

**Striking a Faustian Bargain: The Boundaries of
Public Employee Free Speech Rights.**

By Thomas E. Wheeler, II

Just as Faust struck a deal with Mephistopheles exchanging his soul for knowledge, earthly pleasures, and the love of Gretchen, so too individuals who seek public employment trade their Constitutional rights for employment and monetary gain. The purpose of this paper is to explore the nature of the Faustian Bargain a citizen makes when he accepts public employment.

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“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.”¹

Just as Faust struck a deal with Mephistopheles exchanging his soul for knowledge, earthly pleasures, and the love of Gretchen,² so too individuals who seek public employment trade their Constitutional rights for employment and monetary gain. The purpose of this paper is to explore the nature of the Faustian Bargain a citizen makes when he accepts public employment.

I. Introduction.

The application of the First Amendment’s protection of freedom of speech poses unique problems in the area of public employment. There is no doubt that as citizens public employees may not be “constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the [entity] in which they work”³ However, “[a]t the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of

the citizenry in general.”⁴ The problem is in balancing these two divergent interests, a task which the Supreme Court took on during its 2004-05 term, and will address again during the 2005-06 term, both courtesy of the 9th Circuit.

Over the last decade the 9th Circuit has created a line of cases that adopts a very broad definition of the term “public interest” finding that almost any type of expression by a public employee is *ipso facto* entitled to First Amendment protection. The Supreme Court has taken on the task of reigning in the 9th Circuit and adopting a more narrow view of the free speech rights of public employees.

II. Nude Cops, Whistleblowers and the 9th Circuit.

John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and engaging in sexually explicit activities. He sold the video on the adults-only section of eBay. While the uniform worn in the video was not the specific uniform worn by the San Diego Police Department, he also sold other custom videos, as well as police equipment, including official uniforms of the San Diego Police Department.⁵ Officer Roe’s conduct violated a variety of departmental policies, and following the discovery of his activities, he was ordered to “cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors.”⁶ However, Officer

Roe continued to sell his videotapes and was ultimately terminated from the San Diego Police Department.

Officer Roe challenged the termination of his employment as a violation of his First Amendment right to free speech. The District Court granted the City of San Diego's motion for summary judgment finding that Officer Roe's sale of videotapes of himself for profit did not qualify as expression related to a matter of public concern and could therefore be regulated. Relying on prior precedent,⁷ the 9th Circuit overturned the decision holding that speech by public employees is *ipso facto* on a matter of public concern and thus entitled to protection unless "the subject matter of the public employee's speech falls within the 'genre of personnel disputes and grievances,' a category of speech that is not constitutionally significant."⁸ Because "Roe's videos do not fall within that unprotected category of personnel disputes and grievances" the 9th Circuit concluded that the police officer's speech was on a matter of public concern and thus protected by the First Amendment.⁹

Richard Ceballos was a deputy district attorney in Los Angeles County. He was advised by a criminal defense attorney that the deputy sheriff investigating one of his cases "may have lied in a search warrant affidavit."¹⁰ Ceballos investigated the matter and determined for himself that "the deputy sheriff had, at the least, grossly misrepresented the facts."

He then prepared a memorandum to his supervisors to that effect and recommended that the case be dismissed.¹¹

Ceballos' supervisors agreed that the validity of the warrant was questionable, but decided to proceed with the case pending a ruling on a defense motion that had been filed challenging the search warrant. Ceballos disagreed with this decision and informed the defense counsel that he believed the affidavit contained false statements. The defense attorney then subpoenaed Ceballos to testify at the hearing on the search warrant and Ceballos testified for the defense at the hearing. However, notwithstanding Ceballos' testimony, the Court denied the defense challenge to the search warrant. Ceballos was later removed from the prosecution team, and demoted. He challenged the District Attorney's actions as retaliation for his speech violating the First Amendment.

The District Court granted the County's motion for summary judgment finding that Ceballos' speech was made in the course of his duties as an employee of the County of Los Angeles and not as a citizen on matters of public concern. Therefore his speech was not protected by the First Amendment. The 9th Circuit reversed finding that Ceballos' speech was indeed protected following Roe and holding that public employee speech is always on a matter of public concern unless "the

information would be of *no* relevance to the public's evaluation of the performance of governmental agencies"12

In a special concurrence Circuit Court Judge O'Scannlain noted that the majority had adopted an interpretation of "public concern" that was so broad that it clothed a public employee's speech with First Amendment protection in most conceivable circumstances and effectively eliminated the "public concern" inquiry in direct conflict with prior Supreme Court precedent: "That conclusion -- that the First Amendment encompasses *any* speech by a public employee that touches upon matters of public importance, notwithstanding what might best be described as the 'role' of its speaker -- is at odds with the Supreme Court's instruction in *Connick*."13 The Supreme Court has accepted *certiorari* in Ceballos.14

III. The Historical Context: Employee vs. Citizen.

In determining how the Supreme Court will rule in Ceballos it is important to understand the historical context of the scope of First Amendment rights of public employees. Prior to the Supreme Court's landmark case of Pickering v. Board of Education, public employee speech was not protected at all under the First Amendment. The pre-Pickering position was best characterized by then-Judge Holmes when he wrote that "[a constable] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."15

In Pickering a teacher was dismissed after he wrote a letter to a newspaper that was highly critical of the school board and certain administrators in connection with their handling of a bond issue and the allocation of the funds from the bond issue as “between the schools’ educational and athletic programs.”¹⁶ The teacher challenged his termination contending that his speech was protected under the First Amendment. The Illinois Supreme Court rejected this position. The United States Supreme Court accepted *certiorari* and held as follows:

To the extent the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.¹⁷

Thus under Pickering when an employee speaks as a citizen unrelated to his or her role as a public employee, that speech may fall within the ambit of the First Amendment. The Supreme Court contrasted that situation with one where the public employee is speaking in his or her role as a public employee: “At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any

case is to arrive at a balance between the interest 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.”¹⁸

The Court found that the teacher was speaking on his own time as a mere citizen and thus the speech was protected: “[I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.”¹⁹ Thus the Supreme Court established distinct parameters for First Amendment protection - public employees, by virtue of their employment, should not be deprived of First Amendment protection when the subject speech is expressed pursuant to the exercise of the rights of citizenship, as opposed to speech expressed in accordance with the responsibilities of public employment. These parameters were reaffirmed fifteen (15) years later in Connick v. Myers.²⁰

In Connick an assistant district attorney circulated a questionnaire among her co-workers soliciting opinions on a variety of matters related to the work environment at the office.²¹ In overturning the lower court’s decision which found the speech to be protected, the Supreme Court

noted that the lower court had “misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance” for *Connick*.²² In so doing the Supreme Court noted once again that the central inquiry was balancing a public employer's legitimate interest in an efficient workplace environment against the public employee's interest in commenting on matters of public concern “as a citizen.”²³

The repeated emphasis in *Pickering* on the right of a public employee “as a citizen, in commenting upon matters of public concern,” was not accidental. This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.

* * *

The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment “was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²⁴

The Connick decision ultimately turned on the fact that the attorney was speaking primarily as an employee not as a citizen: “We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision

taken by a public agency allegedly in reaction to the employee's behavior."^{25, 26}

IV. The Supreme Court Addresses the 9th Circuit's Decision in Roe.

There are four basic ways in which a public employee may speak. The first is where a public employee speaks off the job as a private citizen on government policies that are of interest to the public at large, such as when a teacher writes a letter to the editor expressing a political point as in Pickering. The second is where the public employee engages in speech while at work but not as part of his employment, such as a district attorney passing out a questionnaire about job conditions at work as in Connick. The third is where the public employee engages in speech off the job as a private citizen that is not related to public policy issues as in Roe. The fourth and final way is where a public employee speaks on the job as part of his or her official duties on public policy issues as in Ceballos.

In Pickering the teacher speech was protected because he was acting as a private citizen and speaking on matters of public concern. In Connick a majority of the attorney's speech was not protected because the speech focused on purely personal disputes at work and was made on the job as an employee.

In Roe the police officer was speaking off the job on a matter of purely private concern, but which placed his employer, the City of San Diego, in a very unfavorable light. The 9th Circuit determined that such speech was on a matter of public concern and thus subject to Connick/Pickering balancing. The Supreme Court disagreed²⁷ finding that contrary to the 9th Circuit, the videotapes were not on a matter of public concern. “*Pickering* did not hold that any statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices.”²⁸

The Ceballos case involves the fourth and final type of public employee speech on the job “whistle blowing” speech.

The primary danger of the 9th Circuit’s analysis is that by adopting what is effectively a *per se* rule that any on the job speech by a public employee is on a matter of public concern, the 9th Circuit has undercut the ability of public employers to limit speech made on their behalf. Probably the best example of this involves classroom speech by teachers as it arrogates control of the classroom and the curriculum from schools to teachers.

Schools have been at the forefront of the public employee free speech debate since the seminal decision in Pickering. This is not surprising since teachers are, by the very nature of their jobs, paid to speak. However, given the nature of the audience, what one conservative talk show host refers to as “young skulls full of mush,” it is extremely important that schools retain control over speech that is made to these impressionable youngsters. As Plato noted almost 2500 years ago: “For a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.”²⁹ Sir Edmund Burke noted the danger of permitting teachers to control curriculum: “He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors of the professor, rather than the principles of the science.”³⁰ For these reasons, Justice Frankfurter noted that curricular control was one of four “essential freedoms” for schools: “It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”³¹

If a teacher as a public employee has the First Amendment right to say what he wishes as the 9th Circuit in Ceballos suggests, there is a direct collision between a school's right to determine how students are taught, and a teacher's First Amendment rights. Such a situation would seem to conflict with prior Supreme Court cases which quite clearly give schools and other public employees the right to control speech made on their behalf.³²

For example, Hazelwood School District v. Kuhlmeier³³ involved whether a school could regulate a student newspaper published as part of the curriculum. The Supreme Court, recognizing that a school newspaper was a forum created by the school and represented speech of the school, held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."³⁴ This standard applies regardless of whether the school sponsored speech comes from the mouths of students in the school newspaper, or from that of a teacher from the podium.

Thus Supreme Court precedent has established that public employers have wide discretion to restrict on the job speech as Mr. Ceballos engaged in, because such speech is attributable to the

employer: “A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.”³⁵ The vital concern for schools as employers is to ensure that appropriate information is imparted by teachers and that these employees do not depart from the established curriculum.

Yet the 9th Circuit in Ceballos effectively strips schools and other public employers of that ability by creating a presumption that all on the job speech is automatically entitled to First Amendment protection. While a laudable ideal to protect whistleblowers the 9th Circuit has painted with too broad a brush. Congress and most states have enacted state law whistleblower protections. There is no need to twist the First Amendment as the 9th Circuit has done.

VI. In Overthrowing Ceballos the Supreme Court Should Adopt the Employee/Citizen Distinction From Connick Which Provides a Clear Bright-Line Test for Public Employers and Employees Alike.

As noted earlier, the pre-Pickering position was that public employees have no First Amendment rights at all. Although Pickering recognized the First Amendment rights of public employees, it did so only in the context of off the job speech as a citizen noting “the interest of the teacher as a citizen, in commenting upon matters of public concern.”³⁶

Since the speech in Pickering had no connection with the teacher's employment, the teacher was treated as a "member of the general public" rather than as an employee and the speech was protected.³⁷

Since that recognition in Pickering thirty-seven years ago, the Supreme Court has been progressively restricting those rights based upon the adverse impact such unlimited speech has on public employers. In Connick the Supreme Court returned to the distinction between speech on the job as a public employee and speech commenting on matters of public concern as a citizen: "The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment 'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"³⁸

These cases focus on the hat worn by the public employee at the time of the speech. These cases have birthed the Connick/Pickering balancing test which requires that courts strike "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."³⁹ If the public employee is wearing the "citizen" hat at the time the speech is made, then the speech is protected by the First Amendment. On the other

hand if the public employee is wearing the “employee” hat, then the speech is not protected. This distinction provides a clear bright-line test for the courts, public employees and public employers. The nature of the Faustian bargain is clear. Those who accept public employment give up their First Amendment rights while on the job and speaking for their employers.

This bright-line test is not unknown in the lower courts. For example, the 7th Circuit addressed this issue in Gonzalez v. City of Chicago.⁴⁰ In that case the plaintiff, a former police officer alleged that his First Amendment rights had been violated when he was terminated in retaliation for his “speech as an [Office of Professional Standards] investigator.”⁴¹ The 7th Circuit affirmed the dismissal of the complaint finding that the speech in question, reports regarding police misconduct that the plaintiff had written when he was an OPS investigator, could not be characterized as “citizen speech” upon a matter of public concern because they were “a routine requirement of the job.” In so holding, the 7th Circuit noted the important need to distinguish between “citizen speech” and employment required speech:

[T]he plaintiff's statements are not self-serving private statements (except in the sense that performance of one's job is self-serving), but written statements for internal use in the Department. They are reports of his investigations as required by his employer, and as such, they lack First

Amendment protection. ... Thus, the question before us is whether a public employee receives First Amendment protection for producing writings that may address matters of public concern, but are also a routine requirement of the job. ... [H]e was clearly acting entirely in an employment capacity when he made those reports. The form of his speech (routine official reports), the content of the speech (required opinions on misconduct), and the context (pursuant to duties of the job), all indicate that [the plaintiff] did not speak “as a citizen” on a matter of public concern.^{42, 43}

Thus a bright-line distinction between speech as an employee and speech as a citizen is consistent with the Supreme Court’s comments in Connick and has many attractive features as noted in Gonzales. For example, because it creates a clear boundary for public employers and employees alike, it would effectively eliminate much of the litigation over public employee speech. Second, it would eliminate the problem of employees engaging in inappropriate on the job speech that might be attributed to the employer.

With these distinctions in mind we return to the Ceballos decision. As noted earlier, Mr. Ceballos wrote a memorandum to his supervisors as part of his job duties alleging that the police officers had engaged in fraud. Mr. Ceballos contends that the County of Los Angeles violated his First Amendment rights by punishing him for this speech which was made as part of his job duties. Under the proposed bright-line test discussed above, Mr. Ceballos’ speech would not be protected.

This is not to say that public employees who engage in whistleblowing such as Mr. Ceballos are unprotected if the Supreme Court were to adopt the proposed bright-line rule. Such employees have always had many protections under both state and federal whistleblower statutes. For example, in Waters v. Churchill,⁴⁴ the Supreme Court noted these additional protections: “Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. See, e.g., Whistleblower Protection Act of 1989.”⁴⁵ As a consequence, a fear that public employees will be subject to retaliation for on the job whistleblowing is not a justification for extending First Amendment protection to speech made as part of an employee’s job duties as the 9th Circuit did in Ceballos. Therefore, while Mr. Ceballos may have a variety of claims against the County of Los Angeles, a First Amendment free speech claim should not be one of those.

There is no doubt that the foregoing approach imposes significant restrictions on how and where public employees may exercise their First Amendment rights as citizens. However, these restrictions are no different than those imposed on employees in the private sector and public employees remain free to exercise their First Amendment rights on their

own time as citizens. While this approach imposes some slight burdens on public employees, this is simply part of the Faustian Bargain made when he or she accepted public employment.

*I will bend myself to your service in this world,
To be at your beck and never rest nor slack;
When we meet again on the other side,
In the same coin you shall pay me back.*⁴⁶

VI. Conclusion.

As the Supreme Court turns its attention to the First Amendment rights of public employees who engage in on the job speech as part of their regular job duties, it has the opportunity to and should adopt a bright-line test that focuses on the hat worn by the employee at the time he speaks. If the employee is speaking in his capacity as an employee rather than as a citizen, then the speech is not protected by the First Amendment. Such a bright-line approach is consistent with the Supreme Court's prior decisions in Pickering and Connick and provides appropriate protection to public employees speaking as citizens, embodying the common sense proposition that public employers may regulate speech made on their behalf.

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¹ United States Constitution, First Amendment.

² “Mephistopheles: I will bend myself to your service in this world, To be at your beck and never rest nor slack; When we meet again on the other side, In the same coin you shall pay me back.” Goethe, Faust, (Oxford University Press, New York, 1951; tr. Louis MacNeice).

³ Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

⁴ *Id.*

⁵ City of San Diego v. Roe, --- U.S. ---, 125 S.Ct. 521, 522, 160 L.Ed.2d 410 (2004).

⁶ *Id.*, 125 S.Ct. at 523.

⁷ This precedent includes Roth v. Veteran’s Administration of the United States, 856 F.2d 1401 (9th Cir. 1988), Roe v. City & County of San Francisco, 109 F.3d 578, 585 (9th Cir.1997), and Ulrich v. City & County of San Francisco, 308 F.3d 968 (9th Cir. 2002). In each of these cases the 9th Circuit formulated an analysis that concluded that “it is only when it is clear that ... the information would be of *no* relevance to the public’s evaluation of the performance of governmental agencies that speech of governmental employees receives no protection under the First Amendment.” Ceballos, 361 F.3d at 1174 *quoting Ulrich*, 308 F.3d at 978 (emphasis in original).

⁸ Roe v. City of San Diego, 356 F.3d 1108, 1121 (9th Cir. 2004) *quoting Roe v. City & County of San Francisco*, 109 F.3d 578, 586 (9th Cir. 1997).

⁹ *Id.*

¹⁰ Ceballos v. Garcetti, 361 F.3d 1168, 1171 (9th Cir. 2004).

¹¹ *Id.*

¹² Ceballos, 361 F.3d at 1174 *quoting Ulrich*, 308 F.3d at 978 (emphasis in original).

¹³ *Id.*, 361 F.3d at 1187 (O’Scannlain, J., concurring).

¹⁴ Garcetti v. Ceballos, 125 S.Ct. 1395 (U.S. Feb. 28, 2005).

¹⁵ McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (Mass. 1892). See also Connick v. Myers, 461 U.S. 138, 143-144 (1982)(discussing the pre-Pickering status of the law).

¹⁶ Pickering, 391 U.S. at 566.

¹⁷ *Id.*, 391 U.S. at 568.

¹⁸ *Id.*

¹⁹ *Id.*, 391 U.S. at 574.

²⁰ 461 U.S. 138 (1982).

²¹ *Id.*, 461 U.S. at 141.

²² *Id.*, 461 U.S. at 142.

²³ *Id.*, 461 U.S. at 140.

²⁴ Connick, 461 U.S. at 143 *citing Pickering*, 391 U.S. at 568 and New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

²⁵ Connick, 461 U.S. at 147 (citations omitted).

²⁶ Since Pickering, the Supreme Court has not wavered from the pronouncements regarding the importance of “citizen speech.” See Perry v. Sindermann, 408 U.S. 593 (1972)(finding protected a public college’s testimony before a state legislature); Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977)(finding protected a public school teacher’s communication with a radio station regarding the school’s dress code for teachers); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)(finding protected a teacher’s private remarks with a supervisor regarding the school district’s allegedly racially discriminatory policies); Rankin v. McPherson, 483 U.S.

378, 384 (1987)(“Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse...”); United States v. National Treasury Employees Union, 513 U.S. 454, 465 (1995)(in holding unconstitutional the prohibition of government employees from receiving honoraria, the Supreme Court stated that the employees “seek compensation for their expressive activities in their capacity as citizens” and the speeches lack “relevance to their employment.”).

²⁷ City of San Diego, 125 S.Ct. at 524.

²⁸ *Id.*, 125 S.Ct. at 525

²⁹ Plato’s Republic: Book II, Jowett Translation, Walter J. Black, Inc., 1942, p. 281.

³⁰ Letter to a Member of the National Assembly (1791). IV, 23-34, found in The Philosophy of Edmund Burke, University of Michigan Press, 1960, p. 247.

³¹ Sweezy v. New Hampshire, 354 U.S. 234, 255, 263-264 (1957).

³² This applies to speech by students (Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) and Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)) as well as teachers (West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) and Perry Education Assn. v. Perry Local Educators’ Assn., 460 U.S. 37 (1983)).

³³ 484 U.S. 260 (1988).

³⁴ *Id.*, 484 U.S. at 273.

³⁵ Adler v. Board of Education, 342 U.S. 485, 493 (1952).

³⁶ Pickering, 391 U.S. at 568.

³⁷ *Id.*

³⁸ Connick, 461 U.S. at 143 *citing* Pickering, 391 U.S. at 568 and New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

³⁹ Pickering, 391 U.S. at 568.

⁴⁰ 239 F.3d 939 (7th Cir. 2001).

⁴¹ *Id.*, 239 F.3d at 940.

⁴² *Id.*, 239 F.3d at 941 (parenthetical supplied).

⁴³ As noted by the District Attorney in the Petition for Certiorari in Ceballos, many other circuits have joined the 7th Circuit in this holding: “Urofsky v. Gilmore, III, 216 F.3d 401, 407 (4th Cir. 2000)(“[C]ritical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is ‘made primarily in the [employee’s] role as citizen or primarily in his role as employee.’”); Gillum v. City of Kerrville, 3 F.3d 117, 120-21 (5th Cir. 1993)(Having previously focused on whether the employee “spoke as a citizen or employee,” the 5th Circuit explained that the “focus on the hat worn by the employee when speaking rather than upon the ‘importance’ of the issue reflects the reality that at some level of generality almost all speech of state employees is of public concern.”); Bradshaw v. Pittsburgh Independent School Dist., 207 F.3d 814, 186 (5th Cir. 2000) (“Speech rises to the level of public concern when an individual speaks primarily as a citizen rather than as an employee.”); Thompson v. Scheid, 977 F.2d 1017, 1020-21 (6th Cir. 1992)(“First Amendment protection extends to a public employee’s speech when he speaks as a citizen on a matter of public concern, but does not extend to speech made in the course of acting as a public employee. Not all matters discussed within a government office are of public concern, and thus internal office communication does not necessarily give rise to a constitutional claim.”); Sparr v. Ward, 306 F.3d 589, 594 (8th Cir. 2002)(“When a public employee’s speech is purely job-related, her speech will not be deemed a matter of public concern.... It is not enough that the topic of an employee’s speech is one in which the public might have an interest.”); Buazard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999)(Examining the form and context of public employee speech, a

court should consider whether the speech “is purely job-related” and whether the employee “is speaking as a concerned citizen, and not just as an employee.”); Koch v. Hutchinson, 847 F.2d 1436, 1442 (10th Cir. 1988)(Denying 1st Amendment protection to a fire marshal’s report regarding the cause of a fatal fire because the speech “occurred during or as part of an employee’s official duties.”)

⁴⁴ 511 U.S. 661, 114 S.Ct. 1878 (1994).

⁴⁵ *Id.*, 511 U.S. at 674.

⁴⁶ Goethe, Faust.

Author's Note:

This article was prepared in late 2005 while Mr. Ceballos' case was still pending before the United States Supreme Court. However, prior to publication, on May 30, 2006, the Supreme Court issued its decision in Garcetti v. Ceballos, 126 S.Ct. 1951 (2006). The threshold issue presented to the Supreme Court in that case was "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties?" *Id.*, 126 S.Ct. at 1955. The Supreme Court answered this question clearly and succinctly: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline." *Id.*, 126 S.Ct. at 1960. Thus because Ceballos was speaking as a public employee and not as a citizen on a matter of public concern, he "has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.*, 126 S.Ct. at 1957. Thus citizens do indeed strike a Faustian Bargain when accepting public employment.

However, some citizens are more equal than others. In an interesting sidenote to the decision Justice Kennedy, author of the majority opinion, and Justice Souter, a dissenter, engaged in a colloquy relating to Justice Souter's concern that "[t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" Garcetti, 126 S.Ct. at 1969. In making this argument Justice Souter relied on three cases, all from the college or university environment: Grutter v. Bollinger, 539 U.S. 306 (2003); Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957). Each of these cases relies on the same base proposition explained in Grutter: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, **universities** occupy a special niche in our constitutional tradition." *Id.*, 539 U.S. at 309 (emphasis supplied). Based upon the special niche that universities occupy, Justice Kennedy agreed to leave the resolution of that issue to another day: "Second, Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*, 539 U.S. at 1962.