THE POLICY CONSEQUENCES OF GARCETTI V. CEBALLOS FOR PERSONNEL MANAGEMENT IN PUBLIC SCHOOLS

BY

DANA KAY FROHNING KINLEY

DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Education in Educational Organization and Leadership with a concentration in Educational Administration and Leadership in the Graduate College of the University of Illinois at Urbana-Champaign, 2017

Urbana, Illinois

Doctoral Committee:

Professor Kern Alexander, Chair
Professor Christopher Dunbar
Professor Marilyn Parsons
Professor William Phillips, University of Illinois at Springfield
Clinical Assistant Professor Linda Sloat
Abstract
Arthur Goldberg, former United States Secretary of Labor and Associate Justice of the United States Supreme Court, once said, the concept of management rights is simply “a recognition of the fact that somebody must be the boss. . . . People can’t be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do” (Dale, 2008, p. 213). Goldberg’s statement offers a suitable segue into the heart of this study about public employment and the constitutional rights to free speech as guaranteed by the First Amendment. The setting is public elementary and secondary schools of education (k-12), and the target audience is executive school administrators who serve as managers responsible for the development, supervision, evaluation, and discipline of other district staff. The purpose is to provide technical guidance to school administrators relative to the current laws, regulations, and legal considerations of the First Amendment’s Free Speech Clause in k-12 public schools pursuant to the 2006 United States (U.S.) Supreme Court decision in Gil Garcetti, et al. v. Richard Ceballos.
Dedication

I dedicate this work of my mind and hands in honor of my parents Daniel and Kay Frohning. They, along with my sister Andrea, embody the American spirit of mind and hands and of working hard and prospering. They have been the compass by which I have raised my own wonderful, four children—Whittington (23); Lincoln (20); Graham (18); and Gracie (15). To them I dedicate the Frohning will-of-mind found herein this dissertation—to be better tomorrow than I was today. Deliberate perseverance, adaptability, and humility are keys to success.

Sadly, I lost my mother Kay along this journey, and while I miss her dearly, there were days when I needed her on the other side pulling me along this path. I live by her unspoken mantra that mediocrity is unacceptable. Her lessons have served me well.

Finally, I dedicate this work of fulfilling a life aspiration to my beloved Brian Schwartz. His caring and patient support has been beyond what anyone should have to endure. But he did, and I am glad. To you, my dear Brian, I look forward to long bike rides, canoeing in Eminence, weekends at the Ruebel, and Cubs’ games in Chicago.

Thank you to all of you. I look forward to spending immeasurable time with you again now that I have made my way to the end of this amazing journey.
Acknowledgements

I sincerely thank my advisor Dr. Kern Alexander for sharing his infinite knowledge and expertise in school law, educational policy, and school finance. I am especially appreciative of his wisdom in shepherding my specific interests in human resources, organizational development, and school law toward the fascinating topic of *pursuant to duty*. I also thank Dr. Alexander for his patience in helping a life-long school practitioner navigate a theoretician’s world, only to better understand the greater universe of education and policy. My perspectives have been broadened, and for that, I am sincerely grateful.

I sincerely thank my professor and great mentor Dr. William Phillips for sharing his infinite knowledge and wisdom as a retired superintendent and his expertise in school finance and administrative leadership. But mostly, I thank him for always believing in me. His real encouragement to keep going through some desperate researching and writing days was undoubtedly a force in my achievement of this degree. He is a *true grit* professor from whom I have learned immensely, and for that, I am forever grateful.

I sincerely thank my professor and career soul mate Dr. Linda Sloat. Linda too served in the professional role of Assistant Superintendent for Human Resources and Public Relations in a mid-sized school district in central Illinois. We share this title and their respective roles, and as such, we share a unique understanding of school operations exclusive to the position. Dr. Sloat’s direct approach to getting things done has served as a motivating force in my journey toward scholarship. I am forever grateful to have strong women role models, like and including Dr. Sloat, for inspiring the next generation of great school leaders. Dr. Sloat inspires me, and for that, I am immensely grateful.
I will be eternally grateful to Dr. Christopher Dunbar and Dr. Marilyn Parsons, who both so graciously agreed to serve on my doctoral committees, in spite of not knowing me beforehand. These two professors exemplify the commitment that great teachers have for ensuring success among their communities of learners. Dr. Dunbar and Dr. Parsons also personify what makes the University of Illinois a great institution of higher learning. I could not have completed my journey toward scholarship without Dr. Dunbar and Dr. Parsons, and for that, I am profoundly grateful.

Finally, I had an epiphany along this journey that I want to acknowledge. I realized that the ability to focus an issue to a precise point of understanding is the craft of qualitative research. I now have a better understanding of the infinite and intricate web of legal matters and research which underpin a stable civilization. I have a clearer understanding of the judicial system’s role in maintaining civil stability across challenging and ever-fluid situations resulting from time and human circumstances. I have a new appreciation for the effort that goes into maintaining civic equilibrium. I acknowledge that knowing this will make me a better school leader.
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Chapter I

Introduction

Longstanding debate about the speech rights of public employees took a definitive step when the United States (U.S.) Supreme Court ruled in the 2006 landmark decision of *Gil Garcetti, et al. v. Richard Ceballos* (hereinafter referred to as *Garcetti*) that remarks made during the regular scope of employment duties may not be as protected as they once were. Specifically, the Supreme Court ruled 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” (*Garcetti, et al., v. Ceballos*, 2006). This decision had profound repercussions on personnel management practices in public organizations, including public kindergarten through grade 12 (k-12) schools.

Simply interpreted, *Garcetti* set forth the legal standard of *pursuant to duty* as an official metric for determining if and when public employees’ speech is constitutionally protected. This study seeks to heighten awareness in public school administrators of how *Garcetti* serves to guide their personnel and risk management practices, particularly decision-making, relative to the First Amendment and the free speech rights of public employees.

An in-depth review of public court cases, relative to the free speech rights of public employees, reveals useful insight for school administrators who need to know the policy and practical consequences of Supreme Court decisions on school district operations. This study specifically analyzes the case of *Garcetti*, along with other applicable appellate court cases, to identify the valid legal principles important to school administrators who deal with matters of speech rights and public employees, and whose decisions carry potential risk outcomes for school districts. This study is designed to inform future practices of public elementary and
secondary school administrators for avoiding risk to their organizations by explaining the key legal points and practical consequences of the *Garcetti* decision on personnel management practices.

**Statement of the Problem**

The *Garcetti* decision opened a new chapter in public sector employee relations. The decision triggered reverberations in defining the free speech rights of public employees, and it delineated material implications for public school administrators in human resources functions, including personnel practices, financial operations, policy applications, and risk management. As such, legal issues of protected speech involving public employees are worthy topics of information for public school administrators, whose essential duties include making personnel and fiscal policy recommendations to their boards of education and making high-stakes and potentially costly employment and labor decisions. Risk management in schools has many fronts, and maintaining an efficacious workforce is critical to minimizing organizational risk.

Successful risk management contributes to overall operational efficiency and organizational effectiveness, and in public education, it is the responsibility of the school board and the school executive officers to manage risk. Specific to human resources, risk management includes a strategy for avoiding or minimizing, when appropriate, costly personnel-related legal proceedings such as grievance hearings from collective bargaining agreement allegations or violations, policy proceedings, board hearings, and civil litigation. Accordingly, school administrators responsible for executive oversight of district operations and school finances need to know how legal issues relative to personnel matters can expose school districts to substantial legal and financial risk.
A recent 2016 decision out of the Sixth Circuit of Appeals, *Ely v. Dearborn Heights
School District No. 7* against Dearborn Heights School District in Michigan personified a real-life situation in which school officials were forced to deal with First Amendment free speech claims as part of a serious and ongoing personnel and legal matter. The judicial decision was in addition to a parallel determination against the district by the Occupational Safety and Health Administration (OSHA). The cost to the school district was significant.

The headline read “OSHA orders Dearborn Heights School District to pay $193K to employee punished for warning of asbestos exposures at city school. District violated janitor’s whistleblower rights, protections after raising safety concerns” (Occupational Safety and Health Administration, 2016, p. 1). In reality the district was ordered to pay over a half million dollars, because in addition to the $193,139 for back wages, damages, and other compensation as reported in the media, the ruling also awarded $8,139 in lost wages; $45,000 for current and future medical bills, and $140,000 in compensatory damages for loss of reputation and distress. Finally, the district was ordered to pay “reasonable attorney’s fees” (Occupational Safety and Health Administration, 2016).

The same year, Trotwood Madison City Schools in Michigan prevailed when an employee sued that “several of her students were not being educated in the Least Restricted Environment (“LRE”) as provided for under the Rehabilitation Act” (*Williams v. Trotwood Madison City Schools*, 2016). While the U.S. District Court from the Southern District of Ohio ruled in favor of the school district, applying the *Garcetti* standard, the district still incurred financial obligations with legal expenses and direct and indirect human resources including time and attention. The U.S. Supreme Court in *Borough of Duryea, Pa. v. Guarnieri* validated the effect by stating that “(a) petition taking the form of a lawsuit against the government employer
may be particularly disruptive, consuming public officials’ time and attention, burdening their exercise of legitimate authority, and blurring the lines of accountability between them and the public” (2011).

These cases personify the genuine scenarios of First Amendment personnel matters that school administrators routinely face. Recognizing situations where the Free Speech Clause is applicable is the first step to procuring successful local outcomes. The next step, of course, is to engage staff who can navigate personnel circumstances with knowledge and competency. The courts have repeatedly and varyingly asserted that the government may not encroach on the constitutional rights of its citizens except for in very narrow circumstances.¹ Knowing, however, where the line is, between protected and unprotected speech in the workplace, is subjective.

Scenarios such as what happened in Dearborn Heights School District and Trotwood Madison City Schools are not uncommon in public school districts where personnel matters are an everyday reality. Many of the issues are rooted in matters of speech. The proactive response is to have knowledgeable administrators who recognize First Amendment-related personnel issues when they present and then take the necessary actions to ensure an outcome that is aligned with the mission and vision of the local board of education.

Superintendents and other executive school officers need to know to plan for risk exposure and to anticipate budget consequences. Effective leadership requires administrators, as fiduciary stewards of taxpayer investments and district resources, to make wise, evidence-informed decisions and prudently administer district operations within existing resources.

Knowing decisive personnel actions which uphold the constitutional rights of employees, used as an effective management strategy, can minimize risk to the organization.

Because issues rooted in free speech policy arise daily for superintendents and other school administrators, they need a working understanding of the law and what to do in certain circumstances and still preserve organizational resources as well as their own professional reputations. Thus, school administrators need practical guidance to inform their decision-making and consequently avoid making ill-informed personnel management decisions when First Amendment protections are involved.

Court cases citing Garcetti reveal a continued pattern of judicial involvement since 2006 in re-defining the legal boundaries for public sector employees navigating the post-Garcetti era workplace. The pathway to and from this important Supreme Court case, Garcetti v. Ceballos, casts the setting for this doctoral study of the practical applications of Garcetti’s pursuant to duty on personnel management practices.

**Purpose of the Study**

Issues of employee speech made pursuant to duty have practical implications for school districts, including human resources policies, personnel management practices, and financial risk. The purpose of this study is to learn the what and how of Garcetti’s implications by deconstructing applicable case law and conceptualizing it into practical policy guidance for public elementary and secondary school administrators relative to the free speech rights of their employees.

The study is designed to develop awareness and understanding of how the courts have ruled and identify how the rulings have come to bear specifically on public school employees and school districts. The primary objective, after identifying the relevant cases, is to categorize
the human resources functions that are specifically affected by the *Garcetti* decision and then share the findings with public school administrators as research-based guidance for making personnel-related decisions relative to the First Amendment speech rights of their employees. The goal of this research is to provide public school administrators with topic-specific information as an effective approach to managing organizational risk.

The theory underpinning this study is that there exists a consistent pattern of rules, established by federal courts and set forth as legal precedents, from which school administrators can craft their human resources and personnel decisions. Specifically, the study will analyze the opinions and points of dissent from the justices and judges to develop evidence-based guidance for school administrators on how best to navigate First Amendment personnel issues, especially in light of the revolution in employment law, personnel management, and human resources triggered by the 2006 U.S. Supreme Court ruling in the landmark decision of *Garcetti v. Ceballos*. The Court set forth to answer the question—does the First Amendment protect government employees from discipline based on speech made pursuant to the employees’ official work duties. Based on the Court’s final ruling, the following questions have been developed in an effort to extract important information for practicing and developing school administrators.

**Research Questions**

What knowledge, based on an in-depth analysis of court cases and other relevant literature, can be gleaned from this study and applied to make practical recommendations for school administrators who are responsible for the management of human and financial resources? This primary question leads the following inquiry.

**Primary question.** What are the effects of *Garcetti* on human resources and personnel management practices in public elementary and secondary schools?
**Secondary question.** How are the following human resources and personnel management functions affected by the *Garcetti* decision?

- Risk management and budgeting for risk
- Collective bargaining agreements and administrator contracts
- Employee supervision, discipline, termination, and due process
- Job descriptions and essential job duties
- Performance evaluation and professional development
- Personnel policies
- Personnel records
- Teacher tenure and labor law
- Whistleblower protections

**Assumptions**

It is assumed that there is a direct line of logic that can be formed by utilizing a backward mapping method from each of these respective human resources functions to specific key points of law and ultimately to the decisions of federal cases of public employee speech before and after the *Garcetti* decision.

It is assumed that there are multiple, legitimate vantage points to this discussion.

It is assumed that effective public school leadership requires knowledge of fiscal management, human resources administration, personnel management, and labor law.

It is assumed that involvement in legal proceedings will have an effect on school finances.

It is assumed that the study of past judicial patterns can inform the strategies of school leaders “to develop, advocate, and enact a shared mission, vision, and core values of high-quality
education and academic success and well-being of each student” (National Policy Board for Educational Administration [formerly known as ISLLC Standards], 2015, p. 9) by anticipating and preparing for future policy trends.

Limitations of the Study

This study looks at the narrow circumstance of free speech rights for public education employees in Illinois, as set forth in public policy by the Garcetti decision, and it explains the implications of pursuant to duty on school districts and administrators.

This study recognizes that there are other personnel management functions, but delimits this dissertation to the utilities identified in the Research Questions section above.

This study focuses specifically on how the Supreme Court’s decision in Garcetti impacts public elementary and secondary schools to the exclusion of higher education, private education, and other governmental entities. The study is strictly delimited to the First Amendment free speech rights pursuant to duty of public elementary and secondary education employees to the inclusion of administrators and teachers and to the exclusion of students, parents, educational support personnel, third-party vendors, and/or other constituency groups.

This legal analysis dissertation is specific to public kindergarten through grade 12 education (k-12), and it studies relative case law outcomes as well as specific points of law from past U.S. Supreme Court, federal court, and Illinois Supreme Court decisions to the exclusion of other lower courts. While similarities of circumstantial details in many court cases, comparing and contrasting only the substantive key points of law comprise the core focus of this study. The substantive key points of law will be extracted from the opinion and dissent issues offered by the court justices. Minor case law similarities and coincidences are excluded from this study.
There are multiple perspectives to the discussion. This study assumes only the management standpoint to the exclusion of labor. This is not an assertion of preeminence of one over the other; rather it is merely an exclusion for the purpose of delimiting this dissertation discussion.

Finally, while it is understood that “social media has expanded the opportunities for public employee speech and the need to interpret First Amendment protections in light of these new methods of communication” (Marcum & Perry, 2014, p. 6), this study does not divert focus to incorporate commensurately the volumes of social media scenarios into the content of this discussion. The focus of the study remains on the policy, practice, and financial implications of free speech rights pursuant to duty of public education employees.

**Summary**

This legal analysis dissertation contributes to a unique free speech discourse, specific to k-12 public schools. Using results from relative, prior U.S. Supreme Court, federal appellate court, and Illinois Supreme Court decisions, this study conceptualizes the rulings into distinct patterns of outcomes and theorizes various impacts on future public school policy issues relative to free speech and public employment.

The study seeks first to identify the key case law findings which are significant to this particular issue and then, second, to ascertain the implications and legal consequences for school administrators navigating personnel management issues. This study outlines the effect of *Garcetti* on public school practices in an effort to help administrators improve their craft and contribute to the efficient operations of their school districts. By building knowledge and understanding in staff, especially decision-making leaders, school organizations can enrich the
quality of employee outputs, minimize organizational risk, and constructively manage bottom-line operational costs.
Chapter II
Methodology

Framework

This study proposal establishes a framework to gauge the effect of the *Garcetti* decision on public k-12 school districts relative to personnel management, public employment, and work-related speech.

Researching relative court cases, analyzing decisions and opinions, and systematically categorizing outcomes where the courts have qualified protected and non-protected speech for public employees forms the source of data collection for this legal analysis study. Relative cases will be identified and deconstructed in an effort to explore the breadth of this issue of public employment and protected speech and to identify trends and micro legal elements with practical applications for school administrators. If founded, the distillation of information and analysis of usable data will inform recommendations on ways to advance professional practice for public education professionals on issues of protected speech, employment law, and personnel management.

In an effort to gauge the effect of the *Garcetti* decision on public school districts, the following research actions are proposed to address the questions outlined in the introduction section.

1. Use the University of Illinois Library system and online databases to cast for primary sources of information on the topic of protected speech in the public workplace.

2. Use an online legal research service to identify key court cases, findings of law, and points of dissent, as well as other relevant citations.

3. Review available literature found in sources such as U.S. Supreme Court, federal appellate court, and Illinois Supreme Court cases, briefs, and transcripts as well as peer-reviewed journal articles, American Law Reports, books, legal encyclopedias, legal dictionaries, law school reviews, and Restatements of the Law for rulings and arguments.
relative to the free speech rights of public employees and cull for substantive legal points
to inform this study.

4. Summarize how the courts have ruled to date on matters of free speech for public
employees and employers, and especially for public education employees and employers.

5. Conduct an information analysis for the purpose of identifying trending issues and
systematic patterns. Cull for legal patterns in opinions and dissents in the identified cases,
code information, and categorize key points of law.

6. Formulate recommendations, based on an analysis, for public school administrators who
need to know that navigating the free speech rights of public school employees is an
important part of personnel management and can have consequences for organizational
leadership in policy and financial management.

Sources

The following sources will be accessed in an effort to collect topical information and to
assist with the overall review of literature.

1. American Law Reports, a series from the Lawyers Cooperative Publishing company, will
be searched for appellate court cases. Applicable annotations will be reviewed for
relevancy to the study.

2. Legal encyclopedias such, as the Encyclopedia of the American Constitution, will be
used as introductory guides for researching fundamental legal concepts. Legal
encyclopedias, regarded as secondary source materials, are valuable publications to
consult initially, but offer no final legal authority.

3. Black’s Law Dictionary, as the standard authority for legal definitions, will be used to
provide basic meaning to common legal words, terms, and concepts.

4. Thomson Reuters Westlaw online legal research service will be used to research cases, to
access official court documents, and to identify key points of law and dissent. Powered
by the proprietary KeyCite system, Westlaw is uniquely suited for this dissertation
research with advanced search functionalities. This online legal research database will be
the primary source for researching and gathering information.

5. Law school reviews and journals, legal periodicals, will be used as secondary sources to
identify topical cases and to research applicable points of law and dissent.

6. Chicago-Kent College of Law’s Oyez online legal research database will be used as an
online full-text retrieval of court cases and audio transcripts.

7. Restatements of the Law, published by the American Law Institute will be reviewed for
relevant employment law cases.
8. The book *Case Analysis and Fundamentals of Legal Writing* (Statsky & Wernet, 1995) will be used to gather foundational information about the judicial system, court protocols, and legal proceedings.

9. The book *Legal Research for Beginners* (Larsen & Bourdeau, 1997) will be used to gather foundational information about the judicial system, court protocols, and legal proceedings.

10. The book *Legal Research in a Nutshell* (Cohen & Olson, 2013) will be used to access commonly accepted terms and concepts relative to legal research matters.

11. The book *American Public School Law* (Alexander & Alexander, 2012) will be used to cast for beginning information relative to the concept of pursuant to duty.

12. *The Center for Writing Studies* at the University of Illinois Urbana-Champaign, an online resource dedicated to facilitating research and promoting graduate study, will be accessed for technical assistance in achieving a high standard of academic writing.

13. *Ely Library* at Westfield State University, an online citation resource, will be accessed for technical assistance in citing legal materials.

14. *Purdue Owl* at Purdue University, an online writing lab with resources and instructional materials, will be accessed to align the formatting of the manuscript.
Chapter III

Literature Review

U.S. Supreme Court decisions forge common law and public policy. Effective school leaders know this, and they pay attention to legal trends so they can project substantive implications on their school districts (National Policy Board for Educational Administration [formerly known as ISLLC Standards], 2015). Like risk management, there are many fronts to school law and public policy. This literature review focuses specifically on the legal implications for public school districts of the 2006 U.S. Supreme Court’s decision in *Garcetti v. Ceballos*, which recognized, articulated, and progressed the unique legal concept of pursuant to duty. This review seeks to identify and understand pertinent Supreme Court and federal appellate court decisions which led to the *Garcetti* ruling and the public policy of pursuant to duty and which have effected personnel management practices in public elementary and secondary schools. A full review of how the decisions have influenced personnel practices in school districts will follow. First, however, an historical reflection of pursuant to duty is provided to promote understanding. Then, a review of significant cases is provided to develop perspective for the evolution of public policy relative to public employment and First Amendment protected speech. This pathway is pursued because it is assumed that the study of past judicial patterns can inform the practices of school leaders “to develop, advocate, and enact a shared mission, vision, and core values of high-quality education and academic success and well-being of each student” (formerly known as ISLLC Standards, 2015, p. 9) by anticipating and preparing for future policy trends.
What is Pursuant to Duty

The prevailing precedent on public workplace speech was decided 10 years ago, on May 30, 2006, when the United States Supreme Court handed down a narrow decision in *Garcetti, v. Ceballos*. The now decade-old, five to four decision explicitly ruled that “when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline” (*Garcetti, et al., v. Ceballos*, 2006). This ruling sent reverberations through public institutions on issues relative to free speech, employee discipline, and personnel management. At the time, the decision seemed in stark contrast to public policies fueled by four prior decades of employee-centered judgements handed down by the U.S. Supreme Court. The 1968 landmark case of *Marvin L. Pickering v. Board of Education of Township High School District 205, Will County, Illinois* (hereinafter referred to as *Pickering*) had set the then-prevailing public policy that “(t)eachers may not constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work.” *Pickering* served as a bookend case which held for thirty-eight years until *Garcetti’s* pursuant to duty decision in 2006. In this regard, the precept of matters of public interest was the legal precursor to pursuant to duty.

The concept of pursuant to duty was originally cast in the 1960s, when the *Pickering* Court affirmatively held in 1968 that freedom of speech, as protected by the First Amendment, generally prohibited public employers from firing or disciplining employees for speaking out as citizens on matters of public concern. From that point, First Amendment free speech rights in the public workplace were transposed into a new legal lexicon that included *public employment,*
private citizen speech, and matters of public concern. Naturally, what constituted matters of public concern and their relationships to public employment and private citizenship formed the nexus of legal contemplation over the next four decades from *Pickering* (1968), to *Connick v. Myers* (1983), to *Garcetti* (2006), and to other court cases that ensued.

Even before *Pickering*, however, the *New York Times v. Sullivan* case in 1964 first conceptualized matters of public concern. The Justices asserted that “(f)reedom of expression upon public questions is secured by the First Amendment.” They rationalized that open exercise of free speech is necessary in a democratic society, and it must especially be allowed with regard to “matters of the highest public interest and concern” (1964). And regardless their empathetic citing of First and Fourteenth Amendment immunity protections for public officials who make honest mistakes of fact and official conduct, the Justices affirmed that First Amendment “protections for speech and press were fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people” (1964). These policies captured the Court’s strong commitment to upholding the First Amendment and preserving freedom of speech when the Justices ruled, that even in times when public officials file for damages in libel action suits against citizens, that in order to prevail, they must prove that their critics acted with actual malice and caused injury to their official reputations.

The *New York Times v. Sullivan* case exemplified the national policy, as set forth in the First Amendment, which was that citizens could exercise great latitude in their speech in order to preserve and perpetuate a democratic, free society. While the tenets of free speech have evolved with changing societal circumstances, the sentiment that free speech forms the core of open and free-will societies has remained constant. This resounding commitment was initially articulated by the U.S. Supreme Court in 1957 when it ruled in *Roth v. United States* that constitutionally
protected speech is designed to “assure unfettered interchange of ideas for bringing about of political and social changes desired by the people.” The Court simply reiterated its own words from Roth (1957) when it said in the New York Times v. Sullivan case that “(t)he constitutional protections for speech and press were fashioned to assure unfettered interchange of ideas.” The Court would again rule in 2014 in Lane v. Franks that “(s)peech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

The pattern of public policies embedded within the U.S. Supreme Courts’ rulings were emerging and evolving toward the newest legal standard of pursuant to duty as introduced by the Garcetti case in 2006. Garcetti personified how the legal precepts of matters of public concern and pursuant to duty coalesced.

Garcetti was similarly one of the cases filed along the continuum of an evolving public policy on constitutionally protected speech for public employees. There are relative cases in between Pickering and Garcetti which offer insight into the evolution of the policy; however, the setting for this dissertation is primarily cast between these two legal cases.

Presented as yet another case seeking legal resolve to the question of whether a public employee was speaking on a matter of public concern, the landmark Garcetti decision changed the course of Pickering policy (Geisel, 2015). Pickering had previously established, and subsequent cases upheld, that First Amendment protected speech generally prohibited public employers from firing or disciplining employees for speaking out on matters of public concern. Garcetti redirected the policy by asserting that statements made by public employees, pursuant to their official duties, do not qualify as private citizen speech and are therefore not protected by the Constitution. In effect, the precedence that was re-established by the Garcetti Justices shifted the
judicial standard to first ask whether the speech was made pursuant to duty rather than first asking whether the speech was on a matter of public concern. If yes, the speech was made pursuant to duty, it was not constitutionally protected. If not, and the speech was made as a private citizen, the standard of considering if the issue concerned a matter of public interest was then applied. *Garcetti* characterized the relationship between matters of public concern and pursuant to duty as mutually exclusive, and by considering the precepts independently, but sequentially, a new standard of law emerged. This new legal metric of pursuant to duty, in effect, short-circuited the process for discerning protected speech by asking first if the speech was made during the normal course of duty rather than starting with the question about the speech being a matter of public concern (Dale, 2008, p. 217-218). To this end, “*Garcetti* fundamentally altered the analysis courts engage in when deliberating employee speech cases in public school settings” (Geisel, 2015, p. 2). Critics of the decision argue that, while the new standard allows for greater objectivity, it did not allow for the complexity of speech to be considered to the degrees necessary nor for the cases to be considered on their independent merits.

Elizabeth Dale published a counterpoint perspective on *Garcetti* in this regard and argued that the decision will actually serve a long-term benefit to employees even though, on its face, *Garcetti* appears to be management-oriented. Dale argued that the “Supreme Court incorporated the idea of managements’ rights into its analysis of public employee speech rights in *Garcetti,*” and in doing so, it constrained the authority of managements’ rights to control employees to “past practices in the workplace, unionization and labor law, collective bargaining, legislation, and other legal rules” (Dale, 2008, p. 214). Dale’s argument is grounded in a theory of absolutes. In agreement with *Garcetti*, she asserts that all work-related speech is subject to managements’ discretion and is therefore pursuant to duty and is not protected. According to Dale, in contrast
and by default, all other public employee speech must be protected by the First Amendment. In this argument Dale asserts that this default theory is beneficial to the employee in the long-term because the terms of protected speech are vast, and pursuant to the decision, they are now clearly established along legal guidelines and are therefore not vulnerable to shifting ideologies.

Either way, the Garcetti decision substantively influenced the personnel practices of public organizations, including public school districts. While the Garcetti Justices concurred with the Pickering policy of constitutional protections for public employees speaking as private citizens on matters of public concern, they diverged in their analysis from that point. The Justices considered the unique qualifier and priority of pursuant to duty, which distinguished it from preceding cases. Specifically, the Garcetti Court tested the constitutionality of speech made outwardly by a public employee that effectually contradicted the mission of the employing organization and its supervisors. The Court had already ruled in Givhan v. Western Line Consolidated School District, 439 (1979) that “First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly” (Givhan v. Western Line Consolidated School District, 1979). The Court had previously ruled in Connick v. Myers

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. (Connick v. Myers, 1983)

Hence, the next logical question for the Court to discern was if speech is constitutionally protected when spoken as a public employee on a matter, or a perceived matter, of public concern, and this scenario is precisely what Garcetti presented. “The question presented by the instant case is whether the First Amendment protects a government employee from discipline
based on speech made pursuant to the employee’s official duties” (Garcetti, et al., v. Ceballos, 2006). There will be future cases such as Lane v. Franks (2014) and Casey v. West Las Vegas Independent School District (2007) that will advance the next logical legal questions, but for now, this narrative remains focused on how Garcetti specifically contributed to the policy evolution of public employment and First Amendment rights.

A substantive legal point in Garcetti is that while Ceballos’ speech was made about a matter of public concern, it effectually contradicted the mission of his employer. The point of divergence from Pickering policy was when the Garcetti Court sculpted and progressed the unique legal standard of pursuant to duty. In doing so, the Court asserted that speech made pursuant to duty is not constitutionally protected by the First Amendment because, and while a public institution has the obligation of allowing its employees to speak as citizens about matters of public concern, it must balance employee speech rights with its obligation to the taxpayers to operate efficiently and effectively. Garcetti cast the second bookend relative to public employment, speech, and the First Amendment.

The Encyclopedia of the American Constitution projects that the First Amendment is becoming relevant in previously untouched areas, and that the coverage of the First Amendment is becoming broader than historically understood. As with the expansion of coverage on the basis of the nature of the speech, the expansion of the coverage based on the context of the restriction is likely to be the dominant question of free speech in the decades to come, as courts and others wrestle with the question of the range of human conduct. (Levy & Karst, 2007, p. 1135)

Garcetti exemplifies this claim by adding another layer of criteria (i.e., pursuant to duty) to the existing common law. The Encyclopedia’s projection regarding the “expansion of the coverage based on the context” also aligns with the assertion of the Connick Court when it asserted that the “content, form, and context of the speech” is important to the legal
considerations and the outcome of proceedings. Roots of *Garcetti* can be traced back to the *New York Times* (1964) decision which addressed the future acts of courts determining protected speech from unprotected speech when it projected rules about how to deal with “cases where the line between speech unconditionally guaranteed and speech which may legitimately be regulated must be drawn.”

To date, there have been several emerging cases with potential for refining the *Garcetti* decision, but none has had as significant an impact on public policy as has *Pickering* and *Garcetti* even though there were several earmarked cases along the way. Regardless of whether the Garcetti decision fashioned a pivotal shift in policy or merely a critical refinement of law, the unique standard of pursuant to duty emerged as a discrete variable for subsequent courts to consider in deciphering public employee/free speech cases.

Over the course of time, the courts have vigorously preserved the constitutional rights of public employees to speak as private citizens on matters of public interest/concern, so the *Garcetti* decision seemed to shift the balance away from preserving public employees’ free speech rights to protecting the efficiency and effectiveness of the public employers’ operations. Specifically, the *Garcetti* Court said that “(w)hile the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance” (2006). The Justices also opined that the “(g)overnment entity has broader discretion to restrict speech when it acts in its role as employer” (2006). And drawing from the previous *Connick* ruling that said,

(i)n determining a public employee's rights of free speech, (the) task of the Supreme Court is to arrive at a balance between interests of the employee as a citizen, in

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commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. (1983)

The *Garcetti* Court also asserted that “(s)o long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively” (2006). For these reasons, some saw the *Garcetti* decision as a policy shift from employee rights to managements’ rights (Nahmod, 2008; Dale, 2008).

**Pickering’s contribution to pursuant to duty.** *Pickering* and *Garcetti* were the seminal cases on the issue of pursuant to duty. And while there are relative cases prior to *Pickering* and pertinent cases after *Garcetti*, the crux of the policy evolution falls chronologically between these two important cases. The *Pickering* decision changed the course of public thinking in 1968, and germane to this dissertation is that this landmark case was specifically set in a public k-12 school district.

The *Pickering* case was decided in favor of public school teacher Marvin Pickering on several key legal findings. This case will be presented in detail later, but the resulting legal points are important to fomenting an understanding of pursuant to duty and are therefore initially introduced herein. Among other key legal points, *Pickering* ruled that

- “(t)eachers may not constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work;”

- “(s)tatements by public officials on matters of public concern must be accorded First Amendment protection despite fact that statements are directed at their nominal superiors;”

- “public employment, which may be denied altogether, may not be subjected to conditions that diminish their Constitutional rights;” and
• the state should not “have an interest as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” (1968)

The cornerstone of the Pickering decision was the Court’s intent to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. (1968)

In arriving at their decision, the Pickering Justices established and set forth criteria for ascertaining protected speech for public employees. The Court outlined a two-part test, later known as the Pickering Balancing Test. The test first required subsequent courts to determine whether the employee had spoken on a matter of public concern and then second whether the employee’s statement had a disruptive impact that warranted disciplinary action. The Pickering Balancing Test offered an objective metric to cast a legal threshold for determining subsequent cases. Thirty-eight years later, the U.S. Supreme Court set forth the concept of pursuant to duty as a new legal metric to answer, in Garcetti v. Ceballos, whether Richard Ceballos’ speech was classified as protected when he wrote and reported, pursuant to his employment duties, and against his supervisors’ directives, in a disposition memorandum that an affidavit used by police to obtain a critical search warrant in a specified case was inaccurate and made serious misrepresentation to the case supervisors.

In comparison, both Pickering and Garcetti similarly sought to discern protected speech for public employees as their main legal questions. Two seminal arguments prevailed throughout these cases. Judge O’Scanlain characterized the two arguments plainly and succinctly in Ceballos v. Garcetti (2004) when he said that his Court was tasked with distinguishing between speech offered by a public employee acting as an employee carrying out his or her ordinary job duties and speech spoken by an employee acting as a citizen expressing his or her personal views on disputed matters of public import.
Albeit not all jurisdictional, federal court decisions have established a predictable pattern of legal trends from which school administrators can glean practical information relative to best human resource practices and personnel decision-making strategies. Since 2006, there have been many federal cases where the *Garcetti* standard of pursuant to duty has been applied to public institutions; however, there have been few cases litigated specific to public k-12 educational organizations (Geisel, 2015, p. 2).

With regard to legal proceedings, there are few absolutes. There are no safety nets in either federal or state law that would protect school executives from risk in all instances, although the First and Fourteenth Amendments do provide some citizen and immunity protections in certain circumstances. So knowing that by the very nature of their work (i.e., pursuant to their duties), “school administrators are a particularly vulnerable class of public employees when it comes to their job-related expression” (Geisel, 2015, p. 9). This is important information for school executives and those preparing to be future administrators to know. This study serves to inform current and future school administrators about the issues they will face in light of the *Garcetti* decision so they are prepared to transfer theoretical knowledge into appropriate application and routine practice.

**Case review of *Garcetti v. Ceballos***. To fully understand the nuances of the *Garcetti* case, the following summary is provided.

Richard Ceballos was employed as a deputy district attorney, specifically a calendar deputy with certain supervisory responsibilities over other lawyers, for the Los Angeles County District Attorney’s office. Gil Garcetti was the publically elected official serving as the District Attorney of Los Angeles County at that time.
According to testimony in the court transcript, in February 2000, Ceballos was contacted by a defense attorney about a pending criminal case in the District Attorney’s office. The defense attorney had found serious misrepresentations of fact in a sheriff’s affidavit intended to secure a search warrant, and he requested Ceballos review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies, as part of their official duties, to investigate aspects of pending cases. Ceballos agreed, and after conducting an in-depth review, including a site visit, he also had doubts about the affidavit’s accuracy. Unable to reconcile the inaccuracies contained in the affidavit, Ceballos relayed his findings to his supervisors Carol Najera and Frank Sundstedt. He followed-up with a disposition memorandum to his supervisors Najera and Sundstedt outlining his concerns. Ceballos then sent a second memo to his supervisors, and a meeting was held to discuss the affidavit. According to the record, the meeting became heated, and ultimately Sundstedt decided to proceed with the prosecution, against Ceballos’ recommendation. Subsequently, Ceballos was subpoenaed by the defense counsel to testify, which in essence, forced him to submit truthful testimony against the policies and practices of his employer, the Los Angeles District Attorney’s Office. In the end, the trial court rejected the defense’s challenge to the warrant; but the construct of forced, truthful testimony via subpoena had now been introduced to the U.S. Supreme Court as a unique position of law for public employees and employers. The legal question of whether subpoenaed testimony is protected speech will again surface in the future litigation of Lane v. Franks, 134 S. Ct. 2369 (2014); however, in 2006, forced truthful testimony, via subpoena, was a relatively new front in free speech cases.

Ceballos testified as ordered, but afterward contended that he was subjected to a series of retaliatory actions by his employer which included reassignment from his calendar deputy
position to a trial deputy position; transfer to another courthouse; and denial of a promotion.

Specifically, Ceballos alleged that Frank Sundstedt and Carol Najera retaliated against him for submitting the memorandum regarding the search warrant, for otherwise reporting to or discussing with other persons the allegations of misconduct by the deputy sheriff, and for testifying truthfully at the court hearing. Gil Garcetti was named party to the suit in his official capacity of District Attorney for Los Angeles County, California and was duly elected to be accountable for the operations of the Los Angeles District Attorney’s Office when Richard Ceballos filed a claim of denial of constitutional protections. Ceballos specifically alleged that the defendants retaliated against him in that

(1) they demoted him from his position of calendar deputy to that of trial deputy; (2) Najera “threatened” him when he told her that he would testify truthfully at the hearing; (3) at the hearing itself Najera was “rude and hostile” to him; (4) Sundstedt “gave [him] the silent treatment”; (5) Najera informed him that he could either transfer to the El Monte Branch, or, if he wanted to remain in the Pomona Branch, he would be re-assigned to filing misdemeanors, a position usually assigned to junior deputy district attorneys; (6) the one murder case he was handling at the time was reassigned to a deputy district attorney with no experience trying murder cases; (7) he was barred from handling any further murder cases; and (8) he was denied a promotion. (Garcetti, et al., v. Ceballos, 2006)

Ceballos first filed an internal grievance seeking remedy; however, it was denied. His claims of retaliation were not substantiated.

Next, Ceballos sued and sought damages under Section 1983 (hereinafter referred to as § 1983) in the United States District Court for the Central District of California, the Ninth Circuit District Court. Specifically, § 1983 of the United States Code allows civil action for the deprivation of constitutional rights, and further allows liability assignment to the party causing injury, except in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity (Civil Rights Act, 1871).
Claiming that Najera, Sundstedt, and Garcetti had violated his First Amendment rights by retaliating against him based on his memo and cooperation with the defense and denying him due process of law under the Equal Protection Clause, Ceballos filed a complaint. In the suit, Ceballos filed against his supervisors in their individual capacities as well as against Garcetti in his official capacity of District Attorney. He also filed against the County of Los Angeles. Ceballos sought injunctive relief for lost wages and other compensatory damages.

Defendants Garcetti, Najera, and Sundstedt argued that no retaliatory actions had been taken against Ceballos and that every complaint could be legitimately explained. The core argument of the defendant’s case, however, was that the Ceballos’ memo did not constitute protected speech under the First Amendment because the content was pursuant to his official employment duties.

**Summary of findings.** The defendants Garcetti, Najera, and Sundstedt prevailed when the Ninth Circuit Court concluded in 2004 that Ceballos was not entitled to First Amendment protection for the contents of the memo. In addition, the court also held that even if Ceballos’ speech was constitutionally protected, the defendants, as public officials, had the protection of the Eleventh Amendment provision of *qualified immunity*, and therefore, could not be held responsible for compensable damages.

Ceballos appealed to the federal Court of Appeals for the Ninth Circuit, which subsequently reversed the lower court’s decision and confirmed that Ceballos’ speech was indeed protected by the First Amendment. The Appellate Court’s decision hinged on the legal condition that Ceballos had engaged in speech which addressed matters of public concern and was therefore, pursuant to *Pickering* (1968), protected by the First Amendment.
While not the focus, but rather a contributing factor of the case, the Ninth Circuit District Court of Appeals did determine that the lower court had erred in its finding that the defendants representing Los Angeles County, as government officials, were protected by qualified immunity under the Eleventh Amendment. In contrast, the Ninth Circuit Court of Appeals corrected the legal interpretation of the lower court and asserted that the “district attorney’s office and head district attorney were not entitled to Eleventh Amendment immunity” (Ceballos v. Garcetti, 2004). Circuit Judge Reinhardt wrote the opinion on behalf of the court. The opinion, in part, reflected a complex, multi-faceted rationale in explaining the court’s position on qualified immunity. This discussion is particularly relevant to public school administrators who believe they have qualified immunity for their professional decisions and actions. The court held that for purposes of summary judgment, qualified immunity was not available to the individual defendants because the law was clearly established that Ceballos’s speech addressed a matter of public concern and that his interest in the speech outweighed the public employer’s interest in avoiding inefficiency and disruption. Because the Eleventh Amendment does not apply to political subdivisions of the state, the county could ordinarily not assert sovereign immunity, although in this case it could do so if such immunity applied to the District Attorney. Whether the District Attorney, when acting in his official capacity, is entitled to such immunity depends on whether he was performing a state or a county function when he took the alleged actions with respect to Ceballos. We hold that in most respects he was acting in the latter capacity. Thus, he is not entitled to Eleventh Amendment immunity, and neither is the County. (Ceballos v. Garcetti, 2004)

The federal Court of Appeals’ ruling for Ceballos, however, did not withstand the subsequent U.S. Supreme Court’s review in 2006. As an aside, the Ninth Circuit Appellate Court clearly articulated why Eleventh Amendment and qualified immunity were not viable legal arguments for Garcetti to pursue (Garcetti, et al., v. Ceballos, 2006). As such, Garcetti discontinued this portion of the argument when he appealed the Ninth Circuit District Court of Appeals’ decision to the U.S. Supreme Court for final consideration.
The U.S. Supreme Court set about to answer the question of when is the speech of public officials protected by the First Amendment? Ultimately, the High Court held, by the narrowest margin, a five to four vote, that speech by a public official is only protected when it is engaged in as a private citizen, and not when it is expressed as part of the official’s public duties. The Supreme Court found that Ceballos’ employers were justified in taking action against him based on his testimony and cooperation with the defense. “The fact that his duties sometimes required him to speak or write,” Justice Kennedy wrote on behalf of the Court, “does not mean his supervisors were prohibited from evaluating his performance” (Garcetti, et al., v. Ceballos, 2006). This statement created a critical distinction in the establishment of pursuant to duty as a new legal standard for considering these types of First Amendment cases.

The key points held by the U.S. Supreme Court were as follows:

- When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

- In this instance, the defendant Richard Ceballos did not speak as a citizen when he wrote his memo. Thus, his speech was not protected by the First Amendment. (2006)

Ultimately the Supreme Court declared that the Court of Appeals for the Ninth Circuit had erred in its legal holding, reversed the decision, and remanded the case back to the lower court for further consideration. Justice Kennedy delivered the majority opinion of the Court in which Justices Roberts, Scalia, Thomas, and Alito joined.

**Key points of law.** The following are the key points of law articulated in the *Garcetti* decision. The points are critical to this discussion because they delineate specific indicators from which school administrators can apply to their own personnel management practices. The points provide important baseline gauges for developing final recommendations as part of this study, and this is why they are provided verbatim herein.
A state cannot condition public employment on a basis that infringes the 'employee's constitutionally protected interest in freedom of expression.

Public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Pursuant to *Pickering* and its progeny, two inquiries 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; if not, the employee has no First Amendment cause of action based on the government employer's reaction to the speech, but if the answer is yes, the possibility of a First Amendment claim arises, and the question then becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public.

A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.

So long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

While the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance.

In determining whether a public employee's speech is entitled to constitutional protection, the fact that the employee expresses his views inside his office, rather than publicly, is not dispositive; employees in some cases may receive First Amendment protection for expressions made at work.

In determining whether a public employee's speech is entitled to constitutional protection, the fact that the speech concerns the subject matter of the employee's employment is nondispositive; the First Amendment protects some expressions related to the speaker's job.

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.
• Deputy district attorney did not speak as a citizen when, pursuant to his official duties as a calendar deputy, he wrote a disposition memorandum in which he recommended dismissal of a pending criminal case on the basis of purported governmental misconduct, and so his speech was not protected by the First Amendment; when he went to work and performed the tasks he was paid to perform, district attorney acted as a government employee, not as a citizen, and fact that his duties sometimes required him to speak or write did not prohibit his supervisors from evaluating his performance.

• When a public employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences, which degree of scrutiny is absent when the employee is simply performing his or her job duties.

• Public employers may not restrict employees' free speech rights by creating excessively broad job descriptions; the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties, for First Amendment purposes. (Thomson Reuters Westlaw, n.d., p. 1-3)

The Garcetti decision culminated from decades of court decisions about public employee speech in the workplace. Each case added layers of criteria for future courts to consider when ascertaining free speech protections for public employees. The key points of law articulated above exemplify cumulative effect by citing legal findings from The New York Times (1964) case to Connick (1983).

Key points of dissent. There were resonating points of dissent in Garcetti as well. In this narrowly decided case, the points of dissent are critical to understanding and projecting future issues around the topic of protected speech in the public workplace. The Garcetti Court’s decision, being so narrowly split at five to four, offered a microcosm from which to better understand public sentiment on the issue of protected speech for public employees. Analyzing both the similar and the opposing sides of the issue is important to understanding the infrastructure of the argument.

Justice Kennedy outlined the majority opinion while Justices Stevens, Souter, Ginsburg, and Breyer set forth their points of dissent from a variety of legal views. Collectively the Justices
agreed that “(s)upervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission” (2006). They also concurred that the “government needs civility in the workplace, consistency in policy, and honesty and competence in public service” (2006); however, the dissenting Justices argued that to determine whether the First Amendment protects government employees from discipline for speech that offends their employers, the decision warrants deliberation beyond just whether the speech was uttered in the course of official duties. They argued that “it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description” and “to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors” seemed to counter the intent (2006). This latter point addressed the unintended consequence of the decision which was that it would effectually expose public employees to greater potential for disciplinary action when they talked to their supervisors first rather than going public with their concerns about a public matter. The counter argument was that whistleblower protections were already in force at the federal and state levels to protect from employer retaliation on those public employees with reasonable cause to believe that their speech discloses a violation of a state or federal law, rule, or regulation.

The Garcetti Justices argued that “of course a supervisor may take corrective action when such speech is inflammatory or misguided,” but they questioned how and where to draw the bright line between protected and unprotected speech. They argued that the standard of pursuant to duty was too oversimplified and that other contextual issues, as originally argued by Connick, should be considered when making decisions. They contemplated how circumstances such as “unwelcomed speech” would be handled under the common law of pursuant to duty. Would those employees engaging in unwelcomed speech be subjected to discipline after divulging a
matter of public concern about their supervisors; information that their “supervisor[s] would rather not have anyone else discover?” (2006). The dissenting Justices asserted that by placing so much emphasis on the single criterion of speech submitted pursuant to duty, the litmus test was too narrow and would miss opportunities for government employees to alert the public to the wrongdoing of the supervisors for whom they worked. They argued that the line of distinction was arbitrary and that the state would be missing valuable opportunities to hear from employees who could speak pursuant to their duties in addressing subjects they “know intimately for the very reason that it fall[s] within [their] duties” (Garcetti, et al., v. Ceballos, 2006). Waters v. Churchill had already established that “government employees are often in the best position to know what ails the agencies for which they work” (1994). The dissenting Garcetti Justices underscored this point.

The dissenting Justices urged a more moderate approach by recognizing that somewhere “in between these points lies a public employee’s speech unwelcome to the government but on a significant public issue” (2006). The Justices rejected the need for a more restrictive standard (i.e., pursuant to duty) and rationalized by saying that (s)uch an employee speaking as a citizen, that is, with a citizen’s interest, is protected from reprisal unless the statements are too damaging to the government’s capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements (2006).

The debate was robust between the majority and the dissenting Justices. The relevant points of the dissent are distilled below.

- Speech is too voluminous and complex to dichotomize into categories; in other words, whether the speech was uttered during the course of official work duties or not. The Garcetti decision effectively bifurcated the issue with its standard of pursuant to duty. The dissenting Justices argued that rather, each case warrants independent review on its merits. For example, a case where the public employee who engages in professional speech is obligated by professional canons and licensure regulations relative to certain
types of information, should be considered separate from cases where no ethics requirements exist for the speaker. Employees ethically bound to speak of information that is ultimately offensive to his employer, should not result in employee discipline even when the speech is made during the normal routine of work duties. In these situations, the employee is forced to choose between ethical conduct and earning a living. If contingency circumstances such as these cannot be independently considered on their merits, the law, in effect, will fracture within itself trying to appease competing authorities.

- The policy of pursuant to duty is too restrictive and absolute when there are more moderate alternatives available. For example, there are alternative labor laws, such as whistleblower protections, that are less restrictive than pursuant to duty.

- The unintended consequence of pursuant to duty will be that public employees will be incentivized to voice their concerns publicly before talking to their superiors within the chain of command.

- The Pickering Balancing Test is presently sufficient to gauge case diversities and guide a fair and appropriate outcome. It is impossible to entirely separate matters of public concern and public employment. After all, “(g)overnment administration typically involves matters of public concern. Why else would government be involved?” (2006)

The dissenting Justices also disagreed among themselves. For the purposes of this study, however, the accounting and unique exchanges of individual points of view are not considered. Rather, the cumulative counterpoints are presented for the purpose of projecting future policy shifts relative to the protected speech rights for public employees. Collectively the counterpoints shed additional perspective and allow better depth of understanding in the debate.

**Historical context of pursuant to duty.** The U.S. Supreme Court, in its *Garcetti* (2006) decision, refined the course of rights for public employees to speak out on various issues. So now after reviewing this landmark case, and before launching into an in-depth legal analysis, it is essential to reflect on the past four decades of historical evolution as set forth from *Pickering* to *Garcetti* to understand how current-day policies on speech in the public employment sector have been fomented.

Over time there have been wide discrepancies in legal interpretations, vast philosophical differences of opinion, and swinging outcomes with regard to how the courts have applied the
law relative to free speech, protected speech, and public employment. The current common law, pursuant to the U.S. Supreme Court ruling in *Garcetti*, is that speech by a public official is only protected if it is engaged in as a private citizen and not if it is expressed as part of the official's public duties. Simply stated, speech by a public official is not protected when it is expressed pursuant to duty. But to understand the full impact of *Garcetti’s* contribution to current day public policy, it is necessary to analyze the historical and judicial precedents relative to the free speech rights of public employees.

From the case of *New York Times v. Sullivan* in 1964 to *Garcetti v. Ceballos* in 2006 and thereafter, the legal standards on protected speech for public employees have evolved. The accumulation of litigation and legal interpretations has contributed to the evolution and set forth a judicial discourse for distinguishing constitutionally protected speech from unprotected speech. Systematic patterns of judicial dissent have also contributed to the robust discourse. This literature review asserts to identify the key findings of law, as well as the key points of dissent, on the protected speech rights of public employees in an effort to understand current policy and the counterpoints on which policy may shift in the future.

**Chronology of major court renderings.** The list below illustrates an overview chronology of pertinent U.S. Supreme Court and federal court cases which have collectively fomented the policies of free speech for public employees. The remainder of the chapter presents an analytical review of the identified cases and their implications for human resource policies, personnel management practices, and risk management in public school districts.

1892 *McAuliffe v. City of New Bedford*, Supreme Judicial Court of Massachusetts. Case asserts that public officials serve at the discretion of elected officials.

1957 *Roth v. United States*, U.S. Supreme Court. Case asserts that speech by citizens on matters of public concern lies at the heart of the First Amendment, and was fashioned to assure “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

1967 *Keyishian v. Board of Regents of University of State of N. Y.*, U.S. Supreme Court. Case addresses employment contracts by making the distinction between First Amendment rights to free speech in public k-12 education systems and institutions of higher education. It ordains the legitimacy of government’s interest in protecting its public k-12 education system from the employment of subversives (i.e., Communists and others with intent to overthrow the government); however, sustains the necessity of academic freedom in higher education in order to preserve a free society – “First Amendment freedoms need breathing space to survive, and government may regulate in area only with narrow specificity.”

1968 *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, U.S. Supreme Court. Case addresses a balance of interests. The teacher, as a citizen, in commenting upon “matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

1969 *Tinker v. Des Moines Independent Community School District*, U.S. Supreme Court. Case addresses the free speech rights of a minor student in a public school setting; however, it also clarifies that “(n)either students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

1972 *Perry v. Sindermann*, U.S. Supreme Court. Case addresses a person's interest in a governmental benefit as a “property interest” subject to procedural due process protection if the claim of entitlement to the benefit is supported by rules of the agency affording the benefit or by mutually explicit understandings. The “benefit may not be denied to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech.”

1977 *Mt. Healthy City School District Board of Education, v. Doyle*, U.S. Supreme Court. Case addresses constitutionally protected conduct that played a substantial part in the decision not to rehire a non-tenured teacher, but it did not necessarily amount to a constitutional violation justifying remedial action especially if the district “would have reached same decision even in absence of protected conduct.”

1979 *Givhan v. Western Line Consolidated School District*, U.S. Supreme Court. Case addresses public concerns of a public employee expressed in private versus in public. The Court said that “Constitutional freedom of speech is not lost to public employee merely because he arranges to communicate privately with his employer rather than to spread his views before public.”

1983 *Connick v. Myers*, U.S. Supreme Court. Case addresses public matters versus private concerns by asserting that “(w)hile the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance.”
1994 *Waters v. Churchill*, U.S. Supreme Court. Case addresses that for government employee’s speech to be protected, it “must be on a matter of public concern and the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services it performs through its employees.”

2006 *Garcetti v. Ceballos*, U.S. Supreme Court. Case asserts that “(w)hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

2007 *Mayer v. Monroe County Community School Corporation*, United States Court of Appeals, Seventh Circuit. Case asserts that “(t)he First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system

2014 *Lane v. Franks*, U.S. Supreme Court. Case asserts that the “First Amendment protects speech on a matter of public concern by a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.”

2016 *Lincoln Brown, Plaintiff, v. Chicago Board of Education*, United States Court of Appeals, Seventh Circuit. Case exemplifies how procedural due process protections, as provided by the Fourteenth Amendment, apply synonymously with First Amendment protections.

**Evolution of public policy.** Toward the end of the nineteenth century and early in the history of discourse on government regulation of speech, Justice Oliver Wendell Holmes, Jr., when still a member of the Supreme Court of Massachusetts, characterized the sentiment of constitutionally protected speech in *McAuliffe v. Mayor of New Bedford* (1892) by saying that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” Holmes contended that Policeman John J. McAuliffe did have a constitutional right to free speech, and he was in fact free to speak. McAuliffe was not, however, guaranteed continued employment because public employment was a privilege and not a constitutional right.

Holmes’ “rights-privilege distinction effectively denied free speech protections to public employees because it was an understood condition of public employment” (*McAuliffe v. Mayer,*
The “rights-privilege” distinction perpetuated the mindset of the “servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control” (*McAuliffe v. Mayer, Etc., of City of New Bedford*, 1892). Although not a U.S. Supreme Court decision, Holmes' 1892 Massachusetts’ opinion captured the sentiment relative to public employee expression during the era. The decision bolstered the notion that “public employment was viewed as a privilege and not a right” (Alexander & Alexander, 2012, p. 810).

This decision also underscored the relevance of contractual provisions between school boards and teachers during that era. At the time, Boards could legitimately “prohibit the exercise of various rights and freedoms by teachers” (Alexander & Alexander, 2012, p. 810-811) including speech. Not until *Pickering* in 1968 were constitutional rights and freedoms extended to protect teacher employment and school board relationships (Alexander & Alexander, 2012, p. 811).

Beginning in the mid-twentieth century, things began to change. The courts began to consider social issues such as legal oaths and the implications on free speech rights. Public employers requiring their public employees to denounce affiliation with subversive political organizations or membership in the Communist Party, as a condition of public employment became a legal consideration. Where employers in the past had been more empowered to make such demands on their employees as a condition of employment, policies changed after *Wieman v. Updegraff* (1952), *Cramp v. Board of Public Instruction* (1961), and *Keyishian v. Board of Regents* (1967). Loyalty oaths were deemed unconstitutional. The new common law, in a general sense, refined the definition yet broadened the scope of speech in the public workplace.
From 1972 to 1990, the numbers of U.S. Supreme Court cases relative to free speech cases steadily increased. This trend in the number of overall free speech cases has since been declining, but it is worthwhile to note that this past era had a significant impact on the practical application of free and protected speech, just as Circuit Judge O’Scannlain asserted.

In 2004 when the U.S. Court of Appeals, Ninth Circuit, ruled in *Ceballos v. Garcetti*, Circuit Judge O’Scannlain characterized the “Holmesian logic” as being “drastically cast aside” from the “courts generally accepted then-Judge Holmes’s immoderately narrow view of the First Amendment rights of public employees” (2004). Judge O’Scannlain’s opinion, written on behalf of the court, recognized that “(t)he Supreme Court’s burgeoning recognition of public employee’s First Amendment rights reached its first apex in *Pickering v. Board of Education*” (*Ceballos v. Garcetti*, 2004). The Court clearly asserted its claim that matters of First Amendment were evolving, and the Court’s opinion strayed from the traditional “Holmesian logic.”

**Conclusion of pursuant to duty.** The data confirms Justice Kennedy’s assertion in the *Garcetti* opinion that free speech cases began to increase during the mid-twentieth century. Data provided in Figure 1 below is an accounting of the number of free speech cases heard by the U.S. Supreme Court since the year 1900. The number of cases peaked in the years ranging from 1972 and 1990, but then began a downward trend to today. While the trend has shown decline in numbers since the 1990, only one year, 2013, is on record for having absolutely no free speech cases. This trend data suggest that continued judiciary consideration will propagate well into the future and will likely be in-step with emerging social, academic, and economic issues.

Information is provided in Figure 1 to support this claim.
The punctuating free speech case came in 1968 when the U.S. Supreme Court changed the course of public policy with *Pickering v. Board of Education* when it ruled unconstitutional the dismissal of a public school teacher who had published an editorial, inclusive of factual errors, in his local newspaper criticizing the board of education and other school administrators for misuse of public education funds. Thus in a short period of time, the public policy pendulum swung broadly from *McAuliffe* to *Pickering*. And yet, unknown at the time, the policy would narrow its course again from *Pickering* to *Garcetti*. As history reflects, the multi-faceted issue of speech in the public workplace continues to be relevant and is far from settled. For this reason, it is important for school administrators to know the relevance and implications of the legal precepts of matters of public concern and pursuant to duty on personnel practices.

**What is a Matter of Public Concern**

The courts have had much to say about what constitutes a matter of public concern, starting with the landmark 1968 U.S. Supreme Court case of *Marvin L. Pickering v. Board of Education of Township High School District 205, Will County, Illinois*. The ruling, in the k-12 public education case, asserted that freedom of speech, as protected by the First Amendment, generally prohibits public employers from firing or disciplining employees for speaking out on
matters of public concern. This ruling fostered material implications for public employers, including public schools, on the supervision, evaluation, discipline, termination, and due process of employees.

The *Pickering* Court set forth criteria requiring a “balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” (1968). To achieve the balance referred to in the decision, the Court outlined specific criteria for ascertaining protected speech with a two-part litmus test, later known as the *Pickering Balancing Test*. The test first required a court to decipher whether the employee had spoken on a matter of public concern, and then second, whether the employee’s statement had a “disruptive” impact. But what constituted a “matter of public concern” and a “disruptive” effect soon became fodder for further judicial consideration.

The Supreme Court’s ruling in *Pickering* exemplified a major shift in public policy from the late nineteenth century when the *McAuliffe v. Mayor Etc., of City of New Bedford* (1892) Court recognized public employment as a privilege, and public sentiment was that employees serve at the will of the employer (Alexander & Alexander, 2012, p. 810). Decades later in 1968, *Pickering* recognized that public employees do have First Amendment free speech protections, in certain circumstances, and it set forth to qualify objective criteria to discern those circumstances. Subject to interpretation, is whether the *Pickering* decision was a departure from public policy or a refining of public policy. Either way, the case changed public policy and secured First Amendment rights for public employees speaking as private citizens on matters of public concern.
The *Pickering* decision, like the other relative U.S. Supreme Court rulings, set forth multiple implications for personnel management practices. On their face, the decisions have affected areas as foundational as developing and managing personnel policies, collective bargaining agreements, and employee handbooks to areas as serious as employee discipline and dismissal. The decisions, among other things, have established new boundaries for public employees relative to free and protected speech in and about the workplace.

The Court would be called on again in *Connick v. Myers* (1983); *Waters v. Churchill* (1994); and *Garcetti v. Ceballo* (2006) to qualify a matter of public concern, but it was the Justices who decided *Lane v. Franks* (2014) who eventually ruled that speech by public employees involves matters of public concern, as required for First Amendment protection, when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

According to *Lane*, the litmus test in determining whether speech by a public employee involves matters of public concern requires the consideration of “content, form, and context of the speech,” just as the previous *Connick* decision had ruled. The U.S. Supreme Court in the case of *Borough of Duryea, Pa. v. Guarnieri* (2011) also cited “content, form, and context of the speech” for determining when speech by a public employee involves a matter of public concern.

**What is Speech**

Even with today’s sophisticated modern languages and innumerable communication venues, a concise definition of *speech* remains elusive. What is speech and why is it important to quantify and qualify for the purposes of this study? The courts have pondered the circumstances of speech cases for decades, and the legal definition of speech continues to be refined as new circumstances emerge from public employment and First Amendment free speech protections in
the public workplace. The courts have been routinely called upon to discern between protected and unprotected speech, each case, however, presented with a slightly different approach.

Justice Breyer in his dissent of the *Garcetti* decision opined that,

(b)ecause virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity. (*Garcetti, et al., v. Ceballos*, 2006)

Breyer was the first to officially point to what many believe was a major contradiction in rulings between the *Connick* Court and the *Garcetti* Court in that the new standard of pursuant to duty denied subsequent courts the obligation of considering the content, form, and context of the speech.

To understand speech for the purpose of this discourse is to study it within the context of the First Amendment and its inherent protections. Public employees who file claims of deprivation of constitutional rights do so under § 1983 of the United States Code, which allows for civil action and liability assignment to the party causing injury, except in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity (Civil Rights Act, 1871). The pathway for public employees to First Amendment protections is by claiming violations of due process under the Fourteenth Amendment.

To understand the concept of speech is to know that free speech is not always protected speech. Much of First Amendment doctrine, set forth by the U.S. Supreme Court, has been “an attempt to develop and refine precisely this sort of distinction,” (Encyclopedia of the American Constitution, 2007, p. 1053). What is now known as the Pickering Balancing Test is a direct result of judicial attempts to discern speech into categories of being protected and being unprotected.
**True versus false speech.** It was the *New York Times v. Sullivan* (1964) decision that set the stage for *Pickering* with specific regard to the distinction of protections for true versus false speech. By ruling that even speech containing factual errors can be protected because errors do not constitute sufficient reasoning “for repressing speech that would otherwise be free” (1964), the *New York Times* Justices incorporated law and policy on truthful speech as well as false speech. The *Pickering Court* followed suit when it later ruled that “(c)omments by teachers on matters of public concern that are substantially correct may not furnish grounds for dismissal even though they are critical in tone (1968). In referring to *The New York Times* (1964) decision, the *Pickering* opinion specifically stated that

> the public interest in having free and unhindered debate on matters of public importance - the core value of the Free Speech Clause of the First Amendment - is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. (1968)

The U.S. Supreme Court summarized its position in 1968 in the *Pickering* decision by asserting that

> (w)here teacher has made erroneous public statements on issues currently subject of public attention that are critical of ultimate employer but that are neither shown nor can be presumed to have in any way either impeded teacher's proper performance of his daily duties in classroom or to have interfered with regular operation of schools generally, interest to school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting similar contribution by any member of general public.

This ruling later became part of the Pickering Balancing Test because it attempted to balance employee’s interest, as a citizen, speaking on matters of public concern with the government’s interest, as an employer, in providing public services efficiently.

**The core value of the Free Speech Clause of the First Amendment.** The fierceness for which the First Amendment is exercised and protected in the United States is commensurate to
its national policy and the essential belief that freedom of speech is fundamental to the concept and core values of democratic societies. The First Amendment, which guarantees among other rights, freedom of expression, is in the primal position of the Constitution’s Bill of Rights underscoring its critical relativity to free society. As such, the momentum of free will in a democratic society constantly foments policy changes around free speech issues.

The relevance of Pickering and Garcetti is that free speech lies at the heart of American democracy, and speech in the workplace adds yet another complex dimension. This is especially true in the public sector where individual employees speak representatively on behalf of the government as an entity. Systemic vulnerabilities such as personal judgement, bias, and opinion carry potential to sidle into the administration of public policy and ultimately undermine constitutional, statutory, and/or judicial intent. As such, the threat of uninformed, incompetent, biased, and/or unjust individuals leveraging the seat of public authority, while acting in the respective roles of public employers, constitutes a matter of public concern. The U.S. Constitution is uniquely staged to address this potential vulnerability. Specifically, Articles I, II, and III of the U.S. Constitution provide for the balance of power in government by separating it into three distinct branches. The legislative branch (U.S. Const. art. I; i.e., Congress) was established to make laws; the executive branch (U.S. Const. art. II; i.e., President, Vice-President, and Cabinet) was charged with carrying out laws; and the judicial branch (U.S. Const. art. III; i.e., U.S. Supreme Court and Other Courts) was designed to evaluate laws and set forth common laws. Each branch respectively generates national policies via its decisions, statutes, or court rulings.

The explicit purpose of three separate branches of government is to “ensure a central government in which no individual or group gains too much control,” (USA.gov, n.d.) and
asserts unbalanced power and policies on its citizens. As such, the policy of the U.S. federal
government is to serve the citizens of its democratic society with three branches of government
in order to accomplish a balanced system of civil governance. The relevance is that the
Constitution identifies the Supreme Court as one of the three ultimate authorities in the nation for
founding public policy. The Court’s decisions, in conjunction with those made by Congress and
the President, represent the primary sources of law and policy in the United States.

Supreme Court Justice Brandeis in *Whitney v. California* (1927) opined about the critical
nature of public discourse by stating that

(t)hose who won our independence believed that . . . public discussion is a political duty;
and that this should be a fundamental principle of the American government. They
recognized the risks to which all human institutions are subject. But they knew that order
cannot be secured merely through fear of punishment for its infraction; that it is
hazardous to discourage thought, hope and imagination; that fear breeds repression; that
repression breeds hate; that hate menaces stable government; that the path of safety lies in
the opportunity to discuss freely supposed grievances and proposed remedies; and that
the fitting remedy for evil counsels is good ones. Believing in the power of reason as
applied through public discussion, they eschewed silence coerced by law—the argument
of force in its worst form. Recognizing the occasional tyrannies of governing majorities,
they amended the Constitution so that free speech and assembly should be guaranteed.
(*Whitney v. California*, 1927)

The Encyclopedia of the American Constitution asserts that

(t)he First Amendment is typically understood to protect from government abridgment a
broad realm of what might be called “symbolic activity,” including speech, religion,
press, association, and assembly. Because these symbolic activities are intertwined with
many other activities that the government is clearly empowered to regulate—for instance,
education and economic relations—the courts have experienced considerable difficulty in
distinguishing impermissible infringement on First Amendment freedoms from legitimate
exercises of government authority. (2007, p. 1053)

U.S. Supreme Court Justice Thurgood Marshall in *Rankin v. McPherson* asserted that,
“vigilance is necessary to ensure that public employers do not use authority over employees to
silence discourse, not because it hampers public functions but simply because superiors disagree
with the content of employee’s speech” (1987).
So while a fundamental purpose of the First Amendment, as noted by *New York Times Co. v. Sullivan*, is to ensure that debate on public issues “be uninhibited, robust, and wide open” (1964), the craft of balancing free speech rights in and about public workplaces for employers and employees has proven challenging. U.S. Supreme Court Justice William J. Brennan, Jr. acknowledged this when he said in 1965, “(t)he line between protected and unprotected portrayal is dim and uncertain, and judges do experience great difficulty in marking it,” (Brennan, 1965, p. 6). Justice Brennan further lamented that the

Supreme Court’s concern with the true significance of the first amendment has been primarily confined to the last fifty years. That is not a long time in the history of the constitutional interpretation, not long enough in any event to justify the assumption that the Court has yet spoken the final word. (Brennan, 1965, p. 1-2)

Now 50 years beyond Brennan’s 1965 astute reflection on the previous 50 years of the First Amendment, it is now 2017, and a collective century has passed. A number of fundamental free speech issues have surfaced; cases have been litigated and settled; an abundance of data has been generated; and the courts continue to be called upon to interpret the First Amendment and define free and protected speech. There are remarkable and punctuating cases that are studied in an effort to better understand the legal circumstances of public employees and their rights to protected speech. Understanding pursuant to duty and its relevance to personnel practices such as employee supervision, discipline, termination, and due process first requires a conceptualization of matters of public concern, private citizen speech, employee speech, and protected speech.

**What is Protected Speech**

From the case of *New York Times v. Sullivan* in 1964 to *Garcetti* in 2006 and thereafter, the legal standards on protected speech for public employees have evolved. U.S. Supreme Court and other federal court decisions have had subsequent implications on public policy as well as consequences on personnel management practices. The accumulation of litigation and legal
interpretations has contributed to the evolution of free speech and set forth a judicial discourse for distinguishing constitutionally protected speech from unprotected speech. Systematic patterns of judicial dissent have also contributed to the robust discourse of defining what constitutes protected speech.

What the Courts Have Said About Protected Speech and Public Employment

The U.S. Supreme Court has over time continuously refined the terms of what constitutes protected speech for government officials. There are a number of cases that have specifically qualified protected speech and differentiated between unprotected speech. Below are synopses of the cases which have contributed to the evolution. The substantive cases will be presented in greater detail at a later point in this chapter, but for now, the synopses below suffice to explain the central themes of protected and unprotected speech for public employees, as determined by the U.S. Supreme Court and other federal appellate courts, after the 1964 decision in New York Times v. Sullivan.

The U.S. Supreme Court ruled in Pickering (1968) that statements made by public officials on matters of public concern must be accorded First Amendment protection despite the fact that statements are directed at their nominal superiors.

In 1979, the U.S. Supreme Court ruled unanimously in favor of a public school teacher in the case of Givhan v. Western Line Consol. School District. This case further defined protected speech by asserting that constitutional freedom of speech is not lost to public employees merely because they arrange to communicate privately with their employers rather than to spread their views in public.

Sheila Myers, Assistant District Attorney in New Orleans, Louisiana challenged the parameters of protected workplace speech in the U.S. Supreme Court case of Harry Connick v.
Myers when she claimed in 1983 that her employer, District Attorney Harry Connick, violated her First and Fourteenth Amendment rights when he terminated her for workplace speech. The U.S. Supreme Court further differentiated between protected and unprotected speech when it upheld Connick’s decision to terminate Myers.

The Connick decision contributes to the public debate on protected speech for public employees from yet another vantage. One of the main outcomes of the Connick Court’s ruling was its direct address of the constitutionality of employee grievances. The Court acknowledged the difference between claims of constitutional violations for the sake of safeguarding public employee’s rights as citizens to participate in discussions concerning public affairs and attempts to constitutionalize employee grievances. The Court rejected Myers’ claim of a First Amendment violation and rather found that she was attempting “to gather ammunition for another round of controversy” with her supervisors (1983). Connick argued that his decision was grounded in “long-standing recognition that the First Amendment’s primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office” (1983). The Court’s decision asserted that the “First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs” (Connick v. Myers, 1983).

The Connick decision refined, yet again, the criteria for discerning constitutionally protected speech for public employees by articulating what it was not. In 1983, the policy “that a state cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression” was well established common law in accordance with Keyishian v. Board of Regents (1967), Pickering v. Board of Education (1968), and Perry v. Sindermann (1972). The Connick Court refined the criteria further by ruling that
(w)hen 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 appropriate forum in which to review wisdom of personnel decision taken by a public agency allegedly in reaction to employee’s behavior. (1983)

Further the Connick Court stated that “(w)hether a public employee’s speech addresses a matter of public concern so as to shield employee from discharge for expressing those views must be determined by content, form and context of given statement, as revealed by whole record” (1983). In other words, if the speech is self-serving, it may not be eligible for First Amendment protections, but each case must be determined on its merits and in relation to the evidence presented.

Connick, on its merits, bolstered the growing understanding of workplace speech and what is constitutionally protected. It also provided foundational key points of law such that years later it would buttress the Garcetti decision and would further specify legal terms in the evolution of constitutionally protected speech for public employees.

While Pickering required that constitutional protections be accorded public employee speech when spoken as a citizen on a matter of public concern, the Connick decision underscored the importance of treating public employees like any member of the general public, and as such, did not automatically restrict all office-based speech as protected or non-protected.

Connick refined the Pickering standard by asserting that “(s)o long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively” (1983). Connick also confirmed that employee speech has no First Amendment protection based on the employer’s “reaction” to the speech.
Later, in 1995, in the U.S. Supreme Court case of *U.S. v. National Treasury Employees Union*, the Court clarified that the Pickering Balancing Test, “for determining the validity of restraint on job-related speech of public employees, has been applied only when employee speaks as citizen upon matters of public concern, rather than as employee upon matters only of personal interest.” This case mirrored the outcome of *Connick* which asserted that public employees should certainly be afforded First Amendment speech protections, but not so that they can air their grievances about their employers publicly without consequences.

The *U.S. v. National Treasury Employees Union* (1995) Court held that private speech by a public employee that involves nothing more than complaining about changes in the employee's own duties “may give rise to discipline without imposing any special burden of justification on government employer; if, however, (the) speech involves (a) matter of public concern, (the) government bears (the) burden of justifying its adverse employment action” (1995).

In 1987, the U.S. Supreme Court decision in *Rankin v. McPherson* further clarified that (e)ven where public employee's speech does not touch upon a matter of public concern, speech is not totally beyond protection of the First Amendment, but, absent most unusual circumstances, federal court is not an appropriate forum in which to review wisdom of personnel decision taken by public agency allegedly in reaction to employee's behavior.

The 1994 decision in *Waters v. Churchill*, the U.S. Supreme Court clarified that (f)or government employee's speech to be protected, it must be on a matter of public concern and the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services it performs through its employees.

In 2004, the U.S. Supreme Court ruled in *City of San Diego, Cal. v. Roe* that (u)nder the First Amendment government employees have the right to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.
That same year, 2004, the case of *City of San Diego, Cal. v. Roe* also clarified “that when government employees speak or write on their own time on topics unrelated to their employment, speech can have First Amendment protection, absent some governmental justification far stronger than mere speculation in regulating it,” (2004). But in determining “whether public employee's speech is protected by First Amendment, speech is entitled to *Pickering* balancing only when an employee speaks as a citizen upon matters of public concern rather than as employee upon matters only of personal interest” (2004). This case mirrored *Connick* (1983) and *U.S. v. National Treasury Employees Union* (1995) in that matters of personal interest did not necessarily constitute protected speech. The *City of San Diego, Cal. v. Roe* Court ruled in 2004, as had *Connick* in 1984, that each case must be examined “for content, form, and context of given statement, as revealed by the whole record, in assessing whether public employee's speech addresses “matter of public concern” for First Amendment purposes.”

As discussed previously, *Pickering* (1968), *Garcetti* (2006), and other U.S. Supreme Court and federal appellate courts have confirmed that public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. As was also discussed previously, the distinction between protected and unprotected speech is subject to legal interpretation, and until *Garcetti*, there was nothing close to a *thin white line test*. The *Garcetti* Court asserted that

Pursuant to Pickering and its progeny, two inquiries 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; if not, the employee has no First Amendment cause of action based on the government employer's reaction to the speech, but if the answer is yes, the possibility of a First Amendment claim arises, and the question then becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. (2006)
The Court asserted that “in determining whether a public employee's speech is entitled to constitutional protection, the fact that the speech concerns the subject matter of the employee's employment is nondispositive” (2006). The *Garcetti* Court said that in some instances the First Amendment does protect expressions related to the speaker's job.

In the U.S. Supreme Court case of *Tennessee Secondary School Athletic Ass’n v. Brentwood Academy* (2007), the Justices followed the precedents established by *Connick* and *Garcetti* by ruling that so long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

Then in 2007, the 10th Circuit of Appeals, coined a new concept in *Brammer-Hoelter v. Twin Peaks Charter Academy* and again in 2015 in *Nixon v. City and County of Denver* in its attempts to ascertain protected speech when it characterized a series of legal precedents collectively known as the “*Garcetti/Pickering* analysis.” According to the 10th Circuit of Appeals, there are five key points of law that constitute the *Garcetti/Pickering* analysis, and they prescriptively offer a concise set of considerations that can guide decisions about discerning protected from unprotected speech in the public workplace, including the public school office. The five considerations of the *Garcetti/Pickering* analysis are:

1. whether the speech was made pursuant to an employee’s official duties; 2. whether the speech was on a matter of public concern; 3. whether the government’s interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests; 4. whether the protected speech was a motivating factor in the adverse employment action; and 5. whether the defendant would have reached the same employment decision in the absence of the protected conduct. (*Brammer-Hoelter v. Twin Peaks Charter Academy*, 2007; *Nixon v. City and County of Denver*, 2015; Holben, Jacobs, Levin, Surette, & Van Arsdale, p. 7)

The Justices who decided *Lane* seemed to emulate and expand upon the key legal points of the 10th Circuit of Appeals in attempting to qualify speech by setting forth a comprehensive
ruling that articulated the cumulative criteria imposed by the courts from the beginning. An extensive review of the Lane case will come later as it serves to provide a substantive summary of the major issues that have contributed to the cumulative evolution of the policy of public employment and protected speech. By some accounts, the Lane decision advances the discussion beyond Garcetti with the addition of more protected speech qualifiers. And while Lane appears to shift public policy away from Garcetti and back toward Pickering, both cases agree that without a significant degree of control over its employees’ words and actions, a government employer would have little chance to provide public services efficiently. Waters v. Churchill (1994) and Garcetti also agreed that a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations.

The preponderance of cases underscore Garcetti’s assertion that citizens who works for the government are nonetheless still citizens. According to Garcetti (2006) “(t)he First Amendment limits a public employer’s ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively (Connick v. Myers, 1983; Holben et al., 2016, p. 157-159).

In Casey v. West Las Vegas Independent School District (2010), the U.S. Court of Appeals for the Tenth Circuit, while not jurisdictional to all, made an important contribution to this discussion. Casey ruled primarily on the legal point of qualified immunity for public school board members and administrators, but in doing so, also asserted a precedent relative to protected and non-protected speech. The Court established that speech can simultaneously fall into the
separate categories of protected and non-protected speech. Ms. Casey, a public school superintendent, under § 1983 claim, alleged that she was retaliated against and inherently deprived of her constitutional rights by her board of education for exercising her First Amendment rights. The speech in question included statements that were within the scope of the superintendent’s duties in that they included advisement to the board of education about lawful and proper financial procedures. Her speech also included statements alleging state and federal law violations that were not being heeded by members of her board of education. The Court found that while the superintendent’s speech mostly fell pursuant to her duties of advising the board of education and was not protected, some of it was spoken as a private citizen on violations of board procedures, which was a matter of public concern and was therefore constitutionally protected. Another interesting point about the Casey case was that it uniquely illustrated the immediate effect of the Garcetti decision when while the case was pending, the Garcetti decision was handed down forcing plaintiff Casey to concede that part of her speech was not constitutionally protected because it was pursuant to her official duties as superintendent. Casey further exemplified Garcetti’s narrowing effect on defining protected speech.

The U.S. Supreme Court followed suit in Lane v. Franks (2014) when it delineated that speech by citizens on matters of public concern lies at the heart of the First Amendment, and this remains true even when the speech concerns information related to or learned through public employment. The Lane Court asserted that

First Amendment interest at stake in speech by a public employee on a matter of public concern that is related to or learned through public employment is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it. (2014)
On its face, the *Lane* ruling appears to reverse direction from the earlier *Garcetti* ruling. The Justices sharpened the critical question relative to protected speech by ruling that

(m)ere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee speech, rather than First Amendment-protected citizen speech, and the critical question is whether the speech at issue is itself ordinarily within the scope of the citizen's duties as a public employee, not whether the speech merely concerns those duties. (2006)

Further consideration of protected speech was also given by the U.S. Supreme Court in the case of *Borough of Duryea, Pa. v. Guarnieri* (2011). The Court held that when a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern.

Under the First Amendment, if a public employee does not speak as a citizen, or does not address a matter of public concern, when he or she sues his or her government employer, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision allegedly made in reaction to the employee's behavior. In other words, it’s a personnel matter when the employee is not speaking as a citizen and is not addressing a matter of public concern, and the matter, which could include discipline, should be handled between the employer and the employee. This holding was handed down initially by the *Rankin* and the *Connick* Courts.

Finally, the U.S. Supreme Court also summed up many of its rulings in *Harris v. Quinn* (2014) when it asserted that

(p)ublic employee speech is unprotected if it is not on a matter of public concern or is pursuant to an employee’s job duties, but speech on matters of public concern may be restricted only if the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen, in commenting upon matters of public concern.

*Garcetti* consolidated myriad legal issues, drawn from previous cases, and potentially set forth the most concrete criteria for ascertaining free speech parameters for public employees.
While *Pickering*, *Connick*, and *Garcetti* represent the three major Supreme Court cases recognized for defining First Amendment protected speech for public employees, there are other U.S. Court decisions which clarify protected speech for public employees. Those cases are briefed below.

**Detailed Case Reviews**

1964-U.S. Supreme Court, *The New York Times Company, Petitioner, v. L.B. Sullivan*. Originally, L.B. Sullivan, the Montgomery, Alabama city commissioner, filed a libel suit against the New York Times Company and four black ministers for publishing an “editorial advertisement,” specifically “not a commercial advertisement,” communicating “information, expressing opinion, reciting grievances, protesting claimed abuses and sought financial support on behalf of a movement whose existence and objectives were matters of the highest public interest and concern” (*New York Times Co. v. Sullivan*, 1964). Specifically, the advertisement alleged that the arrest of the Reverend Dr. Martin Luther King, Jr. for perjury was part of a conspiracy to undermine Dr. King’s civil rights’ efforts in the South. Sullivan claimed that the allegations made against the Montgomery, Alabama police department and published in the New York Times, libeled him personally.

While this landmark U.S. Supreme Court case only minimally relates to this dissertation study, it does offer several foundational points worthy of inclusion. The primary message of the Court is that open and uninhibited speech is so integral to a free society, that the rights of government officials, as representatives of the State, may be diminished commensurately to ensure constitutional protections for all. According to this Court, under the current system of
government, “counterargument and education are the weapons available to expose” unsubstantiated opinions or deliberate misstatements; not abridgment of free speech.

**Legal questions.**

- To what extent do the constitutional protections for speech and press limit a state’s power to award damages in a libel action brought by a public official against critics of his or her official conduct?

- Did Alabama’s libel law, by not requiring Sullivan to prove that an advertisement personally harmed him and dismissing the same as untruthful due to factual errors, unconstitutionally infringe on the First Amendment’s freedom of speech and freedom of press?

**Holding.** Unanimous decision for the New York Times Company. The Court held that the First Amendment protects the expression of all statements, even false claims, about the conduct of public officials except when statements are made with actual malice, or in other words, are made with knowledge that they are false or are in reckless disregard of their truth or falsity.


**Key findings of law.**

- The U.S. Supreme Court acknowledged a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” This commitment underscores the critical importance of free speech in sustaining a democratic society where the will of the people prevails.

- Federal rule prohibited the U.S. Supreme Court from allowing public officials to recover damages for defamatory falsehood relating to their official conduct unless they prove that the statements in question were made with actual malice. In effect, this ruling required government officials, in order to successfully claim defamation and libel against someone aggrieving their conduct or decisions, to meet the legal standard of *malice*. 
- False statements and factual errors are protected by the Constitution under the First Amendment when made without malice. “The constitutional protections for speech and press do not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.”

**Key points of dissent.** There were no points of dissent as the decision was unanimously in favor of the New York Times Company.

**Implications.** The policy of the United States is so resolute on upholding the free speech rights of its citizens that school administrators, as “government officials,” have minimal recourse against citizens who voice public grievances aimed at their conduct and decisions, even when the statements are false.

The Court also established a *standard of malice* necessary for government officials to successfully claim defamation or libel. The reality of the malice standard, however, is that the burden of proof is extremely high for proving that the defendant made statements that were false or acted in reckless disregard of truth or falsity toward the government official.

**1967-U.S. Supreme Court, Harry Keyishian et al., Appellants, v. The Board of Regents of the University of the State of New York et al.** Harry Keyishian and his fellow faculty and staff members transitioned to state employment in 1962 when the privately owned and operated University of Buffalo merged into the State University of New York system. At that time, the public policy of New York state stood to prevent the appointment and continued employment of “subversive persons” who willfully advocated or taught doctrine of treason or sedition. Under this policy, Keyishian and his colleagues were required by the State University of New York to sign, as conditions for continued employment in state government, loyalty oaths declaring that they were not, nor ever had been, Communists. Defending their First Amendment rights, they refused to sign the affirmation and subsequently filed suit in federal court. The case was eventually heard by the U.S. Supreme Court.
This case too has foundational points worthy of inclusion in the study. The message from the Court was that unconstitutionally vague laws violate the First Amendment, and it takes more than mere membership in a subversive organization to warrant criminal punishment or disbarment from public employment. Like the Garcetti case, the Court was split 5 to 4 signifying competing arguments.

Legal question. Are the provisions requiring public employees to formally renounce their affiliation with Communism so overly broad and vague that they are unconstitutional?

Holding. Five to four decision in favor of Keyishian.


Key findings of law.

- While there is no doubt about the legitimacy of a state’s interest in protecting its public education system from subversion, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

- Standards of permissible statutory vagueness are strict in the area of free expression since First Amendment freedoms need breathing space to survive, and government may regulate in the area only with narrow specificity.

- Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

- Danger of the chilling effect upon exercise of First Amendment rights which arise when one must guess what conduct or utterance may lose him his position must be guarded against by clearly informing teachers what is prohibited.

- Statutory provisions making treason and sedition grounds for removal from public school systems or state employment, barring from employment in public school systems any person willfully advocating or teaching doctrine of forcible overthrow of government,
disqualifying public school employees who are involved with distribution of written matter advocating or teaching doctrine of forcible overthrow are unconstitutionally vague laws that violate the First Amendment.

- Mere Communist Party membership, even with knowledge of party’s unlawful goals, cannot suffice to justify criminal punishment or warrant a finding of moral unfitness justifying disbarment (Thomson Reuters Westlaw [Westlaw], n.d., p. 1-3)

**Key points of dissent.** The duties of public employees should allow the government to inquire into employees’ fitness to serve in particular positions and that actions that “advocate, advise, or teach” the overthrow of the government are not unconstitutionally vague.

**Implications.** Public school districts should avoid policies or practices requiring public employees to sign contingency agreements, such as loyalty oaths, that limit their constitutional rights as citizens when required as conditions of their employment.

**1968-U.S. Supreme Court, Marvin L. Pickering, Appellant, v. Board of Education of Township High School District 205, Will County, Illinois.** Marvin Pickering was a public school teacher employed by the Board of Education of Township High School District 205 in Will County, Illinois, who submitted an editorial to the local newspaper criticizing the Board of Education and the superintendent’s handling of “past proposals to raise new revenue for the schools” (1968). The Board argued that Mr. Pickering’s letter was “detrimental to the efficient operation and administration of the schools of the district” (1968), and consequently, they terminated him.

Pickering subsequently filed suit against the school district for violating his First and Fourteenth Amendment rights. He claimed that the Board of Education wrongfully terminated him and violated his constitutional right to express his concerns as a private citizen about a matter of public concern.

Pickering first filed in the Circuit Court of Will County, and when he did not prevail, he appealed to the Illinois Supreme Court. The state Supreme Court likewise found that the “board
of education did not abuse its discretion in dismissing the teacher.” Pickering then appealed to the U.S. Supreme Court, which ruled in 1968, by an eight to one vote, that the school district had indeed violated Marvin Pickering’s constitutional rights.

The issues before the U.S. Supreme Court centered on whether Marvin Pickering’s statements were protected by the First Amendment. Pickering argued that his letter should be protected on the basis that he spoke as a private citizen on a matter of legitimate public concern. Because he was terminated from public employment for making statements that should have been protected by the First Amendment, but instead offended his employer, Pickering claimed that he was subjected to unconstitutional retaliation. Also germane to the issue is that Mr. Pickering’s public editorial contained statements that were false and factually incorrect. The respective Courts therefore also considered whether false speech is eligible for constitutional protections.

**Legal questions.**

- Was Pickering’s letter to the editor of a local newspaper protected by the First Amendment when he criticized his public employer?
- Was Pickering’s speech constitutionally protected?

**Holding.** Delivering the majority opinion on behalf of the Court, Justice Thurgood Marshall, in an eight to one decision, ruled in favor of plaintiff Marvin Pickering. The Court held that the Board of Education had violated Pickering’s First Amendment right to speech as a private citizen on a matter of public concern.

The Court also dismissed the argument that only truthful speech is protected speech. The Court qualified protected speech to include false statements unless they are made “knowingly or recklessly.”
The Supreme Court’s ultimate ruling in *Pickering* illustrated the Court’s shift from the previous *McAuliffe v. Mayor Etc., of City of New Bedford* (1892) decision which ruled that public employment is a privilege, and employees serve at the will of the employer (Alexander & Alexander, 2012, p. 810). Whether the *Pickering* decision was a departure from or a refining of public policy is subject to interpretation. The case did, however, change public policy and secured First Amendment rights for public employees speaking as private citizens on matters of public concern. Ultimately the Court set forth criteria requiring a “balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” (1968).


**Key findings of law.**

- Teachers may not constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work.

- Supreme Court, on appeal by dismissed teacher from state court decision affirming determination of school board dismissing teacher for sending letter to local newspaper in connection with proposed tax increase, declined to treat teacher’s claim that procedure followed deprived him of due process in that he was not afforded impartial tribunal as independent ground for decision, where teacher failed to raise such claim at any point in state proceedings and made contention for first time in Supreme Court.

- Where state courts, in action by dismissed teacher against board of education seeking reinstatement, at no time gave de novo consideration to statements contained in teacher’s letter, which constituted basis for teacher’s dismissal, Supreme Court was free to examine evidence in case completely independently and to afford little weight to factual determinations made by board of education.
• Comments by teachers on matters of public concern that are substantially correct may not furnish grounds for dismissal even though they are critical in tone.

• Accusation by school teacher that too much money is being spent on athletics by administrators of school system cannot reasonably be regarded as per se detrimental to district’s schools.

• Question whether school system requires additional funds is matter of legitimate public concern on which judgment of school administration, including school board, cannot be taken as conclusive and it is thus essential that teachers, who, as a class, are members of community most likely to have informed and definite opinions as to how funds allotted to operation of schools should be spent, be able to speak out freely on such questions without fear of retaliatory dismissal.

• Where teacher has made erroneous public statements on issues currently subject of public attention that are critical of ultimate employer but that are neither shown nor can be presumed to have in any way either impeded teacher’s proper performance of his daily duties in classroom or to have interfered with regular operation of schools generally, interest to school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting similar contribution by any member of general public.

• Statements by public officials on matters of public concern must be accorded First Amendment protection despite fact that statements are directed at their nominal superiors.

• Absent proof of false statements knowingly or recklessly made by him, teacher’s exercise of his right to speak on issues of public importance may not furnish basis for his dismissal from public employment.

• Act of school teacher, in writing and sending letter to local newspaper, in connection with proposed tax increase, that was critical of manner in which board of education had handled past proposals to raise new revenue for schools did not, in absence of proof of false statements knowingly or recklessly made, afford basis for teacher’s dismissal.

(Thomson Reuters Westlaw, n.d., pp. 1-3)

**Key points of dissent.** Justice Byron White dissented in part. He agreed that the letter might have constituted protected speech; however, he preferred to remand the case back to the lower court for further deliberation on whether the false statements in the letter were knowingly or recklessly untruthful.

**Implications.** Like Marvin Pickering, teachers and other public school employees have constitutional rights to speak as private citizens on issues of public concern, and as long as their
speech is absent of malice to mislead or is recklessly untruthful, they are constitutionally protected from any resulting employer discipline or sanctions. Speech does not have to be truthful or factual to be protected by the Constitution.

Discerning the line between guaranteed constitutional speech and legitimately regulated speech is the role of the school administrator. Examining statements, contemplating issues, and analyzing circumstances under which the speech was made to determine alignment with the principles of the First Amendment, is a professional practice skill for school administrators to develop, refine, and sustain as a part of effective school leadership.

The Pickering Court did not specifically mention tenure protections as teacher property rights; however, there are personnel implications for school administrators when non-renewing and terminating teachers.

1969-U.S. Supreme Court, John F. Tinker and Mary Beth Tinker, Minors, etc., et al., Petitioners, v. Des Moines Independent Community School District et al. This case “is the most important Supreme Court case in history protecting the constitutional rights of students” (Chemerinsky, 2000, p. 527). The Tinker Court asserted in its majority opinion that

(i)n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gerwin, speaking for the Fifth Circuit, said, school officials cannot suppress ‘expressions of feelings with which they do not wish to contend.
And while this dissertation study specifically excludes student speech as a research indicator, *Tinker* is an historically defining case relative to free speech and public k-12 education. Specifically, *Tinker* addressed the constitutional rights of students, but in doing so, the decision also referenced the speech rights of their teachers. The ruling confirmed that certain First Amendment rights extend to students and teachers alike. On this basis, the argument is substantiated for including the case in this study.

The Court made the following critical distinctions in the 1969 case relative to teachers and contributed to the evolution of protected speech rights of public employees.

**Legal question.** What are students’ freedom of speech protections, as guaranteed by the First Amendment, when protesting and exhibiting symbolic speech?

**Holding.** By disciplining students for wearing black armbands on their sleeves as a symbol of their disapproval of the Vietnam War, the school district violated the “students’ right of expression of opinion” (1969). The Supreme Court held that neither students nor teachers lose their First Amendment rights to free expression when they step onto school property.

**Justices.** Decided by the Warren Court (1967-1969). Justice Abe Fortas delivered the opinion of the court with a seven to two majority vote. Chief Justice Warren and Justices Brennan, Marshall, Douglas, and Warren concurred with the majority opinion. For varying reasons, Justices Stewart and White also concurred with the majority. Black and Harlow dissented (IIT Chicago-Kent College of Law, n.d.).

**Key findings of law.** Because *Tinker* is primarily about student speech, and student speech is not a focus of this study, only those key findings relative to teachers are included below. The points do not constitute the whole of findings from the justices.

- Wearing of armband for purpose of expressing certain views is type of symbolic act that is within the free speech clause of the First Amendment.
• Pure speech is entitled to comprehensive protections under the First Amendment.
• School officials cannot suppress expressions of feelings with which they do not wish to contend.
• First Amendment rights, applied in light of special characteristics of the school environment, are available to teachers and students.
• Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

**Key points of dissent.**

• The First Amendment does not provide the right to express any opinion at any time. Because the appearance of the armbands distracted students from their work, they detracted from the ability of the school officials to perform their duties, so the school district was well within its rights to discipline the students.
• School officials should be afforded wide authority to maintain order unless their actions can be proven to stem from a motivation other than a legitimate school interest. (Thomson Reuters Westlaw, n.d., p. 1-4)

**Implications.** The case generated several key findings of law relative to school personnel management. Primarily, the case established that neither students nor teachers loose constitutional protections to free speech while at school. In those instances, when school administrators do take action to suppress the speech rights of students, the legal standard for justification is to prove that the students’ conduct would “materially and substantially interfere” with the efficient operation of the school. If this standard cannot be met, the potential for a First Amendment violation exists. Likewise, this same standard can be applied to teachers’ conduct given that both *Tinker* (1969) and *Pickering* (1968) constitutionalized teachers’ rights as private citizens to speak on matters of public concern.

Finally, *Tinker* introduced the concept of “pure speech” in a legal context. It established that “symbolic speech” is akin to “pure speech” and is therefore eligible for the same protections as actual speech (1969). So based on the *Tinker* decision, students are constitutionally protected when they express their views symbolically by wearing “messages on t-shirts or buttons, but via
other forms of expression as well, including jewelry, hair styles, rubber bracelets, tattoos, body piercings, armbands, and styles of clothing, to name just a few” (Waggoner, 2013, p. 65). So “as long as normal school functions are not unreasonably disrupted” (1969), students and teachers, pursuant to Tinker, are allowed to engage in symbolic speech at school. These legal points summarize the direct implications for school personnel management.

1977-U.S. Supreme Court, Mt. Healthy City School District Board of Education, Petitioner, v. Fred Doyle. In 1969, 3 years after initially being hired by the Mt. Healthy City School District, Fred Doyle was elected president of the teachers’ association (i.e., union). The following year, he served on the union’s executive board, at which time, there were contentious relations between the school board and the association.

Afterwards, in 1970, Doyle was involved in a series of antagonistic personnel incidents that were not tied to his work in the teachers’ union. Among the incidents, Doyle got into an argument with another teacher, which resulted in a physical exchange between the two teachers and ultimately suspensions for both. Other teachers got involved by taking sides, walking out of the workplace, and causing a substantial disruption to the operations of the organization.

Among a variety of adversarial incidents, Doyle argued with other employees including school cafeteria staff over the size of a serving of spaghetti. He referred to students using derogatory comments and made an “obscene gesture” to two girls. Then Mr. Doyle exercised his First Amendment right to free speech and disclosed the substance of an internal district communication regarding a proposed dress code for staff. Doyle gave the information to a disc jockey who subsequently aired the information on a local radio station as a community news item. The board subsequently terminated Doyle who in response requested a “statement of reasons” for the termination. The board cited “a notable lack of tact in handling professional
matters” and referenced the “radio station incident” and the “obscene gesture incident” in its reasoning (Thomson Reuters Westlaw [Westlaw], n.d., p. 6). Doyle brought action against the school district claiming his rights under the First and Fourteenth Amendments had been violated when he was terminated for engaging in protected speech.

The U.S Court of Appeals for the Sixth Circuit District confirmed a lower district court’s finding that the teacher’s exercise of free speech had played a substantial part in the board’s decision not to renew the teacher’s contract, and as such, had violated Doyle’s constitutional rights. On further appeal, however, the U.S. Supreme Court affirmed Doyle’s entitlement to constitutionally protected speech, but further asserted that the lower courts had not adequately considered whether the board of education would have arrived at the same decision in the absence of the protected conduct. On the facts of the case, the Supreme Court upheld the board of education’s right to terminate Fred Doyle.

**Legal questions.**

- Was Mt. Healthy City School District Board protected by the sovereign immunity clause of the Eleventh Amendment when it terminated non-tenured Fred Doyle from a public teaching position?

- Did Mt. Healthy City School District Board violate Fred Doyle’s First Amendment rights by not renewing his contract after he contacted a local radio station and divulged internal school communications?

**Holding.** On behalf of the Court, Justice Rehnquist wrote the unanimous decision in favor of Mt. Healthy City School District Board of Education. The Supreme Court ruled that the board of education was justified in discharging probationary, non-tenured teacher Fred Doyle. The ruling further held that the school district was not entitled to sovereign immunity. The Court rationalized that local board members serve as public officials on a “municipal corporation” and are not “state officials” as required for Eleventh Amendment protections. As such, the Mt.
Healthy City School District Board of Education did not prevail on the minor point of immunity, but they did prevail on the major issue of Mr. Doyle’s termination.


**Key findings of law.** Speaking on behalf of the Court, Justice Rehnquist held that the board of education had the right to terminate Mr. Doyle for his conduct. The Court found that

- constitutionally protected conduct played a substantial part in the decision not to rehire the teacher; however, it did not necessarily amount to a constitutional violation. Justice Rehnquist further opined that the true point for consideration was whether the board of education had shown, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct by the teacher.

- school board members are not considered to be officials of the state for the purpose of being eligible for Eleventh Amendment protections. The Court declared that “a local school board . . . is more like a county or city than it is like an arm of the state, and it therefore was not entitled to assert any Eleventh Amendment immunity from suit in federal court.”

**Key points of dissent.** None cited.

**Implications.** The *Mt. Healthy* decision imparted two relevant points of law which have practical implications for school administrators. Superintendents and other school administrators need to know that there are inherent safeguards to follow when releasing non-tenured teachers to avoid potential claims of First and Fourteenth Amendment violations.

There is substantial evidence that Mr. Doyle had repeatedly participated in workplace activities with adversarial outcomes that affected the efficient operations of the school district. Based on the multiple and varied accounts of aggravating conduct by Mr. Doyle, the Court was able to consider a multitude of factors in the case. The Court recognized that the school district did cite the “radio incident” in its reason for terminating Doyle. The “radio incident,” taken in
sole context, constituted protected speech. The board was acting on “the radio incident,” but only as the last incident in a series of significant conduct breaches by Mr. Doyle. The “radio incident” was merely the last instance that triggered the boards’ action to terminate Mr. Doyle for egregious behavior. The “radio incident” was not acted upon in its sole capacity.

In this case, school administrators were appropriately positioned to be successful against a § 1983 claim, a claim of retaliation, or a claim of union animus and improper labor practices. Because there was an accumulation of evidence on which the school board made its final decision to terminate Mr. Doyle, the Court ruled on the preponderance of the evidence and not on the single “radio incident.” This is a critical distinction for administrators to consider when developing management skill for discerning protected speech from unprotected speech.

Two final implications for school administrators to know is that they, nor their districts, are eligible for Eleventh Amendment sovereign immunities because they are engaging in duties that serve as county or city officials and not in the capacity of state officials. Workplace retaliation and union animus are also relative issues worthy of further exploration.

1979-U.S. Supreme Court, Bessie B. Givhan, Petitioner, v. Western Line Consolidated School District et al. Bessie Givhan was dismissed from her employment as a public junior high English teacher. Afterwards, Givhan filed a § 1983 claim against the school district alleging that her First and Fourteenth Amendment protections had been violated. She argued that she was terminated as a result of her involvement in a desegregation suit against the school district as her employer. Specifically, Ms. Givhan and her principal had a private discussion at school about the district’s minority hiring practices, which she later argued was a matter of public concern and subject to constitutional protection. Ms. Givhan claimed that she was terminated as a result of
that discussion with the principal. She further claimed that her due process rights were also violated when the school district terminated her for participating in that discussion.

As an antecedent case to *Garcetti, Givhan* established important points of law relative to the issue of protected speech for public employees. Like plaintiff Marvin Pickering, the Supreme Court held that plaintiff Bessie Givhan’s speech, made while at work, was protected by the First Amendment when she complained privately to the principal about the district’s personnel hiring policies. Also like Marvin Pickering, Givhan was not denied the right by her employer to speak as a citizen on a matter of public concern nor were her fundamental rights as a citizen denied by virtue of her employment with the local school district.

This U.S. Supreme Court case is relative to the *Garcetti* decision because it served to forge judicial groundwork by offering a ruling in an absolute case in contrast. To explain, the *Givhan* decision, 27 years earlier, set the *Garcetti* decision, if logic prevails, for a predictable outcome. In *Givhan*, the plaintiff’s speech, spoken at work and about work, was protected because Bessie Givhan’s comments were expressed privately to her building principal about personnel practices; subject matter which was outside the scope of her official duties as a junior high English teacher. Whereas in contrast, the later *Garcetti* Court found that while Bessie Givhan’s speech was protected because it was outside the scope of her work duties, Richard Ceballos’ speech was not protected because it fell within the scope of his work duties. In other words, Ceballos’ speech was made pursuant to his official duties and was therefore not protected by the Constitution. The *Garcetti* Court later confirmed this absolute contrast logic.

**Legal question.** Was public school teacher Bessie Givhan’s speech protected by the First and Fourteenth Amendments when she was critical of the school’s desegregation efforts in a private conversation with her school principal in his office?
Holding: Justice Rehnquist delivered the majority opinion of the Court. In a unanimous decision in favor of Bessie Givhan, the Court held that

(1) the school principal, having opened his office door to the teacher, was hardly in a position to argue that he was the unwilling recipient of her views, and (2) constitutional freedom of speech is not lost to a public employee merely because he arranges to communicate privately with his employer rather than to spread his views before the public. (Givhan v. Western Line Consolidated School District, 1979)


**Key findings of law.**

- As opposed to situation in which government employee is involved, in which case manner time and place of delivery of his or her remarks may be material in constitutional free speech context, it is generally content of statements made by teacher, when he or she speaks publicly, that must be assessed to determine whether such statements in any way either impeded proper performance of his or her daily duties in classroom or interfered with regular operation of schools generally.

- School principal, having opened his office door to teacher, was hardly in position to argue, in proceeding on her complaint that she had been wrongfully terminated for her exercise of free speech, that he was unwilling recipient of her views.

- Constitutional freedom of speech is not lost to public employee merely because he arranges to communicate privately with his employer rather than to spread his views before public.

- Judgment affirming judgment for teacher on her complaint that she had been wrongfully terminated for exercise of free speech was reversed, and case remanded, to allow opportunity to employer to show that teacher would have been terminated regardless of her “demands” presented privately to principal.

**Key points of dissent:** None. This was a unanimous decision in favor of Bessie Givhan.

**Implications.** Public employees have the right to communicate privately with their employers rather than to spread their views before public audiences. In the context of discerning constitutionally-protected free speech, however, school administrators should consider the manner, time, and place of delivery of employee remarks (Givhan v. Western Line Consolidated
School District, 1979). Also, they should contemplate the material substance of the speech and ascertain if the speech has “in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally” (Pickering v. Board of Education of Township High School District 205, Will County Illinois, 1968).

Consistent with the Mt. Healthy City School District Board of Education v. Doyle (1977) Supreme Court decision, the Givhan Court likewise granted the school district the opportunity to show that it would have reached the same decision in terminating the teacher, even in the absence of protected conduct by the teacher. To this end, administrators should employ the technique of collecting multiple data points when preparing to release teachers who might have some legitimate claims of § 1983 violations.

Acts of administrators to willingly listen bolster employees’ arguments that their speech is protected, especially when expressed privately to their superiors. The defining point for employee protected speech, however, is whether it is spoken outside the scope of duties (Givhan v. Western Line Consolidated School District, 1979) or inside the scope of duties (Garcetti, et al., v. Ceballos, 2006). School administrators should resist engaging in or listening to employee speech they believe is not protected and subject to disciplinary action.

Finally, potential risk zones for administrators include circumstances where speech is spoken outside the scope of duties and is protected, and speech spoken inside the scope of duties and is not protected. What statutory and common laws say about speech spoken inside the scope of duties that is protected and speech spoken outside the scope of duties that is not protected are worthy topics of continued study.
1983-U.S. Supreme Court, *Harry Connick, Individually and in His Capacity as District Attorney, etc., Petitioner, v. Sheila Myers*. Sheila Myers, Assistant District Attorney in New Orleans, Louisiana challenged the parameters of protected workplace speech when she claimed that her employer District Attorney Harry Connick violated her First and Fourteenth Amendment rights when he terminated her. She claimed he dismissed her, against her constitutional right to free expression, when she circulated a workplace questionnaire to other attorneys concerning the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressure to work in political campaigns.

Connick, on the other hand, claimed that he terminated Myers on the basis of her resistance to an assigned transfer of duties. He argued that Myers’ circulation of the questionnaire occurred soon after his discussion with her about a forthcoming transfer, and her subsequent actions constituted a disruption in the workplace. Connick terminated Myers on the grounds of insubordination, and for this reason, he argued that he was justified in his decision to terminate her. While Myers prevailed in circuit court and in the U.S. Court of Appeals for the Fifth Circuit, the U.S. Supreme Court reversed the case and upheld Connick’s decision to terminate Myers.

The *Connick* decision contributes to the public debate on protected speech for public employees from yet another vantage. One of the main outcomes of the *Connick* Court’s ruling was its direct address of the constitutionality of employee grievances. The Court acknowledged the difference between claims of constitutional violations for the sake of safeguarding public employee’s rights as citizens to participate in discussions concerning public affairs and attempts to constitutionalize employee grievances. The Court rejected Myers’ claim of a First Amendment
violation and rather found that she was attempting “to gather ammunition for another round of controversy” (1983) with her supervisors. Connick argued that his decision was grounded in “long-standing recognition that the First Amendment’s primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office” (1983). The Court’s decision asserted that the “First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs” (Connick v. Myers, 1983).

The Connick decision refined, yet again, the criteria for discerning constitutionally protected speech for public employees by articulating what it was not. In 1983, the policy “that a state cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression” was well established common law in accordance with Keyishian v. Board of Regents (1967), Pickering v. Board of Education (1968), and Perry v. Sindermann (1972). The Connick Court refined the criteria by further ruling 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 appropriate forum in which to review wisdom of personnel decision taken by a public agency allegedly in reaction to employee’s behavior. (1983)

Further the Court stated that “(w)hether a public employee’s speech addresses a matter of public concern so as to shield employee from discharge for expressing those views must be determined by content, form and context of given statement, as revealed by whole record” (Connick v. Myers, 1983). In other words, if the speech is self-serving, it may not be eligible for First Amendment protections, but each case will be determined on its merits and in relation to the evidence presented.
Connick, on its merits, bolstered the growing understanding of workplace speech and what is constitutionally protected. It also provided foundational key points of law such that years later it would buttress the Garcetti decision and further specify terms in the evolution of constitutionally protected speech.

While Pickering required that constitutional protections be accorded public employee speech when spoken as a citizen on a matter of public concern, the decision underscored the importance of treating public employees like any member of the general public, and as such, did not automatically restrict all office-based speech as protected or non-protected.

Connick refined the Pickering standard by asserting that so long as employees spoke as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. Connick also confirmed that employee speech has no First Amendment protection based on the employer’s reaction to the speech.

Legal question. Was the questionnaire distributed by Sheila Myers subject to constitutional protections of free speech?

Holding. In a five to four decision, Supreme Court Justice White held that the discharge of former assistant district attorney Sheila Myers did not violate her constitutionally protected right to free speech.

- In determining a public employee’s rights of free speech, the problem is to arrive “at a balance between the interests of the employee, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees (Pickering v. Board of Education, 1968).

- 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. Here, except for the question in respondent’s questionnaire regarding pressure upon employees to work in political campaigns, the questions posed do not fall under the rubric of matters of “public concern.”

- The District Court erred in imposing an unduly onerous burden on the State to justify respondent’s discharge by requiring it to “clearly demonstrate” that the speech involved “substantially interfered” with the operation of the office. The State’s burden in justifying a particular discharge varies depending upon the nature of the employee’s expression.

- The limited First Amendment interest involved here did not require petitioner to tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships within the office. The question on the questionnaire regarding the level of confidence in supervisors was a statement that carried the clear potential for undermining office relations. Also, the fact that respondent exercised her rights to speech at the office supports petitioner’s fears that the function of his office was endangered. And the fact that the questionnaire emerged immediately after a dispute between respondent and petitioner and his deputies, requires that additional weight be given to petitioner’s view that respondent threatened his authority to run the office. (Thomson Reuters Westlaw, n.d., p. 2-3)


**Key findings of law.**

- In determining a public employee’s rights of free speech, task of the Supreme Court is to arrive at a balance between interests of the employee as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

- Ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if reasons for dismissal are alleged to be mistaken or unreasonable.

- 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 appropriate forum in which to review wisdom of personnel decision taken by a public agency allegedly in reaction to employee’s behavior.
• Whether a public employee’s speech addresses a matter of public concern so as to shield employee from discharge for expressing those views must be determined by content, form and context of given statement, as revealed by whole record.

• Discharge of former assistant district attorney did not violate her constitutionally protected right of free speech where when district attorney proposed to transfer attorney she strongly opposed transfer, expressing her views to several of her supervisors, she thereafter prepared a questionnaire which she distributed to other attorneys concerning office transfer policy, office morale, need for a grievance committee, level of confidence in supervisors and whether employees felt pressure to work in political campaigns, and except for the question regarding pressure upon employees to work in political campaigns, questions posed in questionnaire did not fall under rubric of matters of “public concern.”

• In civil rights action in which former assistant district attorney contended that her employment was terminated because she exercised her constitutionally guaranteed right of free speech, district court erred in imposing unduly onerous burden on the state to justify attorney’s discharge by requiring it to “clearly demonstrate” that speech involved “substantially interfered” with operation of office; state’s burden in justifying a particular discharge varies depending upon nature of employee’s expression. (Thomson Reuters Westlaw, n.d., p. 1-2)

**Key point of dissent.** All speech concerning the way government is run is protected by the First Amendment.

**Implications.** School administrators can learn from the *Connick* case that in discerning constitutionally protected speech, consideration may be given to the motivation of the speech. There is a difference between speech made for the purpose of protecting free speech rights and speech intended to undermine supervisors and their administrations. The Constitution does not protect grievance speech.

The Court acknowledged constitutional protections for employee speech when spoken as citizens upon matters of public concern. The Court did not, however, extend protections to employees who speak upon matters only of personal interest.

While there was some evidence that Myers’ questionnaire touched on a matter of public concern when it asked other employees about their comfort with being asked to participate in the
political campaign activities, the overwhelming evidence showed that this question was only a
minor part of mostly unprotected content asked by Ms. Myers. Personnel issues rarely present
singularly and in isolation. Being capable of teasing out First Amendment issues for individual
analysis is a management skill to be developed by school administrators as a part of effective
personnel management and school leadership practices.

The Court asserted that the role of personnel management rightfully belongs to the local
board of education and not the judicial system.

al. Through the Seventh Circuit of Appeals and to the U.S. Supreme Court for final resolve,
Waters v. Churchill set forth the additional criterion of a test of reasonableness when
determining if the speech of public employees is protected by the First Amendment or not. In yet
another litigation attempting to further discern protected speech from unprotected speech, Waters
v. Churchill instituted a new legal standard requiring employers to consider the context of facts
and circumstances when deciphering protected speech. Waters contributes to the ongoing
discussion and litigation attempting to define constitutionally protected speech by addressing the
unique circumstances of “reasonable investigation” and of discrepancy between what an
employee believes he/she said and what the employer understood him/her to say, as evidenced
through the hearsay of others.

Legal questions.

- Did the public hospital, where Cheryl Churchill was employed, violate her First
  Amendment right to free expression when she was terminated for making critical
  statements at work about her supervisor Cynthia Waters?

- Was Churchill’s speech about Waters the basis for the termination?
**Holding.** The Court was unable to reach a majority opinion; however, a plurality decision prevailed when a majority of four justices opined that public employees cannot be dismissed or disciplined for their speech unless the employer has a “reasonable basis” for believing that the speech was either disruptive or involved a matter of purely private concern, outside the scope of First Amendment protection. There had to be some reasonable, factual basis for its actions.

Justice O’Connor, writing on behalf of the Court, held in favor of Waters on the grounds that the

(1) government, as employer, has far broader powers in First Amendment context than does the government of sovereign; (2) government employee’s speech is treated differently than private person’s speech with regard to substance and procedural requirements; (3) before government employer can discharge employee for unprotected speech, it must undertake reasonable investigation to determine what the speech actually was and must in good faith believe the facts on which it purports to act; (4) hospital had undertaken adequate investigation; (5) nurse’s speech as believed by hospital officials was not protected; but (6) genuine issue of fact existed as to the motivation of the hospital officials.


**Key findings of law.** Among other key points of law, the Court found the following.

- For government employee’s speech to be protected, it must be on a matter of public concern and the employee’s interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services it performs through its employees.

- Government as employer has far broader powers in regard to employees’ speech than does the government as sovereign.

- Government employee speech must be treated differently than private speech with regard to procedural requirements as well as substance.

- First Amendment does not preclude government, as employer, from relying on hearsay or knowledge of people’s credibility or other factors when determining the factual issue of
what an employee’s speech consisted of for purpose of determining whether the employee may be disciplined.

- Government employer which seeks to punish employee for speech must act on the facts as it reasonably finds them to be and as it in good faith finds them to be.

- If employment action against government employee is based on what employee supposedly said and a reasonable supervisor would recognize that there was substantial likelihood that what was actually said was protected speech, management must tread with certain amount of care; it need not be the care with which trials and the rules of evidence and procedure are conducted, but it should be a care that a reasonable manager would use before making an employment decision.

- At-will government employee generally has no claim of protection based on the Constitution at all.

- Investigation undertaken by government employer as to what employee had said was reasonable, so that employee could be discharged based on employer’s determination of what she said, where supervisors interviewed the person to whom the comments were made and interviewed person who overheard them three times and made the decision based on statements of two trusted employees, the endorsement of those employees’ reliability by three managers, and the benefits of a face-to-face meeting with the employee who was discharged.

- As long as public employee was discharged only for the part of her speech that was either on a matter not of public concern or was disruptive, it was irrelevant whether the rest of the speech was nondisruptive and related to a matter of public concern. (Thomas Reuters Westlaw, n.d., p. 1-4)

*Key points of dissent.* The key points of dissent among the Justices were many, but the common disagreement was again on the best approach to define protected speech. The Justices chose to apply the Connick test in the case, but disagreed on how to do it. They debated whether the Connick standard should be applied to the speech as the government employer found it to be in the course of a reasonable investigation or to the speech as it was interpreted by the employer at the time and which formed the basis of the decision to terminate?

Scalia, Kennedy, and Thomas asserted that the “plurality’s recognition of a broad new First Amendment right to an investigation before dismissal for speech is unprecedented and unpredictable in its application and consequences” (*Waters v. Churchill*, 1994).
Implications. Scalia, Kennedy, and Thomas suggested in the Waters’ decision that implications and consequences relative to employee discipline would result. Their assertion holds true for school administrators navigating personnel management practices. Waters set forth that before government employers can discharge employees for unprotected speech, they must first conduct “reasonable investigation to determine what the speech actually was and must in good faith believe the facts on which it purports to act” (1994).

Like Connick (1983) and Pickering (1968), the Waters’ decision asserts that protected speech must be on a matter of public concern and that the employee’s interest in expressing himself/herself on the matter must not be “outweighed by any injury the speech could cause to ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” The Waters decision, however, further advances the public policy by specifically requiring procedural due process for public employees by requiring employers to conduct “reasonable investigation” and requiring that protected speech be considered in the context of the circumstances and the facts (i.e., test of reasonableness).

The practical application of this common law for administrators is to conduct thorough investigations of potential First Amendment violations and to base their decisions on factual and reasonable determinations. This practice can minimize school districts’ exposure to legal and financial risks.

From a professional practice perspective, Waters underscored that at-will government employees generally have no First Amendment claims to protected speech. In effect, executive school administrators, as policy-level and decision-making employees, serve at the will of local boards of education, which are municipal branches of government. As such, school executives have different and minimized constitutional protections relative to free expression.
2006-U.S. Supreme Court, *Gil Garcetti et al., Petitioners, v. Richard Ceballos*. The case was previously reviewed in detailed, but is listed here again in title to emphasize its place in time and the evolution of the public policies of public employment and protected speech.

After *Garcetti*, there were three related cases out of the Seventh Circuit U.S. Court of Appeals, which is jurisdictional to Illinois, that addressed speech in the public workplace. Those cases are detailed below before the U.S. Supreme Court, in 2014, handed down yet another seminal decision on the issue in *Lane v. Franks*. *Lane and Franks* is also briefed below.

2007-U.S. Court of Appeals, Seventh Circuit, *Deborah A. Mayer, Plaintiff-Appellant, v. Monroe County Community School Corporation, et al., Defendants-Appellees*. The case marked the first jurisdictional lower court decision rendered in the wake of *Garcetti*, and specifically concerned public elementary and secondary education. The fundamental premise of *Mayer v. Monroe County* was academic freedom in the public k-12 classroom.

Mayer argued that her First Amendment rights had been violated when she answered a student’s question about her participation in political demonstrations. According to the record, Mayer told her elementary students, during a current events lesson, that when she passed a demonstration against the nation’s military operations in Iraq and saw a sign saying “Honk for Peace,” she honked in support of the demonstrators. Mayer agreed that the lesson was part of her official duties. The Court ruled on the standard established by *Garcetti* and found in favor of the school district. Mayer, however, argued that her circumstances were more consistent with the issues outlined in *Piggee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir.2006), whereby *Garcetti* was “not directly relevant” to the college instructor’s speech.

The circumstances in *Mayer v. Monroe County*, however, are different than *Piggee*. The setting is in a public elementary school rather than an institution of higher education. The age
and maturity of the students is different. As such, the standard of law is different. *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir. 1990) had already established that the First Amendment is “not a teacher license for uncontrolled expression at variance with established curricular content” and that public school teacher Ray Webster did not have a constitutional right to introduce his personal views on a curricular subject, but rather was required to follow the prescribed curriculum as well as the prescribed subject matter. *Webster* further asserted that “(t)hose authorities charged by state law with curriculum development require the obedience of subordinate employees, including the classroom teacher.” *Clark v. Holmes*, 474 F. 2d 928 (7th Cir.) further affirmed that individual teachers have no constitutional prerogative to override the judgement of their superiors as to the proper course content. The rationale for the Seventh Circuit of Appeals’ decision in *Mayer* is that a school system does not “regulate” teachers’ speech, but rather *hires* that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can’t use *Cry, The Beloved Country* instead, even if Paton’s book better suits the instructor’s style and point of view; a math teacher can’t decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz. (*Mayer v. Monroe County Community School Corporation*, 2007)

There are other legal implications from *Mayer* as well. First, the standard applied by the *Mayer* Court preempted the *Garcetti* standard by asserting that the employee did not provide the speech for which she was paid to provide to the employer. The preeminent issue from *Mayer*, however, is the fact that the students of public elementary and secondary schools are members of a *captive audience*. Because education is compulsory, and unless their parents arrange otherwise, children must attend public schools. As such, the Seventh Circuit Court of Appeals ruled that

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children who attend school because they must ought not to be subject to teachers’ idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board’s views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues. (Mayer v. Monroe County Community School Corporation, 2007)

Legal question. Did Monroe County Community School Corporation violate public school teacher Deborah Mayer’s constitutional rights by retaliating against her when they did not renew her teaching position as a result of her expressing anti-war opinions in a public classroom of elementary students.

Holding. The First Amendment did not entitle public school teacher Deborah Mayer to advocate her viewpoint on an antiwar demonstration in a current-events classroom. The Seventh Circuit Court of Appeals found that the Monroe County Community School Corporation had not retaliated against Ms. Mayer when it did not renew her teaching contract after one year of service.

Judge. Chief Judge Easterbrook.

Key findings of law.

- First Amendment did not entitle public elementary school teacher to advocate her viewpoint on an antiwar demonstration during a classroom session on current events, since teacher’s expression of her viewpoint departed from curriculum adopted by school system, which permitted teacher to teach about controversy about policy related to the war, drawing out arguments from all perspectives, as long as teacher kept her opinions to herself.

- The First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system. (Thomson Reuters Westlaw, n.d., p. 1)

Key point of dissent. None noted.
Implications. While teachers at institutions of higher education enjoy academic freedoms relative to curriculum content, public elementary and secondary teachers do not. The courts have established common law whereby curriculum and content is decided at the sole discretion of local school boards. “(P)ublic-school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority)” (Thomson Reuters Westlaw, n.d., p. 2).

This democratic approach allows public constituencies to vote board members out of office when they disagree with educational content. Further contributing to this argument is that public elementary and secondary students are members of a captive audience. *Mayer* and its antecedents dictate that teachers are not privy to constitutional protections when they subject their students in the classroom to personal perspectives beyond district-adopted curriculum.

The point cannot be overlooked that Deborah Mayer, like Fred Doyle in *Mt. Healthy City School District Board of Education v. Doyle* (1977), was a probationary teacher with minimal protections. School administrators can rely on state tenure laws to release teachers without incident and to minimize their districts’ risk for litigation resulting from probationary teacher dismissals.

2008-U.S. Court of Appeals, Seventh Circuit, *Michale Callahan, Plaintiff-Appellee v. Steven M. Fermon and Diane Carper, Defendants-Appellants*. In a situation very similar to that of Richard Ceballos, a federal district court found that Illinois State Police Lieutenant Michale Callahan had been the subject of retaliation on the basis of protected speech when he alleged misconduct by two other ranking state police officers. While the case was pending on appeal, the *Garcetti* Court ruled that speech made pursuant to duty is not subject to Constitutional protection. Given the precedent-setting ruling, the Seventh Circuit of U.S. Court of Appeals held that the lieutenant spoke pursuant to his official duties and that the First
Amendment did not protect a public employee’s statements made as part of his official duties. Therefore, the First Amendment did not insulate Officer Callahan’s statements from employer discipline.

2009-U.S. Court of Appeals, Seventh Circuit, Richard Chaklos and Andrew Wist, Plaintiffs–Appellants v. Kathleen Stevens, Michael Sheppo, Donna Metzger, and Susan Vondrak, Defendants–Appellees. While things did not turn out as Richard Chaklos and Andrew Wist anticipated when they brought § 1983 action against Illinois State Police officials in the Seventh Circuit of U.S. Court of Appeals in 2009, the case was decided consistent with Garcetti’s standard of pursuant to duty. This case presents several relevant considerations.

Illinois State Police employees, Richard Chaklos and Andrew Wist, who trained forensic scientists as part of their official duties, experienced an adverse disciplinary action when they were suspended for submitting a letter protesting a decision not to solicit bids on training services. The employees further proposed to provide the same training services for a lower price through their own personally owned company. A summary judgment in favor of the defendants by the United States District Court for the Southern District of Illinois was overturned by the Seventh Circuit Court of Appeals where Circuit Judge Williams held the following.

1. The employees had standing to file a § 1983 action;
2. The letter was not submitted as part of the employees’ public duties;
3. The letter did address a matter of public concern; but
4. The defendants as Illinois State Police officials were entitled to qualified immunity (Richard Chaklos and Andrew Wist, Plaintiffs–Appellants v. Kathleen Stevens, Michael Sheppo, Donna Metzger, and Susan Vondrak, Defendants–Appellees, 2009).

Citing Pearson v. Callahan (2009), the Court held that defendants Stevens, Sheppo, Metzger, and Vondrak were entitled to qualified immunity because the law didn’t not make clear that their actions were unconstitutional. On its face, the case seemed to have all the
proper elements to qualify for protected speech (i.e., standing, speech not submitted pursuant to duty, speech that addressed a matter of public concern), but in reality the legal point that held was qualified immunity for state-level public officials.

2014-U.S. Supreme Court, Edward R. Lane, Petitioner v. Steve Franks in his individual capacity, and Susan Burrow, in her official capacity as Acting President of Central Alabama Community College. While the opinion was long and detailed, as well as reflective on the historical evolution of the law and the public policy relative to public employees and the First Amendment, the Court did set forth several legal refinements and clarifications of public policy in this landmark whistleblower case.

Edward Lane claimed his employer, Central Alabama Community College (CACC), and specifically its president Steve Franks, retaliated against him for giving sworn testimony in response to a subpoena requiring him to testify on a work-related matter that would be considered pursuant to his official duties. At the time, Lane was the director of the Community Intensive Training for Youth (CITY) program, a publicly-operated program through the local community college system and designed to support underprivileged students.

Specifically, Lane was subpoenaed to testify in federal court after he, in his official capacity as the CITY director, terminated Suzanne Schmitz, a former Alabama Representative on CITY’s payroll, for not reporting for work. Schmitz was ultimately convicted and sentenced to a prison term. In the meantime, CITY was experiencing significant revenue shortages. Franks claims he acted to remedy the financial difficulties by then terminating Lane. Lane sued CACC and Steve Franks in his official capacity as the president of the public community college claiming under 42 U.S.C. § 1983 that his First Amendment rights had been violated when he was fired in retaliation for testifying again Schmitz.
Legal questions.

- Does the First Amendment protect the truthful, sworn testimony of public employees when compelled by a subpoena and are not part of the employees’ regular job responsibilities?

- Does qualified immunity protect Franks from Lane’s claim that his employment was terminated in an act of retaliation?

 Holding. Writing the majority decision for the Supreme Court, Justice Sotomayor held that:

- director’s sworn testimony at former program employee’s corruption trials was citizen speech eligible for First Amendment protection, not unprotected employee speech;

- director’s testimony was speech on matter of public concern;

- government lacked any interest justifying allegedly retaliatory termination of director, and thus director’s testimony was protected by First Amendment; but

- president in his personal capacity was entitled to qualified immunity.

 Justices. Decided by the Roberts Court (2010-2016). Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, and Kagan all voted unanimously (IIT Chicago-Kent College of Law, n.d.) that Lane’s forced, sworn testimony was citizen speech and was eligible for First Amendment protection.

 Key findings of law. Among a number of key findings, the Court found the following.

- First Amendment protection of a public employee’s speech depends on a careful balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

- Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

- Speech by citizens on matters of public concern lies at the heart of the First Amendment, and this remains true when the speech concerns information related to or learned through public employment.
• Public employees do not renounce their citizenship when they accept employment (*Lane v. Franks*, 2014).

• First Amendment interest at stake in speech by a public employee on a matter of public concern related to or learned through public employment is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.

• Under the *Pickering* framework for analyzing whether a public employee’s interest or the government’s interest should prevail in cases where the government seeks to curtail the speech of its employees on matters of public concern, court must balance the interests of the public employee, as a citizen, in commenting upon such matters and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

• First Amendment protects speech on a matter of public concern by a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.

• Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen that is eligible for First Amendment protection, even when the testimony relates to his public employment or concerns information learned during that employment.

• Public employee’s sworn testimony in judicial proceedings on a matter of public concern is a quintessential example of First Amendment speech as a citizen for a simple reason: anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.

• Sworn testimony by director of community college’s program for underprivileged youth, at criminal corruption trials of former program employee who was also state representative, was “citizen speech” eligible for First Amendment protection, not unprotected employee speech, although director learned of the subject matter of his testimony in the course of his employment with program; providing sworn testimony was not a part of director’s ordinary job responsibilities.

• Mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee speech, rather than First Amendment-protected citizen speech, and the critical question is whether the speech at issue is itself ordinarily within the scope of the citizen’s duties as a public employee, not whether the speech merely concerns those duties.

• Speech by public employee involves matters of public concern, as required for First Amendment protection, when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is
a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

- In determining whether speech by public employee involves matters of public concern, as required for First Amendment protection, inquiry turns on the content, form, and context of the speech.

- Public employee’s sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern; rather, if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had an adequate justification for treating the employee differently from any other member of the public based on the government’s needs as an employer.

- Community college president reasonably could have believed, when he fired director of college’s program for underprivileged youth, that government employer could fire employee on account of testimony employee gave, under oath and outside the scope of his ordinary job responsibilities, and thus president in his individual capacity was entitled to qualified immunity in director’s § 1983 action alleging he was fired, in violation of First Amendment, in retaliation for speech on matter of public concern during his sworn testimony at criminal corruption trials of former program employee who was also state representative; circuit precedent did not preclude president from reasonably believing he could fire director and no decision of Supreme Court was sufficiently clear to cast doubt on circuit precedent.

- Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.

- Under “qualified immunity doctrine,” courts may not award damages against a government official in his personal capacity unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct. (Thomas Reuters Westlaw, n.d., pp. 1-4)

**Key points of dissent.** As a unanimous decision, there were not identified points of dissent. The Justices were, however, very diverse in their rationales for their vote.

**Implications.** When the Court ruled that public employee’s sworn testimony was “not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern” (*Lane v. Franks*, 2014), the Justices moved the standard application of law from being very descriptive, was the speech made during the course of official duties, to be
wide open for interpretation. The implication of this ruling on school districts and school leaders is increased risk of making personnel decisions that have costly legal ramifications. While the intent may be justified, the end result is a cost burden on local school districts’ financial resources. *Lane v. Franks* ultimately moved the marker on the degree of subjectivity necessary to gauge whether an employee is speaking “as a citizen on a matter of public concern,” and then further contemplating whether “the government had an adequate justification for treating employees differently from any other member of the public based on the government’s needs as an employer” are challenging metrics to apply in the moment of navigating sensitive personnel issues. Where *Garcetti v. Ceballos* set forth a definitive standard, *pursuant to duty, Lane v. Franks* redefined the criteria for determining protected speech from unprotected speech. The results are the loosening of public policies around public employee speech and vague legal standards which practicing school administrators are left to navigate.

There is some protection for school districts and administrators. *Qualified immunity* gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. So while the legal standards are vague, “qualified immunity doctrine” restricts courts from awarding damages against a government official in his personal capacity unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct.

*Lane v. Franks* asserted that this remains true when speech concerns information related to or learned through public employment. *Garcetti* weathered a major challenge in 2014 when the U.S. Supreme Court held in *Lane v. Franks, 134 S. Ct. 2369 (2014)* that the First Amendment does protect a public employee who provides truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. The case of *Lane v. Franks* offered yet
another refinement to the Court’s earlier holdings, based on Pickering’s separation of speech into content, form, and context and Garcetti’s criterion of pursuant to duty. The Court in Lane v. Franks unanimously held that when an employee is motivated to testify by subpoena, he is acting as a private citizen compelled by the obligation to submit truthful sworn testimony, and his speech is therefore protected by the First Amendment. The Court further opined as to whether public employees may be fired or suffer other adverse employment consequences for providing truthful, subpoenaed testimony outside the course of their ordinary job responsibilities.

Social media has catapulted First Amendment rights to the forefront of issues that administrators handle with staff and students on a routine basis. Well versed administrators can navigate First Amendment issues much more efficiently.

2016-U.S. Court of Appeals, Seventh Circuit, Lincoln Brown, Plaintiff, v. Chicago Board of Education; Barbara Byrd-Bennett, in her official capacity as Chief Executive Officer of Chicago Public Schools; and Gregory Mason, in his individual and official capacities, Defendants. This case was decided in the United States Court of Appeals, Seventh Circuit, and while not a U.S. Supreme Court ruling, it does still have jurisdictional implications for Illinois school districts and administrators.

Legal questions. Was public school teacher’s speech protected “when he used the word “nigger,” in violation of school board policies, during classroom discussion of why such words were hurtful and must not be used.” Was the teacher afforded due process under the Fourteenth Amendment (2016) relative to the disciplinary action of an unpaid suspension taken against him?

Holding. A middle-school “teacher was not speaking as a citizen when he used the word,” and the “Board’s policies were not so vague as to violate the Due Process Clause” (2016). The teacher, who received notice of, and was given, a disciplinary hearing before the school
board prior to his five-day suspension without pay for leading a sixth grade classroom discussion of the word “nigger” received adequate procedural due process required under the Fourteenth Amendment; the notice specifically explained the charges against him, allowed him to select his own representation at the hearing, and the teacher had the opportunity to appeal the school board’s decision.

Implications. Brown v. Chicago Board of Education clearly applies Garcetti’s pursuant to duty standard in deciding the case and rebuffs Brown’s argument that the policy fails to “distinguish between using the word in an educational manner from its use as a slur directed toward a student or colleague.” The Court clearly asserted that “(r)egardless of what he believes the Policy should be, the Policy in force forbids using such language “in front of students” (2016). Just like in the case of Williams v. Trotwood Madison City Schools, 2016 where the Madison City (Ohio) Schools’ teacher felt justified under the federal Rehabilitation Act of 1973 to complain about inadequate support for special education students. Even though her complaints were based on what she felt the policy and practice should be, she found that her speech was, pursuant to duty, and was therefore not protected by the First Amendment.

2014-U.S. Court of Appeals, Ninth Circuit, David K. Demers v. Erica Austin; Erich Lear; Warwick M. Bayly; Frances McSweeney. While not a U.S. Supreme Court case, the unique issues presented very recently by Demers v. Austin were heard by the Ninth Circuit of Appeals. The judges’ decisions set forth a couple of substantive points that have potential for resurfacing again in the future and are henceforth included in this study.

Circuit Judge W. Fletcher, speaking on behalf of the court, found that “as a matter of first impression, Pickering test, not Garcetti test, applies to teaching and writing on academic matters by state-employed teachers.” Plaintiff Demers was a professor of higher education, so the
application to k-12 public schools is not entirely clear, but the reference to “state-employed teachers” and “teaching and writing on academic matters” gave legal reference to a uniquely identifiable category of employees for purposes of First Amendment protections. Justice Souter, in the *Garcetti* decision, had previously predicted important ramifications for academic freedom, but at the time, the Supreme Court deliberately excluded from their considerations other constitutional protections including expression related to academic scholarship or classroom instruction.

Ultimately the court ruled in favor of the university administrators and against Professor Demers by asserting that he had failed to show that his actions resulted in retaliation by the administrators. The Court did acknowledge that Demers was addressing a matter of public concern; however, in this instance, the Court ultimately ruled that the university administrators were entitled to qualified immunity. This finding is consistent with the Ninth Circuit of Appeals’ earlier ruling in *Ceballos v. Garcetti* (2004) when it ruled in 2014 that the university administrators were eligible for sovereign immunity because the Eleventh Amendment applies to state employees. Garcetti and his staff were excluded from Eleventh Amendment protections because the duties in question were done in their official capacities of officials of the county and not the state. The implication is that if municipal employees are considered an ineligible “subdivision” of the state, then local school district employees, being similarly situated, are also not likely eligible for Eleventh Amendment protections. Employees like Demers who were employees of a state university system would be eligible for Eleventh Amendment protections – an important distinction between elementary and secondary education and higher education.
Demers v. Austin effectively prepares the way for a subsequent U.S. Supreme Court case; one which contemplates additional constitutional interests such as when expression is related to academic scholarship or classroom instruction.

Conclusion

This study is ultimately about constitutional rights to free speech, public employment, and due process, as guaranteed by the First and Fourteenth Amendments. The setting is public education, and the target audience is executive school administrators, including superintendents, human resource administrators, policy-level administrators, principals, and all other managing personnel responsible for the development, supervision, evaluation, and discipline of other district staff. The purpose is to provide technical guidance to school administrators relative to the current laws, regulations, and legal considerations of First Amendment protected speech in the public school setting pursuant to the U.S. Supreme Court decision in Garcetti (2006).

Garcetti exemplifies how the courts have established layers of criteria, beyond the Constitution, effectively establishing points of common law which can be used to predict the outcomes of specific, personnel free-speech situations even when the Constitution in its entirety does not speak to specific circumstances.

This is a study intended to interpret policy and guide practice. School leadership requires a working understanding of both policy and practice and a recognition of the interdependence. For example, the Pickering Court set forth the policy of protected speech when public employees speak as private citizens on matters of public concern; the Connick Court set forth the policy of protected speech for public employees asserting their constitutional rights to free speech but not when they are speaking for personal interest; the Garcetti Court added the layer of pursuant to duty, and the Lane Court added the concept of protected speech in relation to information learned
during the course of work. As explained herein, there are many other layers of policy as well, and the chronology of common law and legal standards continues to evolve.

The courts have set forth the legal points underpinning current policy on which administrative decisions can be crafted. Applying the various criteria as established by the courts is essential to effective personnel management and school leadership. In due course, the courts have established broad policies relative to personnel management practices for public administrators to follow, but few situations share the exact circumstances, so application of common laws can be challenging for these public officials and their boards. This policy study is intended to generate technical guidance specifically for school practitioners to implement best-practice personnel policies in their institutions based upon the findings from the courts. This dissertation identifies the key common law findings which are substantive and significant to the issue of free speech rights, pursuant to the duties of public school employees, and converts the common findings into technical guidance for school administrators to navigate the decision-making processes inherent to effective personnel management.

**Gaps in the Literature**

Based upon an in-depth review of the literature, there is an obvious absence of topic-specific and reliable analyses on how the U.S. Supreme Court’s *Garcetti* decision has affected public k-12 school districts. There is a surfeit of literature on the impact of *Garcetti* in the public workplace, but there is little peer-reviewed, professional writing specifically dedicated to the decision’s impact on public k-12 school districts, even though the body of litigation in this area is growing. There is even lesser available literature dedicated to understanding the effects of *Garcetti* specifically on personnel management practices in public school districts.
Along this same logic, and given the propensity of the *Lane* (2014) decision to have a substantive impact on matters of public employment and free speech and to have a softening, if not reversing, effect on the stringency test of the current legal precedent of *Garcetti’s* pursuant to duty, there is a need for future research and analysis of the effects of *Lane* (2014) on public policy and administrative practice.
Chapter IV

Legal Analysis and Discussion of Results

In 2006, the U.S. Supreme Court ruled in *Garcetti v. Ceballos* that speech uttered pursuant to the official duties of public employees is not constitutionally protected. Specifically, the Court said that “(w)hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline” (2006).

This common law has substantive implications for public school administrators whose duties, and whose staffs’ duties, include *job-required speech*. Discerning between job-required speech and *private citizen speech* is the point of debate. The official resolve has been occasionally decided in federal court as explained herein; however, before the differences were litigated in court, they first presented as personnel issues for an administrator to manage. *Garcetti* exemplifies the types of routine personnel issues and decisions that school administrators face as public, government employers. The point is that administrators are unknowing to the propensity for risk at the time when speech-related personnel issues emerge. This study was designed to inform the issue, and this chapter specifically outlines the impact of *Garcetti* on the major human resources functions in public schools.

The *Garcetti* decision “introduced a new refinement to analysis of government employee speech rights” (Roosevelt, 2012, p. 631) by asserting that “government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services” (*Garcetti, et al., v. Ceballos*, 2006). The continuum of court cases, from *New York Times Company v. Sullivan* (1964) to *Garcetti* (2006), chronicled the Supreme Court’s efforts to give independent review to
each case and the yielding outcomes of unique legal qualifiers like matters of public concern and pursuant to duty.

The *Garcetti* decision triggered a seemingly radical departure from the policies set forth almost four decades earlier by the U.S. Supreme Court’s decision in *Pickering v. Board of Education of Township High School District 205, Will County Illinois* (1968) which, by all accounts, was a landmark case relative to public employees’ rights to free speech. Time has revealed that a revolution of change occurred in the short period of time between the two cases, *Pickering* in 1968 and *Garcetti* in 2006, suggesting a provocative future ahead as the impact of the now decade-old *Garcetti* decision sifts through public organizations, including public schools, across the United States.

**Analysis of *Garcetti v. Ceballos***

Thirty-eight years after the *Pickering* ruling, the U.S. Supreme Court set forth to answer, in *Garcetti v. Ceballos* (2006), whether public employee Richard Ceballos’ speech was protected when he wrote and reported, pursuant to his employment duties, in a disposition memorandum that an affidavit used by police to obtain a critical search warrant in a specified case was inaccurate and made serious misrepresentation to the case supervisors.

From this case, the legal concept of *pursuant to duty* debuted as a recognized, legal descriptor for ascertaining protected speech from unprotected speech. The Court ruled in *Garcetti* 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” (2006). From this ruling came legal and operational implications for personnel management functions including job descriptions, personnel policies, personnel files, collective bargaining agreements and other employment
contracts, due process procedures, organizational risk management and financial budgeting, performance evaluation, teacher tenure and probationary terms, and whistle blowing protections.

The Garcetti Court ruled in accordance with the legal precedents of Pickering and Connick, but added a new “threshold inquiry” that shifted the public policy on employee speech relative to matters of public concern. Rather the added litmus test of pursuant to duty first asked if the speech was made by a public employee pursuant to his official duties. The Garcetti ruling effectually usurped the standard balancing inquiry initiated by Pickering and considered foremost whether the speech was made during the normal course of official duties. The Court held that if the answer was yes, then the First Amendment did not apply, and the speech was not protected. This logic is illustrated in Figure 2 below. For school administrators attempting to navigate the dense web of legal provisions relative to protected speech and public employment, the logic below illustrates the simplicity with which the pursuant to duty standard can be applied. The alternative course for determining protected speech reveals many more complexities that need not be considered if the primary standard of pursuant to duty is not met first. The Garcetti standard of pursuant to duty answers the question of whether speech is protected by determining what it is not.
Figure 2. Logic for protected speech determination.

The second part of the *Garcetti* threshold test was to consider whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. Justice Kennedy addressed this matter in the majority opinion by stating,

(t)his consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to effect the entity’s operations. To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal. On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer’s ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capabilities as private citizens. (*Garcetti, et al., v. Ceballos*, 2006)

Justice Kennedy, in writing the majority decision in *Garcetti*, launched the Court’s opinion straight from *Connick v. Myers* (1983) by asserting that “a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression” (2006). Given this condition, Justice Kennedy presented the case’s discrete legal question—does the First Amendment protect a government employee from
discipline based on speech made pursuant to the employee’s official duties. In other words, should a public employee’s purely job-related speech, expressed strictly pursuant to the duties of employment, be protected by the First Amendment simply because it touches on a matter of public concern, or must the speech also be engaged in “as a citizen?” (Garcetti, et al., v. Ceballos, 2006).

This point exemplifies the Court’s evolution in refining the protections of public employee speech. Pursuant to duty is simply another layer of public policy relative to determining free and protected speech. Subsequent court cases will undoubtedly continue to refine the legal concepts and advance the public policy of protected speech in the municipal workplace.

Garcetti successfully argued that “if the Ninth Circuit were upheld, public employees would in effect get constitutional protection for performing their duties to the dissatisfaction of the employer” (2006). Ceballos argued unsuccessfully “that the result the government lawyers were seeking would cause an unacceptable chilling of the speech of potential whistle-blowers” (2006). These winning and losing points serve to define current policy.

The ruling was consistent with previous decisions whereby a standard of logic was applied. In this case, the standard of logic was whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties. While not a case uniquely specific to public education, Garcetti v. Ceballos consolidated many legal issues into one court decision. Justice Kennedy incorporated precedential decisions of the High Court in writing the 5-4 majority opinion in Garcetti. In writing the majority opinion, Justice Kennedy provided a useful summary of prior court rulings when he provided a rationale for why
(w)hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, e.g., Waters v. Churchill, 511 U. S. 661, 671 (1994) (plurality opinion) ([T]he government as employer indeed has far broader powers than does the government as sovereign.). Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services. Cf. Connick, supra, at 143 (government offices could not function if every employment decision became a constitutional matter). Public employees, moreover, 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. At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See Perry v. Sindermann, 408 U. S. 593, 597 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, e.g., Connick, supra, at 147 (Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.). (Garcetti, et al., v. Ceballos, 2006)

As exemplified by the contributing tenets of Justice Kennedy’s majority opinion, the judicial elements are numerous and complex. While Tinker introduced free speech claims for students, Pickering specifically addressed public school employees’ free speech issues. In doing so, Pickering set forth two fundamental inquiries to guide interpretation of the First Amendment protections accorded to public employee’s speech. The first inquiry is to determine whether the employee spoke as a citizen on a matter of public concern. If not, the employee has no First Amendment cause of action based on the government employer's reaction to the speech, but if the answer is yes, a First Amendment claim is plausible. The second inquiry questions whether the government employer had adequate justification for treating the employee differently from any other member of the public.

On its surface, the Garcetti decision appeared to reverse course away from Pickering; however, the blueprint for deciding Garcetti had been laid by the Pickering Court 38 years
prior; in 1968 when the *Pickering* Court set forth to determine when public employee speech was protected by the First Amendment and when it wasn’t. The question the *Pickering* Court attempted to answer was how to arrive at “a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” (1968). From the case emerged what is commonly referred to as the Pickering Balance Test which set forth two fundamental question strands. The *Garcetti* decision, in essence however, said that there is no need to even be concerned with applying the balancing test until there is an answer to the absolute first question which was to determine whether the employee was expressing speech pursuant to official duties or not. Figuratively, *Garcetti* expedited the process for determining protected speech for public employees. For this reason, the *Garcetti* case is most recognized for the policy concept of pursuant to duty when in reality pursuant to duty had been indirectly introduced in Pickering’s Balance Test of the interests of the public employee, as a citizen, in commenting upon matters of public concern” (1968). In retrospect, *Garcetti* was simply decided on the first strand of the *Pickering* inquiry by answering if the employee spoke as a private citizen on a matter of public concern.

To further illustrate, Richard Ceballos, unlike Marvin Pickering, spoke as a public employee when he crafted his memo to his superiors criticizing the sheriff’s department’s practices in securing a search warrant; actions clearly within the scope of his duties. Marvin Pickering, on the other hand, wrote a letter to the editor of the local newspaper in which he claimed to submit his comments as a citizen, and he criticized the board of education for its handling of school finances.
The United States District Court for the Central District of California, while a court of lower jurisdiction, initially gave summary judgment for *Garcetti* on the basis of protection under the Eleventh Amendment and qualified immunity. The analysis was later found to be flawed by the Court of Appeals for the Ninth Circuit. Continuing the course set forth by the Ninth Circuit, the U. S. Supreme Court in *Garcetti* did not consider qualified immunity or protection under the Eleventh Amendment relative to free speech for public employees as a legal matter. The Ninth Circuit of Appeals had previously addressed and resolved the issue. Based upon this analysis of the issues, the Eleventh Amendment protections, as such, appear to have minimal influence on the legal contemplation of free speech rights for public education employees.

This observation, in addition to the absence of other defense references to qualified immunities and Eleventh Amendment protections in subsequent, materially similar cases suggests that the Eleventh Amendment is not a viable legal protection. It has now been addressed, determined not to be a significant consideration by the courts, and is therefore minimized as a relative element in the remainder of the dissertation.

**Relevancy of Research**

Specifically, this study focuses on the policies of protected speech for public school employees pursuant to duty and theorizes about how case law can inform best administrative practices relative to free speech and school-employee legal relationships. Discerning the constitutional right to free speech of public employees, including public education employees, in specific situations and under varied circumstances, has become a practical matter of law. Nahmod asserted his legal opinion on this very topic in an article written for the University of Richmond Law Review, titled, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*. He says that because public elementary and secondary teachers
are public employees paid to speak, there is plausibly little that they say in the classroom that is protected by the First Amendment (Nahmod, 2008, p. 8). Nahmod’s acknowledgement precisely characterizes the concept of *job-required speech*, and it projects even greater obligations onto public school administrators whose essential duties include communicating with students, staff, and community members, but also includes the supervision and evaluation of both licensed professional staff and classified staff.

Both Nahmod and Dale published reviews in 2008 concurring that the *Garcetti* Court solidified the authority of managements’ rights in controlling public employee speech. Nahmod contended that pursuant to duty, while he disagrees with the policy, “is clearly intended to protect managerial authority and discretion by reducing the specter of judicial intervention in managerial decisions” (2008, p. 580). Dale advanced the argument by theorizing that *Garcetti* actually benefits the public employee in the long run. Dale says that while *Garcetti* emphasizes managements’ rights, she counterpoints that the decision actually benefits public employees. Dale contents that

(i)n areas where a public employer has managerial control over the message expressed, public employees may only speak as employees, and therefore lack the protection of the First Amendment. But in areas where managements’ rights are constrained by the constitution, laws, contracts, or public policy, a public employee may speak as a citizen, and under *Garcetti*, those statements are protected by the First Amendment. (2008)

Dale and Nahmod are among many reviewers who have published legal interpretations on *Garcetti*; however, they are among few who specifically reference *Garcetti’s* application to elementary and secondary public education settings. In any regard, these two legal analysts exemplify the ongoing need for adjudication of conflicting issues between employees and/or employers, inside and outside the workplace, about speech. The cases studied herein have cumulatively advanced an entwined cohort of rules including statutes, regulations, and case laws.
which have collectively fomented the current public policy. This analysis attempts to make sense of the current policy of pursuant to duty and its effect on public school districts.

Simply interpreted, the First Amendment offers, among other protections, a fundamental guarantee of free speech to American citizens. But there are human subjectivities necessary to conceptualize free speech into daily life and work. Consequently, there are disagreements. When there are discrepancies of thought, the courts, by default, have become the final arbiters of constitutional intent. The judicial system’s archive of precedence-setting court decisions serves as scaffolding to the multitude of issues that can convolute constitutional, statutory, or judicial intent. The court decisions have also established a pattern of legal points on which recommendations for best practices for school administrators can be coordinated and developed relative to the free speech rights of staff.

This chapter contains a legal analysis of the effect of *Garcetti v. Ceballos* on public k-12 schools in the areas of educational policy, finance, budgeting, and human resource and personnel management. From this in-depth analysis of court cases, key majority and dissent points were collected, compared, and converted to practical recommendations for school administrators who are responsible for managing the human resources, legal operations, and fiscal affairs of their organizations.

The evidence on which the study’s final recommendations are based is the direct relationship between relative court decisions, key points of law, and distinct personnel functions as delineated previously in this dissertation. Chapter II outlined the study methodology to include conducting an information analysis for the purpose of identifying trending issues and systematic patterns. Consistent with the study plan, cases were identified and culled for legal patterns in
opinions and dissents, information was coded, and key points of law were categorized by function.

The collection of data, as predicted, formed a usable pattern of information that allowed for the development of responsive recommendations for administrator practices in personnel management. For example, *Garcetti* specifically states that

(p)ublic employers may not restrict employees' free speech rights by creating excessively broad job descriptions; the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties, for First Amendment purposes. (2006)

The guidance to extract from this statement is that job descriptions must be specific to actual employee duties in order to be defensible in any type of a due process hearing (e.g., grievance, board, or court). This is useful information to practicing school administrators attempting to navigate the legal aspects of human resources; many of whom have been extensively trained in educational leadership, but lack field-specific training in personnel management practices.

This study assumed that a direct line of logic could be drawn by back-planning from each respective human resources function to specific key points of law and ultimately the decisions of specific federal cases. The point of law, in this example (i.e., creating excessively broad job descriptions), was easily transferred to the essential human resources functions of writing and maintaining job descriptions as legal documents. This same type of reverse-planning, matching strategy was generalized to the remaining case data. As such, it was possible to use the data to form general conclusions and develop responsive recommendations.

This research attempts to increase professional understanding of human resource practices and their emerging role in public k-12 school administration by deconstructing, as described above, the U.S. Supreme Court’s opinion in *Garcetti v. Ceballos* (2006) to learn the effect that the decision has had on the following personnel management practices.
• Risk management and budgeting for risk.
• Collective bargaining agreements and administrator contracts.
• Employee supervision, discipline, termination, and due process.
• Job descriptions and essential job duties.
• Performance evaluation and professional development.
• Personnel policies.
• Personnel records.
• Teacher tenure and labor law.
• Whistleblower protections.

Superintendents and other school administrators need to know the applications of *Garcetti* for effective personnel management. In their official capacities, they will encounter situations such as employees submitting editorial comments to community media sources about local tax burdens on citizens caused by the financial support of public school districts. Superintendents, as the executive officers of their respective school districts, will experience employees who circumvent board policy such as the chain of command by going directly to school board members about issues of operational practices attributed to their supervisors. They will likely face situations where teachers supplement the district’s, board sanctioned curriculum with personal interest topics. Some school executives will have to address coaches who require their players to participate in pre-game prayer sessions. Many school executives will deal with staff members posting work-related information on their private social media sites. While it is impossible to capture the universe of potential scenarios, it is possible to help school administrators recognize personnel issues that are rooted in the First Amendment and help them know when to apply the logic set forth by the *Garcetti* decision and the doctrine of pursuant to
duty. Being able to recognize personnel issues that are applicable to *Garcetti* and other important Supreme Court decisions is an important skill for effective school leadership.

The relevance of this legal analysis to school executives is that it projects best practices in personnel management practices. The study, a collective review of federal, especially U.S. Supreme Court, cases relative to the free speech rights of public school employees, reveals a systematic legal pattern among court rulings before and after the significant, landmark, and bookend cases of *Pickering v. Board of Education* (1968) and *Garcetti v. Ceballos* (2006). The information gathered from case law can guide public school administrators to make informed decisions on matters of public action. Poorly crafted personnel decisions, based on insufficient information, can cost school districts, and ultimately taxpayers, unnecessary legal and operational expenses. Efficient operations for public schools require access to factual information for decision-making purposes.

**Results**

This next section presents the results of the data as collected for this dissertation. Remembering that the study design was structured to cast broadly for concepts, it was done in an effort to gather data about the unique legal elements that have come to define the current policy on First Amendment rights to free speech and public employment. By conducting an in-depth review of relevant U.S. Supreme Court and federal appellate cases that have ruled on the issues of public employment and free speech, and by deconstructing their respective key points of law, a definite pattern of rules has been set forth as legal precedents. These data are presented below.

**Recurring Legal Precepts**

In reviewing the relevant cases, the following concepts were identified as recurring key legal points:
• Academic freedom
• Balance of interests
• Clearly established rules
• Citizen speech
• Content, form, and context
• Critical speech (actual malice)
• Discipline
• Due process
• Efficiency of public service
• Efficiently and effectively
• Employee contracts
• Employee speech
• Employee speech as citizen
• Evaluation
• Job descriptions
• Justification for treating employee differently
• Matter of public concern
• Most likely to have informed and definite opinions
• Obscenity is not protected speech
• Protected speech
• Public official
• Pursuant to duty
• Qualified immunity
- Reached same decision even in absence of protected speech
- Related to or earned through public employment
- § 1983 action
  - First Amendment
  - Eleventh Amendment
  - Fourteenth Amendment
- Sworn testimony; forced truthful testimony
- Tenure as a property right
- Truthful speech/false speech (actual malice)
- Unfettered interchange of ideas; debate on public issues should be uninhibited, robust, and wide-open
- Whistleblower protections

These key concepts and terms were culled from the cases as recurring trends and then coded to identify commonalities and interrelatedness of the cases and the legal precepts. Once the cases were coded respectively, the software search feature was used to identify which cases were relevant to each term. For example, the concept of matters of public concern was referenced in several different cases, albeit sometimes articulated differently as shown below, but synchronous in meaning across cases. Table 1 below exemplifies the strand of information that was located by simply searching for the word “matter.”
### Table 1

**Sample Data Search Queue**

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Search yield</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td><em>Keyishian v. The Board of Regents of the University of the state of New York</em></td>
<td>Matters of public concern</td>
</tr>
<tr>
<td>1983</td>
<td><em>Connick v. Myers</em></td>
<td>Matters of public concern</td>
</tr>
<tr>
<td>1994</td>
<td><em>Waters v. Churchill</em></td>
<td>Matters of public concern</td>
</tr>
<tr>
<td>1994</td>
<td><em>Waters v. Churchill</em></td>
<td>On a matter not of public concern</td>
</tr>
<tr>
<td>2006</td>
<td><em>Garcetti v. Ceballos</em></td>
<td>Matters of public concern</td>
</tr>
<tr>
<td>2014</td>
<td><em>Lane v. Franks</em></td>
<td>Matters of public concern</td>
</tr>
<tr>
<td>2016</td>
<td><em>Brown v. Chicago Board of Educ.</em></td>
<td>Matters of public concern</td>
</tr>
</tbody>
</table>

The first exercises of the study, such as the one shown above, helped establish the connections between cases. All of the legal precepts as listed above, were searched in full or partial phrase for presence in the collection of key legal points from each court case. The key legal points, once coordinated, were analyzed to determine case interconnectedness. The data was used throughout the dissertation to crosswalk cases and compare and contrast legal points.

The second part of the data analysis included back-planning from each respective human resource function to applicable key points of law and their emanating cases to establish a direct line of logic, grounded in common law and public policy, to inform the personnel practices of
school administrators. Writing job descriptions is one example of how data was collected from relative court cases and deconstructed to inform practice for school administrators. In this regard, it was possible to use the collected data to form general conclusions and develop useful recommendations about writing and using job descriptions as a key personnel function. There are other relevancies explained in the sections on personnel management functions below.

**Personnel Management Functions: How Rulings Have Come to Bear on Public Education Employees and School Districts**

Each personnel management function strand is discussed in detail below; however, the functions are neither exhaustively listed nor mutually exclusive. As such, the information on how U.S Supreme Court cases and other federal appellate court decisions have affected the nine function strands is presented in a blended, practical approach. While each strand is individually addressed, the study findings reveal dense interconnectedness among the functions.

**Risk management and budgeting for risk.** While listed as an individual function strand, risk management, including planning and budgeting for risk, is the underpinning on which the remaining functions are based. As such, none of its features could be separated from the other functions. From this universal perspective, the topic of risk management and budgeting for risk are discussed.

Projecting costs relative to personnel matters and budgeting accordingly is good fiscal practice, but predicting risk with accuracy is impossible. Being proactive and being informed are the best offense and defense respectively in risk management. Many routine human resources functions incur expenses, including employee turnover and replacement costs, unemployment claims, worker’s injury compensation payments, and legal allegations of harassment and discrimination, and they carry varying degrees of risk potential for school districts.
In *Schenck v. Pro-Choice Network of Western N.Y.*, U.S., Supreme Court Justice Souter in her dissent of the *Garcetti* decision, acknowledged that it had been clearly established that “open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment” (2006). But what does that mean in practical terms? Claims, founded and unfounded, of free speech and due process violations can actuate costly legal proceedings for school districts. As demonstrated in *Ely v. Dearborn Heights School District No. 7* (2016), the cost of litigation can be extreme.

Employee discipline and dismissal as extreme personnel management functions that, when done poorly, can result in lost trust, diminished organizational culture, and costly grievance and legal proceedings as exemplified by *Ely v. Dearborn Heights School District No. 7*. Organizations, including public schools, attempting to lower relative risk thresholds espouse administrative practices that are in accordance with current laws. Personnel practices such as disciplining tenured staff members for speaking out on matters of public concern such as district incompliance with smoke detectors or the financing of athletic facilities in the community, for example, are generally fruitless and can result in wasted human resources and unnecessary legal expenditures. Compliance with laws regarding public safety regulations, just like in *Ely*, presents protected speech on a matter of public concern.

The Courts have advised that clearly established policies are the standard on which legal decisions are based. School administrators are accordingly advised to establish personnel management practices that ensure clearly written expectations are systematically provided to staff. Administrators can utilize board and administrative policies, employee handbooks, relative professional development, job descriptions and essential duties, and collective bargaining agreements to accomplish this personnel practice.
**Immunity provisions.** Terms such as *qualified immunity/sovereign immunity* and *tort immunity* imply that public officials are protected from liability from the effects of their decisions as policy-makers. As the name implies, immunity is protective; however, it is not an absolute guarantee against being sued. It is important for school administrators, whose essential duties include job-required speech, to know that they, as public officials, are vulnerable to public scrutiny in this regard. Immunity provisions are available to help mitigate risk for them in their professional capacities.

Government officials are entitled to assert immunity as a protection to being sued, and one of the protections available to them is qualified immunity. As has been explained at length in this dissertation, qualified immunity doctrine has been contemplated by multiple courts as a way of mitigating risk for public officials. The doctrine imposes that the courts may not award damages against a government official in his personal capacity unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct (*Casey v. West Las Vegas Independent School Dist.*, 2007; *Ceballos v. Garcetti*, 2004; *Lane v. Franks*, 2014). While the act protects public officials from being assessed damages for violating statutory or constitutional law, qualified immunity does not protect those who act with malice or disregard of the clearly established rules.

Sovereign immunity is authorized by the Eleventh Amendment, and it simply establishes that states possess sovereign immunity from being sued in federal court without their consent. Sovereign immunity provides little protection to school administrators as they do not typically act in the capacities of state officials. As local officials, they are not eligible for sovereign immunity.
In Illinois, there are protections built into state law such as the Local Governmental and Governmental Employees Tort Immunity Act which says

(a) The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses. (b) Any defense or immunity, common law or statutory, available to any private person shall likewise be available to local public entities and public employees (The Local Governmental and Governmental Employees Tort Immunity Act, 1965).

The Act was passed to mitigate personal and professional risk by providing immunity protections for public officials who serve in positions involving the determination of policy or the exercise of discretion. Specifically, the Act asserted that government officials are not liable for injuries resulting from their acts or omissions in determining policy. The Tort Immunity Act offers personal and professional defense in some circumstances, but it does not offer protection to school districts named in law suits.

Finally, administrators face the risk of being sued civilly for taking actions in the scope of their employment; they are vulnerable in this regard. As such, administrators need to know that their actions are not always protected by immunity clauses, nor is the conduct of their staffs.

Collective bargaining agreements and administrator contracts. Drawing on a legal point from Keyishian (1967), administrators are cautioned to balance employee accountability with their constitutional rights. Practices such as having employees sign receipt of documents explaining conduct expectations, for example, is a good practice for ensuring that staff are sufficiently informed of clearly established policies and practices; however, the language of the sign-off should be crafted to avoid the appearance of a requirement that employees waive any form of their constitutional rights. For example, a signature statement verifying, “I have received a copy of the employee handbook” is appropriate. To the contrary, a signature statement that says “I have received a copy of the employee handbook and agree to comply with all provisions stated and implied” can leave the district vulnerable to risk of grievance and legal proceedings.
should employees or union associations claim that the district is restricting employee constitutional rights. This same caution applies to other personnel management practices as well like requiring staff or employment candidates to sign waivers or denounce political memberships and effectually establishing a contractual agreement (*Keyishian v. Board of Regents*, 1967). These personnel practices would also have implications for collective bargaining agreements and clauses prohibiting independent bargaining.

**Employee supervision, discipline, termination, and due process.** This specific strand of human resources functions is directly affected by the *Garcetti* decision. As has been repeated throughout the dissertation, the relevant language of *Garcetti* specifically states 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” (2006). In this regard, the term *discipline* is used broadly to characterize the scope of supervision, discipline, termination, and due process duties that school administrators routinely fulfill in the regular expanse of their responsibilities. These duties command job-required speech that increase professional exposure, and they reveal how administrators are vulnerable to attacks on their speech. The First Amendment asserts and the courts have upheld employees’ rights to “petition the Government for a redress of grievances.” Administrators’ and their staffs’ speech can expose the school district to risk liability in this regard.

There are legal rulings from the courts that can be used to inform school administrator practice relative to employee supervision, discipline, termination, and due process. *Garcetti* specifically cautioned to write and maintain official job descriptions that clearly outline occupational requirements and essential job duties. While writing and maintaining job
descriptions is recognized in this study as an independent human resources function; the personnel function overlaps into other areas. To this end, job descriptions should be crafted by school administrators to reflect actual duties of the respective positions. Even duties that are completed on an intermittent basis should be included in the job descriptions. The *Garcetti* Court also warned that

(p)ublic employers may not restrict employees’ free speech rights by creating excessively broad job descriptions; the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties, for First Amendment purposes.

There are other official documents that can be used similarly to fulfill the personnel management functions of employee supervision, discipline, termination, and due process. Administrators can ensure that all staff are equipped with the information necessary to make position-level decisions and that they know the employers’ expectations for their work performance and conduct. Board personnel policies, such as code of conduct and chain of command policies, employee handbooks, collective bargaining agreements, administrative contracts, and student handbooks should all align to a synchronous communications’ plan. These documents should also clearly align to the actual practices of the school district. Outdated and/or unfollowed policies with failed results, such as student injury or internal personnel claims of harassment and/or retaliation, can expose the district to risk.

What administrators need to know is that teachers and educational support personnel are authorized only to deliver the curriculum, programs, and services that have been adopted by the local board of education. Speech outside these terms dictates administrative personnel actions including closer employee supervision, likely disciplinary action, possible termination, and always due process.
As introduced earlier by Nahmod (2008, p. 580), public elementary and secondary teachers are public employees paid to speak, so there is little that they say in the classroom that is protected from employer discipline by the First Amendment. Nahmod characterizes this concept as *job-required speech*, and suggests that it carries significant responsibility for public school administrators whose essential duties include communicating with students, staff, and community members (Nahmod, 2008). Nahmod (2008) and Dale (2008) both address the implication of the *Garcetti* ruling for managements’ rights, and they assert that pursuant to duty is weighted in favor of the employer.

Academic freedom presents another area where administrators frequently experience First Amendment personnel supervision and disciplinary issues. The courts have been clear. Academic freedom is reserved for teachers of higher education. Public elementary and secondary school curriculum is decided by the local board of education, and teachers do not have a protected right to stray from the approved curriculum (*Mayer v. Monroe County Community School Corporation*, 2007; *Brown v. Chicago Board of Education*, 2016).

“The Supreme Court's decision in *Garcetti v. Ceballos* may indeed have “profoundly altered how courts review First Amendment retaliation claims,” but it should not be assumed that the change significantly rolled back public employee speech rights. Instead, by characterizing those rights in relation to management rights and the unconstitutional conditions doctrine, the Court clarified its previous case law in a way that should increase the protections for public employees in the long run. In areas where a public employer has managerial control over the message expressed, public employees may only speak as employees, and therefore lack the protection of the First Amendment. But in areas where management's rights are constrained by
the constitution, laws, contracts, or public policy, a public employee may speak as a citizen, and under *Garcetti*, those statements are protected by the First Amendment” (Dale, 2008)

**Job descriptions and essential job duties.** A prior example illustrated the logical connection of the personnel function of writing job descriptions to the *Garcetti* ruling in this way. The opinion reads that “the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties, for First Amendment purposes” (2006). The line of logic that can be shared with school administrators is, that although a state has greater leverage to restrict employee speech, it must be done only for the purpose of ensuring efficient and effective operations. The official job description is one appropriate place to document board policies on the duties of employee positions. When crafted strategically, job descriptions can serve not only to inform the staff of expected duties and responsibilities, it can also serve as a blueprint for and evidence of efficient and effective operations. School administrators can accomplish this by ensuring that job duties are purposefully interconnected and scaffolded onto appropriate layers of authority and expertise. Job descriptions should be clearly written to establish the rules for expected behavior, and it is important to avoid ill-prepared written job descriptions with overlapping critical duties, omissions of links in the chains of command, and outdated duties.

*Garcetti* can also be used as guidance to ensure that job descriptions are written with fidelity to the expected duties of the respective positions and not just loose placeholders with vague duties. *Garcetti* warns that

(p)ublic employers may not restrict employees' free speech rights by creating excessively broad job descriptions; the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties, for First Amendment purposes. (2006)
The *Garcetti* opinion specifically asserted that public employers may not restrict employees’ free speech rights by creating excessively broad job descriptions. This specific reference to job descriptions in establishing the common law of pursuant to duty offers a direct relationship to the personnel management functions of writing and maintaining accurate job descriptions. The *Garcetti* Justices opined that, for First Amendment purposes, “the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties” (2006).

Administrators can heed this advice as a strategy for minimizing risk exposure by ensuring that job descriptions are documented for all staff and are written to align with the actual duties of each respective position. The Court is saying that it is not enough just to have an inventory of job descriptions. Employees’ actual work activities must also align to the written duties delineated in the job descriptions in order to sustain the district in a defensible position in a conflict-resolution hearing (e.g., grievance hearing, board hearing, arbitration, court of law). *Garcetti* and the other cases confirm that court rulings are relevant to public school districts, and the litigated decisions guide administrators to ensure that rules of employee conduct are clearly established and there is a genuine relationship between policies and practices. Administrators can rely on official school documents like job descriptions, collective bargaining agreements, administrator contracts, personnel policies, due process procedures, performance evaluations, teacher tenure and probationary terms, and whistle blowing policies to ensure that behavior expectations are clearly established with staff.
*Lane v. Franks* held that a public official’s compelled (i.e., subpoenaed) sworn testimony, made as part of a criminal trial against a former subordinate accused of defrauding the agency, was entitled to First Amendment protection because the director’s testimony was speech outside the scope of his ordinary job duties. Eight years after *Garcetti*, *Lane* served to distinguish the prior controversial ruling of *Garcetti*, which held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, to rule that there are occasions when speech spoken on a condition of knowledge gained from the workplace is protected (Allred, 2014).

**Performance evaluation and professional development.** Utilizing professional preparation programs and providing professional development opportunities to in-service staff to communicate expectations relative to behaviors and rights to speak out about work-related matters can facilitate more informed decision-making about what can be said and what should be avoided. Ensuring consistent personnel policies and practices contributes to overall operational efficiency.

Nahmod asserted his legal opinion on this very topic in an article written for the University of Richmond Law Review, titled, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*. He says that because public elementary and secondary teachers are public employees paid to speak, there is plausibly little that they say in the classroom that is protected by the First Amendment. Nahmod’s recognition precisely characterizes the concept of *job-required speech*, and it projects even greater obligations onto public school administrators whose essential duties include communicating with students, staff,
and community members, but also includes the supervision and evaluation of both licensed professional staff and classified staff.

**Personnel policies.** Personnel policies are important to the efficient operation of organizations, including school districts. Specifically, policies that outline the organizational chain of command are necessary for establishing clear expectations for staff conduct. *Garcetti* asserted that “(s)upervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission” (*Garcetti*, et al., v. *Ceballos*, 2006). Policies are the practical places where this directive can be accomplished. The *Garcetti* Justices collectively concurred that the “government needs civility in the workplace, consistency in policy, and honesty and competence in public service” (*Garcetti*, et al., v. *Ceballos*, 2006). Organizational policies can be implemented in many ways including official board policies, including code of conduct and chain of command policies, employee handbooks, collective bargaining agreements, administrative contracts, and student handbooks. Personnel practices aligned to the organization’s written policies provide an effective foundation for risk management and a viable defense against claims of constitutional rights’ violations.

**Personnel records.** Personnel files and the maintenance thereof are authorized by the Illinois Personnel Records Review Act and are incorporated into the School Code [820 ILCS 40/1, et seq.]. The practical application of *Garcetti* to personnel records is administrative procedure. The official personnel file is the appropriate place to maintain any employment records that relate to the supervision, discipline, termination, and due process of staff. In order to prevail against any claims of retaliation or due process violations, a complete and official record that clearly establishes the history of performance, as well as the pattern of administrative communication in response to the conduct, is necessary. Maintaining clear, accurate, and
chronicled personnel records in accordance with the law is essential practice, and ensuring consistent personnel policies and practices contributes to overall operational efficiency of the organization.

**Teacher tenure and labor law.** *Garcetti* ruled that “when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline” (2006). The issue is that “discipline” can lead to termination, and tenured teachers and administrators have property and due process rights vested in their employment. These conditions impose significant legal obligations on school districts and their administrators to properly supervise their staffs and administer appropriate discipline.

“The presence of a statutory tenure contract relationship creates a substantive due process interest as well as a constitutionally protected contract right on behalf of the teacher” (Alexander & Alexander, 2012, p. 809), so a § 1983 claim of violation of First Amendment rights are likely to result in a secondary claim of violation of Fourteenth Amendment protections, thereby increasing exposure to organizational risk. Ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if reasons for dismissal are alleged to be mistaken or unreasonable (*Connick v. Myers*, 1983).

**Whistleblower protections.** The courts have ruled that speech spoken outside the scope of duties is protected (*Givhan v. Western Line Consolidated School District*, 1979), and speech spoken inside the scope of duties is not protected (*Garcetti, et al., v. Ceballos*, 2006). One exception, however, where the circumstance of speech spoken pursuant to duty is protected is whistle-blower speech. More than any other provision, whistleblower protections blur the lines of
pursuant to duty and make the jobs of school administrators attempting to navigate free speech
issues in the public workplace even more difficult.

Whistleblower protections are authorized by both federal and state laws. The Illinois
Whistleblower Act (2004) provides that

(a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing
an employee from disclosing information to a government or law enforcement agency if
the employee has reasonable cause to believe that the information discloses a violation of
a State or federal law, rule, or regulation.

The Act (2004) further defines the parameters of protections by stating that retaliation is
prohibited against those employees

who disclose information in a court, an administrative hearing, or before a legislative
commission or committee, or in any other proceeding, where the employee has
reasonable cause to believe that the information discloses a violation of a State or federal
law, rule, or regulation.

The federal Whistleblower Protection Act of 1989 and the Whistleblower Protection
Enhancement Act of 2012 provide basically the same protections with the exception that these
Acts authorize specific protections for federal employees; not state or local government
employees. Most public school employees in Illinois are local government officials, although not

The law says that a federal agency violates the Whistleblower Protection Act of 2012 if it
takes, threatens to take, or fails to take a personnel action with respect to any employee or
applicant because of any disclosure of information by the employee or applicant that he
or she reasonably believes evidences a violation of a law, rule or regulation; gross
mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific
danger to public health or safety.

Subject to the Pickering Balancing Test, First Amendment protections are available to
public employees who suffer retaliation for whistleblowing, regardless of whether the act of
whistleblowing consists of informing higher level public officials, Congressional committees, or
the media. The Supreme Court in Connick made no distinction between internal and external
whistleblowing when it noted that speech that is “of public import in evaluating the performance of the District Attorney” may include efforts by an employee “to bring to light actual or potential wrongdoing or breach of public trust.” (Connick v. Myers, 1983).

School administrators, charged with managing risk need to know where whistleblowing and job-required speech collide. Nahmod cautions that the policy of excluding job-required employee speech from First Amendment protection against employer discipline could have serious repercussions. He asserts that the policy of pursuant to duty is “clearly intended to protect managerial authority and discretion” (Nahmod, 2008, p. 580). He also projects that Garcetti will create an incentive for public employees to go public and whistle-blow their concerns in an attempt to retain protection under the First Amendment. Nahmod cautions that this approach could cause greater harm to public employers than simply dealing with employee speech issues internally (Nahmod, 2008, p. 580).

**Conclusion of the Impact of Garcetti on the Nine Human Resources Functions**

Ultimately this is a discussion of constitutional rights. It involves the First and Fourteenth Amendments and, with some lesser degree of involvement, the Eleventh Amendment. The premise is that the First and Fourteenth Amendments tie closely with human resources management and are worthy topics of continuous professional development for school administrators. Knowing that the employer is exposed to unpredictable risk when an employee files a § 1983 violation claim under the United States Code alleging that his or her constitutional rights have been violated is useful information for school leaders. Knowing that there can be professional and financial consequences for not handling personnel claims legally is also useful information.
Cases of protected speech for public employees have yielded many split rulings signifying the continued discrepancy in opinion and dissent about the constitutional and legal rights of public employees to exercise free speech at work and about work (Hudson, 2002). Henceforth, the need for rigorous public discourse on this issue continues.

First, from a constitutional perspective, limiting American citizens’ access to the full breadth of rights and freedoms, including the right to exercise free speech, as sanctioned by the First Amendment, has the potential for encroaching upon the hallowed policy ground of American democracy doctrine, as guaranteed by the Constitution of the United States. This perspective is exemplified, in part, in the Pickering decision with the assertion that

(t)he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment – is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. (Pickering v. Board of Education of Township High School District 205, Will County Illinois, 1968)

In essence, the standard for guaranteeing free speech is so broad that the criteria buttress upon the verge of violating the constitutional rights of public officials as private citizens.

**Public accountability.** Policy decisions about the allocation of public resources are statutorily reserved for local boards of education and are to be executed by official action, (School Boards, 1961). As such, the allocation of local taxpayer resources, as a fundamental function pursuant to public policy, is a matter of public concern that can sometimes lead to controversy. Relative to this study is the critical argument that superintendents and members of local boards of education, as policy-makers, are inherently ordained by contract and oath (Section 10-16.5 of the School Code [105 ILCS 5/10-16.5]) respectively to deal with matters of public concern and controversy and are democratically held accountable by way of public
election for their decisions. Whether legal issues begin as disputes over student or staff due process rights, school administrators and members of boards of education need to know the risk factors, including financial risk, associated with major legal proceedings. Whether the disagreements are student- or employee-based is irrelevant, the cumulative costs to districts can be substantial.

In Illinois, district administrators, especially superintendents, are ultimately evaluated and held accountable by boards of education, as well as the public. Their handling of administrative matters such as these are subject to performance evaluation and can have financial, professional, and legal ramifications. See Section 10-16.7 of the School Code [105 ILCS 5/10-16.7].

Board members evaluating and community members judging the performance of its school administrators have a hindsight advantage. School leaders, on the other hand, do not have a foresight advantage when making frontend, policy-making decisions. So having a good understanding of the issues relative to free speech in the public workplace and being familiar with the constitutional standards and the legal criteria established by past court rulings provides guidance for administrators who make high-stakes’ and complex personnel decisions about employee rights relative to the First Amendment and protected speech. For this reason, it is advantageous for public school administrators to know the potential implications for school districts of constitutional, statutory, and case law on personnel matters such as protected speech in the workplace such to craft their actions prudently.

**Gaps of law.** Contrary to literal interpretation, *constitutionally protected free speech* does not guarantee U.S. citizens the right to say whatever they want, about anything, about anyone, at any time, regardless the impact (Marcum & Perry, 2014, p. 5). A litany of court cases, including the 2006 landmark U.S. Supreme Court decision in *Garcetti v. Ceballos*, stands as evidence. The
Garcetti Court specifically asserted 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” (2006). To many, the decision applied a harsh either-or standard that clearly gave boards of education and administrators the upper hand in managing the personnel operations of their schools as public organizations and limited labor’s control over First Amendment-related conduct (Nahmod, 2008; Dale, 2008).

The Garcetti decision, like those that have followed, resulted from a gap in the law, specifically from the combined outcomes of the Pickering and Tinker decisions. The Pickering Court established teachers’ rights to speak as private citizens on matters of public concern, but only when a substantial disruption to organizational operations was not created. The Tinker Court confirmed broad constitutional rights to students and teachers alike, but did not specify what qualified as protected speech. The Garcetti Court was then open to preempt the standards established by Pickering and Tinker with a precursor criterion requirement for determining if speech was spoken pursuant to duty. The Connick Court had earlier hinted at the concept of pursuant to duty by saying, “(w)hen 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 appropriate forum in which to review wisdom of personnel decision taken by a public agency allegedly in reaction to employee’s behavior” (1983). Logic suggests that if a public employee is not speaking as a citizen, he or she must be speaking as a public employee. The Connick Court, however, did not pursue this element of the law and focused rather on employee speech upon matters of personal interest (1983).
This gap left the Garcetti Court to expound upon the undefined circumstances of employee speech relative to work duties and job-required speech, and as such, it re-set the initial standard for determining protected speech by applying the standard of pursuant to duty at the onset of the inquiry process. In effect, Garcetti preempted the Pickering Balance Test and restricted subjectivity for determining a case outcome.

The general nature of the Garcetti ruling opened new possibilities to re-conceptualize and redefine the legal employee and employer relationship. Now determining what litmus test to apply in given circumstances became more defined. Applying the Garcetti/Pickering analysis, the five types of criteria that can be considered are: (a) whether the speech was made pursuant to an employee’s official duties; (b) whether the speech was on a matter of public concern; (c) whether the government’s interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests; (d) whether the protected speech was a motivating factor in the adverse employment action; and (e) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Cases such as this exemplify that, while Garcetti refined the criterion for discerning protected work speech from non-protected work speech, there are still many areas open to interpretation where the courts have not yet opined. The Garcetti ruling triggered other significant gaps in the law that have already been addressed by subsequent court rulings and will undoubtedly continue to be addressed by the judiciary as individual case circumstances arise. Practical matters, such as subpoenaed testimony pursuant to duty, job descriptions versus scopes of duties, and how the courts will handle public employees expressing themselves, pursuant to duty, on matters of private concern have been addressed in Garcetti. These issues are echoed in the dissent of the Garcetti Justices. Categorizing instances of protected speech from unprotected
speech, pursuant to First Amendment protections, they argued cannot be viewed as simplistically as asking if the speech was submitted pursuant to duty.

Differing opinions have prompted diverse interpretations requiring judicial intervention. So in the absence of a more definitive litmus test, the issues left unrequited by the *Garcetti* decision have defaulted to the courts and resulting case law. *Lane v. Franks* and *Brown v. the Chicago Board of Education* are two cases that have recently contributed to the closing of the gap. These decisions have possible implications for public schools.

**The Scope of Public Employment**

Public employment includes ever expanding categories of employment. Examples, among many, of public employees include police officers, fire fighters, librarians, road construction employees, postal workers, public health officials, human services employees, elected officials, and public school employees.

Within each category there are further delineations of employment ranging from classified to professional. Public school employees are also government workers whose ranks include teachers, administrators, and educational support personnel including paraprofessionals, secretaries, bus drivers, school nurses, food service staff, and coaches all with varying degrees of education, qualifications, skills, and authorities.

And so for all of these people who are also government employees, the Labor Management Relations Act, 1947, also known as the Taft-Hartley Act, applies to them in that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that . . . when ‘speech’ and ‘non-speech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.
Public Service as a Growing Industry

Sheer population growth and occupation volumes will perpetuate free speech and public employment issues into the future, transcending the need to project and plan responses to the ever-changing social landscape underpinning matters of free speech in institutions of public education. The United States Census Bureau’s most recent Annual Survey of Public Employment & Payroll Summary Report indicates that 90,000 state, local, and federal governments employed approximately 21.8 million people as public employees in 2013 (Willhide, 2014, pp. 1-2). According to U.S. Census data, public education employees make up nearly half of the total federal, state, and local government workforce with 10.9 million people, or 49.9% (Willhide, 2014, p. 3). In fact, education is the “single largest functional category for all governments,” (Willhide, 2014, p. 3).

In 2010, there were some 22,632,000 local, state, and federal public employees in the United States representing, among other civil occupations, fire protection, police protection, postal service, and national defense. But the largest subcategory of public employees, some 8,037,000 workers, were employed that year by institutions of elementary and secondary education (U.S. Department of Commerce, 2012). Also in 2010, the United States’ Department of Commerce reported the national population at 308,745,538 (Department of Commerce, 2012); 139,064,000 individuals were employed that year overall; and 13,155,000 employees worked in occupations categorized as the educational services’ industry. That means that a little more than four percent of the U.S. population works in the public school workforce and almost ten percent of the total workforce is made up of public school employees. While occupations such as construction and manufacturing have experienced declining populations of employees, the
educational services’ industry has experienced an increase of almost 17% in its employee population (U.S. Department of Commerce, 2012).

Clearly, public employees, and specifically elementary and secondary education employees, represents a large sector of the general population. According to the Department of Commerce, education is the fastest growing sector among public service industries.

Clearly public education employees constitute a significant portion of all public employees, and public employees constitute a significant portion of the general citizenry. With growing density of teachers and other educational support staff, the issues of free speech and public employment will continue to evolve. Social media has demonstrated that the evolution can progress quickly.

While individual rights form the core standard of the First Amendment, the breadth of judicial interpretation has shifted and expanded over time. For many people, a constant part of everyday life is communication in the workplace and communication about the workplace (Jones, 1998), which means that the legal interpretation of free speech and protected speech is fluid and constantly expanding. Emerging social issues, reaching further extremes through the conduit of social media, provide fertile ground for entanglement between First Amendment rights and public employment. Administrators spend a lot of time managing personnel issues which are rooted in human interaction, opinions, and language, which at their core, are progenies of the First Amendment.

Today there are some 21.8 million public employees (Willhide, 2014, p. 1) who fill a wide and diverse spectrum of governmental positions. Accordingly, there are multiple contributory factors from which potential free speech issues may arise in the future.
Chapter V

Conclusions and Recommendations

This concludes a legal analysis intended to explore the substantive issues relative to the First Amendment, public school employment, and free speech and to encourage further thinking on ways in which court decisions can better inform the practices of public school administrators in public k-12 settings.

This study attempted to identify relevant court rulings which have narrowly interpreted the law, and specifically identified individual situations and circumstances of constitutionally protected free speech for government employees, with special attention to public school employees. The theory underlying the study was that there existed a consistent pattern of thought, established by federal courts and set forth as legal precedents, from which school administrators could craft their human resources and personnel management practices. The study set about to collect pertinent data via court decisions, including opinions and points of dissent, and then develop evidence-based guidance for school administrators on how best to navigate employment law, personnel management, and human resources in the post-Garcetti era given everything learned from past to present. The intended outcome was to propose analysis-based recommendations as best practice for school administrators to manage their public organizations in accordance with the First Amendment, the constitutional rights of their employees, and the managerial rights of the board of education and its agents (i.e., administrators).

The practical side of First Amendment considerations in schools is that administrators routinely face them, whether they recognize them as such or not, is a different issue. The reality, however, is that school administrators face diverse First Amendment personnel issues every day. Situations grounded in the First Amendment are common such as when an assistant principal
asks if she can rate an employee’s performance evaluation inclusive of a personal *Facebook* post submitted off work time and from a private home computer and when a principal asks if she is eligible to run for a neighboring district school board seat. Obviously, these are superficial introductions of issues, and there are definitely deeper considerations to these scenarios that must be made, but superficial introductions are typically how administrators first encounter every issue they face. Effective leadership commands good judgment from the start and sound decision-making in the actions that follow. The primary outcome of this research is to suggest that there is a specialized area of school management that can be developed in school administrators in order for them to be more effective leaders in human resource and personnel management. Administrators must first be able to recognize First Amendment issues, then effectively distinguish between protected and unprotected speech, and finally, take actions based on informed decisions that are made in accordance with statutory and common law as established by the pattern of decisions of the U.S. Supreme Court and other federal appellate courts.

There are real questions and issues that school administrators face relative to the First Amendment, their employees, and potential constitutional violations. Providing professional development on these issues can help administrators legally navigate First Amendment-based labor issues and can potentially save their school districts money. Helping employees, not only to recognize First Amendment issues, but also to help them understand the rationale behind the district’s policies and practices, serves to reinforce their capacity to respond in accordance with the organizational mission, which is the goal of effective leadership. This approach can be generalized from professional development to professional practice by rationalizing that informed staffs perform to higher standards of expectations. As such, professional development, which includes employee training on First Amendment issues informing on the types of speech
that are protected by the First Amendment and the types not constitutionally protected, is recognized as a best practice in personnel management.

There are potential financial implications, as well, when First Amendment circumstances turn to unresolved disagreements rooted in constitutional rights. Cases can include employees filing contractual grievances, for example, or making claims of discrimination to the Department of Human Rights; a retaliatory wages dispute at the Department of Labor; or a lawsuit in federal court under 42 U. S. C. § 1983 for violations of constitutional rights, including First Amendment violations. Regardless the action, the relative expenses can be substantial. The best juncture for school administrators to manage the circumstances and reduce risk to the district is at the outset before the issue potentially becomes an expensive legal proceeding (Saucier v. Katz, 2001). This is the point where the administrator has a point of control and should contemplate if the risk to the organization is worth the risk. In other words, does the purpose behind the conflict rise to the level worth the investment of fiscal and human resources that will be necessary to procure resolve? The best practice is to have knowledgeable administrators on the front lines who can adeptly navigate First Amendment personnel issues in accordance with common law. To this end, and based on the in-depth analysis conducted in this study, the following recommendations are made.

**Recommendations**

The continuum of U.S. Supreme Court decisions from *Pickering* (1968) to *Garcetti* (2006) articulates the legal findings that can serve as useful guidance to school administrators in performing their professional responsibilities. Toward this end goal, the following recommendations are proposed to school administrators as a result of this in-depth study and analysis.
**Recommendation #1.** Best practices: convert jurisdictional court rulings to best practice in human resources and personnel management.

- *Pickering, Connick, Givhan,* and *Garcetti* exemplify that each case warrants independent review. School administrators too should independently investigate each employee case with potential First Amendment implications before making assumptions and/or taking official action like discipline or termination.

- Pursuant to *Garcetti,* administrators should ensure that job descriptions delineate the actual duties being performed. Direct supervision and evaluation should serve as the window for administrators to ascertain the genuine relationship between policy (i.e., job description) and practice (i.e., actual duties) and take the initiative to facilitate a reconciliation when necessary. This proactive personnel management can serve as an important strategy for avoiding organizational risk exposure.

- Also pursuant to *Garcetti,* administrators can rely on official school documents like job descriptions, collective bargaining agreements, administrator contracts, personnel policies, due process procedures, performance evaluations, teacher tenure and probationary terms, and whistle blowing policies to ensure that behavior expectations are clearly established with staff. *Saucier v Katz* (2001); *Lane v. Franks* (2014); and *Brown v. Chicago Board of Education* (2016) assert the benefits of clearly established expectations.

- Pursuant to *Pickering* (1968) and *Garcetti* (2006), follow the logic as plotted in figure 1.

- Pursuant to *Connick* (2008) and *Casey* (2007), know that speech is not monolithic. It can contain protected and non-protected speech concurrently. *Connick* advises that when discerning if “public employee’s speech addresses a matter of public concern so as to shield employee from discharge for expressing those views” the decision “must be determined by content, form and context of given statement as revealed by the whole record” (*Connick v. Myers*, 1983).

- Pursuant to *Lane v. Franks* even speech that contains information learned during the course of public employment can be protected speech under certain circumstances. Just because speech includes information learned at work does not mean, in every circumstance, that it is subject to pursuant to duty policies and is therefore not protected. Following the guidance of *Connick,* personnel decisions relative to speech should be based on the “content, form and context” of the statements (*Connick v. Myers*, 1983).

- Pursuant to *Mt. Healthy, Ceballos, Lane, Casey,* qualified immunity, in some situations, gives government officials protection from civil damages unless the official violated a statutory or constitutional right that was clearly established at the time of the action. The “clearly established” prong of the doctrine carries useful guidance for school
administrators responsible for staff communication. The doctrine also qualifies who is eligible for protection, and the courts have ruled that state-level, policy-making officials are protected. Public school administrators in Illinois are considered local or municipal officials. While there could be times when school administrators would act in a state capacity, routine duties would fall within local jurisdiction thus minimizing the protection of qualified immunity.

**Recommendation #2.** Risk management: minimize the risk of legal costs to the school district by following the path established by the sequence of U.S. Supreme Court and other federal appellate court decisions and applying their respective key legal points to guide decisions about issues rooted in labor law and the First Amendment rights of employees.

Administrators must know that legal disputes are costly; proceedings are fluid; and litigation outcomes are never guaranteed. It is important for school administrators to make informed and prudent decisions when making recommendations to their boards of education relative to unpredictable legal endeavors. Pursuits that will undoubtedly command substantial district human and fiscal resources. Administrators need to be fully cognizant that pursuing resolve via legal action presents multi-faceted risk to the school district. Accordingly, board members must be informed.

Managing organizational risk is a human resources function in that organizations are exposed to risk via the window of their human capital. Leading action and navigating critical personnel management decisions are best accomplished when school administrators are informed of court decisions and their practical applications.

**Recommendation #3.** Strategic organizational planning. When administrative control of finances is a primary objective and essential duty for chief school administrators (Illinois School Code, 2006), legal issues relative to personnel management can have a direct impact on available, fiscal resources, and as such, should be included in the ongoing strategic planning and operational budgeting process.
**Recommendation #4.** Professional development plans: develop and utilize professional development plans as a systematic outcome of the strategic organizational planning process. Execute a professional development plan to ensure that in-service and pre-service training opportunities include First Amendment issues informing staff on the types of speech that are protected and the types that are not constitutionally protected.

Specifically, rely on training opportunities via principal and superintendent preparation programs; professional development license renewal programs; and administrative in-service training to advance best practices in personnel management and First Amendment matters. Equipping administrative personnel with the necessary knowledge to legally navigate First Amendment-based labor issues is a proactive effort to build organizational efficiency and effectiveness with the intended outcome of reserving districts resources.

Finally, a call is recommended specifically to institutions of higher education with principal and superintendent preparation programs to include structured content regarding public employee speech in and about the workplace into the required curriculum.

This recommendation also extends to professional organizations to keep their constituencies informed on current and changing case law and to advise their clients in practical terms about the applications and implications of the rulings. To know the outcomes of precedent-setting cases and to understand the legal implications can help guide the actions of practicing school administrators, teachers, and educational support personnel. Institutions of higher education and professional organizations should play an important and direct role in disseminating vital information on best practices relative to the topic of public school employee speech. There remains a need for school leadership preparation, continuing education, and professional development programs to teach the applications and practices of educational policy.
**Recommendation #5.** Qualified immunity and clearly established expectations: follow the wisdom of *Mt. Healthy v. Doyle* (1977); *Saucier v Katz* (2001); *Lane v. Franks* (2014); and *Brown v. Chicago Board of Education* (2016), and be explicitly clear in communicating expectations of employee behavior. This policy applies directly to administrative practices and human resources and personnel management functions which include crafting board policies, developing administrative procedures, publishing employee and student handbooks, negotiating collective bargaining agreements, writing job descriptions, managing past labor practices, issuing disciplinary write-ups, and creating any other documents which provides direction to staff. Facilitating a clear message to all employees of their free speech rights in terms of their public employment can advance a proactive effort of risk management with minimal cost to the organization.

Board policies generally set forth the beliefs about how employees should conduct themselves, including their speech. While such value beliefs are incorporated throughout board policies such as in code of conduct, workplace harassment, and social media policies, the key is providing frontend, explicit information on employer to employee expectations and giving specific details and types of circumstances, including potential consequences. This approach is aligned to a qualified immunity defense (*Saucier v Katz* (2001); *Lane v. Franks* (2014); a procedural due process Fourteenth Amendment defense (*Brown v. Chicago Board of Education* (2016); and with the Courts’ repeated directives to ensure that rules are clearly established at the time the behaviors are expected. This approach can offer an effective, proactive strategy for potentially avoiding complicated and costly disputes relative to employee free-speech rights.
**Recommendation #6:** Fourteenth Amendment and due process: ensure that employees are given proper due process when they make claims of First Amendment violations to their rights of free expression.

There are Fourteenth Amendment applications to this discussion as well. Public employees are guaranteed, by the Fourteenth Amendment, the right to due process when they claim their First Amendment rights have been violated at work. Court records prove a frequent, co-existent nature between First Amendment and Fourteenth Amendment violation claims. Given the propensity for double constitutional violation claims, with the propensity for increased exposure to risk, school administrators should recognize this as an area where their leadership can serve to minimize organizational risk by simply following standard due process steps when dealing with the supervision, evaluation, discipline, and termination of employees. Collective bargaining agreements and board policies typically outline the steps to due process for which employees are owed.

While there is never a guaranteed outcome of employee grievances and/or litigation, avoiding the adverse effects of reckless to malicious compliance with the law, is good practice for school administrators for financial reasons and for organizational culture issues. Staff seek trusting relationships. They want to work in organizations where they feel valued and where they feel systems are fair and equitable. Effective school leadership includes administrative skill in facilitating this environment (formerly known as ISLLC Standards, 2015).

**Recommendation #7:** Academic freedom: follow the pathway of the courts. Academic freedom is reserved for teachers of higher education. Public elementary and secondary school curriculum is determined by local boards of education, and teachers do not have a protected right
to stray from the approved curriculum. Be proactive and avoid potential litigation by supervising teachers to teach the standards and objectives within the parameters of the locally-adopted curriculum.

**Recommendation #8:** Whistleblower protections: know where Garcetti ends and whistleblower protections begin. Administrators as fiduciary stewards of taxpayer resources, are typically bound by executive contracts with morality clauses. First and foremost, school administrators should fulfill the terms of their contracts, and avoid making decisions that will compromise the professionalism and integrity of employees or themselves. Administrators should avoid unethical behavior and/or the appearance of impropriety so that employees do not feel compelled to invoke protections under the state Whistleblower Act of Illinois (2004), the federal Whistleblower Protection Act of 1989 and the federal Whistleblower Protection Enhancement Act of 2012.

Whistleblowers are most typically addressing matters of public concern and are therefore eligible for First Amendment protection for their speech. Based on the analysis contained herein, the issue of pursuant to duty becomes wholly important to the outcome. These are topics that should be included in professional development for pre-service and in-service education professionals.

**Conclusion**

The theory behind this study was that there exists a consistent pattern of thought, established by federal courts and set forth as legal precedents, from which school administrators can craft their human resources and personnel decisions. In conclusion, this theory is founded. The evidence, as outlined in this dissertation, is the network of direct connections with relative court decisions, key points of law, and distinct personnel functions. As such, the final
recommendation from this study is for executive school administrators to approach human resources and personnel management duties in light of the sequence of Supreme Court decisions in public employment and First Amendment cases and apply their respective key legal points as specifically as possible. This is best practice for school administrators relative to the First Amendment rights of their employees and an effective strategy for avoiding unnecessary risk for the school district.
References


Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007).


Brown v. Chicago Board of Education, 824 F.3d 713 (7th Cir. 2016).

Casey v. West Las Vegas Independent School Dist., 473 F.3d 1323 (3d Cir. 2007).

Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).


Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014).


Nixon v. City and County of Denver, 784 F.3d 1364 (United States Court of Appeals, Tenth Circuit 2015).


Roth v. United States, 77 S.Ct. 1304 (1957).


The Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS §§ 10/1-101.1 (1965).


Thomas Reuters Westlaw. (n.d.). *Lane v. Franks*. Retrieved from https://1-next-westlaw-com.ezproxy.uis.edu/Document/I49ce0556f7b011e3b4bafa136b480ad2/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3c0000156d45eb528920ad5e9%3FNav%3DCASE%26fragmentIdentifier%3DI49ce0556f7b011e3b4bafa136b480ad2%26startIndex%3D1%26contextData%3D%2529%26transitionType%3DSearchItemType%26listSource%3DSearch%26listPageSource%3D2361286ab3bfe6aaf5844223ca3a22%26list%3DALL%26rank%3D1%26grading%3D%26sessionScopeId%3D2f07fdd3b979a875498d8d18c89f7d9c950dfc52587de588cac2ade6bc22ad%26originContext%3DSearch%20Result%26transitionType%3DSearchItemType%26contextData%3D%2529%26Search%29

Thomas Reuters Westlaw. (n.d.). *Waters v. Churchill*. Retrieved from https://1-next-westlaw-com.ezproxy.uis.edu/Document/1c312d1069c4f11d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad740150000156d2df761342e2225c3%3FNav%3DCASE%26fragmentIdentifier%3D1c312d1069c4f11d9bdd1cfdd544ca3a4%26startIndex%3D1%26contextData%3D%2529%26Search%29
Thomson Reuters Westlaw. (2006). Garcetti v. Ceballos. In *West Headnotes*. Retrieved from https://1.next-westlaw.com.ezproxy.uis.edu/Document/I9c9379a3ed7811daa223cd6b838f54f9/View/FullText.html?navigationPath=Search%2FV3%2Fsearch%2FResults%2FNavigation%2Fi0ad740130 00015686469906e7541b5%3FNav%3D%26transitionType%3DSearchItem%26listSource=Search%26listPageSource=Search%26list=ALL%26rank=1%26grading=na%26sessionScopeId=8b915b19 57af992c072803ce84fb02b84038cd68f46ca2eb8e083a766d5cd97&originationContext=Search%20Result%26transitionType=SearchItem%26contextData=%28sc.Search%29

Thomson Reuters Westlaw. (n.d.). *Connick v. Myers*. Retrieved from https://1.next-westlaw.com.ezproxy.uis.edu/Document/I1d1a06e29e9711d993e6d35cc61aab4a/View/FullText.html?navigationPath=Search%2FV3%2Fsearch%2FResults%2FNavigation%2Fi0ad740130 00015686469906e7541b5%3FNav%3D%26transitionType%3DSearchItem%26listSource=Search%26listPageSource=Search%26list=ALL%26rank=1%26grading=na%26sessionScopeId=9de42483ecf3a9a9e306c27f82176471d17ff66f007279af1f9a2680f73037&originationContext=Search%20Result%26transitionType=SearchItem%26contextData=%28sc.Search%29

Thomson Reuters Westlaw. (n.d.). *Garcetti v. Ceballos*. Retrieved from https://1.next-westlaw.com.ezproxy.uis.edu/Document/I9c9379a3ed7811daa223cd6b838f54f9/View/FullText.html?navigationPath=Search%2FV3%2Fsearch%2FResults%2FNavigation%2Fi0ad740130 00015686469906e7541b5%3FNav%3D%26transitionType%3DSearchItem%26listSource=Search%26listPageSource=Search%26list=ALL%26rank=1%26grading=na%26sessionScopeId=41816576b0f35b259ab06398993b24342529cb24975d2824a857bc571c0d6c0e&originationContext=Search%20Result%26transitionType=SearchItem%26contextData=%28sc.Search%29

Thomson Reuters Westlaw. (n.d.). *Garcetti v. Ceballos*. Retrieved from https://1.next-westlaw.com.ezproxy.uis.edu/Document/I9c9379a3ed7811daa223cd6b838f54f9/View/FullText.html?navigationPath=Search%2FV3%2Fsearch%2FResults%2FNavigation%2Fi0ad740130 00015686469906e7541b5%3FNav%3D%26transitionType%3DSearchItem%26listSource=Search%26listPageSource=Search%26list=ALL%26rank=1%26grading=na%26sessionScopeId=1cdeb324362a8092f44cc2a3e6269d7e3982b969074998b0e34c11daa7d711&originationContext=Search%20Result%26transitionType=SearchItem%26contextData=%28sc.Search%29

Thomson Reuters Westlaw. (n.d.). *Keyishian v. Board of Regents of University of State of New York*. Retrieved from https://1.next-westlaw.com.ezproxy.uis.edu/Document/Lb5bdcf5b9a10111d9bdc1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2FV3%2Fsearch%2FResults%2FNavigation%2Fi0ad740130 00015686469906e7541b5%3FNav%3D%26transitionType%3DSearchItem%26listSource=Search%26listPageSource=Search%26list=ALL%26rank=1%26grading=na%26sessionScopeId=1cdeb3242362a8092f44cc2a3e6269d7e3982b969074998b0e34c11daa7d711&originationContext=Search%20Result%26transitionType=SearchItem%26contextData=%28sc.Search%29
Thomson Reuters Westlaw. (n.d.). *Mayer v. Monroe County Community School Corporation*. Retrieved from https://1-next-westlaw-com.ezproxy.uis.edu/Document/I78474ce7ab9f12b9127cf4ccfc88547/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3a0000156aad8fa8660c994c%3FNav%3DCASE%26fragmentIdentifier%3DI78474ce7ab9f11db9127cf4ccfc88547%26startIndex%3D1%26contextData%3D%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=19df400d01204d7a19ed8fa9c8b5c0&list=ALL&rank=1&grading=na&sessionScopeId=4c094ff3b7729cd06d0aa97ece7f47b26e5e6e79ca84e25df05f6c355876e53e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29

Thomson Reuters Westlaw. (n.d.). *Mt. Healthy City School District Board of Education, Petitioner, v. Fred Doyle [West Headnote]*. Retrieved from https://1-next-westlaw-com.ezproxy.uis.edu/Document/Ic1d69dca9c1e11d991d0ccc6b54f12d4d/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad7052400001559af824d19bc43a03%3FNav%3DCASE%26fragmentIdentifier%3DIc1d69dca9c1e11d991d0ccc6b54f12d4d%26startIndex%3D1%26contextData%3D%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=19df400d01204d7a19ed8fa9c8b5c0&list=ALL&rank=1&grading=na&sessionScopeId=4c094ff3b7729cd06d0aa97ece7f47b26e5e6e79ca84e25df05f6c355876e53e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29


Thomson Reuters Westlaw. (n.d.). *Tinker v. Des Moines Independent Community School Dist.*. Retrieved from https://1-next-westlaw-com.ezproxy.uis.edu/Document/I236984929c1e11d9bd1c0d544ca3a4/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3e000015685ec6e1546435c9b3%3FNav%3DCASE%26fragmentIdentifier%3DI236984929c1e11d9bd1c0d544ca3a4%26startIndex%3D1%26contextData%3D%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=4b6b8ae1d73537f6a1be63c406c3f6e4&list=ALL&rank=2&grading=na&sessionScopeId=a84ff88616af88f1fd5cc7ec6031b7efa4bcb004de318bde69b3aca6d9cd844&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29


U.S. Const. amend. I.

U.S. Const. amend. XIV.

U.S. Const. art. I.

U.S. Const. art. I, § 1.

U.S. Const. art. II.

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U.S. Const. art. III.


Williams v. Trotwood Madison City Schools, 3 Justia US Law Doc. 12 (United States District Court Southern District of Ohio Western Division at Dayton 2016).
Appendix A

Relative Terms and Definitions

The following are terms and definitions relative to this study.

**Academic Freedom**

According to the Encyclopedia of the American Constitution, the courts have typically supported states determining instructional content in primary and secondary schools because “the state may have a viewpoint, that the state may teach this viewpoint to its students, and that the state may compel its voluntary employees to serve as its agents in this task” (Levy & Karst, 2007, p. 1137). To the contrary, at the college and university level, the higher education “doctrine” holds that “both the free speech rights of teachers and the First Amendment’s commitment to the university classroom as an important forum for the marketplace of ideas urge a moderately extensive amount of First Amendment-based judicial oversight” (Levy & Karst, 2007, p. 1137).

**Bill of Rights**

First ten Amendments to the U.S. Constitution providing for individual rights, freedoms, and protections (Black’s Law Dictionary, 1990, p. 168).

**Common Law** (also known as case law)

As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs, and, in this sense particularly the ancient unwritten law
of England. In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments (Black’s Law Dictionary, 1990, p. 276).

The Constitution

The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers (Black’s Law Dictionary, 1990, p. 311).

Constitutional Law

That branch of the public law of a nation or state which treats of the organization, powers and frame of government, the distribution of political and governmental authorities and functions, the fundamental principles which are to regulate the relations of government and citizen, and which prescribes generally the plan and method according to which the public affairs of the nation or state are to be administered. A constitutional law is one which is consonant to, and agrees with, the constitution; one which is not in violation of any provision of the constitution (Black’s Law Dictionary, 1990, p. 311).

Democracy

The form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from a monarchy, aristocracy, or oligarchy (Black’s Law Dictionary, 1990, p. 432).

Doctrine of Managements’ Rights

A managements’ rights provision is an agreement between the union and management “that certain issues are reserved solely to management” (Murray III, 2017, p. 65). It is a “waiver
by the union of the right to bargain over certain issues that would otherwise require bargaining during the life of the collective bargaining agreement” (Murray III, 2017, p. 65). Sometimes referred to as the *reserved rights clause* of a collective bargaining agreement.

Managements’ rights provide a useful metric for gauging the distinction between managerial rights as supervisors and representatives of the government and employee’s rights as citizens in the workplace.

**Eleventh Amendment**

The Amendment to the U.S. Constitution, which provides that the judicial power of the U.S. shall not extend to any suit in law or equity, commenced or prosecuted against, one of the United States by citizens of another state, or by citizens or subjects of any foreign state (Black’s Law Dictionary, 1990, p. 521).

**Fair Labor Standards Act of 1938, As Amended, 1938/2011(FLSA)**

A Federal Act which set a minimum standard wage (periodically increased by later statues) and a maximum work week of 40 hours in industries engaged in interstate commerce. Such Act also regulates hours of work, and type of work, that can be performed by teen-agers (Black’s Law Dictionary, 1990, p. 597).

**Fifth Amendment**

Amendment to the U.S. Constitution providing that no person shall be required to answer for a capital or otherwise infamous offense unless on indictment or presentment of a grand jury except in military cases; that no person will suffer double jeopardy; that no person will be compelled to be a witness against himself; that no person shall be deprived of life, liberty, or property without due process of law and that private property will not be taken for public use without just compensation (Black’s Law Dictionary, 1990, p. 627).
First Amendment

Amendment to the U.S. Constitution guaranteeing basic freedoms of speech, religion, press, and assembly and the right to petition the government for redress of grievances. The various freedoms and rights protected by the First Amendment have been held applicable to the states through the due process clause of the Fourteenth Amendment (Black’s Law Dictionary, 1990, p. 635).

Fourteenth Amendment

The Fourteenth Amendment of the U.S. Constitution, creates or at least recognizes for the first time a citizenship of the United States, as distinct from that of the states; forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the United States; and secures all “persons” against any state action which results in either deprivation of life, liberty, or property without due process of law, or, in denial of the equal protection of the laws. This Amendment also contains provisions concerning the apportionment of representatives in Congress (Black’s Law Dictionary, 1990, p. 657).

Freedom of Speech

The right, as guaranteed by the First Amendment, to express beliefs and ideas without unwarranted government restriction. (Gale Encyclopedia of American Law, 2011, p. 103).

Government Speech

Most commonly, this variety of question about the coverage the First Amendment comes up in the context of government employment. As with the other examples, one side of the argument maintains that no one is obliged to take government employment, and that for the state to restrict the speech of its employees, especially when they are in the very process of doing their job (as with teachers while actually teaching), is an inevitable part of the employer–employee
relationship, and no part of the concept of freedom of speech. But on the other side is once again the argument against viewpoint-based restrictions, holding that it is one thing to tell a teacher that he or she must teach history and not mathematics (a much more permissible subject-matter distinction), and quite another, and one with serious First Amendment implications, to tell a teacher that he or she must teach one view of how to interpret a particular historical event to the exclusion of another. See *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991).

**Public Employee/Official**

Means an individual employed by a public agency, including the Government of the United States; as a civilian in the military departments; in any executive agency; in any unit of the judicial branch of the Government which has positions in the competitive service; in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces; in the Library of Congress; or the Government Printing Office; by the United States Postal Service or the Postal Regulatory Commission; and by a State, political subdivision of a State, or an interstate governmental agency” (Fair Labor Standards Act of 1938, As Amended, 1938/2011).

Black’s Online Law Dictionary defines an employee simply as any individual employed by an employer” and further states that employee means a person in the “service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.” (Black, Nolan, & Nolan-Haley, 1990, p. 525)

**Public Employer**

Includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such
labor organization. Section 203 of the Fair Labor Standards Act (FLSA) defines employer, in part, as “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency” (Fair Labor Standards Act of 1938, As Amended, 1938/2011).

**Qualified Immunity**

Affirmative defense which shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which reasonable personal would have known (Black’s Law Dictionary, 1990, p. 752).

**Sovereign Immunity**

The legal protection that prevents a sovereign state or person from being sued without consent. (Dictionary of Legal Terms: Gale Encyclopedia of American Law, 2011, p. 206).

**Sovereignty**

The supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference (Dictionary of Legal Terms: Gale Encyclopedia of American Law, 2011, p. 206-207).

**State**

Means any State of the United States or the District of Columbia or any Territory or possession of the United States.

**Unconstitutional-conditions Doctrine**

This is a rule which prohibits the government from conditioning “a person’s receipt of a governmental benefit on the waiver of a constitutionally protected right” (US Legal, n.d., p. 1).
Whistleblower Protections

Statutes contain anti-retaliation provisions which prohibits employers from taking adverse employment action, including discharge, against an employee because the employee has filed a complaint or exercised any rights provided to the employee.


The Supreme Court has held that local governments can be sued directly under this statute for monetary, declaratory, or injunctive relief where “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers (Black’s Law Dictionary, 1990, p. 752). The law allows civil action for the deprivation of those rights secured by the Constitution and laws, and further allows liability assignment to the party causing injury, except in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity (Civil Rights Act, 1871).

The statutory vehicle to file a civil claim in federal court for the deprivation of Constitutional rights. § 1983 states

that (e)very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.