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Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights

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PUBLIC EMPLOYEE FREE SPEECH: THE POLICY REASONS FOR REJECTING A PER SE RULE PRECLUDING SPEECH RIGHTS

Abstract: Public employees do not enjoy the same free speech rights under the First Amendment as do ordinary citizens. The Fourth Circuit Court of Appeals recently adopted a virtual per se rule precluding free speech rights for public employees while they are performing ordinary job duties. This Note argues that such a per se rule both lacks policy justification and, more importantly, would undermine the purposes of the First Amendment by impeding academic freedom and permitting viewpoint discrimination. Rejecting the per se rule best preserves the free speech rights of public employees and in turn allows them to speak freely about governmental operations—an especially important function of public employees, who are firsthand witnesses to government activities.

INTRODUCTION

Although the First Amendment generally protects employees' free speech rights, the rights of those employed by the government are more limited.[1] Courts, most recently the Ninth Circuit Court of Appeals, have wrestled with how best to define the contours of public employee free speech rights.[2] In 2004, in *Ceballos v. Garcetti*, the Ninth Circuit expressly rejected a per se rule precluding First Amendment protection for public employees performing regular work duties.[3] In doing so, *Ceballos* sustained the view that public employees do not give up all free speech protection as a condition of working for the government.[4] Furthermore, *Ceballos* is significant because it relied upon judicial analyses of free speech in the public employment context, one of the few areas in which courts limit free speech rights under the First Amendment.[5]

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[1] *See* Ceballos v. Garcetti, 361 F.3d 1168, 1174–76 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1395 (2005).

[2] *See id.*

[3] *Id.* at 1178.

[4] *See id.* at 1174.

[5] *See id.*

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . 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."[6] First Amendment doctrine, however, limits the general principle that the government cannot abridge free speech in several ways.[7] For example, the government may suppress speech if it is directed at inciting or producing imminent lawless action and is likely to incite or produce such action.[8] This formulation is the modern version of the "clear and present danger" doctrine.[9] Additionally, the government may regulate certain types of obscenity and indecency.[10] Libelous speech also is usually impermissible under the First Amendment.[11] Finally, the government possesses limited ability to restrict speech by its employees.[12]

An inherent tension exists between government employers' need to manage the workplace and the operation of the First Amendment in preventing governmental infringement of free speech.[13] Courts have struggled with the balance of public employees' free speech rights and government interests for over a hundred years, always recognizing, on the one hand, that full operation of First Amendment free speech in public workplaces would allow impermissible work-

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[6] U.S. CONST. amend. I.

[7] *See infra* notes 8–12 and accompanying text.

[8] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (enunciating the test that the government may suppress speech only if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

[9] Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that the defendants violated federal statutes by interfering with military recuitment during wartime and that the speech lacked First Amendment protection because it posed a clear and present danger to national security). *Schenck v. United States* set out the original clear and present danger test. *Id. Brandenburg v. Ohio* is the modern precedent on the issue. *See* 395 U.S. at 447.

[10] *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that child pornography receives no First Amendment protection so long as the applicable statute banning child pornography explicitly restricts only works that visually portray children in a sexually explicit manner); Miller v. California, 413 U.S. 15, 24 (1973) (formulating a three-factor test to determine if sexually explicit material is obscene).

[11] *See* N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964) (holding that in order to comply with First Amendment freedoms, public officials alleging libel must prove actual malice to recover).

[12] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that to receive First Amendment protection, a public employee's interest in speaking must outweigh the public employer's interest in preventing workplace disruption).

[13] *See id.*

place disruption.[14] On the other hand, public employees are in a unique position to uncover improprieties within the government due to their firsthand knowledge of governmental operations, and therefore, the First Amendment's guarantee of a right to petition the government for redress of grievances is an essential right to preserve for public employees.[15]

U.S. courts offered little protection for public employees' free speech rights before 1968.[16] For example, in 1892, in *McAuliffe v. Mayor of New Bedford*, the Supreme Judicial Court of Massachusetts rejected the right of public employees to criticize their employers and maintain their employment.[17] Justice Oliver Wendell Holmes is often quoted for the introductory remark to his opinion in that case: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[18] Accordingly, government employees were forced to give up constitutional free speech rights as a condition of public employment.[19]

Courts today provide some First Amendment protection to public employees.[20] Although public employees do not enjoy the same free speech rights at work as ordinary citizens, certain protections are afforded.[21] Whether public employees' speech is constitutionally protected is determined using several judicial tests.[22] In 2000, in *Urofsky v. Gilmore*, the Fourth Circuit Court of Appeals decided that if a public employee is performing regular workplace duties and thus acting as a representative of the state, the employee's speech should not receive First Amendment protection.[23] Such a per se rule would create a new type of analysis for when a public employee speaks while performing job duties.[24] Although the Fourth Circuit justifies its approach by rea-

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[14] *See, e.g.*, Washington v. Clark, 84 F. Supp. 964, 966 (D.D.C. 1949); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); Reagan v. Bichsel, 284 S.W.2d 935, 937 (Tex. Civ. App. 1955).

[15] *See Ceballos*, 361 F.3d at 1175.

[16] *See Washington*, 84 F. Supp. at 966; *McAuliffe*, 29 N.E. at 517; *Reagan*, 284 S.W.2d at 937; *see also* Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: the Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 530 (1998) (describing the history of public employee free speech jurisprudence).

[17] 29 N.E. at 517.

[18] *Id.*

[19] *See id.*; *see also Washington*, 84 F. Supp. at 966; *McAuliffe*, 29 N.E. at 517.

[20] *See infra* notes 32–54 and accompanying text.

[21] *See infra* notes 32–54 and accompanying text.

[22] *See, e.g., Ceballos*, 361 F.3d at 1174–76; Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000).

[23] 216 F.3d at 409.

[24] *See id.* at 407.

soning from current caselaw, such an approach potentially could eradicate the use of the current judicial public employee speech tests.[25]

This Note argues that courts must reject the per se rule precluding First Amendment protection for public employees' speech made while performing regular employment duties.[26] Part I of this Note explains the U.S. Supreme Court jurisprudence in the area of public employees' free speech rights and discusses the relevance of whistleblower statutes.[27] Part II discusses the concept of a per se rule preventing public employees from claiming First Amendment protection for speech in their regular employment duties.[28] Part III discusses *Ceballos*, in which the Ninth Circuit expressly rejected a per se rule.[29] This Part also discusses the status of the per se rule in other circuits and the common policy objections to the per se rule.[30] Finally, Part IV argues that the purposes of the First Amendment will be undermined unless public employees possess freedom of speech while performing regular employment duties.[31]

I. The History of Public Employees' Free Speech Rights

A. *Two-Tiered Analysis: The Pickering Balancing Test and the* Connick *Public Concern Test*

The modern approach to public employees' speech doctrine began in the 1960s when the U.S. Supreme Court addressed the issue of public employees' free speech rights.[32] In 1968, in *Pickering v. Board of Education*, the Court articulated a new balancing test to determine whether a public employee's speech is constitutionally protected.[33] The plaintiff, a public school teacher, lost his job for writing a letter to a local newspaper alleging irresponsible spending by the school district on sports programs.[34] The Court determined that the Board of Education had violated the plaintiff's First Amendment right to free speech.[35] Us-

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[25] *See id.*

[26] *See infra* notes 160–245 and accompanying text.

[27] *See infra* notes 32–69 and accompanying text.

[28] *See infra* notes 70–105 and accompanying text.

[29] *See infra* notes 106–59 and accompanying text.

[30] *See infra* notes 122–59 and accompanying text.

[31] *See infra* notes 160–245 and accompanying text.

[32] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Rosenthal, *supra* note 16, at 533.

[33] 391 U.S. at 568.

[34] *Id.* at 564.

[35] *Id.* at 565.

ing a formula now referred to as the *Pickering* balancing test, the Court held that for a statement by a public employee to receive First Amendment protection, the employee's interest "as a citizen, in commenting upon matters of public concern," must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[36] Because teachers are likely to have informed opinions on the operation of schools, the Court reasoned that teachers should be able to speak about how their area of government should allocate funds.[37] Furthermore, the Court concluded that even though some of the plaintiff's statements were false, those statements nevertheless constituted protected speech because they were not knowingly or recklessly false.[38]

The *Pickering* balancing test is still used in public employee free speech cases, supplemented by an additional preliminary analysis that the Court later added to this test.[39] In 1983, in *Connick v. Myers*, the U.S. Supreme Court sought to clarify its holding in *Pickering*.[40] The *Connick* Court held that as a threshold issue of law, before applying the *Pickering* test, courts must determine whether the public employee speech at issue touched matters of public concern.[41] In *Connick*, the Court held that a public employee did not have a free speech right to prepare a questionnaire for her coworkers where the complaints at issue—including transfer policies, office morale, pressure to vote for certain political parties, and the need for a grievance committee in her government office—were primarily personal grievances, not matters of public concern.[42] The Court reiterated the importance of ensuring that citizens retain fundamental rights while working for the government.[43] The Court indicated that the essential inquiry under *Connick* is to determine whether an analysis of a public employee's speech can proceed to the *Pickering* test, which depends upon whether the employee spoke "as a citizen upon matters of public concern,"

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[36] *Id.* at 568.

[37] *Id.* at 572.

[38] *Pickering*, 391 U.S. at 572.

[39] *See* Connick v. Myers, 461 U.S. 138, 146 (1983); Rosenthal, *supra* note 16, at 535.

[40] *See Connick*, 461 U.S. at 146.

[41] *Id.*

[42] *Id.* at 141–42. The Supreme Court stated that the district court and court of appeals had misapplied the *Pickering* balancing test. *Id.* at 142. The statement at issue, however, only minimally touched upon matters of public concern. *Id.* at 154.

[43] *Id.* at 147.

rather than "as an employee upon matters only of personal interest."[44] Courts now utilize the "public concern" test.[45]

Connick provides several guiding statements regarding the operation of the *Pickering* balancing test.[46] The *Connick* Court stated that when employee expression does not relate to a matter of political, social, or other concern to the community, the government can manage its offices—and employee speech—as it sees fit without worry of judicial intervention.[47] When a public employee speaks on a matter of public concern, however, the speech is of sufficient importance to receive protection in federal courts.[48]

The *Connick* Court decided that determining what constitutes a matter of public concern is a question of law, and courts must analyze the "content, form, and context" of the allegedly protected speech in making this determination.[49] Because the Court has restricted protected speech to that addressing matters of public concern, not every statement made in a government office, particularly those regarding workplace grievances that have no societal importance, is subject to constitutional scrutiny.[50] The more an employee's speech addresses a matter of public concern, however, the greater a showing of workplace disruption is necessary to disallow First Amendment protection under the *Pickering* balancing test.[51] The Court nevertheless gives great deference to employers and allows preventive measures to disruption when necessary.[52] Thus, as a result of *Pickering* and *Connick*, a trial court presented with a public employee's free speech claim first must consider whether a public employee's statement touches on a matter of public concern, and then the court must weigh the interests of the government, including preventing workplace disruption, against the em-

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[44] *Id.*

[45] *E.g.*, Rodgers v. Banks, 344 F.3d 587, 596 (6th Cir. 2003); Baldassare v. New Jersey, 250 F.3d 188, 197 (3d Cir. 2001); Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996).

[46] *See Connick*, 461 U.S. at 138–54 (citing *Pickering* for the proposition that a statement by a public employee receives First Amendment protection only if the employee's interest "as a citizen, in commenting upon matters of public concern," outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

[47] *Id.* at 146.

[48] *Id.*

[49] *Id.* at 147.

[50] *Id.* at 149.

[51] *Connick*, 461 U.S. at 152.

[52] *See id.*

ployee's interest in the speech.[53] Courts now use the threshold *Connick* public concern test and the *Pickering* balancing test to analyze all public employee free speech cases.[54]

B. *Additional U.S. Supreme Court Commentary on Public Employees' Free Speech Rights*

In the years following *Connick* and *Pickering*, the Supreme Court clarified the operation of the two tests.[55] For example, in 1987, in *Rankin v. McPherson*, the Court held that public employee speech need not directly relate to one's employment to receive First Amendment protection.[56] In that case, the defendant, a constable, terminated the plaintiff, a law enforcement official, when the plaintiff remarked that she hoped assassins would successfully shoot President Ronald Reagan the next time they tried.[57] The Court held that the plaintiff's statements were of public concern under *Connick*, and that the employee's interest in speaking outweighed the employer's interest in forbidding it under the *Pickering* balancing test; therefore, the speech received First Amendment protection.[58] The Court reasoned that the plaintiff's statement did not disrupt the work environment, and that because it did not make her unsuitable to perform her work, no governmental interest existed to balance against the employee's free speech interest under the *Pickering* test.[59]

Furthermore, the Supreme Court also has restrained government employers' right to terminate employees immediately for criticizing the government.[60] In 1996, in *Waters v. Churchill*, the Court held that a government employer must conduct a reasonable inquiry into an alleged unprotected statement before taking any adverse employment action because of it.[61] In *Waters*, the Court decided that a public hospital nurse's interest in criticizing a hospital policy that she thought adversely affected patient care was of public concern under *Connick* and sufficiently outweighed the government employer's interest in an

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[53] *See id.* at 146; *see also Pickering*, 391 U.S. at 568.

[54] *See, e.g.*, *Rodgers*, 344 F.3d at 596; *Baldassare*, 250 F.3d at 197; *Dill*, 155 F.3d at 1201; *Fikes*, 79 F.3d at 1084.

[55] *See generally* Rankin v. McPherson, 483 U.S. 378 (1987).

[56] *Id.* at 389.

[57] *Id.* at 379–80.

[58] *Id.* at 388–89.

[59] *Id.* at 388.

[60] *See* Waters v. Churchill, 511 U.S. 661, 671 (1996).

[61] *Id.* at 677.

efficient workplace under *Pickering*.[62] This holding grants some protection for whistleblowers because it means they do not risk immediate termination after reporting wrongdoing, though the Court suggested that additional procedural protections could be given through whistleblower statutes.[63]

C. *Additional Category of Free Speech Protection: The Whistleblower Statutes*

In addition to the protection accorded to public employees' free speech rights under *Pickering* and *Connick*, whistleblower statutes also protect federal employees.[64] The major law protecting federal employees' speech rights is the Whistleblower Protection Act of 1989.[65] The Act provides that federal employees who reveal particular prohibited personnel practices and experience some adverse personnel action as a result may seek redress from a Merit Systems Protection Board.[66] If the public employee can show both that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, the employee is entitled to corrective action.[67] Employee revelations protected by the Act include violations of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public safety or health.[68] Though whistleblower legislation is sometimes criticized as under-inclusive, it does exist as an additional protection for public employees' free speech rights.[69]

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[62] *Id.* at 675, 677. The *Waters* Court further held that a trial court should decide whether speech is of public concern based upon what content the employer reasonably believed the speech contained, not what content the factfinder determines the speech contained. *Id.* at 677.

[63] *Id.* at 674.

[64] *See* Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1201–1222 (2000).

[65] *See id.*

[66] *See* § 1221(e)(1).

[67] *See id.*

[68] *See* 5 U.S.C. § 2302(b)(8)(A) (2000).

[69] *See infra* notes 228–36 and accompanying text.

II. The Move Toward a Per Se Rule Against Free Speech Rights Within a Public Employees' Job Duties

A. *The Distinction Between Private Citizens and Public Employees in the* Connick *Public Concern Test*

The U.S. Supreme Court has not yet decided a case in which a public employee's speech is part of that employee's fulfillment of an employment duty.[70] Rather, the Court's cases have dealt only with extraneous comments made by employees during work, not speech made in memoranda or reports the employee is required to write to fulfill ordinary employment duties while acting on behalf of the government.[71] Whether this type of speech receives First Amendment protection remains uncertain because the federal circuit courts of appeals are divided on the issue.[72]

This uncertainty regarding whether public employee speech made while carrying out one's employment duties receives constitutional protection may depend upon the interpretation of language in *Connick v. Myers*.[73] *Connick*'s public concern test distinguishes protected speech based on whether a public employee speaks "as a citizen upon matters of public concern" or "as an employee upon matters only of personal interest."[74] A public employee speaking as a citizen on matters of public concern is constitutionally protected, but an employee speaking on matters of private concern receives no First Amendment protection.[75] Consequently, two questions arise: If the public employee is speaking on a matter of public concern, can the employee still speak as a citizen within the meaning of *Connick* when performing employment duties in the role as employee—for example, while writing reports or speaking publicly as a representative of the government?[76] Moreover, has *Connick* set up a test in which courts must determine separately whether the subject matter touches public concern and whether the employee was speaking as an employee or as

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[70] *See generally* Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[71] *See Connick*, 461 U.S. at 138–54; *Pickering*, 391 U.S. at 563–75.

[72] *Compare* Ceballos v. Garcetti, 361 F.3d 1168, 1178 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1395 (2005) (holding that no per se rule exists), *with* Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000) (holding that public employees enjoy no free speech rights while speaking in their employee roles).

[73] *See Urofsky*, 216 F.3d at 409.

[74] *Connick*, 461 U.S. at 147.

[75] *Id.*

[76] *See supra* notes 70–75; *infra* notes 78–159 and accompanying text.

a citizen?[77] The Fourth Circuit Court of Appeals favors a per se rule precluding First Amendment protection for public employees performing their job tasks ("the per se rule") and considers the *Connick* language to create an essential distinction, while the Ninth Circuit Court of Appeals rejects the per se rule and interprets the *Connick* language more loosely.[78] These opposing views are discussed below.[79]

B. Urofsky v. Gilmore: *The Fourth Circuit Moves Toward a Per Se Rule*

The Fourth Circuit has adopted a virtual per se rule precluding free speech rights for public employees.[80] In 2000, in *Urofsky v. Gilmore*, the Fourth Circuit held that in determining whether public employee speech receives First Amendment protection, a court first must consider whether the employee spoke as a private citizen or as a public employee; only after this consideration can a court determine whether the speech was of public concern under *Connick* and then move on to perform the *Pickering v. Board of Education* balancing test.[81] The *Urofsky* court adopted this virtual per se rule in the context of a case where professors at public colleges and universities brought suit to challenge the constitutionality of a Virginia statute restricting state employees' access to sexually explicit material on computers owned or leased by the state.[82] The court decided the case using the framework of the *Pickering* and *Connick* tests and determined that state employees receive no constitutional protection while accessing sexually explicit materials on state-owned computers.[83]

In applying the *Connick* public concern test, however, the *Urofsky* court interpreted the U.S. Supreme Court's enunciated test—whether the employee spoke "as a citizen upon matters of public concern," rather than "as an employee upon matters only of personal interest"—as emphasizing the unrelatedness of the unprotected speech at issue to the public employee's work duties.[84] To demonstrate this distinction, the court used the example that if a district attorney must make a public statement regarding an upcoming murder trial, the attorney

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[77] *See supra* notes 70–75; *infra* notes 78–159 and accompanying text.

[78] *Compare Ceballos*, 361 F.3d at 1178 (rejecting a per se rule), *with Urofsky*, 216 F.3d at 409 (essentially adopting a per se rule).

[79] *See infra* notes 80–159 and accompanying text.

[80] *See Urofsky*, 216 F.3d at 409.

[81] *Id.* at 407.

[82] *Id.* at 404.

[83] *Id.*

[84] *Id.* at 407 (citing the *Connick* public concern test).

has no constitutional free speech right to disregard a supervisor's instructions about the speech because the speech is a requirement of the attorney's employment, even though the content of that speech may be of great public concern.[85] The attorney could, however, write a letter to a newspaper alleging prosecutorial malfeasance—meaning the attorney would be acting as a citizen—and receive First Amendment protection.[86] In drawing this distinction, the court explained that employment duties will often involve speaking on matters of concern to the public and that using the First Amendment to give employees the right to dictate how they perform those work duties—simply because the speech involves a matter of public concern—would be irrational.[87]

Urofsky does not establish a firm per se rule, but if it is applied stringently, public employees speaking in their roles as employees have no free speech rights.[88] The *Urofsky* court asserted that when speech is not made in a public employee's capacity as a private citizen and regarding matters of public concern, no First Amendment protection exists.[89] Although the court did not expressly state that a public employee never has a free speech right while performing employment duties, *Urofksy*'s holding made the role of the speaker dispositive in the public concern analysis under *Connick*.[90] Consequently, *Urofsky* requires a new two-tiered inquiry when an employee speaks in fulfillment of an employment duty.[91] A court must consider first whether the employee spoke as a citizen or as an employee and then consider whether the subject matter was of public concern.[92]

C. *Policy Support for the Per Se Rule*

Urofsky highlights multiple policy concerns that underlie the idea of adopting a per se rule, and its viewpoint has also proven influential with other judges.[93] First, public employees speak for the state.[94] Second, providing such speech rights would be inconsistent with whistle-

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[85] *Urofsky*, 216 F.3d at 407–08.
[86] *Id.* at 407.
[87] *Id.* at 407–08.
[88] *See id.* at 409.
[89] *See id.*
[90] *See Urofsky*, 216 F.3d at 409.
[91] *See id.*
[92] *Id.*
[93] *See id.*; *see also Ceballos*, 361 F.3d at 1189 (O'Scannlain, J., specially concurring).
[94] *See infra* notes 97–99 and accompanying text.

blower statutes.[95] Third, the rule would constitutionalize the performance of everyday work duties.[96]

The first major policy supporting a per se rule is that when public employees act within the scope of their employment, they speak not for themselves but for the state.[97] As a result, the employee's role requires regulation because observers could construe statements as official government stances on any given issue, regardless of whether the statements address matters of public concern.[98] No personal interest in the speech exists, and consequently, no First Amendment right should attach.[99]

Second, according to the *Urofsky* viewpoint, legislatures enacted whistleblower statutes solely because such legislation creates a right where no constitutional protection otherwise exists.[100] In supporting the *Urofsky* court view in his special concurrence to the 2004 Ninth Circuit Court of Appeals decision in *Ceballos v. Garcetti*, Judge O'Scannlain noted that whistleblower statutes became necessary because the First Amendment did not otherwise protect public employees who revealed governmental misdeeds.[101] Consequently, legislatures passed laws to protect this speech because it had value but remained constitutionally unrecognized.[102]

Finally, the *Urofsky* court reasoned that without a per se rule, a constitutional claim could arise in every action a public employee performs.[103] Out of their fear of lawsuits, government employers could be forced to tolerate mere workplace grievances or unprofessional language and to avoid making rules and taking disciplinary action.[104] Because of public employees' status as representatives of the government, the existence of whistleblower statutes, and the fear of constitutionalizing everyday work duties, some reason that a per se rule against constitutional protection for public employee speech is necessary.[105]

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[95] *See infra* notes 100–02 and accompanying text.

[96] *See infra* notes 103–04 and accompanying text.

[97] *See Ceballos*, 361 F.3d at 1189 (O'Scannlain, J., specially concurring).

[98] *See id.* Judge O'Scannlain argued that performance of a public employment task is state action, and therefore, that speech contained within an employment task bears the seal of the state. *See id.*

[99] *See id.*

[100] *See id.* at 1192.

[101] *See id.*

[102] *See Ceballos*, 361 F.3d at 1192 (O'Scannlain, J., specially concurring).

[103] *See Urofsky*, 216 F.3d at 408.

[104] *See id.* at 409.

[105] *See supra* notes 93–104 and accompanying text.

III. The Rejection of the Per Se Rule

A. *Rejecting* Urofsky: Ceballos v. Garcetti

Although some courts maintain the necessity of a per se rule precluding free speech rights for public employees performing job duties, others take the position that some constitutional protection for public employees at work necessarily must exist.[106] In 2004, in *Ceballos v. Garcetti*, the Ninth Circuit Court of Appeals expressly rejected the per se rule.[107] In *Ceballos*, the plaintiff, a deputy district attorney, was instructed by his superiors to investigate the possibility that a deputy sheriff lied in a search warrant affidavit.[108] The plaintiff sent a memorandum to the head deputy district attorney, who informed the plaintiff that he should revise the memorandum to make it less accusatory of the sheriff.[109] While a hearing on a motion challenging the search warrant was pending, the plaintiff informed opposing counsel that he believed the affidavit contained false statements and that he felt the law compelled him to turn over his memorandum to opposing counsel.[110] The plaintiff's superiors then instructed him to amend the memorandum to include the statements of only one detective, and as a result, the plaintiff was prevented from telling the court some of his conclusions.[111]

The plaintiff was then demoted, treated in a hostile manner, and denied a promotion for criticizing the deputy sheriff too harshly.[112] He filed a complaint against his employer alleging a violation of his First Amendment rights.[113] The district court dismissed the complaint against the government on Eleventh Amendment grounds and against individual defendants on the grounds of qualified immunity.[114]

On appeal, the Ninth Circuit reversed as to the individual defendants, holding that public employees can have free speech rights while carrying out employment duties.[115] The plaintiff's employers

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[106] *See infra* notes 107–59 and accompanying text.

[107] 361 F.3d 1168, 1178 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1395 (2005).

[108] *Id.* at 1171.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Ceballos*, 361 F.3d at 1171–72.

[113] *Id.* at 1172.

[114] *Id.*

[115] *Id.* at 1178. In its opinion, the Ninth Circuit discussed only the dismissal based on qualified immunity of individual public officials. *Id.* at 1170. The court held that qualified immunity does not apply where a public official has violated a clearly established constitu-

contended that even though exposing a sheriff's false testimony undoubtedly addresses a matter of public concern, the memorandum that the plaintiff prepared was unprotected speech because he prepared it in fulfillment of an employment responsibility.[116] Under the employers' conception of the *Connick v. Myers* public concern test, the plaintiff had acted as an employee and not as a citizen; therefore, they argued, the speech should not receive constitutional protection.[117]

The court ultimately rejected this argument, reasoning that public employees are in a unique position to contribute to the debate on matters of public concern, and that depriving them of free speech protection when carrying out their employment duties could undermine the maintenance of governmental integrity.[118] Additionally, the court stated that a per se rule would negatively affect whistleblowers because public employees have a duty to notify their supervisors of wrongdoings.[119] Moreover, the court noted that if a distinction is made between whether the employee acted as a citizen or as an employee, a public employee could receive protection for reporting some operation of the government to the press but not to supervisors who might be able to remedy the situation.[120] *Ceballos* thus expressly criticized the Fourth Circuit's decision in *Urofsky v. Gilmore* and then rejected a per se rule.[121]

B. *Other Federal Courts of Appeals Expressly or Impliedly Rejecting a Per Se Rule*

Like the Ninth Circuit in *Ceballos*, most circuits have either impliedly or expressly rejected the per se rule.[122] In 2001, in *Baldassarre v. New Jersey*, the Third Circuit expressly rejected a per se rule.[123] In that case, a prosecutor's office demoted and later fired an investigator

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tional right of which a reasonable person would have known. *Id.* In determining whether such a constitutional right existed, the court considered Ceballos's free speech rights under the First Amendment. *Id.*

[116] *Id.* at 1174.

[117] *Ceballos*, 361 F.3d at 1174; *see also* Connick v. Myers, 461 U.S. 138, 147 (1983).

[118] *Ceballos*, 361 F.3d at 1175.

[119] *Id.* at 1176.

[120] *Id.*

[121] *Id.* at 1177 n.7; *see* Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000).

[122] *See, e.g.*, Rodgers v. Banks, 344 F.3d 587, 598–99 (6th Cir. 2003); Baldassare v. New Jersey, 250 F.3d 188, 196–97 (3d Cir. 2001); Lewis v. Cowen, 165 F.3d 154, 164 (2d Cir. 1999); Dill v. City of Edmond, 155 F.3d 1193, 1202–03 (10th Cir. 1998); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996).

[123] 250 F.3d at 196–97 (holding that a public employee can state a claim for violation of free speech rights while performing work duties).

after he conducted a routine investigation into an automotive scam implicating other investigators.[124] In rejecting the argument of the prosecutor's office that statements made in the course of carrying out employment duties received no constitutional protection, the court noted that the speech condemning the other investigators fit squarely into *Connick*'s public concern test, which emphasized the importance of bringing to light breaches of the public trust.[125]

Similarly, in 2003, in *Rodgers v. Banks*, the Sixth Circuit Court of Appeals held that an employee could engage in protected speech as a citizen while performing employment duties.[126] The court expressly rejected the district court's finding that a letter written by the plaintiff could not pass the *Connick* public concern test because it was written in her capacity as an employee and not in her role as a citizen.[127] Instead, the court explained that the *Connick* analysis requires a determination whether an employee was "speaking as a *citizen* (albeit in the employee role) [rather than] speaking as an employee *for personal interest.*"[128] *Rodgers* decided that a proper focus under *Connick* is on the purpose of the speech as opposed to the role of the speaker in saying it.[129] Again, a circuit court rejected the adoption of a per se rule.[130]

Several other circuits have impliedly rejected a per se rule.[131] For example, in 1999, in *Lewis v. Cowen*, the Second Circuit Court of Appeals held that a state lottery worker's refusal to propose certain changes to the game was a matter of public concern, but that the state's interest in efficiency outweighed the employee's personal interest in the speech.[132] By allowing the lottery worker's speech made within his official capacity to pass the threshold *Connick* public concern test, the Second Circuit impliedly accepted the idea that public employees have protected speech rights within the scope of their employment duties.[133]

Similarly, in 1998, in *Dill v. City of Edmond*, the Tenth Circuit Court of Appeals held that a police officer's statement that he believed certain determinations about the facts of a homicide investiga-

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[124] *Id.* at 200.

[125] *Id.* at 196–97; *see also Connick*, 461 U.S. at 147.

[126] 344 F.3d at 598–99.

[127] *Id.* at 598.

[128] *Id.* at 599.

[129] *Id.*

[130] *See id.*

[131] *See infra* notes 132–36 and accompanying text.

[132] 165 F.3d at 164–65.

[133] *See id.*

tion to be untrue was a matter of public concern even though the investigation was a part of his employment duties.[134] Likewise, in 1996, in *Fikes v. City of Daphne*, the Eleventh Circuit Court of Appeals also held that a police officer's statements regarding improprieties within the department touched on matters of public concern, regardless of the fact that the statements were made in the course of the officer's duties.[135] By acknowledging that these employees had constitutionally protected rights in carrying out employment tasks, these circuit courts impliedly rejected the per se rule.[136]

C. *Federal Circuit Courts of Appeals Using Other Approaches to a Per Se Rule*

Unlike federal appeals courts that have expressly or impliedly rejected the per se rule, the Fifth Circuit Court of Appeals acknowledges a public-private distinction in determining whether public employee speech reaches matters of public concern under *Connick*.[137] Yet in 2000 in *Kennedy v. Tangipahoa Parish Library Board of Control*, the Fifth Circuit held that even when a speaker has mixed motives in his or her role as a speaker, a statement still can pass the *Connick* public concern test.[138] Therefore, in *Kennedy*, where a library worker suggested a new security policy in response to a rape on the premises, the court held the speech was still protected because the employee was speaking as both an employee and a citizen.[139]

The Seventh Circuit Court of Appeals also has adopted a unique approach to the proposed per se rule.[140] In 2001, in *Gonzalez v. City of Chicago*, the court held that employees' routine reports were not of public concern under *Connick* because they formed part of a constant duty to fill out paperwork.[141] In 2002, in *Delgado v. Jones*, however, the court narrowed the holding of *Gonzalez* to address only the most routine work tasks, where no evidence of public motivation exists.[142] In *Delgado*, this meant a police officer's reports detailing impropriety

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[134] 155 F.3d at 1202–03.

[135] 79 F.3d at 1084.

[136] *See supra* notes 132–35 and accompanying text.

[137] *See* Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 366 (5th Cir. 2000) (holding that a free speech right can exist where a public employee speaks both as a citizen and as an employee on matters of public concern while performing job tasks).

[138] *Id.*

[139] *Id.* at 376.

[140] *See, e.g.*, Delgado v. Jones, 282 F.3d 511, 517–19 (7th Cir. 2002).

[141] Gonzales v. City of Chi., 239 F.3d 939, 941 (7th Cir. 2001).

[142] *Delgado*, 282 F.3d at 519.

within the department were protected.[143] The court explained that "*Gonzalez* is limited to routine discharge of assigned functions, where there is no suggestion of public motivation."[144] Although the *Delgado* court expressly stated that it rejected a per se rule against speech rights in the course of employment duties, the *Gonzalez* precedent still creates a per se rule preventing First Amendment protection for speech in the most routine job functions.[145] Overall, then, the majority of circuits have expressly or impliedly rejected a per se rule.[146]

D. *Policy Reasons for Rejecting the Per Se Rule*

The *Ceballos* court and others opposed to a per se rule raise two policy objections.[147] First, a per se rule would provide diminished protection for the whistleblower.[148] Second, a per se rule would chill valuable speech.[149]

The first policy objection to a per se rule is that such a rule would adversely affect the status of the whistleblower.[150] Discouraging public employees from unveiling scandal, corruption, or illegal acts within the government defies reason, according to the *Ceballos* court, because such matters are always of great public concern.[151] In particular, the court reasoned that under the per se rule formulation, which distinguishes between speech by employees acting as citizens and speech by employees acting as employees, protecting only speech by citizens would encourage public employees to speak to the media or other indirect sources to seek redress—an indirect approach to resolution—instead of reporting the improper doings to superiors.[152] The *Ceballos* court also noted that the *Connick* ruling draws no distinction between internal and external speech when determining whether public em-

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[143] *Id.*; *see also Gonzalez*, 239 F.3d at 941. Only the most rote tasks that were of little public concern did not receive First Amendment protection after *Delgado*. 282 F.3d at 519.

[144] *Delgado*, 282 F.3d at 519 (distinguishing *Gonzalez*).

[145] *Id.*

[146] *See Rodgers*, 344 F.3d at 598–99; *Baldassare*, 250 F.3d at 196–97; *Lewis*, 165 F.3d at 164; *Dill*, 155 F.3d at 1202–03; *Fikes*, 79 F.3d at 1084. The First and Eighth Circuit Courts of Appeals have not addressed the issue sufficiently to discern their stance on the legality of a per se rule. *See generally* Schilcher v. Univ. of Ark., 387 F.3d 959 (8th Cir. 2004); Rivera-Jiminez v. Pierluisi, 362 F.3d 87 (1st Cir. 2004).

[147] *See Ceballos*, 361 F.3d at 1176; *Urofsky*, 216 F.3d at 439 (Murnaghan, J., dissenting).

[148] *See infra* notes 150–56 and accompanying text.

[149] *See infra* notes 157–59 and accompanying text.

[150] *Ceballos*, 361 F.3d at 1176.

[151] *See id.*

[152] *Id.*

ployee speech touches on matters of public concern.[153] Therefore, articulating a test that encourages external whistleblowing and discourages internal whistleblowing adds a distinction to public employee speech unacknowledged by the Supreme Court.[154] Furthermore, the court reasoned, whistleblower statutes provide only some protection for government employees who reveal wrongdoing.[155] Although such statutes often allow for whistleblowing against the government, the First Amendment can more affirmatively protect what its very language commands: freedom from the suppression of the ability to seek redress from that government.[156]

Finally, those opposing the per se rule reason that adopting such a rule will produce a general chilling effect on speech.[157] This rationale reflects the policy consideration that because public employees generally have insight into the functioning of government, their speech is inherently valuable.[158] Together with concerns about protection for whistleblowers, then, the potential chilling effect on speech discourages the adoption of a per se rule.[159]

IV. Analysis: The Per Se Rule Would Be Contrary to the Purpose of the First Amendment

In addition to the previously discussed criticisms of the proposed per se rule precluding free speech protection for public employees performing regular job duties, courts must reject the rule because it is contrary to the purposes of the First Amendment.[160] First, a per se rule could pose practical difficulties for professors in public universities and limit academic inquiry.[161] Furthermore, a per se rule could result in an increase of impermissible viewpoint discrimination.[162]

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[153] *See id.*

[154] *See id.*

[155] *See* Waters v. Churchill, 511 U.S. 661, 674 (1996).

[156] *See* U.S. Const. amend. I; *Ceballos*, 361 F.3d at 1174.

[157] *See Urofsky*, 216 F.3d at 439 (Murnaghan, J., dissenting).

[158] *See id.*

[159] *See supra* notes 150–58 and accompanying text.

[160] *See infra* notes 164–212 and accompanying text.

[161] *See* Urofsky v. Gilmore, 216 F.3d 401, 439 (4th Cir. 2000) (Murnaghan, J., dissenting); *see also infra* notes 164–84 and accompanying text.

[162] *See* Rosenthal, *supra* note 16, at 542; *see also infra* notes 185–212 and accompanying text. Content discrimination is the practice of forbidding speech because it addresses a certain topic. Rosenthal, *supra* note 16, at 540. Content discrimination can lead to viewpoint discrimination, which is the practice of forbidding speech that takes a standpoint disfavored by the suppressor of the speech. *Id.* at 542.

Additionally, the justifications for the per se rule are contrary to existing First Amendment caselaw.[163]

A. *The Issue of Speech in Public Universities*

A per se rule is contrary to the purposes of the First Amendment because it would negatively affect academic inquiry in public universities.[164] Professors at public educational institutions are employees of the state and as such would be subject to a per se rule adopted by courts.[165] Allowing the per se rule in this context is problematic for two reasons.[166] Professors often speak both as citizens and as employees, rendering it difficult as a practical matter to determine the role in which the professor speaks in a particular instance.[167] Additionally, allowing such a rule could impede academic freedom.[168]

Adopting the per se rule would create practical difficulties for courts, which would be forced to determine whether a professor spoke as an employee or as a citizen in an academic context.[169] The per se rule adopted by the Fourth Circuit in *Urofsky v. Gilmore* requires such a determination before a court can inquire into whether the subject of the speech involved matters of public concern.[170] So, under the per se rule, courts must determine in which role, citizen or employee, a professor speaks in deciding if his or her speech is constitutionally protected.[171] This determination is practically difficult because professors frequently publish articles and books, some in the name of their respective public employers and some not.[172] They often make presentations at different events, participate in speaking engagements, and have scholarly discussions with colleagues.[173] Often it is difficult to classify the role in which a professor speaks and whether the topic is of personal or employment interest.[174] Moreover, if courts determine that all these activities occur within the professor's role as an employee, all such activities would lose free speech protection under

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[163] *See infra* notes 213–45 and accompanying text.
[164] *See Urofsky*, 216 F.3d at 439 (Murnaghan, J., dissenting).
[165] *See id.* at 438–39.
[166] *See infra* notes 169–84 and accompanying text.
[167] *See infra* notes 169–76 and accompanying text.
[168] *See infra* notes 177–84 and accompanying text.
[169] *See* Connick v. Myers, 461 U.S. 138, 147 (1983).
[170] *See* 216 F.3d at 420.
[171] *See id.*
[172] *See id.* at 439 (Murnaghan, J., dissenting).
[173] *See id.*.
[174] *See id.* at 420 (majority opinion).

the per se rule.[175] Thus, it is practically difficult to apply the per se rule in the academic environment.[176]

Besides such practical difficulties, a per se rule affecting public school professors could impede academic freedom.[177] The Supreme Court recognizes that academic freedom is a special concern of the First Amendment.[178] Professors and others involved in academia are often a large source of intellectual discourse because they frequently comment upon and criticize various governmental operations.[179] If a per se rule is adopted, a professor's scholarly discourse could lead to retaliatory action, with no First Amendment recourse, should a professor's superior disagree with the professor's scholarship.[180] For example, under the per se rule, an economics professor would lack First Amendment protection in publishing an article criticizing current U.S. fiscal policy.[181] Such a potential result counsels against the adoption of the per se rule because public university professors have unique knowledge of their areas of specialization and can contribute significantly to the debate in their fields.[182] If courts adopt the per se rule, open debate on scholarly topics could diminish for fear of reprisal.[183] The per se rule would thus eradicate free speech protections in one of the places where it is most important to protect them—public universities.[184]

B. *The Risk of Content and Viewpoint Discrimination*

In addition to the risk of impeding academic freedom, the per se rule should be rejected because it increases the risk of impermissible viewpoint discrimination, which is the practice of forbidding speech because it expresses a standpoint disfavored by the suppressor of the speech.[185] Whenever speech is restricted, the restriction constitutes some form of content discrimination because it disallows a certain

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[175] *See Urofsky*, 216 F.3d at 420.

[176] *See supra* notes 169–75 and accompanying text.

[177] *See infra* notes 178–84 and accompanying text.

[178] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (holding unconstitutional a requirement that university faculty certify that they were not members of the Communist Party and recognizing a commitment to protect academic freedom).

[179] *See Urofsky*, 216 F.3d at 439 (Murnaghan, J., dissenting).

[180] *See id.*

[181] *See id.*

[182] *See id.*

[183] *See id.*

[184] *See Urofsky*, 216 F.3d at 439 (Murnaghan, J., dissenting).

[185] *See* Rosenthal, *supra* note 16, at 542.

category of speech.[186] For example, forbidding employees from engaging in sexual harassment in the workplace might be an acceptable form of content discrimination.[187] Given that the Supreme Court in *Pickering v. Board of Education* held that a public employee receives free speech protection only if the employee's interest in the speech outweighs the employer's interest in promoting efficiency, content discrimination is permissible under *Pickering* if used to promote workplace efficiency.[188]

Although some forms of content discrimination can be permissible, dangers of viewpoint discrimination can arise.[189] For example, a government employer might permissibly forbid political conversations during departmental meetings for the sake of efficiency—a restriction that constitutes content discrimination.[190] If the employer forbids only conversations about the Democratic Party, however, such a restriction constitutes viewpoint discrimination.[191] Viewpoint discrimination is dangerous because it can be used to perpetuate the domination of majority views and suppress valuable speech.[192]

The adoption of the per se rule would increase the risk of impermissible viewpoint discrimination in governmental workplaces.[193] A proponent of the per se rule might argue that by precluding speech rights for employees performing work tasks, only permissible content discrimination exists concerning topics unrelated to assigned work.[194] This justification is grounded in the *Pickering* concern of ensuring that government employers have latitude to manage and promote efficiency.[195] Such an argument is misguided, however, because most likely the adoption of a per se rule would deter only some public employees from criticizing workplace operations or engaging in other speech, and many public employees would still speak freely despite their lack of First Amendment protection.[196] Instead, a per se rule

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[186] *See id.*

[187] *See id.*

[188] *See* 391 U.S. 563, 568 (1968).

[189] *See* Rosenthal, *supra* note 16, at 542.

[190] *See id.*

[191] *See id.*

[192] *See id.*

[193] *See infra* notes 194–212 and accompanying text.

[194] *See Pickering*, 391 U.S. at 568. For example, a public employer might hypothetically argue that it is mere content discrimination to punish employees who mention politics within work assignments, grounding its argument for permissibility in the employer's right under *Pickering* to promote workplace efficiency. *See id.*

[195] *See id.*

[196] *See Urofsky*, 216 F.3d at 439 (Murnaghan, J., dissenting).

would allow government employers simply to suppress the viewpoints they disfavor by arbitrarily reprimanding employees for speech with which the employers disagree.[197] Government employers could engage in this type of viewpoint discrimination without fear of repercussion under the per se rule because such a rule leaves public employees with no recourse in courts.[198] *Pickering* authorizes government employers to regulate workplace efficiency, but the Supreme Court does not provide a license to do so by punishing only disagreeable ideas.[199]

An increased risk of viewpoint discrimination within governmental workplaces is problematic because governmental interference within the political and moral realms could result.[200] If government employers can suppress speech that individual managers deem unfavorable, issues regarding the type of speech suppressed could arise.[201] Of course, concern arises that whistleblowing or other speech alleging mismanagement would be suppressed.[202] Additionally, the danger exists that government employers would encourage certain political affiliations.[203] Such a danger is real; for example, in *Connick v. Myers*, the plaintiff received a reprimand for distributing a questionnaire asking other employees if pressure to conform to certain political views existed within the government workplace.[204] Moreover, the danger exists that certain majority views on moral or controversial issues would be encouraged through the suppression of minority opinions.[205] For example, government employers could allow speech in a law enforcement office recommending or supporting the death penalty and could reprimand workers who take a contrary view.[206]

Exceptional dangers to free speech arise where government employers are able to suppress minority views through reprimand but can allow speech on viewpoints with which they agree.[207] In its virtual endorsement of the per se rule, the *Urofsky* court reasoned that speech rights should not protect public employees carrying out employment tasks because onlookers could perceive the speech as an

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[197] *See id.*
[198] *See id.*
[199] *See* 391 U.S. at 568.
[200] *See id.*
[201] *See id.*
[202] *See infra* notes 226–36 and accompanying text.
[203] *See Connick*, 461 U.S. 138 at 142.
[204] *See id.*
[205] *See* Rosenthal, *supra* note 16, at 542.
[206] *See id.*
[207] *See id.*

official state view.[208] In practice, however, if employers can allow only speech they deem favorable without fear of First Amendment claims due to the per se rule, creating an official state view on certain issues becomes easier.[209] One viewpoint could easily predominate in a government office if the decisionmakers in that office punish those who engage in deviating speech—a result that essentially itself creates an "official" view.[210] An official or quasi-official state view on any political or moral issue is contrary to the purpose of the First Amendment.[211] For all of these reasons, the per se rule could result in impermissible viewpoint discrimination.[212]

C. *The Lack of Justification for a Per Se Rule*

In addition to impeding academic freedom and allowing impermissible viewpoint discrimination, policy considerations cited by the *Urofsky* court and those endorsing the per se rule logically fail as well.[213] They contend that courts should adopt the rule for three major reasons.[214] First, public employees speak for the state.[215] Second, speech rights would be inconsistent with whistleblower statutes.[216] Finally, the rule would constitutionalize performance of everyday work duties.[217] Each of these arguments misconstrues the *Connick* public concern test and the *Pickering* balancing test.[218]

The *Urofsky* view rests on the idea that public employees should not have free speech protection in carrying out employment duties because in fulfilling these duties, employees are speaking for the state.[219] This position, however, ignores the factors that the U.S. Supreme Court articulated for performing the *Connick* public concern test.[220] Under *Connick*, in determining whether employee speech touches on matters of public concern, courts must analyze the "con-

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[208] *See* 216 F.3d at 408 n.6.

[209] *See id.*

[210] *See id.* at 407–08.

[211] *See* Rosenthal, *supra* note 16, at 542.

[212] *See supra* notes 185–211 and accompanying text.

[213] *See infra* notes 214–45 and accompanying text.

[214] *See supra* notes 93–105 and accompanying text.

[215] *See infra* notes 219–25 and accompanying text.

[216] *See infra* notes 226–36 and accompanying text.

[217] *See infra* notes 237–45 and accompanying text.

[218] *See infra* notes 219–45 and accompanying text.

[219] *See* Ceballos v. Garcetti, 361 F.3d 1168, 1189 (9th Cir. 2004) (O'Scannlain, J., specially concurring), *cert. granted*, 125 S. Ct. 1395 (2005); *Urofsky*, 216 F.3d at 408 n.6.

[220] *See* 461 U.S. at 147–48.

tent, form, and context" of the allegedly protected speech.[221] The purpose of these factors is to provide courts with criteria for determining as a matter of law what speech addressed matters of public concern.[222] The premise of a multi-factored test is that in the public employment context, the entire set of circumstances dictates whether or not speech is worthy of constitutional protection.[223] For example, although an Internal Revenue Service employee speaking to the public about new tax policies might be a representative of the state while carrying out that employment task, a public university professor drafting a scholarly article criticizing new tax policies probably represents his or her own views and does not represent the state even though the professor is performing regular employment duties.[224] Because the *Connick* Court recognized that factual circumstances differ in public employee free speech cases, it also implicitly acknowledged that an employee can speak as a citizen and as an employee at the same time, not only as one or the other.[225]

In addition to misconstruing *Connick* by reasoning that public employees necessarily speak on behalf of the state while performing job tasks, supporters of the *Urofsky* view also fail in arguing that affording free speech rights to public employees performing job tasks is inconsistent with whistleblower statutes.[226] This position fails on two counts because whistleblower statutes provide mainly procedural protections, and some valuable speech does not constitute whistleblowing and thus is not covered by whistleblower statutes.[227]

Whistleblower statutes do not exist because public employees lack free speech protection to report wrongdoing, as supporters of the per se rule might suggest.[228] Instead, in *Waters v. Churchill*, the Supreme Court clarified that absent a strong showing of workplace disruption, most employee speech receives First Amendment protection, especially because public employees are often in a unique position to comment upon governmental operations because of their insider

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[221] *Id.*

[222] *See id.*

[223] *See id.*

[224] *See id.*

[225] *See* 461 U.S. at 147–48.

[226] *See Ceballos*, 361 F.3d at 1192 (O'Scannlain, J., specially concurring). Proponents of the per se rule reason that if the First Amendment protected employees in these circumstances, no need for whistleblower statutes would exist. *See id.*

[227] *See infra* notes 228–36 and accompanying text.

[228] *See* Waters v. Churchill, 511 U.S. 661, 674 (1996).

viewpoint.[229] Legislatures may choose to provide supplemental protections in whistleblower statutes out of respect for the values underlying the First Amendment and to prevent adverse employment actions taken against public employees who exercise speech rights.[230] Whistleblower statutes do not create a new right to speak about governmental wrongdoing; rather, they provide employees who exercised their right with additional guarantees against the consequences of doing so.[231] The result is procedural protection, not the creation of a new free speech right that did not previously exist.[232]

Additionally, the per se rule could thwart constitutional protection for speech that does not constitute whistleblowing but still engenders valuable discourse, although it is part of the public employee's job duties.[233] For example, although a police officer reporting that another officer used excessive force on an arrestee might constitute whistleblowing, a police officer writing a report giving the number of instances of officers shooting arrestees and suggesting the number is high might not constitute whistleblowing because it is not necessarily unveiling wrongdoing.[234] Nonetheless, such speech, which possesses the potential to improve governmental operations, should receive First Amendment protection even if the speech does not blow the whistle on wrongdoing.[235] Overall, the mere existence of whistleblowing statutes does not negate the need for First Amendment protection for public employees carrying out job duties.[236]

In addition to failing in the position that whistleblower statutes demonstrate the needlessness of First Amendment protection for public employees performing job tasks, the *Urofsky* court and those supporting its virtual adoption of the per se rule also fail in concluding that providing constitutional protection will constitutionalize everyday work duties.[237] This argument attempts to substitute an absolute abolition on fundamental free speech rights where the *Pickering* test already allows leniency for government employers to control speech while still providing First Amendment protection.[238] Supporters of the

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[229] *See id.*

[230] *See id.*

[231] *See* Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1) (2000).

[232] *See id.*

[233] *See* 5 U.S.C. § 2302(b)(8)(A) (2000).

[234] *See id.*

[235] *See Waters*, 511 U.S. at 674.

[236] *See supra* notes 226–35 and accompanying text.

[237] *See* 216 F.3d at 408.

[238] *See* 391 U.S. at 568.

per se rule assume that by allowing constitutional protection for some employee speech contained in work tasks, free speech issues will pervade government workplaces.[239] The Supreme Court clearly acknowledges, however, that government employers must enjoy great deference in managing operations, such as in forbidding the use of offensive language.[240] For this very reason, the *Pickering* test balances the government interest in workplace efficiency against the speech interests of public employees.[241]

Thus, it is nonsensical to distinguish, as the *Urofsky* court does by adopting the per se rule, between public employees speaking as citizens and those speaking as employees, in an attempt to preserve employer power to regulate speech because such power already exists in the *Pickering* balancing test.[242] Allowing free speech protection for public employees performing regular job duties will not constitutionalize all work tasks.[243] Instead, the *Urofsky* viewpoint fails in each of the three rationales offered to justify the adoption of the per se rule.[244] These arguments misconstrue the proper application of the *Pickering* balancing test and the *Connick* public concern test; therefore, courts should reject the per se rule when analyzing public employee speech under the First Amendment.[245]

Conclusion

Adopting a per se rule precluding free speech rights for public employees performing regular job duties would be contrary to the purposes of the First Amendment. The rule would infringe upon academic freedom because professors at public universities engage in academic discourse as a regular employment responsibility. Moreover, such a rule increases the risk of viewpoint discrimination because it allows employers to punish only speech they find personally unfavorable and leaves employees with no cause of action when reprimanded for their speech. Additionally, no logical justification for the per se rule exists. Public employees do not always speak on behalf of the state when carrying out job tasks, and whether speech is protected is determined through the circumstance-based inquiry in *Connick*. Whis-

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[239] *See Urofsky*, 216 F.3d at 408.

[240] *Waters*, 511 U.S. at 672.

[241] *See* 391 U.S. at 568.

[242] *See id.*

[243] *See id.*

[244] *See supra* notes 213–43 and accompanying text.

[245] *See supra* notes 213–43 and accompanying text.

tleblower statutes merely supplement existing rights; they do not render these rights ineffectual. Moreover, employer interests in suppressing disruptive speech are weighed in the *Pickering* balancing test, quelling concerns that speech rights constitutionalize everyday job tasks. Because of the lack of justification for a per se rule precluding free speech rights for public employees performing regular job duties, courts must reject the adoption of the per se rule.

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a. Total Number of Copies *(Net press run)*			800	800
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)*	377	377
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	(2)	In-County as Stated on Form 3541	73	73
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e. Free Distribution Outside the Mail *(Carriers or other means)*			50	50
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g. Total Distribution *(Sum of 15c. and 15f)* ▶			715	715
h. Copies not Distributed			85	85
i. Total *(Sum of 15g. and h.)* ▶			800	800
j. Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)*			75.5%	75.5%

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