).

150. *Garcetti*, 547 U.S. at 424–25.

151. Prior to *Garcetti* it was not a part of a status assessment of the speaker (i.e., public employee/private citizen). In *Givhan*, for example, Justice Rehnquist announced that "[w]hen a teacher speaks publicly, it is

first inquiry in a *Pickering* analysis. What is less clear is whether the form that the speech takes—for example, a union grievance—is relevant to that analysis at all. Particularly unclear is whether the form is relevant to the initial assessment of speaker's status as a citizen or a public employee, now explicitly required as a separate inquiry under *Garcetti*.

Courts addressing the question of public employee speech have taken note of the form of the speech, but this was generally in the context of examining whether the employee's speech addressed a matter of public concern.[152] In *Garcetti*, however, the form of the speech became a significant and determinative factor in the status assessment of the speaker, and thus ultimately dispositive in the First Amendment analysis.[153] Likewise, the *Weintraub* court focused on the form of the speech when it stated that, by filing a grievance with his union, Weintraub "was speaking pursuant to his official duties."[154] And "because Weintraub made his statements 'pursuant to' his official duties as a schoolteacher . . . his speech was not protected."[155] The court thus never reached the question of whether the subject of Weintraub's speech addressed a matter of public concern.[156] In other words, for the Second Circuit engaging in the first step of a *Garcetti* analysis, it was the form of Weintraub's speech

generally the *content* of his statements that must be assessed to determine whether they 'in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally.'" Givhan v. W. Line Cons. Sch. Dist., 439 U.S. 410, 415 n.4 (1979) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968)). Similarly, the First Circuit in *Mercado-Berrios*, citing Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010), noted that "[t]he relevant inquiry under *Garcetti* . . . has two basic components . . . both of which are highly *context*-sensitive." Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 26 (1st Cir. 2010) (citing Brewster v. Bd. of Educ., 149 F.3d 971, 980 (9th Cir. 1998)) (emphasis added); *see also* McCarthy & Eckes, *supra* note 19, at 232 (stating that "the forum is not dispositive in identifying whether the comments are pursuant to job duties" and that "lower courts observed that determining whether a public employee's expression is protected requires a 'fact-sensitive, context-specific balancing of competing interests"). *But see* Stahura-Uhl v. Iroquois Cent. Sch. Dist., 836 F. Supp. 2d 132 (2011) (holding that special education teacher spoke pursuant to her official duties when she complained to coworkers and students' parents about deprivation of resources for students and could thus not avail herself of First Amendment protection).

152. *See, e.g.*, *Pickering*, 391 U.S. at 569 (letter to the editor); Connick v. Myers, 461 U.S. 138, 140 (1983) (internal office questionnaire); Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F. 3d 158, 161 (2d Cir. 2006) (letter to supervisor); Montle v. Westwood Heights Sch. Dist., 437 F. Supp. 2d 652, 653 (E.D. Mich. 2006) (T-shirt with pro-union message).

153. *Garcetti*, 547 U.S. at 421 (asserting that the subject matter of Ceballos's memo was "nondispositive").

154. *Weintraub III*, 593 F.3d at 201.

155. *Id.* at 205.

156. In support of this view of the form of speech, the Second Circuit favorably cites *Boyce v. Andrew* in which the Eleventh Circuit held that "[t]he form and context in which the [plaintiffs'] complaints were made are indicative of the fact that they intended to address only matters connected with their jobs." *Id.* at 204 (citing Boyce v. Andrew, 510 F.3d 1333, 1343–44 (11th Cir. 2007)). From this assertion, the Second Circuit concluded that the "form and context" in which the speech was made in *Boyce*—an internal communication to a supervisor—"weighed against First Amendment protection" in that case. *Weintraub III*, 593 F.3d at 204. In fact, however, the Eleventh Circuit in *Boyce* focused primarily on the subject matter of the plaintiffs' speech in arriving at the conclusion that it was made pursuant to their official duties. *Boyce*, 510 F.3d at 1344–46.

(union grievance), not its subject matter (school safety), which determined that he had spoken as an employee rather than as a citizen, and thus disqualified his speech from First Amendment protection. The problem with this analysis is that the union grievance is a form of speech legally protected by labor law regardless of its subject.[157] Therein too lies a logical fallacy of the Second Circuit's reasoning:

Major Premise:	Employee speech made pursuant to the employee's official duties is not protected by the First Amendment.
Minor Premise:	Only employees can file union grievances.
Conclusion:	Union grievances constitute speech pursuant to an employee's official duties and is unprotected by the First Amendment.

The first two premises, at least after *Garcetti*, are valid. To accept the court's conclusion, however, is to assume a third premise: employees file union grievances pursuant to their official duties. But this is false. The Second Circuit nonetheless assumed the validity of this third premise, without explanation or rationale, which was necessary in supporting its conclusion. This confusion of form and subject, and especially the misplaced focus on the form of the speech in the threshold inquiry, renders this First Amendment analysis critically flawed in connection with the union grievance.[158]

So ingrained is this analytical confusion, in fact, that even where the courts find the challenged speech to be protected, they nevertheless seem compelled to conflate subject and form. In *Brammer-Hoelter v. Twin Peaks Charter Academy*, for example, the court asserted that "[n]early all of the *matters* Plaintiffs claim they discussed *were made pursuant to their duties* as teachers."[159] But a "matter" (i.e., a subject) cannot be "made" (much less made pursuant to a duty).[160]

157. *See* National Labor Relations Act, 29 U.S.C. §§ 157–59 (2006); N.Y. Civ. Serv. Law §§ 204, 208, 209-a (New York State's Public Employees' Fair Employment Act, or "Taylor Law") (McKinney 2011). In addition, N.Y.C. Administrative Code § 12-306(a)(3) makes it an improper practice for a public employer or its agents to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. The New York City Board of Collective Bargaining has jurisdiction over disputes involving this section of New York City Administrative Code. N.Y. Civ. Serv. Law § 205(5)(d) (2009).

158. The confusion is not just among the courts. *See* R. George Wright, *Retaliation and the Rule of Law in Today's Workplace*, 44 Creighton L. Rev. 749, 766 (2011) ("It may be assumed that filing such a union grievance is indeed part of one's job, within one's realistic job description . . . ."). Paul Forster falls into the typical post-*Garcetti* trap in *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*. Forster conflates (or at least equates) a teacher's "official duties" with her "official teaching duties," which leads to his analytical confusion of subject and form. *See* Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 Gonz. L. Rev. 687, 696 (2011). *But see* Elzer, *supra* note 19, at 378 (citing Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006)). Elzer notes that "it is far from 'clear' what part of Freitag's job duties required her to be subjected to sexual harassment, let alone to report it," and that "the effect of the [*Freitag* decision] is to strip all internal grievances of First Amendment protection, regardless of their truth or importance."

159. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007) (emphasis added).

160. In other words, one may "make" a complaint, where the act of and/or forum for complaining is "part-and-parcel" of one's employment duties, *regardless* of the subject matter of the complaint. Vice versa: one

This confusion of form and subject, and especially the misplaced focus on the form of the speech in the threshold inquiry, renders the First Amendment analysis centered on the citizen analogue inquiry inapt in connection with the union grievance.[161]

One apparent exception is the Fifth Circuit's decision in *Williams v. Dallas Independent School District*, in which a school district discharged an athletic director after he issued a memorandum asserting the misuse of public school funds.[162] While the Fifth Circuit found this speech unprotected because it was "made in the course of performing his employment," the court explained that "[u]nder *Garcetti*, we must shift our focus from the content of the speech to the role the speaker occupied when he said it . . . Ceballos was acting pursuant to his official duties because he was performing activities *required* to fulfill his duties."[163] But the *Williams* court distinguished Williams's situation because the employer conceded "that an Athletic Director is not required to write memoranda to his principal regarding athletic accounts."[164] The court asserted that it "must determine the extent to which, under *Garcetti*, a public employee is protected by the First Amendment if his speech is not necessarily required by his job duties but nevertheless is related to his job duties."[165] But the court did not indicate *why* it must pursue that inquiry, which it explained was beyond the scope of *Garcetti*.[166]

A related manifestation of this confusion is found in the misplaced focus on the underlying event rather than on the immediately precipitating event. Weintraub was not retaliated against—indeed, did not claim retaliation—for his failure to maintain order and discipline in his classroom (the underlying event/fact); he was retaliated against for filing a grievance (the immediately precipitating event).[167] This is sloppy legal analysis, particularly when the court: (1) offers no rationale for the assertion, and nevertheless dismisses the plaintiff's First Amendment claims; and (2) finds that

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may complain where the subject is clearly related—indeed, closely related—to the employee's duties, but may utilize a forum (such as a contractual grievance procedure) that nevertheless leaves the "speech" protected. But one may not "make" a matter, subject, or topic. This is semantically, and by extension conceptually, flawed.

161. *See supra* note 158.

162. 480 F.3d 689 (5th Cir. 2007).

163. *Id.* at 692–94.

164. *Id.*

165. *Id.* at 693. The *Williams* court articulated one of the more expansive definitions of "official duties" when it equated "[a]ctivities undertaken in the course of performing one's job" with "activities pursuant to official duties." *Id.* (citations omitted).

166. *Id.* at 692.

167. See also Adams v. N.Y. State Educ. Dep't, 752 F. Supp. 2d 420, 426 (S.D.N.Y. 2010), in which the court conflated the underlying fact (falsification of records) with the immediately precipitating event (complaint) in erroneously, and conclusorily, holding that the complaint was unprotected speech. In other words, the *Adams* court implicitly equated "part-and-parcel of a teacher's concerns as a teacher" with that teacher's "official duties" as a teacher.

absent a "relevant analogue" to speech by private citizens, public employees speak pursuant to their official duties, and are thus unprotected by the First Amendment.[168]

1. Union Grievance: A Form of Speech That Should Never Constitute Speech "Pursuant to an Official Duty"

This note argues that the filing of a union contract grievance should never be found to constitute an "official duty" of any public employee and thus should not preclude First Amendment protection under the first step of the *Garcetti* test. As previously noted, this is partly because the filing of a union grievance, in accordance with a collectively bargained grievance procedure, is protected by state and federal labor law.[169]

In *Weintraub II*, in support of its position that Weintraub's claims were barred because his statements were made in his capacity as an employee, the City argued that "[o]bviously, it is within the job duties of any teacher to maintain discipline within the classroom, and Weintraub's referral of the student to Goodman . . . falls within these duties."[170]

But, apropos *Weintraub*, grievance filing is not—and has never been—part of a teacher's official duties.[171] Indeed, Judge Calabresi in his *Weintraub* dissent suggests that grievance filing is hostile to a school district's interests and by extension, is at least arguably hostile to the interests of any public employer.[172] Because grievance filing is not part of a teacher's official duties, even very broadly defined, it must not be summarily precluded from First Amendment protection even while it is also expressly protected under state and federal labor law.[173] More broadly, this means that no adverse employment action should be taken against a public employee for exercising her right to file a union grievance. "Utilization of the grievance process is a 'protected activity,' and interference with the exercise of that right is an improper practice."[174] Otherwise the National Labor Relations Act and by extension New York's Taylor Law contain meaningless provisions and the determination that the

168. *Id.* at 428 (quoting *Weintraub III*, 593 F.3d at 203).

169. *See* discussion *supra* Part II.B; *supra* note 157.

170. *Weintraub II*, 489 F. Supp. 2d 209, 221 (E.D.N.Y. 2007).

171. *See* N.Y. Educ. Law §§ 3001 et seq. (McKinney 2011); N.Y. Comp. Codes R. & Regs. tit. 8, §§ 30, 100 et seq. (McKinney 2011). Although teacher duties are not codified in New York State, standard industry practices, in New York and around the country, have nonetheless emerged over the years. Teachers prepare for class, teach class, respond to and grade student work, assist students in need, or desirous, of extra help; they staff committees, supervise student acstivities, etc. With the notable exception of certain statutory mandated reporting obligations, public school teachers have no civil obligation to notify their employer of any concerns, malfeasance, grievances or complaints.

172. *See Weintraub III*, 593 F.3d at 209 n.6.

173. *See supra* text accompanying note 157.

174. *See* N.Y.S. Bar Ass'n, Public Sector Labor & Employment Law 293 (1998) (citing Bd. of Educ. Union Free Sch. Dist. No. 5, Half Hollow Hills, 6 PERB 3034 (1973), *aff'd on other grounds sub. nom.* Frank v. PERB, 384 N.Y.S.2d 705, 9 PERB 7012 (2d Dep't 1976); *see also* N.Y. Civ. Serv. Law §§ 203, 204, 208, 209-a (2008).

First Amendment does not protect the filing of union grievances effectively results in a circumvention of the labor laws which expressly protect such activity. In *Weintraub III*, the court could have given effect to both the U.S. Constitution and New York State law by finding either that filing a union grievance constitutes protected activity under state law and so *Garcetti* is inapplicable, or that filing a union grievance is consistent with the types of speech protected by the First Amendment.

No court applying the *Garcetti* test has asserted that the filing of a union grievance is a legally unprotected activity. In fact, those courts that have addressed the question at all have typically done so with conclusory pronouncements implying the self-evidence that such filing is an "official duty."[175] Generally this assertion is based on the perceived lack of "citizen analogue" to the chosen form of speech. In *Weintraub III* for instance, the Second Circuit concluded, without further explanation, that Weintraub's filing of a grievance in accordance with his union's collective bargaining agreement was part of his official duties[176] because the court found that the grievance "constituted 'part-and-parcel of his concerns about his ability to properly perform his duties.'"[177]

This interpretation seems to imply that, depending on their subject matter, some union grievances might be considered official duties and others might not. However, this contradicts the court's earlier broad assertion incorporating the filing of a grievance among a teacher's official duties. Most schoolteachers, presumably, go through their entire careers without ever filing a contractual union grievance. It is hard to imagine that most—indeed *any*—go through their entire careers without confronting some issue which might be worthy of at least informal complaint. Does this mean that most work a full career without ever fulfilling their official duties?

Nevertheless, *Decotiis* significantly narrowed *Garcetti*, holding that "[i]n identifying Plaintiff's official responsibilities," the court must focus "on 'the duties an employee is actually *expected to perform*.'"[178] Further, the court found that "[a]lthough no one contextual factor is dispositive . . . several non-exclusive factors . . . are instructive" in conducting this analysis.[179] Among those the court cited

175. *See, e.g.*, Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007); Phillips v. City of Dawsonville, 499 F.3d 1239, 1242 (11th Cir. 2007); Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158 (2d Cir. 2006).

176. *Weintraub III*, 593 F.3d at 202.

177. Adams v. N.Y. State Educ. Dep't, 752 F. Supp. 2d 420, 428 (S.D.N.Y. 2010) (citing *Weintraub III*, 593 F.3d at 203).

178. Decotiis v. Whittemore, 635 F.3d 22, 31 (1st Cir. 2011) (quoting Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006)).

179. *Decotiis*, 635 F.3d at 32–33 (citing Foley v. Town of Randolph, 598 F.3d 1, 7–8 n.9 (1st Cir. 2010); *Garcetti*, 547 U.S. at 420–21, 423; *Williams*, 480 F.3d at 694; Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1205 (10th Cir. 2007)). "Applying these factors," the court found that the plaintiff's "speech may have been related to the subject matter of her job, but it was not, strictly speaking, among her enumerated duties to make such speech," and thus found for the employee-plaintiff on the defendants' motion to dismiss. *Decotiis*, 635 F.3d at 32–33.

> whether the employee was commissioned or paid to make the speech in question; the subject matter of the speech; whether the speech was made up the chain of command; whether the employee spoke at her place of employment; whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it "official significance"); whether the employee's speech derived from special knowledge obtained during the course of her employment; and whether there is a so-called citizen analogue to the speech.[180]

While the *Decotiis* saga may not be over yet, in some courts there are workplace speech claims that are surviving a *Garcetti* analysis.[181] Other courts, however, have held that an employee's unsupported assertions that a particular function was not among her official duties were not dispositive. In *Adams v. New York State Education Department*, for example, a teacher's complaints about school conditions and practices led to retaliation.[182] In response to the teacher's claims of a First Amendment violation, the district court found the teacher's "conclusory statements that making the complaints in question did not fall within the scope of their job descriptions does not end the inquiry."[183] In ruling against the plaintiffs, the court relied on the "clear instructions" provided by *Garcetti* and *Weintraub*.[184]

D. A Modest Proposal for a Return to Reason: Montle v. Westwood Heights

In his dissent in *Weintraub III*, Judge Calabresi notes that "*Garcetti* leaves open the definition of 'pursuant to official duties.'"[185] Notwithstanding that *Garcetti* is inapposite in a First Amendment analysis where the speech in question took the form of a union grievance, that opening should be filled with an unambiguous definition and corresponding standard of "pursuant to official duties" that the courts may apply consistently and on which employers and employees may rely. The U.S. District Court

180. *Decotiis*, 635 F.3d at 32

181. *See, e.g.*, Kodrea v. City of Kokomo, 458 F. Supp. 2d 857 (S.D. Ind. 2006) (discussing "ordinary duties" versus "official duties"); Day v. Borough of Carlisle, 1: CV-04-1040, 2006 WL 1892711 (M.D. Pa. July 10, 2006) (plaintiff alleging no duty to report); Batt v. City of Oakland, No. C02-04975 MHP, 2006 WL 1980401 (N.D. Cal. July 13, 2006) (showing evidence of culture of not reporting prevailed over employer's assertion of duty to report).

182. 752 F. Supp. 2d 420 (S.D.N.Y. 2010).

183. *Id.* at 427.

184. *Id.* It is worth noting that the court found "[t]his guidance" to be "relevant in the Court's evaluation pursuant to the *Twombly/Iqbal* plausibility rule to test the sufficiency of a cause of action alleging unlawful retaliation under the First Amendment." *Id.* (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)). Following a similar analysis, the Seventh Circuit in *Trigillo v. Snyder* found dispositive the fact that Trigillo's speech was "written on department letterhead and signed by her as 'Chief of Procurement.'" Trigillo v. Snyder, 547 F.3d 826, 829 (7th Cir. 2008). Based upon these factors, the court found that Trigillo's speech had been made pursuant to her official duties. Under this test as well, the filing of a union grievance cannot be deemed an official duty. *See id.* These cases would seem to suggest that the question of the scope of "official duties" is one of fact, not law, although the Supreme Court in *Garcetti* never reached that question.

185. Adams v. N.Y. State Educ. Dep't, 752 F. Supp. 2d 420, 427 (S.D.N.Y. 2010).

for the Eastern District of Michigan provided a step in the right direction in *Montle v. Westwood Heights School District*,[186] issued just two weeks after *Garcetti*.

In *Montle*, a probationary teacher claimed her termination was in retaliation for, among other things, her coming to work in a t-shirt containing a pro-union slogan.[187] The teacher claimed First Amendment protection, and the district court conducted what was essentially a *Pickering* analysis. First, the court considered whether Montle was speaking on a matter of public concern; second, it weighed Montle's interest in commenting on a matter of public concern against the school district's interest in promoting efficient operation of its business;[188] and third, it determined whether Montle's t-shirt message was a "substantial or motivating factor" in her termination.[189] By not engaging in an initial determination of the speaker's status, and by not first looking for a citizen analogue, the court clearly did not follow *Garcetti*, a case it nevertheless cites favorably.[190]

This (relatively) quiet act of (relatively benign) judicial defiance may be a harbinger of a potential return to reason in public workplace speech jurisprudence. A doctrinal test that disregards the status question of whether the employee was speaking as a private citizen or as a public employee—recognizing that this distinction is irrelevant to the interests of both the public and the public employer—but which instead begins by asking whether the speech addressed a matter of public concern sufficiently great as to render the employer's interest in undisturbed operation of his business secondary is sound and rational. As *Montle* demonstrates, it is also workable. If the employee's speech passes that initial threshold test of whether it addressed a matter of public concern, the court should engage in a balancing of competing interests between government and citizen. As part of this analysis, the court would ask whether the employee chose a reasonable form and forum for her speech. If she did, then the speech is protected under the First Amendment. If not, then the court might engage in a totality of the circumstances analysis, with burden of proof shifting between parties.

As a matter of law, a union contract grievance filed by a public employee would always satisfy the second prong of this test.[191] It constitutes a separate and unique category of speech that requires a different analysis because, as discussed in Part II above, it is mutually negotiated—thus, by definition, is acceptable to both employer and employee—and is protected by statute.[192]

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186. 437 F. Supp. 2d 652 (E.D. Mich. 2006).

187. *Id.* at 653.

188. Relevant to this analysis was the degree of "disharmony" Montle's speech case in the workplace. *Id* at 656.

189. *Id.* at 654–56.

190. In the end, the district court sustained the termination. *Id.* at 656.

191. On a related note, the National Labor Relations Board recently extended protection to work-related speech on online social network sites. *See* Steven Greenhouse, *Labor Board Says Rights Apply on Net*, N.Y. Times, Nov. 9, 2010, at B1.

192. *See* 2-6 Educ. Law § 613 (Matthew Bender, LEXIS 2010). Because of the constitutionally protected rights of association, employees may be dismissed for union membership, participation or activity only if the employing board can demonstrate a compelling state interest to be served. Greminger v. Seaborne,

Such a test would appropriately emphasize the form of the speech over its content in the balancing of competing interests and would not require a citizen analogue. For instance, an internal union grievance filed with a supervisor is, in and of itself, unlikely to cause any disruption at all to the employer's operation, whereas a newspaper editorial is much more likely to be highly disruptive.

V. CONCLUSION

In 1968, the U.S. Supreme Court in *Pickering* announced a two-part test for determining what workplace speech enjoys First Amendment protection and what speech does not. The *Pickering* balancing test was applied by the courts without significant modification for nearly forty years. In 2006, the *Garcetti* Court modified that analysis when it introduced a threshold "status" inquiry—whether the speaker was speaking as a citizen or an employee at the time of the speech—as a precondition to applying the *Pickering* balancing test. The calculus employed by the Court in engaging in that status inquiry involves a determination as to whether there exists a "citizen analogue" to the employee's speech. The Court in *Garcetti* arrived at that calculus by focusing, for the first time, on the "citizen" element of *Pickering*'s "as a citizen on a matter of public concern" test. From *Pickering* until *Garcetti*, the courts had always focused on the "matter of public concern" element. The *Garcetti* Court noted that the "citizen" analysis focuses on the "official duties" the employee is required to perform. In 2010, the U.S. Court of Appeals for the Second Circuit in *Weintraub III* further modified the evolving workplace speech jurisprudence when it found that the filing of union contract grievance is an official duty of a public school teacher.

This note argued that the Second Circuit's holding is unsupported. The filing of a union grievance is a speech act that is protected by federal, state, and local labor laws. It is a right held by the public employee to be exercised—or not—*only* at that employee's discretion and is a communication not *for* the employer, but *to* the employee on the employee's own behalf. An employee cannot be compelled to file a grievance, even if doing so would be the only means of challenging a perceived wrong in the workplace. The filing of a grievance, therefore, cannot be seen as an employee's official duty. Moreover, the Court's focus on the form of the speech (union grievance and its citizen analogue) rather than on its subject (school safety in *Weintraub* and matters of public concern more broadly) irrationally places the interests of the public employer ahead of the interests of the members of the public it serves. Finally, permitting employer imposition of discipline or retaliation when a public employee engages in such speech, under the rationale that such speech is not protected by the First Amendment, effectively eviscerates those federal, state, and local labor laws.[193]

584 F.2d 275 (8th Cir. 1978). The state's interest generally becomes compelling only when the employee's activities are disruptive and impede either the employee's own performance or the normal operations of the educational institution. McGill v. Bd. of Educ., 602 F.2d 774 (7th Cir. 1979); Yuen v. Bd. of Educ., 77 Ill. App. 2d 353 (1966).

193. This is arguably so notwithstanding the fact that the employee-plaintiff, like David Weintraub, for example, may have brought the wrong legal claim in the wrong forum. That is, had Weintraub brought a claim of Taylor Law violation to the New York Public Employment Relations Board, he likely would

In the end, the current workplace speech jurisprudence unreasonably includes within *Garcetti*'s broad reach the union contract grievance. This unnecessarily privileges the public employer's right to efficient operation of services above the public employee's right to speak out about workplace issues, as well as the public's right to important, often otherwise unavailable, information concerning its safety and welfare. As more recent case law demonstrates, all three categories of rights may be protected without significant sacrifice. The first step toward that goal would be to allow First Amendment protection to workplace speech in the form of a union grievance that addresses a matter of public concern, regardless of the form in which that speech is made.

have emerged victorious, as the City of New York essentially conceded in its initial brief. Defendant's Memorandum of Law in Support of their Motion for Summary Judgment, Weintraub v. Bd. of Educ., 593 F.3d 196 (2d Cir. 2005) (No. 00-CV-4384), 2005 WL 3499475 at *8–9.