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## **Free Speech Rights That Work at Work: From the First Amendment to Due Process**

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First Amendment doctrine is often “institutionally blind” – surprisingly oblivious to institutional differences that seem to matter out here in the world. But the workplace is an obvious and longstanding counterexample; it is undoubtedly a distinct “constitutional niche.” In my own view, the civic and political importance of what happens in the workplace, and the constitutional stake in employees’ rights and freedoms at work, are pervasively undervalued. That is true in different ways in both the private sector – in which state action against employees is rare and constitutional rights are seldom implicated – and in the public sector – in which every reprimand, suspension, and termination is state action. That feature of the public sector workplace makes it a prolific source of constitutional disputes and doctrine, and an interesting laboratory in which to study the implications of taking institutions seriously for constitutional purposes.

The Supreme Court’s recent decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), highlights both the difficulty of applying First Amendment principles in the workplace setting and the Court’s tendency to resolve doubts in that setting against employee rights. In eviscerating the free speech rights of public employees when they speak in the course of doing their jobs, *Garcetti* gets it wrong, I think. But the right answer to the *Garcetti* problem is not so obvious, for the First Amendment is a bit of a square peg in a round hole here. The public clearly has an interest in hearing the speech that *Garcetti* leaves unprotected; but from the employee’s standpoint, the problem in *Garcetti* is as much about defeated expectations as it is about lost liberties.

I propose a “due process solution” to the *Garcetti* problem that fits more comfortably with workplace structures. I believe the due process solution is not merely better than nothing for employees, which is what *Garcetti* prescribes, but better than the judicial remedy that the dissenters would have granted them. More tentatively, I suggest that due process law might provide a better framework for the larger universe of public employee free speech controversies outside of *Garcetti*. Transforming public employees’ free speech claims from First Amendment rights into “liberty interests” protected by the due process clause could afford a quicker and more accessible form of speech protection that actually worked within the public sector workplace. The fullest version of the due process solution would extend protection to categories of speech left unprotected not only by *Garcetti* but also by *Connick v. Myers*, which confined the reach of the First Amendment to public employee speech on “matters of public concern.” The resulting regime would smooth out some of the troubling “cliff effects” and distortions that current

doctrine creates within the workplace setting. Those broader but flatter protections would be more compatible with workplace structures and relationships, and might afford a more reliable freedom of speech for employees, than current law, with its reliance on federal litigation as the enforcement mechanism.

Whether the due process solution would work as hoped depends on the answers to some difficult questions that I only begin to explore here. Most important is the question whether a due process regime would prove *too* compatible with prevailing workplace norms, and too deferential to managers, to afford the protection that dissenters and whistleblowers, and the public, need. This question echoes broader concerns about the kind of self-regulatory or “reflexive” models of modern law to which many legal scholars (including myself) are drawn, and of which the due process solution is an example. The idea that institutions do matter, and should affect the shape of constitutional rights, is likely to lead further down the road toward institutional self-regulation. That is a perilous path unless we find ways of encouraging institutions to internalize public values and constitutional norms, while maintaining an external check on those institutions that reinforces rather than undermines effective self-regulation.