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Silence or Noise?: The Future of Public Employees Free Speech Rights and the United States Supreme Court's Jurisprudence on the Scope of the Right

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I. Introduction: Public Employees Do Not Automatically Surrender their First Amendment Rights

A broad interpretation of the right to free speech has been and continues to be, an important and distinctive part of American political culture.[1] The language of the First Amendment attempts to be clear and concise: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[2] While the language of the Amendment appears unambiguous, the United States Supreme Court has nevertheless grappled with numerous constitutional questions on the breadth of the Amendment.[3] The Court has been forced to balance the importance of protecting free speech, with ensuring that some limits on hateful, hurtful, or potentially dangerous speech exist.[4] Through a complex line of case law, different lines of jurisprudence have been established.[5]

Though the amendment does not reference differing categories of speech or separate levels of protection for different categories of citizens, the United States Supreme Court has done so through its jurisprudence.[6] Under this jurisprudence the free speech rights of public employees have

1. *See* JUHANI RUDANKO, DISCOURSE OF FREEDOM OF SPEECH: FROM THE ENACTMENT OF THE BILL OF RIGHTS TO THE SEDITION ACT OF 1918 1(2012) (explaining the First Amendment and the right to freedom of speech guaranteed within the amendment's text).

2. U.S. CONST. amend. I.

3. *See* RUDANKO, *supra* note 1, at 1(explaining the difficulty in defining the scope of free speech rights in the United States).

4. *Id*.

5. *See id*. (describing the complex body of case law that has developed around the right to free speech).

6. *Id*. at 2.

been limited.[7] While it has been established that free speech rights for public employees are different from the rights guaranteed to private employees, many legal scholars are still pushing for more clarity on the scope of the rights given to public employees.[8] Over two hundred years after the passage of the First Amendment, the United States Supreme Court is still grappling with the outermost limits and corners of the free speech rights of public employees.[9]

While courts have been wrestling with the scope of public employee rights within the context of free speech issues since the passage of the Bill of Rights, much of the current jurisprudence has developed over the last century.[10] Specifically, over the course of the last fifty years the United States Supreme Court has developed a complex system for analyzing cases in which the primary legal issue in the case is related to the free speech right of a public employee.[11] While the number of cases centering around this issue decided by the Supreme Court has been numerous, many legal scholars argue that the Court has failed to articulate a clear test for the outer limits of the right to free speech for public employees.[12]

Within the classification of speech made by public employees lies the more nuanced issue of what level of free speech protection a public employee making a truthful sworn statement has and what defenses such employee possesses against any retaliatory action by his or her public employer.[13] When the United States Supreme Court finally decides to tackle this question, the Court will probably rule that public employees testifying under oath, specifically those employees that can be characterized as

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7. *Id*.

8. *Id*.

9. *See id*. at 1 (discussing how the jurisprudence related to the First Amendment is constantly changing and evolving).

10. *See* Kary Love, *Free Speech Rights of Public Employees*, MICH. B. L.J. 28, 29 (2005) (explaining that following the passage of the Bill of Rights the free speech rights of public employees has been an issue that has come before the Supreme Court numerous times).

11. *See id*. (discussing the jurisprudence developed by the Court on this issue throughout the past fifty years).

12. *Id*.

13. *See* Beai Boughamer, *SEIU's Henry Comments On Supreme Court's Ruling in* Lane v. Franks, SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC (June 19, 2014, 3:56 PM), http://www.seiu.org/2014/06/seius-henry-comments-on-supreme-court-ruling-in-la ("It is unfortunate that the Supreme Court didn't . . . establish a clear rule that truthful sworn testimony by public service workers should never be the basis for any retaliatory action by a public employer.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

whistleblowers, are protected by guarantee of free speech that lies within the text of the First Amendment of the United States Constitution.

In July 2014 the Court announced its opinion in *Lane v. Franks*,[14] a case many legal scholars and employment lawyers alike were hoping would help to clear the blurred line which has become the speech rights of the public employees testifying under oath.[15] Writing for the Court, Justice Sotomayor stated in her majority opinion that:

> the 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."[16]

> By citing to the landmark public employee free speech case of *Pickering v. Board of Education*, [17] Justice Sotomayor and the rest of the unanimous Court indicated that the Court would take a step back from the formalistic analysis of the issue that pervaded its jurisprudence less than ten years prior in *Garcetti v. Ceballos*.[18] Later in this note, both *Pickering* and *Garcetti* will be explored more thoroughly. Both cases are important precedent within public employee free speech jurisprudence.[19]

A. Defining Public Employee Free Speech

There are over twenty million Americans employed by state governments and the federal government in some capacity.[20] Among the

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14. Lane v. Franks, 134 S. Ct. 2369 (2014).

15. *See* Marty Lederman, *Commentary: The fundamental constitutional principle is not discussed in* Lane v. Franks, SCOTUS BLOG, (June 20, 2014, 2:53 PM), http://www.scotusblog.com/2014/06/commentary-the-fundamental-constitutional-principle-not-discussed-in-lane-v-franks/ (discussing how the ruling in the *Lane* decision fell short of what many legal scholars were hoping for the case to produce).

16. *Lane*, 134 S. Ct. at 2374 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

17. *See generally* Pickering v. Bd. Of Educ., 391 U.S. 563 (1968).

18. *See* Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (holding 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).

19. *Id*.

20. *See* U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, at 330 (tbl. 525) (120 ed. 2000), https://www.census.gov/prod/2001pubs/statab/sec09.pdf (describing the number of government employees and the various classifications of government employees as of the year 2000) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

twenty million individual employees exist many different classifications of public employees.[21] Classifications for public employees include layers of distinction such as federal and state, and are even further broken down into local, but they can also be categorized further by type of career.[22]

Because there is broad range of speech related matters for which public employees can be disciplined, the Court has been presented with several opportunities to rule on the Constitutionality of such punishments under the First Amendment guarantee of free speech.[23] In some cases the Court has drawn bright line rules which stand as well established precedent within free speech jurisprudence.[24] For example, one form of speech, which has been deemed punishable by federal courts, includes the act of a public employee uttering a racial slur at a dinner party.[25] There are many other instances in which courts have ruled that public employee free speech can be limited.[26] Another such example of a case where a court ruled in favor of the government punishing an a public employee for speech was a case in which public employees complained that a police helicopter was not being properly operated, which lead to mass chaos.[27] Five officers of the Tucson police department explained their concerns regarding the safety of police helicopters to other police employees and they were retaliated against for their speech.[28] Additionally, it is well established that public employees must remove all religious symbols from government issued uniforms.[29] While there are many examples of the government limiting the speech of public employees, public employees do retain some degree of free speech rights under the First Amendment.[30]

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21. *Id*.

22. *Id*.

23. *Id*.

24. *Id*.

25. *See* Victor v. McElveen, 150 F.3d 451 (5th Cir. 1998) (uttering a racial slur at a dinner party was ruled unconstitutional by the 5th Circuit Court of Appeals).

26. *Id*.

27. *See* Clark v. City of Tucson, No. 98-17082, 2000 U.S. App. LEXIS 23326 (9th Cir. Feb. 15, 2000) (ruling that plaintiffs raised triable issues of fact when they alleged they were retaliated against for raising safety and mismanagement concerns about the unite in which they worked).

28. *Id*. at *2.

29. *See* Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (ruling that denying a Jewish Air Force officer the right to wear a yarmulke when in uniform was not a violation of the officer's First Amendment rights).

30. *See* Pickering v. Bd. Of Educ., 391 U.S. 563, 574 (citing Garrison v. Louisiana, 379 U.S. 64, 85 (1964)) ("This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First

B. The Role of Public Employees in Promoting Efficiency in Government

In the United States, one of the primary functions of the government is the provision of efficient services to its citizens.[31] In order for the government to successfully act efficiently the government needs to set some boundaries to regulate its employees' conduct.[32] The government is bound to make sure it is able to carry out its duties in an efficient manner, while also ensuring that it complies with the Constitution of the United States.[33]

C. A General Historical Look at the Right to Free Speech in America

The First Amendment was drafted and then passed very quickly after the signing of the Constitution itself.[34] The First Amendment is an example of the fundamental rights that the government grants its citizens.[35] Specifically, the First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[36] While it is well established that the First Amendment guarantees the right to free speech, through a complex line of case law, different lines of jurisprudence have been established.[37]

Amendment protection despite the fact that the statements are directed at their nominal superiors.").

31. *See* Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 296–97 (2000) (analyzing the factors the court looks at when deciding whether to restrict speech).

32. *Id*.

33. *Id*.; *see also* John T. Harvey, *Why the Government Should Not be Run Like a Business*, FORBES, (Oct. 5, 2012, 2:20 PM), http://www.forbes.com/sites/johntharvey/2012/10/05/government-vs-business/#42406d042685

34. *See Bill of Rights (1791)*, THE OUR DOCUMENTS INITIATIVE, (last visited Nov. 21, 2015) http://www.ourdocuments.gov/doc.php?flash=true&doc=13 (explaining the history of the Bill of Rights and the debates that surrounded the ratification of the first ten amendments of the Constitution) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

35. *See First Amendment Timeline*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/first-amendment-timeline (last visited Nov. 17, 2015) (explaining the founders' purpose in drafting and then passing the First Amendment of the Constitution) (on file with the Washington & Lee Journal of Civil Rights and Social Justice).

36. *See* U.S. CONST. amend. I (quoting the rights given to the citizens of the United States through the First Amendment).

37. *See generally* Joseph Blocher, *Nonsense and the Freedom of Speech: What*

One such limit derives from the fact that, because it is restricted to governmental action, the First Amendment applies to public but not private employees.[38] For example, under the First Amendment a private employer can discipline an employee with far more autonomy than the government.[39] While the government lacks significant power to discipline employees in ways that private employers might, the government has far greater authority than private employers to regulate the speech of its employees.[40] Courts demonstrate that, when asked to determine whether employee speech was disruptive or subversive to the government employer's interest in maintaining an efficient workplace, employees may lose their case against the government.[41]

As previously mentioned, the Supreme Court has created a distinct section of First Amendment jurisprudence for cases arising out of free speech cases involving public employees.[42] The free speech rules that apply to citizens outside the workplace, as well as some of the rules that apply within the private sector, have little or no relevance to public employees.[43] The government has the power to regulate the speech of its employees and government discipline for employee speech can take many forms.[44] Employees found by the Court to undermine the integrity of their office or agency are subject to a range of punishments.[45] Some examples of punishments the government may impose on an employee for speech violation are transferring the individual to a different department or

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Meaning Means for the First Amendment, 63 DUKE L. J. 1423 (explaining the Court's outer limits on the scope of the Freedom of Speech guaranteed under the First Amendment).

38. *See generally First Amendment Timeline*, *supra* note 35 (explaining the limited scope of the First Amendment).

39. *See* David L Husdon Jr., *Balancing Act: Public Employees and Free Speech*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/madison/wp-content/uploads /2011/03/FirstReport.PublicEmployees.pdf (explaining the narrow power to regulate employees enjoyed by private employers).

40. *See id*. (explaining that there is a large gap between the areas of speech that private employers have the right to regulate when compared to the right to regulate employee speech granted to the government).

41. *See id*. (explaining the likely outcome when the balancing test articulated in *Pickering* is applied to a case).

42. *See id*. (noting that public employees and private employees are treated differently under the First Amendment).

43. *Id*.

44. *See generally* Husdon, *supra* note 39 (discussing how many government supervisors have the power to implement a variety of different kinds of regulations and limits on the speech of government employees).

45. *Id*.

location, a demotion, or in some extreme cases a discharge from governmental employment.[46] When speech by a government employee includes information that may be useful to the public or is not meant to be merely critical but rather an analysis of a situation, the government is limited in its power to regulate the speech.[47] The Court has coined the phrase, matter of "public concern" for the speech issue in such cases.[48]

II. History of Court's Jurisprudence in Public Employee Free Speech

Courts in employee free speech cases are tasked with balancing the competing interest of the government agency or department acting as the employer and the interests of the individual employee.[49] The balancing of these two interests is a product of decades of First Amendment jurisprudence spanning multiple Courts.[50] The Court has not always engaged in such a balancing test.[51] In fact, while the Supreme Court acknowledges that the government as an employer must protect and greatly values business efficiency,[52] it has also expressed the view that "the threat of dismissal of public employment is a potent means of inhibiting speech."[53] Thus, in the beginning of the free speech-public employee jurisprudence the Court deferred to the employers.[54] One justification the Court gave for this deference was the reasoning that employees were free to

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46. *See id*. (exploring the types of actions that can come out of a disciplinary action for speaking out against the government when the perpetrator is a government employee).

47. *See id*. (explaining that the Court has identified that in cases where his or her speech circulates around a matter of public concern the government is much more limited in the way in which it can regulate the speech of an employee).

48. *Id*.

49. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (deciding that when an issue arises under free speech for public employees, a balancing test should be applied to determine whether the government has the power to regulate or if free speech has been violated).

50. *Id*.

51. *See Free Speech Rights of Public Employees*, UNIVERSITY OF MISSOURI—KANSAS CITY SCHOOL OF LAW, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/public employees.htm (last visited Nov. 17, 2015) (highlighting that free speech jurisprudence is not a new topic but rather is a topic that has been debated almost since the Supreme Court's inception) (on file with Washington & Lee Journal of Civil Rights and Social Justice).

52. *See generally First Amendment Timeline*, *supra* note 35 (explaining the founders' purpose in drafting and then passing the First Amendment of the Constitution).

53. *Pickering*, 391 U.S. at 574 (1968).

54. *See generally* Husdon, *supra* note 39 (discussing the outcome in many of the early cases of public employee free speech cases).

leave their jobs if they did not agree with their employer or were dissatisfied with their working conditions.[55] In reaching that decision, the Court followed the reasoning of Justice Oliver Wendell Holmes who, as a member of the Massachusetts high court, wrote that while a police officer "may have a constitutional right to talk politics, . . . he has no constitutional right to be a policeman."[56]

A. The Beginning of the Journey: Free Speech and the Sedition Act

The Court's jurisprudence on the right to free speech now spans centuries.[57] During the debates over the substance of the Bill of Rights two distinct and contrasting approaches to the freedom of speech emerged in young America.[58] The Republicans fought for a sweeping power of free speech and sought to keep free speech unhindered by federal legislation.[59] On the opposite side of the aisle, the Federalists wanted to secure "genuine" free speech.[60] By allowing for genuine speech to be free but placing limits on types of speech that were not deemed genuine, such as limits on the freedom of discussion particularly as it related to criticism of the government and the nation's leaders.[61] Challenges to the limits and outright bans on speech came about within politics within years of the First Amendment's ratification.[62]

B. Taking a Categorical Approach: Public Employee Free Speech

Through this deep-rooted jurisprudence a number separate areas of free speech have emerged.[63] Not all categories of speech receive equal

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55. *See id*. (explaining why early courts were quick to defer to the public employees in cases related to free speech issues).

56. McAuliffe v. New Bedford, 155 Mass. 216, 220 (1892).

57. *See* RUDANKO, *supra* note 1, at 1 (explaining the difficulty in defining the scope of free speech rights in the United States).

58. *Id*.

59. *Id*. at 54.

60. *Id*.

61. *Id*. at 67.

62. *Free Speech Rights of Public Employees*, *supra* note 51.

63. *See generally* RUDANKO, *supra* note 1 (explaining that through a high volume of cases the Court has divided free speech cases into a number of different categories).

treatment.[64] For example, hate speech as well as political speech are analyzed under strict scrutiny, the most burdensome test given by the court.[65] Employee speech is another category of speech itself. Within the umbrella category of employee speech lie other subcategories.[66] Public employee free speech is one such category.[67]

Public employee free speech has its own jurisprudence and throughout history there have been a number of different definable eras within the subcategory of public employee free speech.[68] The four major eras can be identified through examining the decisions of the Court and looking at the factors the Court considered and analyzed that eventually lead to the decision and ultimate outcome of the case.[69] The four eras in the order in which they emerged can be described as the Era of Categorical Denial, the Era of Recognition: Undefined Scope, the Era of Balancing: Scope and the era of OE < MPC Speech.[70]

The Era of Categorical Denial lasted from the ratification of the Constitution until 1952.[71] During this era, a citizen who was not employed by the government had the benefit of all the rights under the First Amendment's Free Speech Clause.[72] In contrast, government employees received diminished free speech protections based on their employment. Limits were placed on the types of speech allowed both in and out of the workplace environment.[73] Under this rationale, public employers were free to place nearly any type of limitation on the conditions of the employment for their employees.[74] The justification used by the Court for this outcome

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64. *Id*.

65. *See id*. (describing how hate speech and political speech are treated when a dealing with such an issue is brought before the Court).

66. *See id*. (explaining how the broad category of employee speech can be further broken down into smaller subcategories).

67. *See id*. (explaining that public employee is a sub-category of free speech).

68. *See* Joseph O. Oluwole, *Eras in Public Employment-Free Speech Jurisprudence*, 32 VT. L. REV. 317, 319 (2007) (noting that even within the subcategory of free speech there are distinct and identifiable eras).

69. *See id*.at 323 (observing that there are four distinct eras).

70. *See id*. (stating the eras that exist within the subcategory of public employee free speech jurisprudence).

71. *See id*. (explaining when the Era of Categorical Denial began).

72. *See* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952), *overruled in part by* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) (rejecting the notion that public employment may be denied unconditionally).

73. *See id*. (explaining the unique relationship that forms when a citizen becomes a public employee).

74. *See id*. (explaining the freedom public employers have to place limits on the

was that public employment was a privilege not a right; therefore, public employees were extremely limited in their rights.[75]

The case of *Wieman v. Updegraff* in 1952, ended the Era of Categorical Denial and marked the beginning of the Era of Recognition: Undefined Scope.[76] The decision in *Wieman* marked a departure from the unbridled power of public employers to limit First Amendment Rights as a condition of employment.[77] The issue in *Wieman* centered on an Oklahoma statute that required public employees to swear loyalty oaths within a statutorily defined period as a qualification for employment.[78] Employees who failed to take the oath were not eligible to renew their employment with the state.[79]

The Court ruled that if the retaliation against a public employee was patently arbitrary or discriminatory, it would be unconstitutional.[80] The burden of persuasion to prove the employer's acts were patently arbitrary or discriminatory was held to be on the employee.[81] The Court during this time period overturned many similar statutes that dealt with freedom of association issues for public employees.[82] One major shift in legal thinking that occurred during this era was a change in how the Court viewed public employment.[83] In the previous era the Court saw public employment as a privilege, but the Court during the Era of Recognition moved away from

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speech of their employees).

75. *See id*. (justifying the outcome of many cases during this era that appeared to favor the government rather than the employees).

76. *See* Oluwole, *supra* note 68, at 325 (explaining how the case of *Wieman v. Updegraff* marked the end of the Era of Categorical Denial and marked the beginning of the Era of Recognition: Undefined Scope).

77. *See* Wieman v. Updegraff, 344 U.S. 183, 184–85, 191 (1952) (holding that the loyalty oath required by the State of Oklahoma as a prerequisite to employment violated due process).

78. *Id*.

79. *Id*.

80. *See* Oluwole, *supra* note 68, at 325 (describing the holding of *Wieman*, ruling that patently arbitrary or discriminatory action against a government employee should be ruled unconstitutional).

81. *See id*. (explaining that while this was a large step towards more speech rights for public employees, the burden of proof to show that the decision was discriminatory or arbitrary was the responsibility of the employees).

82. *See id*. (showing that the *Wieman* case was the first of many cases during this era to allow for freedom of association).

83. *See id*. (highlighting that in light of many decisions that seemed to be positive for public employees the Court's perspective on public employment appeared to have shifted).

this perspective and towards the notion that public employees had to some right to speak.[84]

While the Court moved towards recognizing that public employees had a right to free speech, the Court failed to examine the extent or scope of such right[85] before the reasoning drastically changed during the latter part of the twentieth century.[86] The Court's view on public employees' rights eventually evolved and, as a result, today public employees possess far greater First Amendment rights.[87] Under both state and federal laws, whistleblowers—employees who call attention to workplace waste or corruption—are protected from discipline.[88] While much progress has been made within this jurisprudence in recognizing the free speech rights to which public employees are entitled, courts remain reluctant to treat more mundane, day-to-day matters within employment as issues of constitutional law.[89] One reason why courts might be hesitant in this regard is a general disinclination to expand judicial power to act as a "super" officer in different agencies through oversight of the day-to-day actions of all employees.[90] As a result, the Court awards some degree of deference to public employers.[91]

The issue of fault when a public employee faces discipline or another form of retaliation or job loss because of their speech has developed into a complex body of law and jurisprudence.[92] There are three general

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84. *See id*. at 328 (shifting the Court away from viewing public employment as a privilege and recognizing that some free speech rights exist under the First Amendment for public employees).

85. *Id*.

86. *See generally* O'Neill, *supra* note 31 (explaining that the shift that started during this era continued onward and free speech rights during the latter half of the twentieth century for public employees continued to extend).

87. *See generally* Husdon, *supra* note 39 (explaining that public employees today enjoy more free speech rights than they have since the ratification of the First Amendment).

88. *See id*. (discussing the importance of giving whistleblowers a special status under free speech).

89. *See id*. (noting that the Court has been more expansive to grant free speech rights to employees when the speech falls outside of the scope of public employment).

90. *See id*. (explaining that the Court itself does not see itself as the ultimate superior to all public workers rather, the Court is aware that there are structures for management of employees within the government and the importance of superiors have some level of control over their employee).

91. *Id*.

92. *See generally* Husdon, *supra* note 39 (explaining when a public employee speaks and a superior takes retaliatory action against the employee, the employee may in some cases be protected through whistleblowing statutes).

categories into which such claims fall.[93] The first category is when a public employee is fired because of speech or expressive conduct that the employer claims is disruptive to efficient operation of the workplace.[94] The second category arises when a public employee contends that they have suffered an adverse employment action such as dismissal or demotion in retaliation for protected speech.[95] The third and final category is when a public employee is fired because of their political affiliation. In most cases, this last category relates to instances in which the employee belongs to a different political party than his or her boss.[96]

III. Modern Cases of Public Employee Free Speech

A. Keyishain v. Board of Regents

One of the first modern cases in which the Court granted public employees greater First Amendment protection was in the 1967 case of *Keyishain v. Board of Regents*.[97] The case involved the constitutionality of a New York state law that extended the state's loyalty-oath requirement to state college and university employees.[98] One of the law's provisions allowed for the dismissal of state public school employees who spoke "treasonable" or "seditious" words. Another provision banned employment of individuals who advocated or taught to overthrow the government.[99] In an opinion written by Justice Brennan, the court found the language of the New York law overly broad. [100] Justice Brennan asked whether "the teacher who informs his class about the precepts of Marxism or the Declaration of

93. *See id*. (defining the three categories that speech leading to retaliatory action can fall into).

94. *See id*. (defining disruptive speech within the workplace).

95. *See id*. (discussing a circumstance that potentially could arise causing the speech to be protected and the employer to be disciplined for the retaliatory action against the employee).

96. *See id*. (highlighting the high bar set by the Court for matters relating to political speech. The Court has time and time again ruled about the importance of political speech and the need to protect such speech).

97. *See* Keyishian v. Bd. of Regents, 345 F.2d 236, 239 (2d Cir. 1965) (explaining the importance of the case in public free speech jurisprudence).

98. *See id*. (explaining the facts of the case and the issue that arose out of New York state law that had extended the state's loyalty-oath requirement to state colleges and universities).

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

100. *Id*.

Independence violate[s] this prohibition [and suggested that] . . . the theory that public employment which may be denied altogether may be subjected to any condition, regardless of how unreasonable[,] has been uniformly rejected."[101] Thus, the Court acknowledged the need to limit government regulation of employee speech.[102]

B. Pickering v. Board of Education

During the Era of Balancing: Scope the Court shifted its focus to defining the scope of employee free speech rights.[103] This era brought about the landmark case of *Pickering v. Board of Education*.[104] The case examined a set of facts that involved public employee publicly criticizing his employer.[105] The case had its roots in a high school in Will County, Illinois.[106] Marvin L. Pickering was a high school teacher.[107] He wrote a letter to the editor of a the local newspaper criticizing the board of education and the superintendent of the school district in which he taught.[108] The letter criticized the administrators' proportional allocation of funds to the schools' educational and athletic programs.[109] In his letter Pickering wrote, "[t]hat's the kind of totalitarianism teachers live in at the high school, and your children go to school in," and "I must sign letter as a citizen, taxpayer, voter, not as a teacher, since that freedom has been taken from the teachers by the administration." Pickering's letter then continued, and he warned the newspaper's readers that they would not want to know what went on behind the closed doors of the school.[110] Overall the letter underscored the fact that as a teacher Pickering was forced to give up his free speech rights and had been silenced because of his employment.[111] The

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101. *Id*. at 600–06.

102. *Id*.

103. *See* Oluwole, *supra* note 68, at 325 (explaining how during this era of public free speech jurisprudence the Court was focused on defining the scope of free speech rights for public employees).

104. *See id*.

105. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (explaining the facts of the case involving a public employee criticizing an employer).

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*.

110. Pickering v. Bd. of Educ. 391 U.S. 563, 574 (1968)

111. *Id*.

board of education said that the letter was "detrimental to the efficient operation and administration of the schools of the district" and thus the board took action and fired Pickering.[112] He then sued on First Amendment grounds, and when the case came before the Court the nine Justices were tasked with balancing the employee's right of free speech with the employer's interest in efficiency.[113]

When the Court reached a decision in the *Pickering* case, the court declined to set a "general standard" in regards to what comment by a public employee would be allowed but it did offer a test by which courts could analyze a way to balance the interests in a similar case.[114] Important to the outcome of the case were the distinguishing facts that the comments in the letter were not directed at anyone within the school district that Pickering worked with on a daily basis as well as the fact that the letter did not interfere with his teaching or the daily operation of the high school in which he taught.[115] The Court also emphasized that the subject of the letter was a matter of public importance.[116] Many legal scholars now point out that on its face the *Pickering* case was not difficult due to the fact that, the teacher's speech was in the form of a letter to the editor of a local newspaper and did not involve personal attacks on supervisors or coworkers.[117]

The last era of public employee speech, titled Era of OE > MPC Speech refers to specific elements of the *Pickering* balancing test.[118] The "OE" refers to operation efficiency, and "MPC" refers to the employee's interest in speech on matters of public concern.[119] The greater than sign refers to Court's tendency during this era to favor employers.[120] Thus,

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112. *Id*.

113. *Id*.

114. *See id*. (explaining how the Court was reluctant to develop a bright line rule in this case, but did develop a balancing test).

115. *See id*. at 574 (explaining how the Court found it factually significant that the letter was not directed at anyone Pickering interacted with on a daily basis and did not interfere with his ability to do his job).

116. *See id*. (classifying the contents of the letter, the speech in the case, to address a matter of public importance, important to the outcome of the case).

117. *See* Husdon, *supra* note 39, at 14 (noting that the facts of the case made the case easy to apply the balancing test to).

118. *See generally* Oluwole, *supra* note 68 (explaining "OE" refers to operation efficiency, and "MPC" refers to the employee's interest in speech on matters of public concern).

119. *Id*.

120. *Id*.

beginning in 1977 a trend emerged in cases before the Court to give greater weight to operational efficiency under the balancing test relative to employee interest in speech on matters of public concern.[121] The first and the last era focuses on protection for public employees who are retaliated against for whistleblowing and the Era of Categorical Denial as well as the Era of OE > MPC focused on operational efficiency.[122] In the years since *Pickering* the court has regressed to the Era of Categorical Denial, *Lane* however could be a sign of a turn.[123] The *Pickering* test provided the Court with a large amount of judicial discretion in interpretation and application, can therefore be used to limit speech, not only uphold the freedom to speak.[124] Elements of the *Pickering* balancing test include: Did the individual demonstrate that his or her speech addressed a significant or motivating factor in the employer's decision?;[125] Did the individual demonstrate that his or her speech was a significant or motivating factor in the employer's decision?; Did the court balance the interest of the individual commenting on matter of public concern as a citizen and the public employer's interest in "promoting the efficiency of public service?"[126] The Court then distinguished the *Pickering* test in *Garcetti v. Ceballos*.[127] The court in *Garcetti* denied First Amendment protection to a public employee who had blown the whistle on police misconduct.[128]

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121. *See id*. (explaining how beginning in 1977 there was a trend in Court decisions to give a greater amount of weight to operational efficiency under the *Pickering* balancing test especially on matters of public concern).

122. *Id*.

123. *See id*. (explaining that in cases that have come in the modern era the Court has regressed from the large amount of public employee free speech that it advocated for in *Pickering*, however the July 2014 decision of *Lane* may be a step towards approaching *Pickering* in a different way yet again).

124. *See id*. (discussing that the *Pickering* test can be applied a number of different ways that can reach different outcomes).

125. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968) (explaining the distinct elements courts are to consider when deciding if speech by a public employee should be protected).

126. *Id*.

127. *See* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (distinguishing the test established in the *Pickering* opinion).

128. *Id*.

C. Garcetti v. Ceballos

It is also important to note that the *Garcetti* case came nearly fifty years after *Pickering* was decided by the court.[129] The case involved a deputy district attorney, Richard Ceballos who objected to misstatements that were made in an affidavit for a search warrant.[130] When Ceballos brought his concerns to his supervisors at the District Attorney's office they ignored his objections and elected to proceed with the case.[131] Ceballos then spoke to the defense attorney in the case who subpoenaed Ceballos to testify.[132] Upon learning that Ceballos contacted the defense attorney, his supervisors at the District Attorney's office retaliated.[133] Specifically, he was denied a promotion and was transferred to a distant location.[134] After the retaliation by his employer, Ceballos sued.[135] A federal court heard the case and Ceballos lost; he then appealed to the Ninth Circuit and won.[136] On appeal, the U.S. Supreme Court reversed the Ninth Circuit and concluded public employees are not protected when the speech occurred in the context of their official duties."[137]

While some claim that *Garcetti* distinguished *Pickering*, Justice Kennedy argued the opposite in his majority opinion and instead asserted that the Court in fact relied on *Pickering*.[138] That majority opinion took a very formalistic approach to the issue[139] and explained that, "when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution

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129. *See* Husdon, *supra* note 39, at 29 (explaining the timing of the *Garcetti* in comparison to *Pickering*).

130. *See Garcetti*, 547 U.S. at 415 (2006) (citing the facts surrounding the public free speech issue in the case).

131. *Id*.

132. *Id*.

133. *Id*.

134. *See id*. (explaining the action taken against *Garcetti* as a result of his speech).

135. *See id*. at 419 (explaining the procedural posture of the *Garcetti* case and the way in which the Ninth Circuit ruled that public employees are not protected when speech at issue occurred within the context of their official duties as an employee).

136. *See id*. at 418 (explaining the ways in which the ruling in *Garcetti*, distinguished the test established in the *Pickering* case).

137. *See id* (noting that in his opinion Kennedy did not overturn the decision reached fifty years earlier in *Pickering*, but rather distinguished the precedent).

138. *Id*.

139. *See id*. (highlighting that the opinion in the case written by Justice Kennedy was very formalistic in its approach).

does not insulate their communications from employer discipline."[140] The opinion's formalistic approach was seen by many as a step backwards for free speech rights of public employees due to the fact that, prior to that case, the Court had been seeming to expand such rights.[141]

In the Court's most recent free speech by a public employee case, *Lane v. Franks*, decided in July of 2014, the Court narrowed the holding in *Garcetti* by ruling that the test established in *Garcetti* is limited in application to cases where the speech is part of the public employee's job.[142] Sotomayor, writing for the majority, stated that "[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim."[143] The unanimous opinion in *Lane*, however, does not address whether the First Amendment should protect truthful testimony of a public employee when the testimony is part of the employee's job responsibilities.[144] This is an extremely important question that many First Amendment and employment law scholars have raised as an essential question for the Court to answer. If and when the Court is squarely presented with this question, it should hold that the First Amendment protects speech by public employees testifying under oath when the testimony is related to the employee's job duties. There are a number of factors that the Court could point to in support of such a ruling. First, such a ruling would be consistent with precedent. Secondly, a decision protecting public employees is good for American business and the economy. Third and finally, ruling in this way would uphold the morals and ideals upon which the United States was founded.

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140. *Id*. at 427–28.

141. *See id*. (highlighting that the test applied to the facts of the *Garcetti* case is limited to cases in which the speech was part of the public employees job duties).

142. *See* Scott Oswald, *New Ways To Separate Employee Speech From Citizen Speech*, LAW 360 (June 19, 2014, 8:37 PM), http://www.law360.com/articles/549799/new-ways-to-separate-employee-speech-from-citizen-speech (explaining the way in which the rationale used to reach an outcome in the recent case, *Lane* differed from the rationale in *Garcetti*).

143. Lane v. Franks, 134 S. Ct. 2369, 2380 (2014).

144. *See generally* Oswald, *supra* note 142 (explaining the way in which the rationale used to reach an outcome in the recent case, *Lane* differed from the rationale in *Garcetti*).

IV. Good Law

While the *Lane* decision was a step in the correct direction because it narrowed the scope of the much criticized *Garcettti* opinion, it was extremely narrow and based heavily on the facts of that particular case.[145] Ultimately the Court will probably rule that public employees testifying under oath outside of the scope of their job should receive free-speech protections for their testimony and will reach this conclusion not by creating a new precedent, but rather returning to *Pickering*.

While the First Amendment's right to freedom of speech is not without limits, speech on public issues has traditionally been viewed as occupying the "highest rung of the hierarchy of First Amendment values."[146] One of the primary interests of the First Amendment is to protect speech on matters of public concern.[147] When drafting the First Amendment the founders wanted to ensure that free speech would not in any catastrophic way harm the young nation. The founders also recognized that a government permitted to place limits on citizen speech in regards to matters of public concern would be detrimental to the nation and posed a variety of threats.[148] Thus the First Amendment was drafted in a manner that sought to balance these two competing ideas.[149]

Individuals do not renounce their citizenship as a condition of public employment.[150] There are a number of civic rights that are given to public and private employees alike.[151] For example, all public employees enjoy the

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145. *See* Lane v. Franks, 134 S. Ct. 2369, 2380 (2014) (noting the Court highlighted the facts of the case leading to the outcome, and that the Court was reluctant to paint a bright line rule).

146. *See* Connick v. Myers, 461 U.S. 138, 145 (1983) (explaining that that while the Federalists were opposed to the addition of the Bill of Rights initially during the drafting of the Constitution, they eventually were convinced by the opposing political party of its importance and the Bill of Right was soon after ratified).

147. *See Free Speech Rights of Public Employees*, UNIVERSITY OF MISSOURI—KANSAS CITY SCHOOL OF LAW, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/publicemployees.htm (explaining that matters of public concern are subject to a higher level of free speech protection than some other forms of speech).

148. *See id*. (explaining why it is important for matters of public concern to be protected under the First Amendment).

149. *See id*. (noting that public employees do still receive some of the same rights and protections as other citizens and are still United States citizens).

150. *Retaliation—Public Employees and First Amendment Rights*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/retaliation-public-employees (last visited Nov. 21, 2015) (explaining that public employment does not renounce one's citizenship status).

151. *See id*. (explaining that public and private employees share a number of the same civil rights under the Constitution).

right to vote in all federal, state and local elections.[152] A second civic right enjoyed by public employees is the right to due process.[153] In fact during the 1960s the court extended the constitutional right to due process for public employees to include a constitutional right to their job.[154] The Court ruled that if a public employee has an expectation of continued employment, the government could not terminate that job without first giving the public employee due process protections.[155] The Court thus extended the constitutional definition of property to include government employment.[156] Under *Garcetti* a government employee's due process rights do not hinge on whether the relationship between the individual and the government is one of employee-employer or citizen-sovereign.[157]

In cases involving public employees the courts do not simply consider the employee's rights as a citizen within the context of present issues of political and social concern to the community but also the government's interest as an employer in guaranteeing efficiency in the workplace.[158] One question that arises out of the *Lane* case is whether the Court was correct in considering that the speech was citizen speech rather than employee speech.[159] In *Lane*, while the plaintiff's speech arose out of his public employment, the Court still characterized it as citizen speech.[160] Should the Court rule on a case where the speech arose out of employment and was within the scope of that employment, it will be more difficult for the Court to characterize the speech as citizen speech.[161] If the Court is able to categorize the speech as citizen speech, the employee has more leeway to

152. *See id*. (giving some examples of rights shared by public and private employees).

153. *Id*.

154. *See* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (distinguishing the test established in the *Pickering* opinion).

155. *See id*. (explaining that due process protections are available to public employees).

156. *See id*. (explaining that job security has been found by the Court as a property interest).

157. *Id*.

158. Sarah Helden, *3 Reasons Why the Supreme Court Must Protect Public Workers*, LAW STREET: LAW & POLICY FOR OUR GENERATION, http://lawstreetmedia.com /news/headlines/3-reasons-supreme-court-must-protect-public-workers/ (last visited Nov. 21, 2015).

159. Lane v. Franks, 134 S. Ct. 2369 (2014) (citing *Pickering*, 391 U.S. at 573 (1968)).

160. *See id*. (explaining how categorizing speech as citizen speech could give public employees more protection under the First Amendment).

161. *Id*.

speak, and the employer does not have as much freedom to place limitations on the speech.[162]

Testifying truthfully arises from one's status as a citizen and therefore, the Court could rule that testifying truthfully should always be considered citizen speech.[163] Additionally, a strong argument can be made for the notion that the distinction between citizen speech and employee speech in the context of testifying under oath is an artificial distinction.[164] The Court could decide that all speech in the course of testifying in a judicial proceeding is "citizen speech," and thus abolish the distinction between employee and citizen speech in the context of testimony provided in judicial proceedings.[165]

The *Lane* opinion shows that the Court is working toward narrowing and tweaking the 2006 ruling in *Garcetti* that was viewed by many as a step backwards for free speech.[166] Specifically, while the Court in *Lane* was reluctant to draw a bright line rule and instead emphasized that the ruling was limited to the facts before the court,[167] it is not the first time that the Roberts Court has turned to this method of decision making.[168] In fact, many scholars and critics have referred to the current Court as a game of inches;[169] rather than overruling precedent and drafting strong and sweeping decisions, the Roberts Court has seemingly moved to looking at cases on

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162. *See* Oluwole, *supra* note 68, at 319 (explaining how being able to categorize the speech as citizen speech may likely lead to an outcome in a case in which the public employee has free speech rights).

163. *See Sixth Amendment: Speedy Trial by an Impartial Jury*, BILL OF RIGHTS INSTITUTE, http://billofrightsinstitute.org/resources/educator-resources/americapedia/americapedia-bill-of-rights/speedy-trial/ (describing why testifying under oath should always be categorized as citizen speech).

164. *See generally* Oswald, *supra* note 142 (arguing that the distinction between citizen speech and employee speech is an artificial distinction).

165. *Id*.

166. *See generally* Lane v. Franks, 134 S. Ct. 2369 (2014) (explaining that public employees testifying truthfully under oath when it is outside of the scope of their employment are entitled to free speech protection).

167. See id. (explaining the Court was reluctant to announce a change or step away from Garcetti, but effectively distinguished the case).

168. *See* Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. TIMES. (July 1, 2014), http://www.nytimes.com/2014/07/02/us/supreme-court-term-marked-by-unanimous-decisions.html?_r=0 (last visited Nov. 21, 2015) (noting a trend among decisions handed down by the Roberts Court where decisions are extremely narrow and tied down by the specifics of each case).

169. *See id*. (referring to the matter in which decisions appear to only many minute changes rather than large steps).

the more micro or case-by-case basis.[170] Through this method of decision making the court is able to uphold precedents while also striking specific policies and local laws.[171] At the conclusion of 2013, members of the press noted that the court heard a number of highly politicized cases as well as a number of cases that were heavily covered across various media outlets.[172] One commentator went so far as to sum up the term by stating that "[t]hey didn't pull the trigger on any of the big precedents they were asked to overrule."[173] He continued with, "[t]he question is, is it all a game of chess that's directed at five or 10 years down the road?"[174]

The following term in 2014 pointed toward a similar set of outcomes.[175] While the Court did hand down a number of 5–4 decisions throughout the term, with many of those decisions split by angry divisions that appeared to advance a conservative agenda.[176] But, at second glance, nearly two-thirds of the sixty seven cases decided during the term led to a unanimous vote by the Court.[177]

Roberts, during his nine years as Chief Justice, has not pursued such persuasive techniques.[178] He does not engage in backslapping or horse-trading, but rather chooses to use the power of the pen.[179] Roberts has taken the opportunity to express his viewpoint while at the same time reaching an outcome that satisfies all members of the Court through savvy opinion writing and strategic assignment of opinions to the other Justices.[180]

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170. *See id*. (explaining the Roberts Court takes a micro view of issuing, looking at it specifically in the case before the court at the moment rather than the issue as a whole).

171. *See id*. (referring to the Court's striking of local laws rather than broad policies).

172. *See* Richard Wolf, *From Politics to Prayer, a Supreme Court Game of Inches*, U.S.A. TODAY (Jul. 2, 2014), http://www.usatoday.com/story/news/politics/2014/07/02/supreme-court-term-conservative-incremental/11915611/ (discussing the political role many have claimed the Court now plays within the government and the increasingly number of politicized cases that have come before the Court in the past few years).

173. *Id*.

174. *Id*.

175. *See id*. (describing how future dockets before the Court are likely to contain more politicized cases).

176. *See id*. (highlighting a surprising split among the justices of the Court, a split that does not necessarily follow ideological lines).

177. *See generally* Wolf, *supra* note 172 (noting the surprising number of unanimous decisions by the Court during the 2014 term).

178. *See id*. (describing how, through the assigning of opinion, Chief Justice Roberts has been able to exercise his power as chief and reach decisions that find middle ground between conservative and liberal viewpoints).

179. *Id*.

180. *Id*.

Through these techniques Roberts and the other eight Justices protected and somewhat shielded the Court from accusations that the Court is a political institution.[181] While these techniques may be good for the longevity and stability of the Court, it has caused confusion within the legal world.[182] Narrow opinions in which the Court makes clear it is ruling on a specific set of facts can cause confusion for lawmakers.[183] The narrow opinions do not produce clear black-letter law but rather uphold precedent while carving out exceptions.[184] During the 2014 term the *Lane* case was one example of such a carve out.[185]

Sotomayor's opinion in *Lane* noted that the information related to or learned through public employment is often considered to be a matter of public concern.[186] There is a value in encouraging rather that inhabiting speech by public employees for this reason. Government transparency has been a goal since the founding of the country. Public employees are privy to information about the inner workings of the government.[187] As a result, there is a high likelihood that the speech of public employees called to testify in court about something that occurred within the workplace will be related to a matter of public concern.[188] The courts should encourage speech in these circumstances rather than encourage silence or non-truthful testimony.[189] Matters of public concern are best aired through public

181. *See id*. (explaining that through reaching a large number of unanimous decisions and uniting the Court on seemingly political issues, the Court has been able to fight back against critics who claim the Court is too political).

182. *See generally* Wolf, *supra* note 172 (noting that while this method has public appeal, it has caused confusion among legal scholars).

183. *See id*. (coming to narrow decisions also can cause confusion for lawmakers, tasked with making new laws that will not be overturned by the Court on constitutional grounds).

184. *See id*. (explaining how the Roberts Court has been decidedly dedicated to precedent, but has on a number of occasions carved out narrow exceptions to precedent).

185. *See generally* Lane v. Franks, 134 S. Ct. 2369 (2014) (citing *Lane* as an example of the Court upholding precedent while at the same time creating a new carve out).

186. *See id*. (describing a way to classify speech as a matter of public concern).

187. *Only Those between the Public Employee and the Public Body*, REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, http://www.rcfp.org/alaska-open-government-guide/iii-meeting-categories-open-or-closed/k-negotiations-and-collective-b-1.

188. *See id*. (exploring how in many cases a public employee may be protected by the public matters exception because it applies often in matter arising out of a public employee's job duty).

189. *See id*. (encouraging public employees to speak out on matters of public concern could show potential flaws in the government system).

dialogue and the courts are one venue where the First Amendment should protect such speech.[190]

V. Good for Business

One argument that has been made to reduce free speech for employees is that it is bad for business because there are certain aspects of business deals and communication that are not intended for the public.[191] This argument has been expanded even to public entities.[192] There are, however, a number of reasons why expanding free speech coverage could conversely be good for American business.[193]

A. Heightened Productivity Level Associated with Happy Employees

Scientific studies have shown increased job security leads to happier employees.[194] Happy employees have been shown to be more productive employees.[195] One of the main concerns within the area of public employee free speech is the need to for government departments that produce and maintain effective employees.[196] While there have been studies showing that increased job security may lead to less productive workers,[197] this is not the whole story.[198] For example, though employees with a high level of job security may be less productive, they may also be

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190. *Id*.

191. *See generally* Husdon, *supra* note 39 (discussing how some government employees are privy to confidential information).

192. *See id*. (discussing how government employees may be privy to information that is confidential or sensitive and should not be displayed to the general public).

193. *See* Mark Bovens, *Public Accountability, in* THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 182 (Ewan Ferlie, Laurence E. Lynn & Christopher Pollitt eds., 2007).

194. *See New Study Shows We Work Harder When We Are Happy*, UNIVERSITY OF WARWICK, http://www2.warwick.ac.uk/newsandevents/pressreleases/new_study_shows/ (last visited Nov. 21, 2016) (explaining that happiness has been shown to increase productivity in the workplace) [hereinafter *Warwick Study*].

195. *Id*.

196. *See* Love, *supra* note 10, at 29 (explaining how since the passage of the Bill of Rights, the free speech rights of public employees has been an issue that has come before the Supreme Court numerous times).

197. *See generally Warwick Study*, *supra* note 194 (explaining that productivity and job security are not necessarily linked, but rather there is no clear evidence they are or are not).

198. *See id*. (explaining that just because job security may lead to less productive workers does not mean that job security is bad for employees on the whole).

more loyal.[199] Loyal government employees have the potential to lead changes within government and can be a source of beneficial political and social change.[200] Furthermore, government employees are often tasked with transforming legislation passed by Congress into practical and efficient regulations.[201] By preventing government employees from engaging in what some may characterize as constructive criticism in favor of blind loyalty, there is a risk that innovative or change-producing ideas may be lost.[202] While it is important that public employees are loyal to the government, and equally important that the government has some freedom to regulate the speech of its employees, within the context of testifying under oath, loyalty to one's place of employment should not trump the need for the individuals to be truthful under oath.[203]

B. Efficiency

The balancing test the Court applies includes balancing the employee's interests with the employer's interest.[204] One of the employer's interests is in efficiency.[205] An efficient government is more stable and causes the public to become more satisfied with their results.[206] Efficiency can also be

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199. *See id*. (citing loyalty towards one's employer as one of the benefits of increased job security).

200. *See id*. (explaining how loyalty to one's employer can be a positive trait for an employee to possess).

201. *See id*. (noting that local government employees have the potential to lead changes within the society and noting how as both members of society and employees of the government they play a unique role).

202. Suzy Welch, *The Loyalty Fallacy*, BLOOMBERG BUSINESSWEEK, (Jan. 7, 2009, 4:00PM), http://www.bloomberg.com/news/articles/2009-01-07/the-loyalty-fallacy (last visited Nov. 21, 2015).

203. *See Being a Witness*, OHIO BAR ASSOCIATION (Apr. 10 2014), [hereinafter *Witness*] https://www.ohiobar.org/ForPublic/Resources/LawFactsPamphlets/Pages/LawFactsPamphlet-20.aspx (last visited Nov. 21, 2015) (explaining the importance a truthful testimony and the impact testimonies have on the administration of justice within the judicial system) (on file with the Washington & Lee Journal of Civil Rights and Social Justice).

204. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty. Ill., 391 U.S. 563, 573 (1968) (creating a balancing test that takes into account both the government's interest as well as the interests of the employee).

205. *See generally* Helden, *supra* note 158 (explaining the important government interest in limiting free speech as a matter of increasing efficiency within the government).

206. *See* William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 715 (1984) (explaining the importance of governmental efficiency).

cost effective.[207] One way for the government to cut down on costs and to strive to become more efficient is to be more open to criticism and for the flaws to be exposed through open conversation or during a trial through witnesses recounting events.[208] By protecting a witness testifying about a practice that arose out of the course of employment, a flaw in such practice may be exposed and ultimately by changing or swapping out the practice the government could become more efficient.[209]

C. Government Transparency

An additional way for the government to become more efficient is for the government to become more transparent.[210] Not only could increased transparency lead to more productivity by identifying flaws and then implementing changes to increase efficiency, it could also lead to more public trust in the government and its motives.[211] Distrust in the government and a lack of government transparency may lead some American businesses to relocate abroad.[212] To increase efficiency, the government, similar to the practices of many different corporations, contracts work out to companies both within the United States and abroad.[213] The government will often go through a bidding process before deciding which company to grant the government contract to.[214] For many corporations getting granted a government contract is extremely appealing.[215] Government contracts can

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207. *Id*.

208. United States v. Mandujano, 425 U.S. 564, 576 (1976) (explaining sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth).

209. *See* Banks, *supra* note 206, at 715 (explaining how the government needs to promote efficiency).

210. *See* Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) (explaining the government's goal to become more transparent to the public).

211. *Id*.

212. Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, *in* PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 1, 3 (Michael W. Dowdle ed., 2006).

213. Ian Millhiser, *Improving Government Efficiency*, CTR. FOR AM. PROGRESS, (Mar, 15, 2010), https://www.americanprogress.org/issues/general/report/2010/03/15/7403/improving-government-efficiency/.

214. *Id*.

215. *Id*.

be lucrative and earning a strong reputation as a government contractor is appealing to many.[216] The American economy benefits from the government contracts staying in America.[217] In turn, the government benefits from a healthy economy.[218] Granting government contracts to American companies can create jobs.[219] Not only does the government have various economic reasons to fight for government contracts to be given to companies that employ United States citizens but the government also possesses a moral obligation.[220] While the government needs to fight for efficiency and make sure it is making cost effective and cost conscious decisions in regards to government contracts, acting in a manner which will drive away potential American-based contractors is irresponsible.[221] By not protecting the free speech of its own government employees, the government is not sending a strong message of trust to private companies.[222] Earning the trust of companies is important to ensure that the government is getting bids from both high quality companies as well as cost effective companies.[223]

VI. American

A. Citizen Participation in Government

Citizens have the opportunity to serve on a jury and therefore have an active role in determining the outcome of a case. The founders viewed jury trials as a check on tyrannical government.[224] A second way that citizens have the opportunity to participate in government is through being called a witness in a case and testifying under oath in court. Testifying under oath is

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216. *Id*.

217. *See Register for Government Contracting*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/content/register-government-contracting (last visited Nov. 21, 2015) (describing the process of registering to be a government contractor and the benefits of doing so).

218. *Id*.

219. Arthur S. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 29 (1955).

220. *Id*.

221. *Id*.

222. Millhiser, *supra* note 213.

223. *Id*.

224. *See Sixth Amendment*, *supra* note 163 (explaining the importance of trial by jury within the justice system).

an important aspect of a jury trial.[225] The founders viewed both serving on a jury and testifying in court as "essential responsibilities of citizenship."[226] Public employees should be able to participate in the judicial system within the scope of their employment and not be concerned about whether their testimony will be covered under the First Amendment. Public employees should not be silenced when testifying about their work simply because they are employed by the government in some capacity. While the government does have a legitimate interest in controlling the workplace, the Court has long recognized that public employees are still citizens and when testifying under oath in the scope of their employment, should not be treated differently than private company employees.[227]

B. Public Confidence in the Judicial System

Citizen participation in the judicial system is important and citizens will only elect to participate and trust the judicial system if they have confidence that the judicial system in place is fair and equitable.[228] Failing to promote truthful sworn testimony may lead to public distrust of the system itself.[229] The system of justice in America is upheld and has worked for over two centuries because of the public's faith that the system works.[230] A system that punishes public employees for telling the truth is not a system that inspires such confidence.[231]

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225. *Why Jury Trials are Important to a Democratic Society*, JUDGES.COM, http://www.judges.org/uploads/jury/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf (explaining the history of jury trial in the United States).

226. *See id*. (explaining the great amount of importance that the founders saw testifying during a trial and sitting on a jury exemplified).

227. *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 605 (1967) (citing an old law that allowed public employment to be conditioned upon "the surrender of constitutional rights which could not be abridged by direct government action").

228. *See The Importance of Citizen Participation*, THE CENTER ON CONGRESS AT INDIANA UNIVERSITY [hereinafter *Citizen Participation*], http://centeroncongress.org/importance-citizen-participation (noting that public distrust in the political system could cause to a collapse); *see also generally Public Trust and Confidence*, NATIONAL CENTER FOR STATE COURTS, http://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx (last visited Nov. 21, 2015).

229. *Id*.

230. *Id*.

231. *Id*.

"[W]ithout public confidence, the judicial branch could not function."[232] There have been cries from some Americans that the Court has become too powerful, a response to both the lifetime appointments of the justices as well as its seemingly increasingly political nature.[233] In light of such accusations, the Court needs to maintain its legitimacy in the eyes of public.[234] Ruling to offer some level of protection under the First Amendment for public employees would help to promote the system of justice in America as it stands today.[235] By protecting public employees testifying under oath, the Court would demonstrate that is committed to fighting to find the truth and seeking justice as well as using the Constitution to seek greater justice for all citizens.[236] This could lead to a better public view of the Court, further legitimizing its existence.[237]

C. Promoting Truthful Testimony

As previously mentioned it is also important for the Court and the government to promote truthful testimony.[238] If a public employee's truthful testimony is not protected, the individual does not have motivation to tell the truth, other than the motivation of not being found guilty of perjury.[239] The Court should protect truthful testimony in an effort to create a more balanced judicial system, which emphasizes telling the truth under oath.[240] By not protecting a public employee under oath there is little incentive to tell the truth.[241] In an ideal world citizens would always tell the truth when

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232. *See* In re Raab, 100 N.Y.2d 305, 315–16 (2003) (commenting on the importance of limitations on judicial campaign contributions, as people must have confidence in an impartial judiciary).

233. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 424 (1996) (discussing the ways to classifying a case as one that presents a political question).

234. *Id*.

235. *Id*.

236. *Id*.

237. *See generally Witness*, *supra* note 203 (explaining the importance of serving as a witness in a case).

238. Pushaw, *supra* note 233, at 424.

239. *See generally Witness*, *supra* note 203 (explaining the importance of serving as a witness in a case).

240. *Id*.

241. *See* Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV.1037, 1037 (1996) (highlighting cases of police perjury and therefore demonstrating the need to incentivize truth-telling for police officers who are testifying

their speech is part of sworn testimony, however if the public employee testifying is faced with the burden of being concerned about his future employment, the individual must make a choice between self and country; a choice that could be avoided by extending the individual's free speech rights.[242]

Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.[243] The Court has made clear that the duty to testify when subpoenaed is an important part of the adversary system: the "conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions."[244]

While some have interpreted the First Amendment as providing a shield from citizen duties such as the duty to testify, this characterization of the First Amendment's scope is false.[245] In order for the judicial system to function properly, people must have confidence that the system is just.[246] Failure to protect someone who has been called to testify may compromise the truthfulness of his or her testimony.[247] If the person testifying is concerned that saying something under oath will cause their employer to take retaliatory measures they may be more likely to lie under oath, which has been criminalized under federal law.[248]

Speech by government employees may be especially important to public debate when compared to speech by private employees, yet the government employees do not have any comparable free speech rights.[249] It

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under oath).

242. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 574–75 (1991) (explaining how public employees should not be allowed to contract away their free speech).

243. *See* United States v. Mandujano, 425 U.S. 564, 576 (1976) ("Hence, Congress has made the giving of false answers [during testimony] a criminal act punishable by severe penalties.").

244. United States v. N.Y. Tel. Co., 434 U.S. 159, 175 n.24 (1977) (citation omitted).

245. *See generally* Branzburg v. Hayes, 408 U.S. 665, 666 (1972) (holding that the First Amendment accords a newsman no privilege against appearing before a grand jury and answering questions regarding the identity of his news sources or information received confidentially).

246. *See generally Public Trust and Confidence*, *supra* note 228 (noting that public distrust of the political system could cause it to collapse).

247. *Id*.

248. *See* 18 U.S.C. § 1623 (2015) (criminalizing false statements under oath in judicial proceedings).

249. *See* Husdon, *supra* note 39, at 2 (explaining the greater authority of government to

is important to note, however, that some limitations on government employees are necessary to maintain order.[250] The release of classified documents such as the documents leaked by Edward Snowden in 2013 are an example of an action by a government employee exercising free speech rights that caused not only controversy within the United States, but that spread throughout the globe.[251]

While some limits are needed, the limits as they currently stand are far too broad.[252] As the case law and earlier sections of this Article suggest the Court through recent cases has appeared to be inching ever so slightly toward increasing the free speech protection offered to government employees.[253] Political debate can be electrified through some public employee speech.[254] One can assume that many government employees may know things about government programs that are important for voters considering how the government is operating.[255] As the court noted in the landmark free speech case of *New York Times Co. v. Sullivan*, "[t]he First Amendment reflects the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[256] This can be dichotomized by the fact that a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, the Constitution bars a state employee from doing the same thing, and if such employee elects to do so, the employer has the right to terminate the employee's public employment.[257] The constant balancing

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regulate public employees over private employees).

250. *Id*. at 3.

251. Jacob Stafford, *Gimme Shelter: International Political Asylum in the Information Age*, 47 VAND. J. TRANSNAT'L L. 1167, 1168–70 (2014).

252. R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH LAW 255 (1990).

253. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (explaining that public employees such as teachers are entitled to some free speech rights absent proof of false statements knowingly or recklessly made, and that a balancing test combining the State's interest in promoting the efficiency of public services and the interests of the employee in commenting upon matters of public concern should be applied to determine if the First Amendment applies).

254. *Id*. at 571–72.

255. *See id*. at 566 ("A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters . . . . It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.").

256. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (discussing the reasoning for the general proposition that freedom of expression upon public questions is secured by the First Amendment).

257. *Free Speech Rights of Public Employees supra* note 51.

game over the government restricting public employee speech to some extent to promote efficiency with the public employee's right as a citizen can be difficult at times.[258]

VII. Conclusion

When the United States Supreme Court grants certiorari to a case in which the Court is faced with determining whether a public employee's testimony relating to their job duties as a public employee is protected under the First Amendment, the Supreme Court should vote to protect the public employees. This note has highlighted three major reasons why the court should vote to protect public employee free speech in the form of testimony relating to duties of public employment. First, such a ruling would be in line with established precedent from the most recent era of public employee free speech jurisprudence, the era of balancing operational efficiency and public concern.[259] Secondly, offering political free speech protection in this capacity is good for American businesses.[260] Limiting free speech of public employees in this manner could potentially lead to lost government contracts as well as other economic losses for American companies. The Supreme Court needs to recognize the impact that limits on speech has on business; promoting free speech in this venue can create more American jobs as well as save the government money. One final reason why the Court should rule to protect free speech in this way is because it is American. The values on which this nation was founded continue to have an influence on the political and government culture of today. The role of the citizen as an active participant in government was fundamental and important to the drafters of the Constitution. Citizen participation in government has only expanded.[261] Through the passage of the amendments that expanded the voting class and called for the direct election of Senators, as well as a drastic increase in the number of citizens employed in the government, citizen participation in government has

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258. *See* Husdon, *supra* note 39, at 3.

259. *See generally* Helden, *supra* note 158 (explaining the way the Supreme Court has ruled in the past).

260. *See* Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) (explaining the government's goal of becoming more transparent to the public).

261. *See Public Trust and Confidence*, *supra* note 228 (noting that public distrust of the political system could cause it to collapse).

increased. Citizen participation within the justice system is another important component of the system of government outlined by the United States Constitution.[262] Testifying as a witness in a case is an important way for citizens to participate in the justice system.[263] Allowing for government employees who truthfully testify in court, about their duties as an employee, to have protection under the First Amendment is consistent with the American ideals. Citizens who are fighting to ensure that justice is served by acting as a witness in a case should not be barred from having First Amendment protection simply because they are government employees testifying about their duties as a government employee.

For the reasons set forth above, the Court should rule that public employees are protected from retaliation under the First Amendment. While the Court has been able to successfully dodge addressing this question in the past, it may not be able to ignore the question in a future, more straightforward case. In the event that such a case comes before the Court, looking at the history of the Court's jurisprudence on this issue, the economic impact, and the history of the nation, can help lead the Court during the decision making process.

262. *Id*.
263. *Id*.