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Patrick M. Garry

THE CONSTITUTIONAL RELEVANCE OF THE EMPLOYER-SOVEREIGN RELATIONSHIP: EXAMINING THE DUE PROCESS RIGHTS OF GOVERNMENT EMPLOYEES IN LIGHT OF THE PUBLIC EMPLOYEE SPEECH DOCTRINE

PATRICK M. GARRY†

INTRODUCTION

The Constitution prohibits the government from depriving anyone of a property interest without first according that person procedural due process.[1] The Fifth Amendment Due Process Clause codified the natural law principle that government cannot arbitrarily deprive its citizens of the property they have acquired through their participation in civil society.[2] However, during the due process revolution of the 1960s, the Court extended the constitutional definition of property to include government employment. If a public employee had an expectation of continued employment, the government could not terminate that job, or property, without first giving that person sufficient due process protections. Under this new approach to property, a public employee did not just acquire a job from her government employer, he or she also acquired a constitutionally protected property interest. Thus, in their employment relationship, public employees, by way of the Due Process Clause, possessed something that none of their private sector colleagues possessed: a constitutional right to their job.

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† Associate Professor of Law, University of South Dakota School of Law; J.D. and Ph.D., University of Minnesota.

1 U.S. CONST. amends. V, XIV § 1.

2 *See* J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 56 (1931) (discussing how due process rights do not flow from the Constitution, but are natural rights).

This extension of property protections brought a significant change in the focus of the Due Process Clauses. During the eighteenth, nineteenth, and first half of the twentieth centuries, due process protections pertained to the relationship between citizens and their government. Procedural due process aimed to check and prevent a sovereign authority's arbitrary deprivations of certain fundamental rights of its citizens. As such, due process rights were shared equally by all citizens. The necessity of such rights resulted from the fact that, regarding actions by the sovereign, citizens had no other remedies available to them to redress actions by the sovereign: There was no other sovereign to which the citizens could appeal, no other sovereign that could rectify the injustices. However, after the due process revolution had infused the public employment area with due process rights, public employees obtained a special constitutional protection that no other citizens had enjoyed. Moreover, due process rights were given even though public employees had an adequate and ample alternative for the loss of their jobs: They could go out into the private sector, where the majority of jobs existed, and obtain employment.

By equating government employment with constitutionally protected property, the courts have muddied the traditional focus of the Due Process Clauses and blurred the distinctions between government functions and roles. Government as employer was equated with government as sovereign. This Article attempts to reveal the error of that equation. It seeks to revive the original focus of the Due Process Clauses and highlight the constitutional relevance of the distinction between government as sovereign and government as employer. In doing so, the Article relies on the doctrines governing the First Amendment speech rights of public employees as an analogy for how the due process rights of public employees should be defined.

In *Garcetti v. Ceballos*, the Supreme Court recently clarified the First Amendment speech rights of government employees.[3] According to the Court, public employees who speak as a result of the required duties of their job, who speak as employees rather than as citizens, do not have a First Amendment protection from subsequent disciplinary action by their employers. This ruling obviously hinges the granting of constitutional rights on the vital

[3] 126 S. Ct. 1951, 1958 (2006).

distinction of how the individual is acting or speaking: Is she exercising her constitutional rights as a citizen, or is she simply performing the job functions required by her government employer? Such a distinction, as argued in this Article, should be reincorporated into the due process doctrines governing public employees. If a right as fundamental and basic as the First Amendment right to free speech hinges on whether the individual-government relationship is one of employee-employer or citizen-sovereign, then the procedural due process rights of public employees should be similarly qualified.

I. THE DUE PROCESS RIGHTS OF PUBLIC EMPLOYEES

Under current due process doctrines, government employees can have a property right in their continued employment, where interference with that employment must be preceded by due process protections.[4] The Fifth Amendment prohibits the federal government from depriving a person's life, liberty, and property without providing adequate due process.[5] Up until the mid-twentieth century, courts defined property interests by looking at how the common law had defined property; however, in *Goldberg v. Kelly*, the Supreme Court took a drastic turn from precedent and significantly expanded the legal sources of property interests eligible for due process protections.[6] In *Goldberg*, the Court ruled that statutory entitlements like welfare benefits could also constitute a property interest, not just a governmentally conferred privilege, thus, entitling recipients to full adversarial-type hearings before those benefits could be terminated.[7] Later, in *Board of Regents of State Colleges v. Roth*, the Court extended this new due process property approach to include a public employee's interest in continued government employment.[8] As

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[4] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539, 542 (1985) (applying constitutional protections to tenured government employees).

[5] U.S. CONST. amend. V (stating that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation"); *see also id.* amend. XIV (stating that no state shall "deprive any person of life, liberty, or property, without due process of law").

[6] 397 U.S. 254, 261–63 (1970) (holding that an interest in continued welfare benefits was a statutory entitlement that equated to a property interest under the Due Process Clause).

[7] *Id.*

[8] 408 U.S. 564, 576–78 (1972) (holding that a state college professor could have a property interest in his job if he had a government-created expectation in

the Court stated, a property interest is "defined by existing rules or understandings that stem from an independent source such as state law."[9] If state law, for instance, entitled the employee to continued employment subject to certain terms, then a constitutionally protected property interest could arise.[10]

The current constitutional status of public employment contrasts with the way courts formerly treated public employment. Up until the 1950s, courts viewed the rights of government employees through the lens of rights and privileges: Public employment was seen as a privilege, rather than a right, that could be withdrawn at any time without any due process.[11] This right-privilege distinction was based on the view that no person had a constitutional right to government largess.[12] According to this view, as perhaps most famously articulated by Oliver Wendell Holmes, public employment is a privilege that the government is free to grant or withhold at its pleasure.[13] This

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continued employment).

[9] *Id.* at 577. Such a state law creating a property interest was present in *Loudermill*, where the employee was covered by a state statute entitling civil servants to retain their jobs "during good behavior and efficient service" and could not be fired "except [for] . . . misfeasance, or nonfeasance in office." 470 U.S. at 538–39 (quoting OHIO REV. CODE ANN. § 124.34(A) (West 1984)). The Court has held that due process must be given to a nonprobationary public employee when, after his probationary period, the employee acquires a property interest in continued employment. Perry v. Sindermann, 408 U.S. 593, 602–03 (1972). In addition, even when there is an informal probationary period, an "expectation" of continued employment can create a constitutionally protected property interest. *Id.*

[10] *See Loudermill*, 470 U.S. at 538.

[11] Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discount Center*, 63 U. DET. L. REV. 609, 614 (1986). The early courts reasoned that, unless specifically provided for by statute, public employees occupied strictly employment-at-will positions. *See, e.g.*, Reagan v. United States, 182 U.S. 419, 424 (1901) (noting that "inferior" offices not held for life or a fixed tenure fall under the settled rule that the "power of removal is incident to the power of appointment"); Parsons v. United States, 167 U.S. 324, 330–34 (1897) (noting that members of Congress considered the president's power of removal to be a settled question); *In re* Hennen, 38 U.S. 230, 233–34 (1839) (discussing the power of removal from office as a political question and noting that the power of appointment implies the power of removal).

[12] *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440–42 (1968). Under the right-privilege distinction, courts lump government jobs into the larger category of government largess, and thus as privileges that can be withdrawn at any time. *See* Connick v. Myers, 461 U.S. 138, 142–44 (1983) (outlining the history of the rights privilege doctrine).

[13] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no

view reflected a private sector vision of the public employment relationship: One does not possess a basket of rights that private sector employees do not possess merely because one works for the government.[14]

Beginning in the early 1960s, however, the individual rights movement transformed the traditional view of public employees.[15] Throughout this individual rights era, the Court moved beyond the right-privilege distinction and steadily expanded the rights of public employees.[16] During the 1970s' "due process explosion," the Court completely cast aside the right-privilege distinction and held that public employment could indeed qualify as a property interest.[17] In *Perry v. Sindermann*, for instance, the Court found that a faculty manual, along with guidelines promulgated by the state college system, created a property interest for a faculty member because the institution's actions legitimated his claim of entitlement to continued employment.[18] This holding effectively guaranteed lifetime tenure for the faculty member.[19]

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constitutional right to be a policeman."); *see also* Garner v. Bd. of Pub. Works, 341 U.S. 716, 720 (1951) (stating that a government employer can require an individual to provide any and all information relevant to prove the employee's fitness and suitability for public service).

[14] *See Developments in the Law—Public Employment: The Constitutional Rights of Public Employees*, 97 HARV. L. REV. 1738, 1743 (1984) [hereinafter *Constitutional Rights of Public Employees*]; *see also* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (analogizing public employment to at will employment in the non-public sector).

[15] *Constitutional Rights of Public Employees*, *supra* note 14, at 1744.

[16] During this period, the Court expanded the constitutional rights of public employees on a number of fronts, including their First Amendment right of free speech. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (reversing the circuit court decision to allow the discharge of a public school teacher for speaking out on a matter of public concern).

[17] *See* Bd. of Regents of State Sch. v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). Both cases involved untenured college professors who were fired at the end of their employment contracts without a hearing. *Roth*, 408 U.S. at 566; *Perry*, 408 U.S. at 594–96. While the Court held that no property interest existed in *Roth*, 408 U.S. at 579, the *Perry* Court held that a constitutionally protected property right may exist if the employee can prove the legitimacy of his claim of entitlement to continued employment based on rules and understanding promulgated by the public employer. *Perry*, 408 U.S. at 602–03. To make this determination, the Court paid close attention to the particular tenure laws at issue to see if they created a property interest in continued employment. *Roth*, 408 U.S. at 566–67, 578; *Perry*, 408 U.S. at 599–01. Regarding the due process explosion, see Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

[18] 408 U.S. at 600–03.

[19] Thus, even though not formally tenured by the college, the faculty member had the opportunity to prove in the district court that he had a legitimate

The *Loudermill* Court—by holding that a property interest, once created by state or local law, must be given full constitutional due process protections and could not be subject to any procedural limitations set out in the statute that created it[20]—rejected the rule of *Arnett v. Kennedy*, which held that a property interest could be conditioned or limited in that way.[21] In *Arnett*, the Court held that a property interest could be conditioned by statutorily created "procedural limitations which had accompanied the grant of that interest."[22] The *Loudermill* Court, however, rejected the notion that a state could create a limited property interest in employment (limited by statutory procedures governing the termination of that interest); instead, the Court held that once a property interest is created by state law, its deprivation is to be governed by constitutional due process procedures, regardless of any statutorily imposed procedures.[23] Thus, according to *Loudermill*, even though a particular statute creating a property interest might designate the terms of employment and the means or methods by which that employment can be modified or terminated, the procedures for depriving that property interest are governed by the Due Process Clause rather than by the statute itself.[24]

Subsequent public-employment due process decisions have invoked due process requirements and found property

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expectation to continued employment, which in turn would give him a de facto tenure. *Id.* at 602–03.

[20] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

[21] 416 U.S. 134, 153 (1974) ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.").

[22] *Id.* at 155.

[23] *See Loudermill*, 470 U.S. at 541. According to the Court, "The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.' " *Id.* at 541 (quoting *Arnett*, 416 U.S. at 167). In his dissent, Justice Rehnquist restated his *Arnett* position that states should be able to grant conditional property interests. *Id.* at 561 (Rehnquist, J., dissenting). He argued that if state law created property interests, then that law should also be able to impose procedural limitations. *Id.* at 562–63. He also argued for adoption of the rule that "one who avails himself of government entitlements accepts the grant of tenure along with its inherent limitations." *Id.* at 563.

[24] *See Loudermill*, 470 U.S. at 541. The Court held that though a property interest in continued employment can be created by statute, that statute cannot dictate the means by which the government cannot deprive an individual of that interest. *See id.* Instead, the procedures for terminating that property interest are to be governed by the Due Process Clause. *See id.*

deprivations even when an employee has not been terminated.[25] According to case law, a reasonable expectation in a particular position can constitute a property interest.[26] In *Ciambriello v. County of Nassau*, the court ruled that a denial of a promotion to which the employee had a reasonable expectation amounted to a deprivation of a property interest.[27] A court has even held that certain job titles or designations rise to the level of legitimate property interests.[28] However, on the question of whether a government contract is enough to create a property interest, the courts are somewhat divided.[29] According to some courts, contractual provisions alone are sufficient, and violations of those provisions amount to the deprivation of property interests.[30] But in other jurisdictions, contractual provisions are not sufficient to bestow property interests on government employees.[31]

The due process explosion of the 1960s and 1970s greatly expanded and broadened the understanding of due process. This expansion of procedural due process protections reflected a notion

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[25] *See, e.g.*, Sonnleitner v. York, 304 F.3d 704, 713 (7th Cir. 2002) (applying due process to an employee's demotion); Greenwood v. New York, 163 F.3d 119, 122 (2d Cir. 1998) (holding that psychiatrists have a property interest in their clinical privileges); Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 900–01 (8th Cir. 1994) (holding that due process procedures were invoked by a transfer of an employee).

[26] *See* Erwin Chemerinsky, *Qualified Immunity: § 1983 Litigation in the Public Employment Context*, 21 TOURO L. REV. 551, 555 (2005).

[27] 292 F.3d 307, 318 (2d Cir. 2002).

[28] Ezekwo v. NYC Health & Hosps. Corp., 940 F.2d 775, 783 (2d Cir. 1991) (denying that an interest in the designation of chief resident was "trivial" and finding that hospital policy had entitled the person to the position of chief resident at the hospital).

[29] Chemerinsky, *supra* note 26, at 556–57.

[30] *See* Brockell v. Norton, 688 F.2d 588, 591 (8th Cir. 1982) (finding that "common practices and agreements derived from the employer-employee relationship which would create a sufficient expectancy of continued employment" establish a property interest); *see also* Yates v. Bd. of Regents, 654 F. Supp. 979, 981 (E.D. Tex. 1987) (stating that a property interest could be created either in an employment agreement "or in a state statute, rule, or regulation").

[31] *See, e.g.*, Downtown Auto Parks v. City of Milwaukee, 938 F.2d 705, 711 (7th Cir. 1991); Gaumond v. City of Melissa, 227 F. Supp. 2d 627, 631 (E.D. Tex. 2002) (holding that the "existence of a property interest must be determined by reference to state law"). Thus, according to Professor Chemerinsky, "the jurisdictions are split on the issue of whether a contract creates a property interest for government employees." Chemerinsky, *supra* note 26, at 557 (citing Hulen v. Yates, 322 F.3d 1229, 1240 (10th Cir. 2003) (holding that contracts created by state agencies present property interests)); *see also* Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 255 (5th Cir. 1984) (holding that no property interest was created by a state-initiated one year teaching contract).

that the law should protect a system of rights that would maintain "independence, dignity and pluralism in society."[32] Thus, the traditional protections given to common law forms of property were now to be extended to the new forms of property, such as government benefits and jobs.[33] For the advocates of this due process explosion, the purpose of government benefits was to preserve the individual's rightful share in society.[34] Yet even early advocates of broadened due process protections did not consider public employment to be one of the benefits that qualified as property: As one scholar put it, a government job does not reflect "an arrangement which exists for the sake of its holder, in order to satisfy one of his basic needs."[35]

In eighteenth century America, due process rights were equated with rights arising out of natural law.[36] Procedural due process was tied to common law rights and natural rights.[37] The notion of due process held during the constitutional period reflected the idea that natural law acted as a limitation on governmental power.[38] Thus, under this approach, a natural law concept of property should apply to the kind of property given due process protections—property held and acquired by citizens that, under common law or natural rights rationales, should be immune from governmental interference.[39] This constitutionally

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[32] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

[33] *See id.* at 756–64.

[34] *See id.* at 785–86.

[35] Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS 126, 145 (J. Roland Pennock et al eds., 1977).

[36] *See* LEARNED HAND, THE BILL OF RIGHTS 2 (1958). The natural rights discussions of the nineteenth century were frequently associated with a natural right concept of property. *See* R.H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401–02, 410 (2007).

[37] *See* J. Roland Pennock, *Introduction*, *in* DUE PROCESS, *supra* note 35, at xv, xvi–xvii.

[38] *See* John Adams, Minutes of the Argument: Lechmere's Case, *in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 184, 184–85 (1971).

[39] As envisioned by late eighteenth century Americans, the due process clause had roots in the Magna Carta as a source of rights on which the government could not infringe. *See* 4 THE WRITINGS OF BENJAMIN FRANKLIN 445 (Albert H. Smyth ed., 1970). These rights involved the most basic and fundamental rights, such as the right to be free of imprisonment without the due process of law or the arbitrary taking of private property without adequate due process. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *134–35, *138–40. According to the Blackstonian understandings existing during the eighteenth century, the property protected by due process requirements referred to possessions, both real and personal. *See* Frank

protected property was the kind of property that laid the groundwork for a well-ordered society, the kind of property that created "the material foundation for creating and maintaining the proper social order, the private basis for the public good."[40]

The rights to which due process protections also apply relate to the type of fundamental rights that government must respect.[41] These fundamental rights were defined during the constitutional period primarily as "common law property rights, and rights to traditional institutional arrangements and legal procedures."[42] The fact that the rights meant to be protected by the Due Process Clause were only the most basic and fundamental rights is also indicated by the placement of the Fifth Amendment, which follows the First Amendment protection of speech, press, assembly, and religious exercise,[43] the Second Amendment right to bear arms,[44] the Third Amendment limitations on the quartering of soldiers,[45] and the Fourth Amendment protections against search and seizure.[46] Furthermore, the Fifth Amendment precedes the Sixth Amendment right to a free and speedy criminal trial,[47] the Seventh Amendment guaranty of trial by jury,[48] and the Eighth Amendment prohibition of cruel and unusual punishment.[49] As with all these enumerated rights protections, the Due Process Clause serves as an additional limitation on the powers of the central government regarding the most fundamental rights of its citizens.

H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95–98 (1983); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411–12 (1977).

[40] GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 1 (1997).

[41] The reference to life, liberty and property reflects a natural rights approach to due process protections. *See generally* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* DUE PROCESS, *supra* note 35, at 3, 10.

[42] Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 892 (1978).

[43] *See* U.S. CONST. amend. I.

[44] *See id.* amend. II.

[45] *See id.* amend. III.

[46] *See id.* amend. IV.

[47] *See id.* amend. VI.

[48] *See id.* amend. VII.

[49] *See id.* amend. VIII.

The notion of due process relates broadly to the ways in which all citizens confront and are affected by their government, not to the more selective, customized ways in which individuals intersect with the government, such as in an employment context. This is because, for instance, the government has a "greater and more obvious interest in controlling the behavior of its employees than its interest in controlling the conduct of citizens in general."[50] As will be argued in the section below, constitutional rights should generally apply only to the relationship between government and citizens.

According to Professor Amar, "There is a . . . conspicuous connection between the Fourth Amendment's limitations on 'seizures' of 'houses' and 'effects' and the Fifth's restrictions on 'takings' of 'private property.' "[51] Accordingly, this definition of "property" means private property that is acquired in a person's private capacity, independent of government. It suggests a natural rights theory of property, that the Due Process Clause protects the kind of property that has ancient roots, the kind that has been historically abused by government and is unique to the individual. Government jobs, on the other hand, are not unique to the individual holder. They are pre-designed employment positions to which individuals must conform. If one individual withdraws from a particular job, another individual is hired to fill that same pre-designed job.

II. THE ANALOGY TO PUBLIC EMPLOYEE SPEECH RIGHTS

The issue of whether the job status or expectations of public employees rises to the level of constitutionally protected property interests within the meaning of the Due Process Clause has many parallels with the issue of whether public employees have First Amendment rights regarding speech made in connection with their duties and functions as public employees. Both of these issues raise questions relating to whether government

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[50] Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 704 (1984). For an example of the government's special interest in controlling its employees, see generally *Snepp v. United States*, 444 U.S. 507, 509, 510 n.3 (1980), holding that the CIA could require its employees to sign prepublication review agreements as a condition of employment.

[51] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 80 (1998).

employment has an effect on an individual's constitutional rights. Are speech and property rights defined in connection with the status of citizenship alone, or are they also determined by one's employment? Do public employees have essentially more rights than citizens employed in the private sector, such as rights of job tenure and freedom of speech? Is there a distinction between citizen and employee that has constitutional relevance?

The evolution of public employee speech cases mirror, in some respects, the evolution in the due process public employment cases. Both types of cases grapple with determining the impact on an individual's constitutional rights caused by his or her employment by the government.[52] However, unlike the due process area, public employee speech doctrines have undergone a correction since their expansion during the Warren Court era. In particular, the Supreme Court's latest decision in the public employee speech context suggests that the Court should, in turn, rethink its position on the issue of whether a government job qualifies as property under the Due Process Clause.[53]

A. The Evolution of Public Employee Speech Rights

Up until the 1960s, the judicial doctrines covering public employee speech were fairly deferential to employers.[54] Public employee speech was given practically no constitutional protection from employer disciplinary action.[55] As with their private sector counterparts, government employees had virtually no free speech rights they could assert against their employers.[56] The reasoning behind this rule was famously articulated by Oliver Wendell Holmes in *McAuliffe v. Mayor of New Bedford*, where the Supreme Judicial Court of Massachusetts upheld an

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[52] *Compare* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–40 (1985) (discussing whether public employment can create a constitutionally protected property interest under the Due Process Clause), *with* Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006) (discussing the extent to which public employment imposes limitations on free speech rights).

[53] *See Garcetti*, 126 S. Ct. at 1958.

[54] *See* Connick v. Myers, 461 U.S. 138, 143–44 (1983); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

[55] *See* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1028–29 (2005); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 530 (1998).

[56] *See* Kozel, *supra* note 55, at 1028.

ordinance prohibiting police officers from engaging in political fundraising.[57] According to Holmes, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[58] Consequently, a policeman, just like any other public employee, must take that employment "on the terms which are offered him."[59]

This judicial deference to the actions of government in its role as employer prevailed into the 1950s.[60] A year after *Garner*, the Supreme Court, in *Adler v. Board of Education*, upheld a similar law in New York that made any person who advocated overthrowing the government by violent or unlawful means ineligible for employment in public office, particularly in the public school system.[61] In drawing the distinction between government as employer and government as sovereign, the Court stated that while public employees "have the right under our law to assemble, speak, think, and believe as they will," they do not have the right "to work for the State in the school system on their own terms."[62] But in the 1960s, the Holmesian model gave way to the Warren Court's heightened attention to individual rights.

In a marked departure from past precedent, the Court began giving greater protections to the speech rights of public employees.[63] Ushering in this new era of public employee speech protection was the Court's decision in *Pickering v. Board of Education*, which involved the termination of a public school teacher who had published a letter to the editor criticizing the

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[57] 29 N.E. at 517.

[58] *Id.*

[59] *Id.* at 518. As part of the bargain entered into by a public employer with a public employee, the latter agrees to a restriction on his or her speech rights. *Id.* at 517–18.

[60] *See, e.g.*, Garner v. Bd. of Pub. Works, 341 U.S. 716, 717–20 (1951) (upholding a city law requiring government employees to take an oath that they were not affiliated with a Communist organization within the past five years). According to the Court, past conduct and loyalty "are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." *Id.* at 720. Thus, it was constitutionally irrelevant that the employer in this case was the government. As Justice Frankfurter stated in his concurrence, "[The] Constitution does not guarantee public employment." *Id.* at 724 (Frankfurter, J., concurring in part and dissenting in part).

[61] 342 U.S. 485, 487–89, 493, 496 (1952).

[62] *Id.* at 492.

[63] *See* Van Alstyne, *supra* note 12, at 1442.

Board of Education's handling of a proposed tax increase.[64] Ruling that public employees do not relinquish their First Amendment rights when they assume their government jobs, the Court created a new balancing test to determine whether public employee speech is constitutionally protected: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[65]

Applying this test in *Pickering*, the Court found that since the letter obviously related to a matter of public concern and did not interfere with the operation or efficiency of the school, the Board of Education had no more right to curtail the teacher's speech than it would have to curtail the speech of any other citizen.[66] Notwithstanding this holding, the Court recognized that the interests of the government "as an employer in regulating the speech of its employees . . . differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[67]

By blurring the line between government as sovereign and government as employer, the *Pickering* balancing test took a big step away from the Holmesian model of deference to governmental authority.[68] Another step was taken fifteen years later when the Court further explained the "public concern" factor articulated in *Pickering*, adopting it as a threshold test to the *Pickering* balancing test. In *Connick v. Myers*, a disgruntled district attorney was fired for insubordination after distributing to her colleagues a questionnaire dealing with a variety of workplace matters, including office morale and employee confidence in supervisors.[69] To determine whether a First

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[64] 391 U.S. 563–64, 568 (1968) (stating that the Holmesian approach was "unequivocally rejected").

[65] *Id.* at 568, 574. In reversing the Illinois Supreme Court, which upheld the Board's action, the U.S. Supreme Court found that the lower court had not accorded high enough protections to the teacher's free speech rights as a citizen, which had to be weighed against the government's interests as an employer. *Id.*

[66] *Id.* at 572–73.

[67] *Id.* at 568.

[68] *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716–17 (1996) (acknowledging the abandonment of the Holmesian model).

[69] 461 U.S. 138, 141 (1983) (involving a claim that the termination violated the employee's free speech rights).

Amendment violation occurred, the Court undertook first to determine whether the speech in question, distributed through the questionnaire, involved a matter of public concern.[70] This was a threshold issue to be decided even before application of the *Pickering* balancing test.[71]

In *Connick*, the Court distinguished between matters of public concern and "matters only of personal interest," such as employee grievances.[72] As the Court stated, except for "the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision" involving employee grievances that have no public concern and which an employer should be free to handle as it sees fit.[73] The distinction between employees-speaking-as-employees and employees-speaking-as-citizens was crucial, since speech that did not touch upon matters of public concern was not eligible for the *Pickering* balancing test.[74] As a citizen, a person can speak freely on just about any topic without restriction from her sovereign—the government—but as a public employee, a person can have her non-public concern workplace speech controlled by her

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[70] *Id.* at 146. The Court held that the distribution of the questionnaire was in connection with a private dispute between employee and employer and hence did not involve a matter of public concern. *Id.* at 148. Since the speech did not involve a matter of public concern, there was no need to proceed with any further analysis or balancing. *Id.* at 146. In emphasizing that citizens still possess their full fundamental rights even while employed by the government, the Court adopted the test that the constitutional protection of public employee speech depends on whether the employee spoke "as a citizen upon matters of public concern" or "as an employee upon matters only of personal interest." *Id.* at 147. Thus, the public concern test is a way for courts to determine if the rights of citizens or the rights of employees are at stake.

[71] *See id.* at 146.

[72] *See id.* at 147. Although the Court was aware of how government employer sanctions could chill the speech rights of its employees, the Court stated that the government "should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. As the Court recognized, "[T]he 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." *Id.* at 154.

[73] *See id.* at 147. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. The public concern determination was preliminary to a *Pickering* balance test. *See id.*

[74] *See* Kozel, *supra* note 55, at 1024–25.

government employer, just as a private-sector employee can have her speech controlled by her private employer.[75]

B. *The Court's Most Recent Pronouncement*

Although *Connick* took a somewhat narrow view regarding what kind of speech constituted a matter of public concern, essentially ruling that workplace grievances were not a topic of public concern, subsequent courts have tended to define "public concern" more broadly.[76] But, not until its recent decision in *Garcetti v. Ceballos* did the Supreme Court address the constitutional status of a public employee's speech made in furtherance of employment duties.[77] Previous cases, as reflected by *Pickering* and *Connick*, focused on peripheral statements made by employees during work rather than on speech required to be made as part of the employee's official duties.[78]

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[75] *Id.* at 1029. According to Professor Kozel, the "decoupling of governmental functions is important to understanding the model: The government as sovereign regulator of private conduct is limited by the First Amendment in its ability to restrict citizen speech, but when the government steps out of its role as sovereign and into its role as employer, it transcends these limitations." *Id.*

[76] *See, e.g.*, Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996) ("[C]ourts have defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace."); Nat'l Treasury Employees Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993) (stating that the term public concern relates "not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche"), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995).

[77] 126 S. Ct. 1951 (2006).

[78] Such cases, however, had been decided in the circuits. For instance, in *Urofsky v. Gilmore*, the Fourth Circuit ruled that to determine the constitutional status of public employee speech, a court must first decide whether the employee spoke as a private citizen or as a public employee. 216 F.3d 401, 406 (4th Cir. 2000) (ruling that when a public employee acts in accordance with her workplace duties and hence as an agent of the government, that employee's speech is not constitutionally protected). To explain this determination, the *Urofsky* court referred to the hypothetical of a district attorney making a public statement about a murder trial: Because the statement is a required part of the attorney's work duties, he or she has no right to disobey a supervisor's directions about the content of the statement, even though the statement is obviously of public concern. *See id.* at 407–08. However, as the court explained, the attorney could freely publish a newspaper editorial accusing the district attorney's office of breaching its prosecutorial duties, since in that case the attorney would be speaking as a citizen. *Id.* at 408. Thus, in *Urofsky*, the constitutional protection of public employee speech depended first on the role of the speaker (e.g., whether the speaker spoke as a citizen or employee) and then on whether the speech involved a matter of public concern. *Id.* at 406. According to the court, without such an approach, a constitutional issue might arise

In *Garcetti*, a deputy district attorney in the Los Angeles County District Attorney's Office was demoted after filing a disposition memorandum outlining alleged false statements contained in an affidavit used to obtain a critical search warrant and informing defense counsel of those false statements.[79] The demoted deputy district attorney then commenced a suit alleging that his demotion had been in retaliation for speech protected by the First Amendment.[80] In denying this claim, the Court held that the First Amendment did not apply because the deputy district attorney spoke as an employee and not as a citizen when he wrote his critical memorandum.[81]

Under this rule, when public employees speak as part of their employment duties, they do not speak as citizens and hence are not accorded constitutional protection from their employers' disciplinary actions.[82] Recognizing that the "government as employer indeed has far broader powers than does the government as sovereign,"[83] the Court stated that the First Amendment "does not empower [public employees] to 'constitutionalize the employee grievance[s].' "[84] To accord constitutional protection to the speech in the case at hand, according to the *Garcetti* Court, would be to undermine employer authority and force the judiciary into "a new, permanent, and intrusive role."[85]

The issue in *Garcetti* was not whether the particular speech involved a matter of public concern (which it clearly did), but whether the speech was made by a government employee in furtherance of his official duties.[86] For this reason, the Court

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every time a government employee performs a work-related function. *Id.* at 408.

[79] *See Garcetti*, 126 S. Ct. at 1972 & n.14.

[80] Ceballos v. Garcetti, 361 F.3d 1168, 1172 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

[81] *See Garcetti*, 126 S. Ct. at 1960 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.").

[82] *See id.* According to the Court, public employees occupy "trusted positions in society" and must exercise caution when speaking, as their views may be read as a contravention to governmental policies or could operate as an impairment of governmental functions. *Id.* at 1958.

[83] *Id.* (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994)).

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

[85] *Id.* at 1961. The Court also argued that government employees are adequately protected by "legislative enactments—such as whistle-blower protection laws and labor codes." *Id.* at 1962.

[86] *See id.* at 1955.

took a different approach than had been taken in *Connick*. Since the deputy district attorney in *Garcetti* investigated the affidavit and wrote his memorandum as part of his assigned employment duties, he acted as a government employee rather than as a citizen; consequently, his supervisors had every right to criticize his performance and take disciplinary action.[87] Thus, if a public employee speaks not as a citizen but as an employee of the government, the *Connick* public concern test and the *Pickering* balancing test are not even reached.[88]

The *Garcetti* Court more or less adopted a per se rule that built upon the phrase "as a citizen" in the public concern test as articulated in *Connick*.[89] The rule makes a fundamental distinction based on the relation of the individual speaker to the government. If the relationship is one of citizen to sovereign, the First Amendment governs. But, if the relationship is one of employee to employer, no constitutional protection comes into play. Public employees speaking "pursuant to [their] official duties" do not speak "as citizens for First Amendment purposes," regardless of whether their speech might touch upon matters of public concern.[90]

III. APPLYING PUBLIC EMPLOYEE SPEECH DOCTRINES TO THE DUE PROCESS RIGHTS OF PUBLIC EMPLOYEES

The crucial distinction made in *Garcetti* was one of whether the individual was acting as a citizen or as a government employee.[91] First Amendment rights attach only to those public employees who are acting as citizens. Thus, it is the role of the person asserting the right that is determinative. When a person is speaking not as a citizen but as a government employee, that person is not entitled to the protections of the First Amendment, which serves to protect citizens from an overreaching sovereign. The First Amendment does not encompass a special protection for government employees, which incidentally constituted a minute fraction of the U.S. population in the late eighteenth

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[87] *Id.* at 1959–60 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.").

[88] *See id.* at 1960.

[89] *See id.*; *Connick*, 461 U.S. at 147.

[90] *Garcetti*, 126 S. Ct. at 1960.

[91] *See id.* at 1959–61.

century.[92] Likewise, the Due Process Clause should protect the property that individuals acquire as citizens, but not the job expectations they acquire as government employees. For this reason, the decision in *Garcetti* should have a spillover effect on the due process public employment cases, since the same employee-citizen distinction exists in those cases as in the public employee speech cases.

Constitutional rights should only reside in the most basic level in society, the common denominator level which all individuals share. Constitutional rights should relate to the citizen-sovereign relationship because that is the relationship that every individual possesses and shares with one another. Constitutional rights cannot reside in a relationship possessed by only a few members of society like the government employer-government employee relationship.

As the public employee speech cases reveal, the distinction between employee and citizen carries vitalconstitutional relevance. Indeed, as *Garcetti* suggests, the test for constitutional protection of public employee speech is a "but for" test: But for the employment relationship, would the government be able to restrict the speech at issue? In *Garcetti*, the deputy district attorney learned of the facts about which he spoke not because he was a citizen, but because he was a government employee. Thus, his speech was possible only because he was a government employee charged with performing certain duties.

Garcetti also marks a certain retrenchment from the *Pickering-Connick* line of cases; it places primary importance on the citizen-employee distinction for purposes of designating constitutional rights.[93] *Garcetti* treats the citizen-employee distinction as more controlling than the kind of speech uttered.[94] Similarly, the type of government job or the expectations surrounding it should not be as important in determining constitutional due process rights as the citizen-employee distinction.

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[92] *See* Clinton v. City of N.Y., 524 U.S. 417, 470 (1998) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 1, at 8 (1975).

[93] *See Garcetti*, 126 S. Ct. at 1959–61.

[94] *See id.*

Government employment is a creation of the legislative process, and hence should be governed by that process. As suggested in *Garcetti*, if there is value in having government employees speak out openly and without restraint about the workings of their government offices, then laws can be passed to grant that freedom and protection to public employees.[95] The efficient, responsive, and non-corrupt working of the government is a citizen concern, a democratic process concern. If the democratic community wishes to receive critical or exposing speech from government employees, despite its effect on the efficient operation of government offices, then the legislature can pass laws to ensure and protect such speech.[96] This interest corresponds to what Vincent Blasi once called "the checking value" of free speech, or the ability of speech, particularly by government insiders, to expose instances of government waste and corruption.[97] But, this value can just as easily be protected by whistleblower statutes.[98] If the democratic community needs or desires free and open "whistleblower" speech, it can enact the appropriate laws as it has done so on numerous occasions.[99]

This same logic applies to the protection of public employee job rights and expectations. If a democratic community wishes to

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[95] *See id.* at 1962.

[96] Bolstering the claim that due process rights should not pertain to government employment, Justice O'Connor has stated that the government employer possesses wide discretion in firing or sanctioning its employees, given the interest in running an efficient, responsive, and non-corrupt public service. *See* Bd. of County Comm'ns v. Umbehr, 518 U.S. 668, 674 (1996); *see also* Waters v. Churchill, 511 U.S. 661, 672 (1994) (distinguishing the government's roles as sovereign and employer by arguing that when the government acts as an employer, certain constitutional rights should not be applicable to government employees' speech).

[97] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527, 634 (1977) (arguing that the ability of free speech to check governmental officials' abuse of power is particularly served by protecting "speech critical of public officials by those persons in the best position to know what they are talking about—namely, government employees").

[98] The Court in *Garcetti* expressed this notion when it stated that public employees were well protected by "legislative enactments—such as whistle-blower protection laws and labor codes." 126 S. Ct. at 1962. Thus, even though the Court acknowledged "the public's interest in receiving informed opinion" regarding the inside operation of government, such interest could be protected by statute. *Id.* at 1959.

[99] Indeed, subsequent to *Garcetti*—in an effort to provide additional protection for public employee speech—a bill entitled the Federal Employee Protection of Disclosures Act was introduced on January 11, 2007 in the U.S. Senate. *See* S. 274, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-274.

provide these protections, it can enact the necessary civil service laws. Indeed, just as whistleblower laws have been enacted to protect certain types of public employee speech, various civil service laws have been enacted to provide the same kind of protection to public employees that a democratic community wishes to provide.[100] If society is concerned about oppressive governmental employment practices, just as if society is concerned about public employees exposing governmental waste or corruption, then it can address the problems through the legislative process. Moreover, if government agencies are oppressively silencing watchdog speech, and if government supervisors are unfairly firing employees, then the legislature can pass laws that require change. But aside from such laws, the government should be free to decide the rules for its own employment arena.

Public employees should not gain additional rights that private employees do not have. Just as the First Amendment is concerned with the constitutional rights of citizens, not public employees, the Due Process Clause is concerned with property held by individuals as citizens, not as public employees.

The distinction between citizen and employee, for purposes of defining the constitutional right of due process, is based on the fact that the latter can be changed in a way that the former can not. As Professor Kozel explains:

> There is a market for employment, but there is no market for federal constitutional sovereignty. If a citizen is not satisfied by the package of constitutional rights that the government affords her, she has no ability to choose a new federal constitutional sovereign, at least within the country. But the employment market is different. Employees, the Holmesian approach contends, have choices as to where they will work: choices between public and private employers, and among employers within each category.[101]

This is what due process guarantees were meant to protect against: adverse and arbitrary property deprivations by a

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[100] *See* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 1004 n.8 (1992) ("[C]ivil service laws . . . generally require some cause for discharge and provide for hearings on the issue [and] offer some protection to public employees against retaliatory discharge.").

[101] Kozel, *supra* note 55, at 1030–31.

sovereign authority to which the individual has no recourse.[102] Once the governmental sovereign acts upon a citizen, that citizen has no ability to step outside that citizen-sovereign relationship to seek justice or compensation, since there is only one governmental sovereign. For instance, if the government takes a person's home, that home has been lost for good. In the absence of due process requirements, there is no other authority to which that person can appeal for retribution. But, if a person loses a government job, there is a host of other employment options available. The simplest, most available remedy is merely to find a job in the private sector.

An individual has little choice over what governmental entity is to rule over him or her. A citizen of the United States must abide by the laws of the U.S. government. That citizen, as long as she resides in the United States, is subject to the laws of the U.S. government; she cannot pick and choose which government is to hold power over her. But, when a person becomes a public employee, it is a voluntary choice—just one of many employment choices available to that individual. Indeed, there are many areas in which government employees do not have the same constitutional rights as citizens do. For instance, public employees may have their property searched without a warrant supported by probable cause, as required by the Fourth Amendment.[103] Even though the Fifth Amendment prohibits the government from forcing private citizens to provide incriminating information, government employees can be fired when the incriminating information given by the employee relates to their job duties.[104] Moreover, under the Hatch Act, federal government employees are restricted in their political activities in ways in which private citizens are not.[105]

CONCLUSION

As highlighted in the public employee speech cases, the citizen-employee distinction is an important one for determining

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[102] *See* County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (stating that due process is "intended to secure the individual from the arbitrary exercise of the powers of government").

[103] *See* O'Connor v. Ortega, 480 U.S. 709, 723 (1987).

[104] *See* Gardner v. Broderick, 392 U.S. 273, 278 (1968).

[105] *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding the constitutionality of the Hatch Act).

the placement of constitutional rights. As citizens, individuals enjoy the full protections accorded by the Constitution. But, as public employees, individuals are governed by the employment relationship existing between them and their government employer. Consequently, a government employee's job interests should not be considered property for purposes of due process protections. Indeed, it seems somewhat paradoxical to refer to the due process property rights of public employees in an at-will economy. Furthermore, since it is public employees who essentially constitute the government, it seems odd to have a situation where the same people are depriving rights as are claiming the deprivation; thus, by becoming a part of the government, public employees acknowledge that the government must have the power to ensure its own effective operation. Moreover, while most forms of property are inheritable from generation to generation, government jobs have no such quality.

In dealing with public employee speech, the courts during the 1960s moved away from the right-privilege doctrine and began granting more expansive speech rights to public employees. However, with its recent decision in *Garcetti*, the Court is now drifting back somewhat to its earlier approach. It is giving more deference to the government's need for managing its employees, and is thus moving closer to the private sector model. Likewise, the Court should consider a similar move with respect to a public employee's due process rights.