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The Special Value of Public Employee Speech

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In its 2014 decision in *Lane v Franks*,[1] the Supreme Court held that a public employee deserved protection, under the First Amendment, for testifying under oath about financial fraud in the statewide youth program he directed. The Court rejected the lower court's view that, because the testimony consisted of information that Lane had learned in the course of performing his job, his employer should be free to sanction him for his speech.[2] The lower court's approach, the Supreme Court explained, is in tension with one of the core reasons that it accords public employees some First Amendment protection. That is, "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[3]

Lane's internal logic is eminently sound. If public employee speech is protected partly because employees gain unique insights on the job, it makes little sense to exclude from protection all speech reflecting

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[1] *Lane v Franks*, 134 S Ct 2369 (2014).

[2] *Lane v Central Alabama Community College*, 523 Fed Appx 709, 711–12 (11th Cir 2013).

[3] *Lane*, 134 S Ct at 2379 (2014).

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those insights. This reasoning inspires both a hope and a lament about the Court's 2006 decision in *Garcetti v Ceballos*.[4] The lament is that *Garcetti*'s rule—that speech conducted pursuant to one's public employment is unprotected—itself is at odds with the notion that public employee speech has special value because of the distinctive insights and expertise it offers. The *Garcetti* rule also reflects an overly generous vision of the government interests at stake. The hope is that *Lane* provides occasion to dig more deeply into both the special value of public employee speech and the government interests at issue and thus to rethink *Garcetti* entirely. More modestly, *Lane* can point the way to means by which *Garcetti* can be limited.

In this article, I explore the yin and yang of *Lane*, both the lament and the hope. In lamentation mode, I argue that *Garcetti* is emblematic of the Court's failure to dig beneath the surface of its own long-standing acknowledgment that public employee speech holds special value. If one tunnels into that subterrane, one finds that the value of public employee speech is a function not just of content, but of form. Public employees play a special role under the First Amendment by virtue of their privileged access both to information and to communication channels for conveying it. The special communication channels to which employees have access—including internal channels—can be uniquely effective in supporting accountability and the rule of law, and thus in fulfilling core free speech values.

Public employees' special communication channels take two forms. The first encompasses avenues to raise grievances, such as when agencies provide employees with special complaint procedures or privileged access to inspectors general. The second is more subtle, encompassing the simple acts of employees doing their jobs conscientiously and in accordance with the norms of their professions. When employees engage in such behavior—for instance, when government auditors honestly and competently investigate and report in a manner consistent with professional auditing standards—they help to maintain consistency between the functions government purports to perform and those that it actually performs. In this sense, public employees are potential barriers against government deception. They can disrupt government efforts to have it both ways by purporting publicly to provide a service while distorting the na-

[4] *Garcetti v Ceballos*, 547 US 410 (2006).

ture of that service. When they do this through their speech acts—for example, by reporting the results of budgetary analyses or scientific studies—they engage in speech of substantial First Amendment value.

Apart from its cramped and under-theorized conception of special value, *Garcetti* also betrays confusion over the government interests at stake. *Garcetti* suggests both that public employers require managerial discretion to evaluate work product that takes the form of speech and that because public employees speak for the government their supervisors can dictate their speech content. Although the former is a legitimate concern, the latter is wildly overbroad. It applies legitimately to only a narrow subset of government jobs. The latter also reflects a profoundly underdeveloped conception of special value, as special value derives partly from employees making independent professional judgments. Indeed, a government speech rationale would swallow even a shallow vision of special value, overtaking employees' rights to disseminate any speech that supervisors deem unwelcome.

In my more hopeful mode, I consider how a fuller conception of special value might be reconciled with a more sharply defined government interest. I propose that, where work product speech can confidently be identified, courts should consider whether employees were disciplined based on a genuine, not pretextual assessment of work product quality. Only disciplinary actions based on such assessments should be exempt from further scrutiny. Crucially, in cases where employees were hired to render independent professional judgments, disappointment with those judgments, not because they reflect low quality, but because they are politically or personally inconvenient for employers, should *not* be deemed quality-based assessments. As a second-best, but perhaps more realistic near-term alternative, I also consider means to limit *Garcetti*'s reach.

In Part I, I unpack the Supreme Court's understanding of public employee speech value as reflected in the so-called "*Pickering*" cases,[5] which include *Garcetti* and *Lane*. In Part II, I turn to lower federal courts, summarizing lower court approaches, both before and after *Lane*, to the difficult, case-by-case determination that *Garcetti* requires them to make: when is speech engaged in pursuant to one's

[5] The cases are so named for the first in the series, *Pickering v Board of Education*, 391 US 563 (1968).

job and thus unprotected by the First Amendment? In Part III, I develop the concept of the special value of public employee speech, exploring its underpinnings in free speech theory and constitutional structure. In Part IV, I examine *Garcetti*'s major defenses and challenge the argument that *Garcetti* does not much impact free speech values because it mostly affects internal government speech. In Part V, I expand on what constitutes a judgment based on work product quality and on how courts can determine whether discipline was based on a genuine such judgment. Finally, in Part VI, I consider a more moderate, and perhaps more realistic, approach. That approach builds on *Lane* in order to narrow *Garcetti*'s reach.

I. Unpacking the Supreme Court's Understanding(s) of Public Employee Speech Value

This part summarizes the modern constitutional doctrine of public employee speech, with an emphasis on the Court's stated understandings of the free speech interests at stake. As I will show, one of the Court's two major rationales for protecting public employee speech—the goal of achieving parity between the free speech protections enjoyed by government employees and those enjoyed by others—does little explanatory work on its own. The Court is much more convincing insofar as it suggests that public employee speech warrants protection because it holds special social value. But the Court's failure to probe very deeply into the nature of this special value, and its tendency to vacillate between the parity and special value rationales, stunts the special value rationale's contributions to the doctrine. I also explain that an additional rationale for protecting public employee speech—one based on fears of government-imposed orthodoxy—can be found in the loyalty oath and antisubversion cases that are the modern doctrine's most immediate ancestors. This third rationale does little work in the decisions that comprise the modern doctrine, but if resurrected it could contribute to a richer and more coherent approach.

A. The Modern Approach to Public Employee Speech: An Overview

The Court's 1968 decision in *Pickering v Board of Education* was the first in the line of cases comprising the modern doctrine of public employee free speech rights. In *Pickering*, the Court established

both that public employees have some protection from being terminated or disciplined for their speech, and that the government has broader discretion to punish speech when it operates as an employer than when it acts as sovereign.[6] The government may constitutionally punish its employees for their speech when justified by the "interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[7] The Court explained that courts must weigh any such interests, case by case, against the interests of employees, as "citizen[s], in commenting upon matters of public concern."[8] In *Connick v Myers*, the Court clarified that employee speech is subject to protection under this standard (hereafter the *Connick-Pickering* test) only when it involves a matter of public concern.[9] In *Garcetti*, the Court added that speech is unprotected, even if it involves a matter of public concern, when it is part of the employee's job.[10]

Pickering and its progeny offer two main justifications for protecting employee speech. The first justification, aptly termed the "parity theory" by Randy Kozel,[11] is that government employees should not be robbed of "the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest."[12] The goal of parity is not definitively linked to a single conception of free speech value. In describing it, the Court evokes both free speech's intrinsic value to the speaker and its social value.[13] The parity approach seems grounded in the notion that whatever values are served by free speech presumptively apply to government employees just

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[6] *Pickering*, 391 US at 568.

[7] Id.

[8] Id.

[9] *Connick v Myers*, 461 US 138, 142–43, 146–47 (1983). The Court later suggested that public employees who speak or write on their own time about matters unrelated to their jobs—whether or not those matters are of public concern—warrant protection stronger than that accorded public employees who speak on or about their jobs. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 Supreme Court Review 115, 128–29, 131–32 (2006) (citing *United States v National Treasury Employees Union*, 513 US 454 (1995), *City of San Diego v Roe*, 543 US 77 (2004)).

[10] *Garcetti*, 547 US at 421.

[11] Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 Wm & Mary L Rev 1985, 1990 (2012).

[12] *Pickering*, 391 US at 568.

[13] See id at 568, 571–72. See also, for example, *Roe*, 543 US at 82–83.

as they do to others. Deviations from ordinary free speech protections thus are warranted only when justified by the state's needs as employer.[14]

The second justification, which I call the "special value" rationale, is linked to speech's extrinsic value to the public. From this perspective, public employees deserve free speech protections not because they are just like everybody else, but because they have something *special* to contribute to the marketplace of ideas. As the Court has observed, public employees "are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."[15] This justification, too, must give way when warranted by overriding employer needs.

B. A CLOSER LOOK AT THE PARITY RATIONALE

1. *Parity as independent justification.* Perhaps the most foundational criticism that can be directed toward the parity rationale is that it compares metaphorical apples and oranges. The approach's premise is that public employees should not be robbed of "the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest."[16] But when government fires or disciplines its own employees, it exercises a power that by definition it could not exercise over persons not in its employ.[17]

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[14] See *Pickering*, 391 US at 568 (citing need to balance employee's interest "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"). See also Kozel, 53 Wm & Mary L Rev at 2011 (cited in note 11) (deeming "default of parity" the most logical implication of the Court's rejection of the rights-privilege distinction and explaining that under "[p]arity theory . . . the doctrine of employee speech should be reoriented around a single inquiry: Is there a valid reason for permitting the government to treat the employee differently from her peers in the citizenry at large?").

[15] *Roe*, 543 US at 82.

[16] *Pickering*, 391 US at 568. See also, for example, *Connick*, 461 US at 142 ("state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression").

[17] See Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U Pa J Const L 631, 637 (2012) ("Government employees cannot be fined or thrown in jail for speech any more than a private citizen"); Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 St John's L Rev 797, 798 (2007) (suggesting Supreme Court erred in equating "[G]overnment as employer" with "government as sovereign").

If parity between likes were the Court's concern, it might make more sense for it to compare public employers with private employers, rather than to compare government *qua* sovereign with government *qua* employer. This would return us to the approach that the Court took prior to the mid-twentieth century, when it drew a distinction between rights (such as free speech) and privileges (such as holding a job).[18] As Justice Holmes famously explained while sitting on the Supreme Judicial Court of Massachusetts, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[19] Holmes's rights/privilege distinction seems grounded in a baseline norm of parity between private and public employers. As a government employee, one enters into an employer-employee relationship, just as one would do in a private enterprise. That the employer happens to be the government ought not to affect its discretion to supervise its employees. Only when the government operates as a sovereign—imposing civil or criminal penalties—does the Constitution restrain it.

The modern Court does not explain why, insofar as parity is its concern, it shifts from comparing public and private employers to comparing government *qua* sovereign with government *qua* employer.[20] Perhaps the answer inheres, simply enough, in the state action doctrine. After all, the First Amendment applies only to the government, not to private actors. Still, if the state action doctrine explains why public employers are constrained by the First Amendment, it does not guide us as to the type and degree of such constraints. In this respect, parity may be viewed simply as a logical starting point.

The notion that the free speech rights enjoyed by nonemployees should be the starting point, or default norm, for public employees' First Amendment rights seems closest to what the Supreme Court has actually said about parity. Yet the doctrine that the Court constructs—that is, the *Connick-Pickering* balance and its caveats—bears

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[18] See Estlund, 2006 Supreme Court Review at 147–48 (cited in note 9) ("To anchor the free speech rights of public employees to those of private sector employees vis-à-vis their employers would … take us back to the heyday of the 'rights-privileges' distinction.").

[19] *McAuliffe v City of New Bedford*, 155 Mass 216, 220 (1892).

[20] Kermit Roosevelt observes that the modern Court to some extent is motivated by both types of parity. See Roosevelt, 14 U Pa J Const L at 633 (cited in note 17) ("First, the Court wants to promote equality between government and private employers with respect to control over the workplace and employee performance.… Second, it wants to maintain equality between government employees and other citizens.").

little resemblance to the doctrine that applies when government restricts speech in its sovereign capacity. Recall, for example, that public employee speech is unprotected when it is not about a matter of public concern.[21] A categorical pass for government employers to punish speech not of public concern could not be further removed from the doctrine that restricts government's power to punish speech when it acts as sovereign. And the *Connick-Pickering* balance itself, with its deferential approach even to restrictions based on content, marks a far cry from the protections accorded persons when the government acts as sovereign. The concept of parity thus seems to do very little work beyond contributing to the view that public employee speech warrants some First Amendment protection.[22]

2. *Social value as a supplement to parity*. While the concept of parity in its own right contributes little to the public employee speech doctrine, other factors have greater explanatory value. The most obvious is government's interest in protecting its managerial control over employees. As for speech value, the factor that looms largest in the Court's reasoning is the social value of public employee speech.

The Court cites social value as among the reasons why it protects public employee speech. Of more practical consequence, it has concluded that only speech on matters of public concern is sufficiently valuable to displace employers' managerial discretion. Parity interests therefore are triggered only when public employees speak on matters of public concern. In *Connick v Myers*, in which the Court first declared that speech on "matters of personal interest" would not be protected "absent the most unusual circumstances,"[23] the Court observed that it "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[24]

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[21] Employees retain some protection for conveying speech away from and unrelated to their job. See note 9.

[22] See Kozel, 53 Wm & Mary L Rev at 1989–90, 2013–22 (cited in note 11) (deeming parity rationale incompatible with modern public employee speech doctrine, describing what parity-based doctrine would look like). See also Estlund, 2006 S Ct Rev at 149 (cited in note 9) ("When we scratch the surface of the [*Garcetti*] majority's recurring references to the 'liberties the employee might have enjoyed as a private citizen,' they appear to be less an aid to analysis than a rhetorical trope.").

[23] *Connick*, 461 US at 147.

[24] Id at 145.

The Court in *Connick* did hedge its bets a bit, citing the heightened value of public affairs speech while also conflating private interest speech with speech "made as an employee," such as "employee grievances," for which there are no nonemployee analogues.[25] In this way, the Court hinted at two separate justifications for limiting protection to public interest speech: the greater social worth of such speech and the goal of parity in its own right. Subsequent cases made clear, however, that private interest speech is not limited to employee grievances.[26] This development, combined with the Court's invoking the heightened value of public affairs speech in *Connick* and elsewhere, suggests that the Court excludes private interest speech mainly because it is insufficiently valuable to offset employers' managerial control. The Court made this point explicit in *City of San Diego v Roe*:

> 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.... This concern prompted the Court in *Connick* to explain a threshold inquiry ... that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "public concern."[27]

C. THE SPECIAL VALUE RATIONALE

Beyond the parity rationale, the Court has recognized that public employees can add something special to the marketplace of ideas—something that other individuals cannot contribute—when they speak about their jobs. As the Court explained in *San Diego v Roe*, "[u]nderlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."[28] This reasoning is prominent in several opinions in the *Pickering* line of cases, including *Pickering*, *Garcetti*, and *Lane*. The Court in these cases

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[25] Id at 147.

[26] See, for example, *Roe*, 543 US at 78–79, 84 (deeming sexually explicit videos featuring uniformed police officer not of public concern); id at 83–84 ("public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication").

[27] Id at 82–83.

[28] Id at 82.

has invoked this concept, in addition to parity, to explain why public employee speech warrants some protection.[29]

To be sure, it was not until *Lane* that the Court coined the term "special value" to capture this rationale.[30] Nor has the Court cited the special value rationale consistently.[31] Moreover, there are two significant shortcomings in the Court's discussion of special value, and both affect the contours of the doctrine. First, the Court's understanding of special value is incomplete. Second, the Court mixes its special value and parity discussions somewhat haphazardly, at times interjecting parity in a way that stunts the scope of the protections that might otherwise follow from special value.

As for the Court's incomplete understanding, although it recognizes the potentially high value of public employee speech content, it overlooks the value of employees' access to privileged channels through which to communicate that content. As the Court has recognized in the *Pickering* cases and elsewhere, the First Amendment serves partly to support self-government and the rule of law. It serves, in short, to support the constitutional structure. That structure depends on a variety of internal as well as external checks.[32] The special access that public employees have to a mix of channels, including internal channels, to convey dissenting views is as important to the constitutional design as the content of those views. It was the Court's failure to credit this aspect of special value that enabled it to deny protection to work product speech in *Garcetti*.[33]

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[29] See *Pickering*, 391 US at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions"); *Waters v Churchill*, 511 US 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know what ails the agencies for which they work"); *Roe*, 543 US at 82 (language quoted at text accompanying note 28); *Garcetti*, 547 US at 419–21 (citing with approval *Pickering* and *Roe* discussions of special value); *Lane*, 134 S Ct at 2379 ("speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment").

[30] *Lane*, 134 S Ct at 2379.

[31] For example, the Court does not mention the rationale in *Connick*, despite the fact that the speech the Court deemed "of public concern" there involved the speaker's workplace. See *Connick*, 461 US at 149.

[32] See Part III(B) (explaining that federal executive branch is designed partly to facilitate internal checking).

[33] For instance, the *Garcetti* Court minimized *Garcetti*'s impact by observing that employees still can participate in "civic discourse" like other citizens. *Garcetti*, 547 US at 422–24.

The Court also wields the concept of parity in a way that stunts the reach of special value-based protections. It did this most notably in *Garcetti*. There, it based its decision to preclude protection for all work product speech partly on the fact that "such speech owes its existence to a public employee's official responsibilities." Suppressing it therefore "does not infringe any liberties the employee might have enjoyed as a private citizen."[34] While the Court elsewhere in *Garcetti* cited the special social value of public employee speech, it shifted its focus to parity just long enough to dismiss constitutional concerns over categorically denying protection to work product speech.

The parity-based aspect of *Garcetti*'s reasoning is in tension with the very notion of special value,[35] and it generated the uncertainty that led to *Lane v Franks*. Some lower courts, relying on *Garcetti*'s statement that speech is unprotected when it "owes its existence" to the speaker's public employment, leaned heavily against protecting speech consisting of information learned through such employment.[36] The Fourth Circuit took this view in *Lane*,[37] leading to its reversal by the Supreme Court.[38]

In *Lane*, the Supreme Court mitigated some of the damage caused by its incomplete conception of special value and its haphazard mixing of the special value and parity rationales. It did not, however, fully reverse that damage or eliminate the tension between *Garcetti* and the special value rationale. Indeed, *Lane* is potentially subject to a narrow reading, one that limits it to settings in which speech consists of "truthful subpoenaed testimony" that is not part of the speaker's ordinary job duties.[39] Under this reading, *Lane* would not necessarily

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[34] *Garcetti*, 547 US at 421–22. See also Estlund, 2006 Supreme Court Review at 144–45 (cited in note 9) (citing "recurring motif in the *Garcetti* majority opinion: the effort to anchor the free speech rights of public employees to the 'liberties the employee might have enjoyed as a private citizen,'" and explaining motif's restrictive effects).

[35] See Estlund, 2006 Supreme Court Review at 119–20 (cited in note 9) (noting tension between parity and special value rationales).

[36] See Part II(A)(1).

[37] See note 56 (discussing Eleventh Circuit opinions in *Lane*).

[38] See text accompanying notes 2–3.

[39] The *Lane* majority notes that it granted certiorari to "resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities." *Lane*, 134 S Ct at 2377.

preclude courts in other settings from weighing the fact that speech conveys information learned on the job heavily or even conclusively against First Amendment protection. To be sure, this would be a flawed interpretation of *Lane*. Although the Court in *Lane* deemed special value particularly evident in the factual setting before it, it invoked the concept more broadly.[40] It also cited earlier decisions embracing the special value rationale outside of the testimonial context.[41] Moreover, for reasons that I discuss later, a generous reading of *Lane* is most consistent with free speech theory. Nonetheless, *Lane* is open to a narrow interpretation that would sharply limit its significance in protecting speech of special value, and even a broad reading of *Lane* cannot fully erase the damage done by *Garcetti*.

D. GOVERNMENT DISTRUST

For better or worse, then, the modern public employee speech cases frame the free speech interests at stake predominantly in terms of (under-theorized) parity and special value rationales. A third rationale—one arising out of government's natural inclination to quell criticism about itself—can be gleaned from a string of earlier decisions. These ancestors to *Pickering* arose "from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated."[42] In several of these decisions, the Court characterized loyalty requirements as dangerous attempts by government to leverage its role as employer to enforce orthodoxy in its institutions and throughout American society.

The Court's opinion in *Wieman v Updegraff* reflects this view. Writing for the Court in 1952, Justice Clark cited the inevitable chilling effect of a state law conditioning public employment on an oath of nonaffiliation with subversive groups.[43] "There can be no dispute," he explained, "about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a

[40] Id at 2377, 2379.

[41] Id.

[42] *Connick*, 461 US at 144 (calling these cases "the precedents in which *Pickering* is rooted.").

[43] *Wieman v Updegraff*, 344 US 183, 184–86 (1952) (describing state law).

badge of infamy."[44] The oath requirement "stifle[s] the flow of democratic expression and controversy at one of its chief sources."[45]

The Court suggested that the stakes were especially high where employment in public schools was at issue. In *Keyishian v Board of Regents*—a case decided just one year prior to *Pickering*, and cited in *Pickering* and throughout its progeny—"the Court invalidated New York statutes barring employment [in the New York State public school system] on the basis of membership in 'subversive' organizations."[46] Justice Brennan's opinion for the Court invoked "academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[47]

Wieman itself was brought by faculty and staff members of Oklahoma Agricultural and Mechanical College.[48] Concurring in *Wieman*, Justice Frankfurter, joined by Justice Douglas, observed that "the case of teachers brings the safeguards of [the First Amendment] vividly into operation. . . ."[49] Inhibitions such as loyalty and oath requirements have "an unmistakable tendency to chill that free play of spirit which all teachers ought especially to cultivate and practice."[50]

Pickering's most direct ancestors were thus rooted partly in fears that government will leverage its power as an employer to enforce a culture of political orthodoxy. In these decisions, the Court reasoned that employees might censor themselves to avoid retaliation from employers, and that restrictions on public employee speech could threaten the operation of government institutions that depend on open lines of inquiry and discourse.

These concerns provide another set of explanations for important aspects of *Pickering* and its progeny. First, they enhance the case for protecting public employee speech, supplementing the special value rationale with the concern that, left to its own devices, government will leverage its role as employer to skew public knowledge and

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[44] Id at 190–91.

[45] Id at 191.

[46] *Connick*, 461 US at 144 (citing *Keyishian v Board of Regents*, 385 US 589, 605–06 (1967)).

[47] *Keyishian*, 385 US at 603.

[48] *Wieman*, 344 US at 184–85.

[49] Id at 195 (Frankfurter, J, concurring).

[50] Id at 195.

debate. Second, they suggest a further reason for the Court to focus on speech about public affairs. That is, government officials will be most tempted to manipulate knowledge and criticism about themselves rather than about purely private matters. Third, these concerns help make sense of the Court's acknowledgment in *Garcetti* that "[t]here 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," and its consequent caveat that it is not deciding "whether the analysis . . . [in *Garcetti*] would apply in the same manner to a case involving speech related to scholarship or teaching."[51]

The Court has not explicitly incorporated a government distrust rationale into its modern public employee speech doctrine, but it should. Such reasoning would improve the doctrine's coherence and content. For instance, *Garcetti*'s reference to academic freedom could be buttressed by analysis echoing that of the loyalty oath and antisubversion cases. The Court might also connect the dots between the academic freedom arguments of the earlier cases and broader "antidistortion" fears to the effect that government might leverage its employment relationships to manipulate the messages produced by its institutions. Indeed, the Court has hinted at an antidistortion rationale in First Amendment cases involving government subsidy conditions.[52]

In Parts III through VI, I will elaborate on how government distrust and the related antidistortion interest should factor into the doctrine and theory of public employee speech rights. Specifically, I will explain how a richer conception of special value might incorporate such concerns and help improve the doctrine. For the moment, though, suffice it to note that the rudiments of such reasoning can be found in the loyalty oath and antisubversion precedents that are the *Pickering* cases' most direct antecedents.

II. Lower Court Decisions Since Garcetti and Lane

In this Part I explore some of the approaches taken by lower courts in their efforts to determine when public employee speech

[51] *Garcetti*, 547 US at 425.

[52] See discussion at Part III(A)(2).

can be restricted after *Garcetti*. Some approaches reflect and even exacerbate *Garcetti*'s pathologies, while others mitigate them. Similarly, in the year since the decision in *Lane*, some lower courts have invoked *Lane* to narrow *Garcetti*'s reach, while others have essentially ignored it.[53]

A. THE CONTENT OF THE SPEECH

1. *Does the information relate to, or was it learned through, the speaker's job?* Prior to *Lane*, some courts and commentators adopted strong, even conclusive presumptions to the effect that speech is unprotected under *Garcetti* when it conveys information learned on the job.[54] Support for this view derived most directly from *Garcetti*'s parity-driven statement that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[55] In the wake of *Garcetti*, some lower courts reasoned that speech relating to, or conveying information learned through, an individual's public employment would not have existed absent the employment. They weighed this factor heavily against protection.[56] Other courts

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[53] *Lane* was issued on June 19, 2014. Using Westlaw, I researched opinions decided between that date and June 26, 2015. I used the search term (garcetti /2 ceballos) to search the entire text of opinions for all state and federal cases issued within the designated time frame. Given the number of cases that turned up (over 260), I looked only at federal appellate court cases. Some of the cases that I reviewed relied on pre-*Lane* developments in their jurisdictions. Where useful, I followed those leads and thus read and report here on some pre-*Lane* cases as well as post-*Lane* cases. I also conducted separate searches to find pre-*Lane* opinions on certain discrete issues, including the status of speech conveying information learned on the job.

[54] See cases cited at note 56. See also Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 Am U L Rev 1531, 1540–41 (2008) (suggesting *Garcetti* precludes protection for speech conveying information learned through speaker's public employment); Garry, 81 St John's L Rev at 814 (cited in note 17) (same).

[55] *Garcetti*, 547 US at 421–22.

[56] See, for example, *Lane v Central Alabama Community College*, 523 Fed Appx 709, 712 (11th Cir 2013) (relying solely on fact that Lane's testimony was about acts performed in his official capacity, although stating that that fact was "not dispositive" of conclusion that the testimony was unprotected); *Abdur-Rahman v Walker*, 567 F3d 1278, 1279, 1283 (11th Cir 2009) (deeming reports unprotected because they concerned information learned through investigations performed "as part of [plaintiffs'] assigned duties"); id at 1289 (Barkett dissenting) ("the essence of the majority opinion, with its emphasis on *Garcetti*'s phrase 'owes its existence to,' appears to be that speech about anything a public employee learns about in the course of performing his job … is unprotected, because the speech would not exist without the job activity"). See also, for example, *Gorum v Sessoms*, 561 F3d 179, 185 (3d Cir 2009) ("We have held … that a claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience' acquired through his job."). But see *Dougherty v*

implicitly rejected this reasoning by protecting speech relating to, or conveying information learned through, a speaker's public employment.[57] Still others explicitly rejected this reasoning, deeming it at odds with reasoning in the *Pickering* cases, including *Garcetti*, regarding the special value of public employee speech.[58]

In *Lane*, the Supreme Court made clear that, at a minimum, speech is not unprotected merely because it conveys information learned on the job, or otherwise relates to one's public employment, when it consists of truthful subpoenaed testimony outside of one's ordinary job responsibilities.[59] More broadly, the Court in *Lane* observed that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech."[60]

Since *Lane*, federal courts of appeal have continued to ask whether speech relates to the speaker's employment or concerns information learned in the course of the employment. Although they usually indicate that these factors are not dispositive, they differ appreciably in the weight they accord the factors. The most straightforward way for courts to limit the weight of these factors is to consider them only insofar as they shed light on the ultimate question articulated in *Lane*—that is, whether an employee spoke within "the scope of his ordinary job responsibilities."[61] The United States Courts of Appeals for the Third and Fifth Circuits both described their inquiries, post-*Lane*, as so circumscribed.[62] On the other hand, the Eleventh Circuit

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School District of Philadelphia, 772 F3d 979, 989 (3d Cir 2014) (clarifying, post-*Lane*, that *Gorum* does not stand for proposition that the special knowledge factor alone makes speech unprotected).

[57] See Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J Natl Sec Law & Policy 409, 436 nn 135–36 (2013) (citing post-*Garcetti* cases protecting speech conveying information learned on the job).

[58] See *Chrzanowski v Bianchi*, 725 F3d 734, 738 (7th Cir 2013); *Carl v City of Mountlake Terrace*, 678 F3d 1062, 1071–72 (9th Cir 2012).

[59] See note 39 and accompanying text.

[60] *Lane*, 134 S Ct at 2379.

[61] Id at 2378.

[62] See *Culbertson v Lykos*, 790 F3d 608, 618 (5th Cir 2015) ("First Amendment . . . may still apply when the employees make statements *relating* to their public employment; the question 'is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties' "); *Flora v Luzerne*, 776 F3d 169, 178 (3d Cir 2015) ("whether an employee's speech 'concern[s] the subject matter of [his] employment' is 'nondispositive' under *Garcetti*. . . . In *Lane*, the Supreme Court clarified that " '[t]he critical

described the "central inquiry" as "whether the speech at issue 'owes its existence' to the employee's professional responsibilities." The Eleventh Circuit did not deem it "dispositive" that "the speech concerns the subject matter of the employee's job," although it allowed that that "may be relevant."[63]

It also is worth noting that, in a post-*Lane* unpublished opinion, the Fifth Circuit appeared to place substantial emphasis on whether information was learned in the course of the speaker's job, and neither cites *Lane* nor otherwise makes clear that the factor is not dispositive.[64] Similarly, the Ninth Circuit has issued a post-*Lane* unpublished opinion that does not cite *Lane*, and that gravitates between asking whether speech was made "pursuant to" an employee's duties or whether it simply "related to" or "owed its existence to" those duties.[65]

2. *Is the speech directed toward resolving problems that interfere with the employee's duties?* Both before and after *Lane*, a number of lower courts deemed the fact that speech is directed toward resolving problems that interfere with the speaker's duties to signal its status as work product speech. In *Weintraub v Board of Education*, for example, the Second Circuit held, in a pre-*Lane* case, that a teacher's union grievance "challeng[ing] the school assistant principal's decision not to discipline a student who had thrown books" at the teacher was unprotected under *Garcetti*.[66] The court cited Weintraub's argument that inaction posed a threat to himself, to other teachers, to students, and to the school's learning environment.[67] The court deemed the grievance "'pursuant to' [Weintraub's] official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' . . . as a public school teacher—namely,

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question under *Garcetti* is whether the speech at issue is itself *ordinarily* within the scope of an employee's duties, not whether it merely concerns those duties'"); *Dougherty v School District of Philadelphia*, 772 F3d 979, 989 (3d Cir 2014) (rejecting notion that speech is unprotected because it relates to one's job or conveys information learned through it, explaining that prior case considered such factors but treated them as nondispositive).

[63] *Moss v City of Pembroke Pines*, 782 F3d 613, 618 (11th Cir 2015).

[64] *Tucker v Parish*, 582 Fed Appx 363, 365–66 (5th Cir 2014) ("even assuming his duties as a probation officer did not include reporting misconduct that occurred in his presence, Tucker's speech consisted of reporting information he gained because of his employment as a probation officer").

[65] *Smith v North Star Charter School, Inc.*, 593 Fed Appx 743, 744–45 (9th Cir 2015).

[66] *Weintraub v Board of Education*, 593 F3d 196, 198 (2nd Cir 2010).

[67] Id at 199, 203.

to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning."[68] The court cited opinions from several circuits using similar reasoning.[69]

In a post-*Lane* case, the Eleventh Circuit similarly took the view that an assistant fire chief engaged in *Garcetti* speech, largely because his comments were directed toward resolving problems that fell within his job responsibilities. The court found that the assistant chief's duties "encompassed every aspect of running the fire department," including budgetary matters.[70] The court also cited his testimony to the effect that his criticisms of the city on budget and pension matters—criticisms made in a pension board meeting, a staff meeting, and conversations with fire department employees—were "motivated by his belief that the City's actions would negatively impact the fire department's provision of services." This testimony, the court explained, "confirms that plaintiff's speech was made in furtherance of his self-described responsibilities."[71] The court was unmoved by the fact that he "was not required to provide the requested guidance" and that he had, in fact, "been instructed to keep his opinions [on these matters] to himself."[72]

Lower court decisions also identify factors that may indicate that speech was *not* directed toward resolving problems within a speaker's job responsibilities. For example, the more narrowly that an employee's job duties are defined, the more difficult it is to characterize speech as supporting them. To illustrate, the Second Circuit in *Matthews v City of New York* recently distinguished *Weintraub* and found that a police officer did not speak as an employee when he complained to his commanding officers about the precinct's arrest quota policy.[73] The court explained that the officer's "speech addressed a precinct-wide policy. Such policy-oriented speech was neither part of his job description nor part of the practical reality of his everyday work."[74]

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[68] Id at 203.

[69] Id at 202–03.

[70] *Pembroke Pines*, 782 F3d at 618–19.

[71] Id at 619.

[72] Id at 620.

[73] *Matthews v City of New York*, 779 F3d 167, 169, 174 (2d Cir 2015).

[74] Id at 174.

Some of the Supreme Court's language in *Lane*—particularly its casting of the *Garcetti* inquiry as whether the employee spoke within "the scope of his ordinary job responsibilities"[75]—strengthened the case for defining speech that furthers one's job responsibilities narrowly. Indeed, while the court in *Matthews*—which was decided post-*Lane*—did not invoke *Lane* in this manner, its emphasis on whether speech addresses impediments to one's "day-to-day responsibilities" is consistent with such reasoning.[76] Other courts have expressly "speculated whether" *Lane*'s use of a "new adjective, ['ordinary'] signals a shift in the law that broadens the scope of First Amendment protection for public employees."[77] For example, the D.C. Circuit in *Mpoy v Rhee*, while not deciding the question, acknowledged that this aspect of *Lane* might require the court to narrow its "consistent[]" holding that "a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command."[78]

3. *Does the speech convey information about government misconduct?* Another factor is whether speech conveys information about government misconduct. Both prior to and since *Lane*, the Fourth Circuit has invoked broad language suggesting that speech exposing public corruption warrants protection. In its 2015 decision in *Hunter v Mocksville*, the Fourth Circuit reiterated its statement from an earlier case that "'speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected.'"[79] The court observed that the Supreme Court in *Lane* made statements in keeping with this view.[80] The Court in *Lane* had indeed explained that "[i]t would be antithetical

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[75] See *Lane*, 134 S Ct at 2378.

[76] The *Matthews* court does cite *Lane* in passing in two places. *Matthews*, 779 F3d at 172, 175.

[77] *Flora*, 776 F3d at 179, n 11 (3rd Cir 2015) (citing *Mpoy v Rhee*, 758 F3d 285, 295 (DC Cir 2014)). See also *Gibson v Kilpatrick*, 773 F3d 661, 668 (5th Cir 2014) ("much of the treatment of *Lane* thus far has speculated that the insertion of 'ordinary' may signal a narrowing of the Supreme Court's position on *Garcetti*'s coverage").

[78] *Mpoy* at 291, 294–95. The court refrained from deciding whether the D.C. Circuit must indeed adjust its past holdings in light of *Lane*. It found that, at minimum, the defendant had qualified immunity because she could reasonably have believed prior to *Lane* that the plaintiff's speech was unprotected. Id at 295.

[79] *Hunter v Mocksville*, 789 F3d 389, 401 (4th Cir 2015).

[80] Id at 398.

to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim."[81]

While the Fourth Circuit's expansive language could be interpreted to mean that speech exposing public corruption or abuse of authority intrinsically constitutes citizen speech, the Fifth Circuit in *Gibson v Kilpatrick* cautioned against reading *Lane* so broadly. It argued that "the passage [in *Lane*] must be read in the context of *Lane*'s facts and in light of *Lane*'s statement that the opinion does 'not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties.'"[82] The court in *Gibson* only decided, however, that so expansive a reading of employee protections was not "clearly established" with respect to conduct that took place prior to *Lane*.[83]

B. HOW OR TO WHOM WAS THE SPEECH CONVEYED?

Lower courts have also considered, both before and since *Lane*, whether the audience to whom the speech was conveyed, or the medium through which the speech was conveyed, reflects the speaker's employment. A common way for courts to couch this inquiry is to ask whether the employee directed her speech "up the chain of command."[84] Others frame the inquiry by asking whether there is a

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[81] *Lane*, 134 S Ct at 2380.

[82] *Gibson*, 773 F3d at 669.

[83] Id. See also id at 666 (explaining inquiry's significance: defendants possess qualified immunity for behavior infringing on rights not clearly established at the time of that behavior).

[84] See, for example, *Wilson v Tregre*, 787 F3d 322, 325 (5th Cir 2015) ("Wilson was acting in his official duties. . . . he was simply reporting potential criminal activity up the chain of command"); *Flora*, 776 F3d at 177 (citing 2007 case in which Third Circuit "declined to extend First Amendment protection when the speech in question was directed 'up the chain of command'"); *Olendzki v Rossi*, 765 F3d 742, 749 (7th Cir 2014) (quoting 2010 Seventh Circuit case to effect that "a public employee's complaints 'made directly up the chain of command to his supervisors are not protected under the First Amendment'"); *Mpoy*, 758 F3d at 294 (DC Cir 2014) ("whether speech is made inside or outside a chain of command may be a contextual factor in determining *whether* the employee made it to report interference with his job responsibilities"); *Wetherbe v Smith*, 593 Fed Appx 323, 328 (5th Cir 2014) (quoting 2008 Fifth Circuit case for proposition that an employee "generally does not have First Amendment protection for communications that 'relate to his own job function up the chain of command'").

"civilian analogue" for the speaker's chosen medium or the speech recipient.[85]

Of course, what constitutes "the chain of command" or what possesses a "civilian analogue" can be defined broadly or narrowly, with significant consequences for the scope of speech protection. For example, the Fifth Circuit in *Gibson v Kilpatrick* took an expansive view of the "chain of the command"—or, more precisely, of its equivalent—in reasoning that a city's mayor (Kilpatrick) did not infringe the city police chief's (Gibson's) clearly established First Amendment rights. Gibson alleged that Mayor Kilpatrick had retaliated against him for reporting Kilpatrick's misuse of a city gas card to outside law enforcement agencies, including the FBI, the federal Drug Enforcement Agency (DEA), the state attorney general, and the Office of the State Auditor (OSA).[86] The court acknowledged that among the factors it typically considers in determining whether a speaker spoke as an employee "is whether the employee's complaint was made within the chain of command or to an outside actor, such as a different government agency or the media."[87] The court clarified, however, that reports to outsiders are not invariably citizen speech. It concluded that Gibson conveyed his reports to external agencies as an employee. The court relied partly on the fact that chain-of-command reporting would not have been a desirable option for Gibson. It explained:

> the only entities to which [Gibson] could have reported within the chain of command were [Mayor] Kilpatrick and the Board. Reporting to Kilpatrick—the suspected perpetrator—clearly was undesirable, while reporting to the Board might have required public disclosure of Gibson's suspicions, perhaps endangering the subsequent investigation. Indeed, it appears that once Board members learned of the investigation, one of them informed Kilpatrick.[88]

In *Gibson*, the Fifth Circuit thus defined the chain-of-command factor broadly enough to encompass reporting either through an employee's actual chain of command or through logical alternatives.

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[85] *Matthews*, 779 F3d at 173, 175–76.

[86] *Gibson*, 773 F3d at 664–65.

[87] Id at 670.

[88] Id at 671. See also id at 670 ("where, as here, the employee is reporting the misconduct of his supervisor, an outside agency may be the most appropriate entity to which to report the misconduct").

The court also considered whether *Lane* should affect its reasoning.[89] While acknowledging that a few "aspects of the *Lane* opinion … appear to offer the prospect of new law,"[90] the court concluded that such aspects, at minimum, were not "'clearly established' at the time of the challenged conduct," which took place prior to *Lane*.[91] *Lane* thus did not affect the Fifth Circuit's finding that the defendants violated no clearly established rights and therefore had qualified immunity.[92]

In contrast to the Fifth Circuit in *Gibson*, the Second Circuit in *Matthews* recently rejected a very expansive take on the conditions under which a speaker's forum choice signaled that he spoke as an employee. The Second Circuit held that police officer Craig Matthews spoke as a citizen when he complained to his commanding officers about an arrest quota policy at his precinct.[93] Among the factors the court considered was whether the forum through which Matthews spoke had "a civilian analogue."[94] The Second Circuit found that Matthews "chose a path that was available to ordinary citizens who are regularly provided the opportunity to raise issues with the Precinct commanders."[95] It rejected the district court's reasoning that Matthews's speech lacked a civilian analogue because "Matthews had better access to his commanding officers than would ordinary citizens."[96] "Presumably," the Second Circuit explained, "employees always have better access to senior supervisors within their place of employment."[97] If an employee's relative "degree of access" were considered, "internal public employee speech on matters of public concern not made as part of regular job duties would be unlikely to receive First Amendment protection."[98]

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[89] The Fifth Circuit had issued an initial decision in *Gibson* prior to *Lane*. The Supreme Court vacated and remanded after *Lane*. Id at 666.

[90] *Gibson*, 773 F3d at 668.

[91] Id at 669. See also id at 670.

[92] Id at 670–73.

[93] *Matthews*, 779 F3d at 169.

[94] Id at 173.

[95] Id at 176.

[96] Id.

[97] Id.

[98] Id.

Sounding a note similar to that of the Second Circuit, the Fourth Circuit recently emphasized that speakers can be protected for speech directed through internal as well as external channels.[99] The court cited *Lane*'s trumpeting of the special value of public employee speech and its warning against reading *Garcetti* too broadly.[100] The Fourth Circuit also cited Justice Stevens's concern, expressed in dissent in *Garcetti*, "that it would be 'perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly,'" rather than internally.[101]

III. The Special Value of Public Employee Speech

In this part, I develop the concept of the special value of public employee speech. The basic argument is that public employees have a crucial structural role to play in countering government's capacity for deception. As courts acknowledge, one aspect of special value consists of the unique insights that public employees gain through their work. But courts disregard two other facets of special value. First, to the extent that employees have special access to internal communication channels, this heightens their free speech value. Second, through the very act of doing their jobs conscientiously and in accordance with the norms of their professions, public employees help to maintain consistency between the functions in which government purports to engage and those that it actually performs. In this sense, public employees are potential barriers against government deception through distortion.

The remainder of Part III expands on these points by building their theoretical foundations. Subpart A sets forth the free speech theory based foundations and identifies judicial precedent consistent with the same. Subpart B draws support from constitutional structure, particularly the federal separation of powers.

A. Insights from Free Speech Theory

1. *Self-government, checking, and distrust.* The First Amendment's text simply does not, either on its face or through its original mean-

[99] *Hunter*, 789 F3d at 399, 402.

[100] Id at 396–97.

[101] Id at 402.

ing, tell us very much about its scope.[102] As a result, scholars and courts long have relied on theories about the values underlying the Free Speech Clause to help determine the scope of First Amendment protections.[103]

The case for protecting public employees' work product speech builds on several strands of free speech theory. At its most basic level, it starts with the notion that, whatever other purpose the Free Speech Clause serves, it undoubtedly protects the conveyance of information and opinion about government to support an informed and engaged citizenry. This point is of no real controversy.[104] It is closely tied to the notion that speech that facilitates oversight and checking of government has substantial value.[105] A corollary of both notions is that wariness is called for whenever government seeks to restrict speech about its own operations.[106]

Vigilance against government efforts to skew public knowledge and debate in its favor is central to the Supreme Court's understanding of the First Amendment. As already noted, in its Cold War era loyalty oath and antisubversion decisions the Court railed against government's leveraging its role as employer to enforce political orthodoxy in the workplace or the broader community.[107] Similar judicial concerns are evident in the "content distinction" rule, which creates a strong presumption against laws or law enforcement based on the viewpoint, subject matter, or communicative impact of speech.[108] The Court even has limited government's ability to punish content-based subcategories of otherwise unprotected speech, for

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[102] I have elaborated on this point elsewhere. See Heidi Kitrosser, *Interpretive Modesty*, 104 Georgetown L J *nn 168–72, 183–85 and accompanying text (forthcoming, 2016) (on file with author); Kitrosser, 6 J Natl Sec L & Policy at 421–22 (cited in note 57).

[103] See note 102.

[104] Kitrosser, 6 J Natl Sec L & Policy at 422 n 63 (cited in note 57) (citing consensus that "whatever else the freedom of speech may encompass, it undoubtedly includes a right to convey information and opinion about government").

[105] The seminal work on the checking value in First Amendment theory is Vincent Blasi's article of that title. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am Bar Found Res J 521 (1977). Blasi details the checking value and explores its relationship to other free speech values. Id at 548, 553–554, 557–65.

[106] Frederick Schauer demonstrated that all major free speech theories share a core distrust of government, and that this should be a central concern of free speech doctrine. Frederick Schauer, *Free Speech: A Philosophical Enquiry* 33–34, 44–46, 86, 162–63 (Cambridge, 1982).

[107] See discussion at Part (I)(D).

[108] See, for example, Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Matter and the First Amendment*, 96 Nw U L Rev 1339, 1339–1342, 1345–49

fear that government will use unprotected speech categories as vehicles to discriminate based on "hostility—or favoritism—towards the underlying message expressed."[109]

2. *Distortion.* Self-government, checking, and distrust theories lend themselves to concerns that government will distort information no less than that it will suppress it. By "information distortion," I refer to the phenomenon whereby government purports to provide or subsidize information of a type that is defined by reference to professional or social norms, while manipulating the information in a manner antithetical to those norms. Distortion occurs, for example, where government hires climate scientists to make climate projections but insists that they alter their findings for political reasons as a condition of their continued employment. Distortion alters the very picture of reality against which the public or intragovernmental actors can assess and respond to government actions and decisions.[110]

This concern about distortion is linked to another concern: that courts tend to overstate the dichotomy between "government speech" and "citizen speech."[111] The government is free, of course, to express its own viewpoints, including through government employees and subsidy recipients. Few would argue, for example, that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was . . . constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[112] But not all government speech consists of policy messages that the

(2002) (summarizing the rule and citing cases, though noting that Supreme Court does not always treat communicative manner as content).

[109] *R.A.V. v St. Paul*, 505 US 377, 386 (1992).

[110] See, for example, Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 Duke L J 1, 27–31 (2009) (explaining that free speech concerns are raised when government's role in crafting speech of employees or subsidy recipients is obscured); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 NYU L Rev 605, 665–71 (2008) (making similar point); Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L Rev 1377, 1397–1401, 1450, 1460–61, 1487, 1491 (2001) (same).

[111] See text accompanying notes 114–16. See also, for example, Corbin, 83 NYU L Rev at 625–26 (cited in note 110) (suggesting that public employee speech typically mixes "citizen speech" and "government speech"); Estlund, 2006 Supreme Court Review at 151–53 (cited in note 9) ("The work [public] employees do for the public through their job may be a truer . . . expression of their character and self-conception as citizens than their rare letters to the editor or statements at public meetings.").

[112] *Rust v Sullivan*, 500 US 173, 194 (1991).

government transparently acknowledges as such. In many cases the government purports to subsidize speakers—whether by employing them or by funding particular projects—precisely for the expertise that enables them to make sound independent judgments.

Accordingly, some scholars observe that when government hires certain types of employees—for instance, lawyers or scientists—or subsidizes particular types of speech—such as artwork or health-care guidance—it commissions work constrained by professional, artistic, ethical, or other norms. Courts artificially wipe away these aspects of expertise and judgment—these "private citizen" aspects, so to speak—when they treat the speech as government property subject to government's unfettered control. In so doing, courts conflate speech that purports to deliver professional expertise with speech that transparently conveys the government's policy preferences. By placing both in the "government speech" category, the Court enables the government to claim that it has commissioned "professional" speech at the same time as it strips that speech of the very features that make it professional.

For example, Robert Post criticizes the Supreme Court's reasoning in the 1991 case of *Rust v Sullivan*. In *Rust*, the Court upheld federal regulations barring family planning clinics from mentioning abortion in the course of providing federally subsidized counseling.[113] Post questions whether the Court erred by treating subsidized medical counseling as falling within the government's "managerial domain," subject to extensive government control. Post notes that "[p]hysicians are of course professionals, and … professionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards."[114]

Orly Lobel expresses similar concerns, using insights from organization theory. Lobel invokes the concept of "enlightened loyalty," whereby a loyal employee exercises some independent judgment, rather than blind obedience, to further the good of their organization.[115] From this perspective, the Court in *Garcetti* misstepped by

[113] Id at 173, 191.

[114] Robert C. Post, *Subsidized Speech*, 106 Yale L J 151, 172 (1996). See also id at 170–76.

[115] Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 Cal L Rev 433, 437–40, 477 (2009).

drawing too sharp a distinction between one's wisdom, judgment, and moral and legal commitments as a private citizen, and one's acts as a public employee.[116]

The Supreme Court expressly invoked antidistortion reasoning in the 2001 case of *Legal Services Corporation v Velazquez*. *Velazquez* involved a federal statutory restriction on the use of Legal Services Corporation (LSC) funds. LSC was established by Congress in 1974 "to distribute funds appropriated by Congress to eligible local grantee organizations 'for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.'"[117] The restriction prohibited attorneys, in the course of LSC-funded representation, from challenging the constitutionality of state or federal welfare laws or the consistency of state welfare laws with federal statutes.[118] While LSC attorneys were free to argue that agents had interpreted or applied welfare statutes incorrectly in their clients' cases, they were forbidden from challenging the legality of the statutes themselves.[119]

The United States argued that the restriction did not abridge speech, but simply set the parameters of a program that Congress had created and funded. The Court rejected this position. It explained that "[w]here the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations."[120] The LSC program purported to use the legal system "to facilitate suits for benefits."[121] Yet the restriction distorted that system by interfering with the "traditional role" of attorneys, limiting the range of "arguments and analyses" that they may make to courts and the options that they may present

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[116] Id at 433–34, 453–55.

[117] *Legal Services Corporation v Velazquez*, 531 US 533, 536 (2001).

[118] Id at 536–37.

[119] LSC interpreted the restriction to mean that "[e]ven in cases where constitutional or statutory challenges became apparent after representation was well under way . . . its attorneys must withdraw." Id at 539.

[120] Id at 543. To support this point, the Court cited limited public forum cases invalidating restrictions that altered the nature of the forums at issue. It acknowledged that the forum cases, while instructive, "may not be controlling in a strict sense" since *Velazquez* "involves a subsidy." Id at 544.

[121] *Velazquez*, 531 US at 544.

to clients.[122] The Court cited the negative effects of this distortion on the separation of powers, particularly on the judiciary.[123]

The Supreme Court had hinted at similar antidistortion concerns in the Cold War era loyalty oath and antisubversion cases. As expressed by the majority in *Keyishian*, the fear was that the restrictions would distort the classroom's status as "peculiarly the 'marketplace of ideas.'"[124] Or, as Justice Frankfurter put it, concurring in *Wieman*, such restrictions might "chill that free play of spirit which all teachers ought especially to cultivate and practice."[125]

Of course, neither the antisubversion cases nor *Velazquez* constitute the Supreme Court's only wisdom regarding public employee speech or government-funded speech. *Garcetti* and *Rust* complicate the case law, and they have kindred precedent. Indeed, *Rust* was the first in a line of cases taking an expansive view of the government's power to control "government speech." These cases involved speech that was created at least partly by private actors and that was not transparently presented as having been shaped by the government. Nonetheless, the Supreme Court characterized the speech as the government's own and permitted the government to control its content, free from the constraints of the First Amendment.[126] While *Velazquez* and the antisubversion cases thus are hardly the Supreme Court's only word on the matter, they do reveal flashes of judicial insight consistent with a more robust conception of the special value of public employee speech. These shards of wisdom, combined with those in the academic literature, provide the foundation for a free speech theory that offers a more satisfying approach to public employee speech.

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[122] Id.

[123] Id at 546.

[124] *Keyishian*, 385 US at 603.

[125] See note 50.

[126] See, for example, *Walker v Sons of Confederate Veterans*, 135 S Ct 2239 (2015) (holding that state engaged in speech when it issued specialty license plates designed by private groups and that state therefore could reject proposed designs without any First Amendment limits); *Pleasant Grove City, Utah v Summum*, 555 US 460 (2009) (holding that city engaged in speech by accepting privately donated monuments for a public park and that city therefore could reject donations without First Amendment constraint). See also, for example, Corbin, 83 NYU L Rev at 611–16, 639–40, 663–71 (cited in note 110) (discussing government speech doctrine and arguing that it takes an overly broad view of what constitutes government speech); Norton, 59 Duke L J at 25–32 (cited in note 110) (same).

B. A ROLE FOR CONSTITUTIONAL STRUCTURE

The First Amendment is not the only constitutional means to check government power.[127] The Constitution is filled with mechanisms that enable government actors and institutions to challenge one another. Most important for our purposes are those checks on presidential power that empower subordinates to dissent.

Elsewhere, I have discussed such checking mechanisms in depth.[128] I summarize them here, starting with those that draw directly on constitutional text.[129] A number of textual details—including but not limited to the division of the appointments power between the President and the Senate, Congress's constitutional ability to delegate some inferior officer appointments away from the President, and the Opinions Clause, which confirms that the President may require written opinions from executive department heads—suggest an executive branch in which the President has substantial but not unfettered supervisory authority and in which his subordinates are potential checks against abuse or incompetence.[130]

The textual indications are bolstered by history from the framing and ratification period. For example, supporters of the proposed Constitution insisted that the Framers, in declining to annex a council to the President, had intentionally deprived the President of a group that would do his bidding and hide his secrets. Alexander Hamilton argued that the President not only would lack a council behind which to hide, but that his appointed subordinates, who were subject to Senate approval, would be unlikely to shield his bad acts.[131]

These structural aspects of the Constitution and its history confirm the dual role of public employees in the federal system. On the one hand, government employees are a part of the executive branch and are charged with supporting its efficacy. On the other hand,

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[127] As Charles Black observed, a free speech right might be inferable from the Constitution even without the First Amendment. See Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 41–50 (Louisiana State, 1969).

[128] See, for example, Heidi Kitrosser, *Reclaiming Accountability* at chap 7 (Chicago, 2015).

[129] Parts of this paragraph and the next two are drawn from Section II(C)(1) of *Leak Prosecutions and the First Amendment: New Development and a Closer Look at the Feasibility of Protecting Leakers*, 56 Wm & Mary L Rev 1221, 1244–46 (2015).

[130] For elaboration on these points see Kitrosser, *Reclaiming Accountability* at 147–62 (cited in note 128).

[131] Federalist 76 (Alexander Hamilton) in Lawrence Goldman, ed, *The Federalist Papers* 373 (2008).

government employees are crucial safety valves for protecting the people from abuse and incompetence, given their unique access to information and to a range of avenues for transmitting the same.

While the Constitution does not dictate the structure of state or local governments, the logic underlying the federal model—that internal checks are necessary to head off tyranny or incompetence by superiors—also bolsters the insights of free speech theory as it relates to the states and localities.

IV. Practical and Conceptual Objections to Accommodating Special Value

While academic opinion runs largely against *Garcetti*, some thoughtful opposing views have been articulated and warrant attention. *Garcetti*'s defenses fall into two rough categories. One set of arguments suggests that *Garcetti* does not pose much of a threat to free speech. The other stresses that public employers need ample discretion to manage employees and their work product.

A. FREE SPEECH VALUE BASED OBJECTIONS

Some commentators posit that *Garcetti*'s impact falls predominantly on internal workplace speech, and that this speech lacks much salience under the First Amendment.[132] It is only when employees take their concerns public, they argue, that the speech has significant First Amendment value. One scholar writes, for example, that "the First Amendment … is intended to facilitate public oversight of government, and that purpose is not served by intra-governmental speech."[133] Another argues: "When a public employee brings heretofore concealed misconduct into public view, he enables the process of political accountability to function.… Public employees whose views remain hidden from public view, in contrast, contribute little to public discussion and debate."[134]

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[132] See Roosevelt, 14 U Pa J Const L at 649 (cited in note 17) ("*Garcetti* does not reach speech to the public, unless producing such speech is the employee's job (in which case the speech is actually the government's speech))"; Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 Fordham L Rev 33, 57 (2008) ("For public employees who take their concerns to the public, *Garcetti* should pose no bar to First Amendment protection.").

[133] Roosevelt, 14 U Pa J Const L at 653–54 (cited in note 17).

[134] Id at 59.

This position is belied by the tremendous importance of private discussions to free speech values, including checking values. In the context of public employment, effective checking may occur, for instance, where improprieties are reported up the chain of command, even if those reports never reach the public. Such checking also can help shape the information that does make its way to the public. It may, for example, stymie practices that punish honest or effective internal reporting that itself enters the public discourse.[135]

Nor does it resolve First Amendment concerns to suggest that employees can simply bring their information or complaints directly to the public or otherwise air them in a manner that falls outside of their job responsibilities. Public employees' special value as speakers stems partly from their capacity to choose from a number of forums, including those through which they perform their jobs or other avenues to which the public lacks access. This flexibility enables employees to make judgments about more or less effective or safe forums from the outset, and to adapt when government plays shell games with accountability, as when it purports to provide an avenue for redress that it fails to deliver or that becomes a retaliation trap.[136] Such flexibility also empowers employees to reconcile their checking roles with respect for bureaucratic protocol without forfeiting constitutional protection. It enables them, for instance, to attempt to report through internal channels rather than turning to the press as a matter of first resort.

The Supreme Court has made clear that speech communicated privately by government employees in the workplace warrants protection. In *Rankin v McPherson*, for example, the Court deemed unconstitutional the firing of McPherson, who worked as a clerical employee in a constable's office.[137] McPherson was fired for saying, in a private office conversation with a work colleague after the two had heard a radio bulletin about the attempt to assassinate President

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[135] See Estlund, 2006 Supreme Court Review at 125 (cited in note 9) (citing democratic benefits of internal employee speech).

[136] For one striking example of an apparent retaliation trap, see Jane Mayer, *The Secret Sharer*, New Yorker (May 23, 2011) (describing simultaneous raid on homes of three persons—two former NSA employees and one former congressional staffer—who had filed what they believed to be a confidential complaint with the Pentagon's Inspector General).

[137] *Rankin v McPherson*, 483 US 378, 383 (1987).

Reagan, that Rankin disapproves of Reagan's policies and that "'if they go for him again . . . [she] hope[s] they get him.'"[138] The Court deemed Rankin's statement to be about a matter of public concern because it related to President Reagan's policies and the attempt on his life.[139] In a footnote, the Court rejected the suggestion, made by the United States as amicus, that "[t]he private nature of the statement . . . vitiate[s its status] as addressing a matter of public concern."[140] In rejecting this contention, the Court cited *Givhan v Western Line Consolidated School District*.[141] In *Givhan*, the Court had vacated a lower court's holding that a teacher was not constitutionally protected from termination for expressing concerns to her principal, in private meetings, about perceived race discrimination in their school district.[142] The Court in *Givhan* emphasized that the Constitution protects a speaker when she "arranges to communicate privately with [her] employer rather than to spread [her] views before the public."[143]

B. OBJECTIONS BASED ON MANAGERIAL DISCRETION

Garcetti's defenders also emphasize government's need to manage its employees.[144] *Garcetti* itself "gestures at" two facets of this view.[145] The first—the "government speech" rationale—is the position that "speech produced pursuant to official duties [is] in some sense government speech."[146] When employees speak as the government, their

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[138] Id at 380–82.

[139] Id at 386–87.

[140] Id at 386 n 11. The majority also found, in applying *Connick-Pickering*, that the speech's private setting cut strongly against finding it disruptive. Id at 388–89 & 388 n 13. The majority "agree[d] with Justice Powell," who concurred, "that a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee." Id at 388 n 13. See also Estlund, 2006 Supreme Court Review at 123 (cited in note 9) (citing this aspect of *Rankin*).

[141] *Rankin*, 483 US at 386 n 11 (citing *Givhan v Western Line Consolidated School District*, 439 US 410, 414–16 (1979)).

[142] *Givhan*, 439 US at 412–13.

[143] Id at 415–16. See also Estlund, 2006 Supreme Court Review at 121–22 (cited in note 9) (discussing this aspect of *Givhan*).

[144] See Roosevelt, 14 U Pa J Const L at 652 (cited in note 17); Rosenthal, 77 Fordham L Rev at 38, 46–49 (cited in note 132).

[145] Roosevelt, 14 U Pa J Const L at 635 (cited in note 17).

[146] Id.

employers must have free rein to dictate or correct what they say.[147] The second managerial discretion argument—the "evaluation rationale"—is that spoken or written work product "should be conceptualized as job performance rather than speech,"[148] and that courts are in no position—either constitutionally or as a practical matter—to second-guess supervisors' job performance evaluations.[149]

1. *The government speech rationale.* The "government speech" rationale plainly fails to justify *Garcetti*'s categorical rule. The problem is not that this consideration is invalid in all cases, but that it is inapplicable to many public jobs. As discussed earlier, some types of public employment—let us call them "scripted jobs"—entail conveying messages crafted by the government.[150] The very nature of a scripted job demands full governmental control of the messages that the employee is hired to deliver. Helen Norton offers several examples of scripted jobs, including those generated "when a school board hires a press secretary or lobbyist to promote its anti-voucher position, a health department hires an employee to implement an antismoking promotional effort … or a mayor commissions a muralist specifically to create patriotic art for the Fourth of July."[151]

But as noted earlier,[152] and as Norton and others point out, many government positions, including the assistant district attorney job at issue in *Garcetti*, are not scripted jobs (let us call these "unscripted jobs"). Unscripted jobs call for employees to exercise a nontrivial degree of independent judgment.[153] Such judgment can manifest itself in spoken or written work product, whether in the form of reports to supervisors, scientific reports for public or internal distribution, or court briefings.

It is true that even unscripted employee speech is government speech in the narrow sense that the government has paid for it.

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[147] It is on this basis that Kermit Roosevelt dismisses concerns about *Garcetti*'s impact on public speech. Though acknowledging that "[s]ome employees might have the job of communicating to the public," he concludes that "such an employee is probably best conceived of as speaking for the government, in which case the government would be allowed to dictate the content of the speech." See id at 647 & 647 n 62.

[148] Id.

[149] See Part IV(B)(2), (3).

[150] See text accompanying notes 111–12.

[151] Norton, 59 Duke L J at 30–31 (cited in note 110).

[152] See text accompanying notes 112–25.

[153] See notes 110–25 and accompanying text.

But by definition, the government has paid unscripted speakers to produce undistorted speech.[154] In these circumstances, *Garcetti*'s categorical rule cannot be justified by invoking the particularized case of the scripted public employee.

2. *The evaluation rationale: the accountability argument.* The evaluation rationale has both practical and constitutional dimensions. As a constitutional matter, Lawrence Rosenthal argues that "if public policymakers could not remove subordinates whom they regard as unwilling or unable to execute their duties as those policymakers wish—including duties that involve speech—then they cannot be fairly held politically accountable for the performance of their offices.... Preserving the process of political control and accountability over public offices is surely at the core of our Constitution."[155]

The argument from political accountability rests on a premise that is partly sound. Political actors undoubtedly must retain meaningful control over unelected bureaucrats and their work product in order to tie administration to political accountability. But meaningful control does not necessarily equal full and unfettered control. I have discussed this point at length in a different context, explaining that unitary executive theorists err in deeming unfettered presidential control over all federal executive actors necessary to preserve accountability. As I argue in that setting, the level of political control necessary to maintain accountability is a functional, fact-sensitive question. Its answer varies with the nature of both the employment and the restriction at issue.[156]

More importantly, as I have also emphasized in discussing unitary executive theory, unfettered supervisory control can defeat rather than enhance accountability. This is especially true where written or spoken work product is at issue. At the federal level, for example, "[u]nfettered presidential control can be used ... to keep truthful information from emerging from the executive branch through White House vetting of congressional testimony, pressure to alter scientific findings for political reasons, or secretive influence over agency

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[154] See Part III(A)(2) for discussion of the concept of distortion.

[155] Rosenthal, 77 Fordham L Rev at 48 (cited in note 132). Another scholar ties employee speech protections themselves to political accountability, explaining that "[i]f the democratic community needs or desires free and open 'whistleblower' speech, it can enact the appropriate laws." Garry, 81 St John's L Rev at 815 (cited in note 17).

[156] See Kitrosser, *Reclaiming Accountability* at 165–66 (cited in note 128).

policy decisions."[157] Helen Norton makes a similar point in critiquing *Garcetti*, explaining that "the government's accountability for its performance may well be undercut by the carte blanche *Garcetti* gives government to discipline workers who truthfully report irregularities and improprieties pursuant to their official duties."[158]

3. *The evaluation rationale: arguments concerning judicial overreach and relative competence.* The most challenging defenses of *Garcetti* are based on notions of comparative institutional advantage. Specifically, they are grounded in arguments that public employers are better situated than judges to evaluate employee work product. The point is partly about competence. As Kermit Roosevelt puts it, "the employer is much better than a judge at deciding whether particular speech is good job performance or not."[159] Nor would it help for courts to apply the *Connick-Pickering* test and weigh, case by case, the public employer's efficiency interests against employees' interests in "commenting upon matters of public concern."[160] As Roosevelt explains, *Connick-Pickering*'s application "would prevent employers from firing or reassigning employees whose memos address issues of public concern and are nondisruptive, but are riddled with errors of legal analysis."[161] Roosevelt also suggests that the judiciary is not the constitutionally appropriate institution to judge work product quality. Such content-based judicial judgments, he explains, would themselves raise First Amendment concerns.[162]

Concerns over institutional roles and competence are serious, but they are overstated in important respects. For one thing, as lower court applications of *Garcetti* reflect, the lines separating work product speech from other public employee speech often are quite fuzzy. The *Garcetti* rule itself thus demands no easy judicial feat. More importantly, this means that there is no bright line separating what courts have done for years—apply the *Connick-Pickering* test to "nonwork product" speech—from the task of applying *Connick-Pickering* to work product speech.

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[157] Id at 144.

[158] Norton, 59 Duke L J at 33 (cited in note 110).

[159] Roosevelt, 14 U Pa J Const L at 653 (cited in note 17).

[160] See text accompanying note 8.

[161] Roosevelt, 14 U Pa J Const L at 652 (cited in note 17).

[162] Id.

Even when we can comfortably identify work product speech, institutionally based objections to judicial review rest on a faulty premise. They assume that judicial review must entail substantive assessment of work product quality, duplicating the review conducted by work supervisors. But, as I will show in subpart C, this need not be the case.

C. ACCOMMODATING SUPERVISORS' EVALUATIVE NEEDS WITHOUT SACRIFICING SPECIAL VALUE

Judicial review in the work product context can and should be designed not to second-guess supervisor assessments of work product quality, but to smoke out retaliation against work product speech *for reasons other than quality*. The need for managerial discretion is at its apex in the realm of work product quality review. And employers' nonpretextual, quality-based judgments do not pose a strong threat to special value. On the other hand, special value is deeply threatened by retaliation in response to inconvenient facts or analysis in work product speech. Although such retaliation is not the only proper target of judicial review, it ought to be its main target.

Under the approach suggested here, then, courts would effectively leave nonpretextual decisions based on work product quality untouched. For example, a government lawyer's supervisor would have free rein to discipline her for turning in a memorandum "riddled with errors of legal analysis."[163] Similarly, a government scientist's superior would be free to discipline her for sloppy research methods or poorly written reports. On the other hand, retaliating against a government lawyer for her internal legal advice, not because the advice is unsound but because it provides a politically inconvenient answer, is not a work quality-based judgment. Nor would it constitute a work quality-based decision were a government scientist's supervisors to discipline her for reaching scientific conclusions in tension with an administration's policy agenda. On the other hand, a scripted employee's failure to stick to her script could legitimately be deemed poor work quality warranting discipline.

At this point, some of my fellow *Garcetti* critics might question why one would draw any threshold distinction between work product speech and non-work product speech in the first place. They could

[163] See text accompanying note 161 (citing Roosevelt's use of this example).

point to the practical difficulties in making the distinction. They might add that, even if we could confidently identify work product speech, the best way to accommodate free speech and managerial needs is to evaluate all challenged discipline under the fact-sensitive *Connick-Pickering* test.

In response to these concerns, it is important first to acknowledge that it is no easy task to distinguish work product speech from other public employee speech made in the workplace. Lower court decisions betray both this difficulty and the risk that poor line-drawing will suppress speech. That said, some work product speech is relatively easy to identify as such. Examples include legal briefs or memoranda written by government lawyers in the course of litigating their assigned cases, or scientific reports written at the request of agency scientists' superiors.

Furthermore, the fact that discipline for work product speech is not immune from judicial review under my approach should conduce to greater definitional precision. Such discipline would be spared further review only after a judicial determination that it was based on work product quality. This may help to narrow judicial understandings of work product speech to speech of a type that could be reviewed for its professional quality in the first place. In Part VI, I elaborate further on tools that courts can use to focus their conceptions of work product speech. The fact that work product speech based discipline would not be immune from judicial review also lowers the stakes of questionable judicial judgments in identifying such speech.

In addition, my approach has advantages over one that draws no distinction between work product speech and other employee speech. It accommodates the most compelling managerial prerogative needs without sacrificing free speech value. On the other hand, applying *Connick-Pickering* to evaluative determinations poses some risk to free speech value. The test, already subject to very deferential applications, may become yet more diluted through its application to such decisions.

Of course, my approach could be criticized from another perspective—that of *Garcetti*'s supporters. Such critics might argue that it is infeasible for courts to assess whether managerial judgments are based on work product quality without themselves evaluating such quality. But courts have considerable experience conducting inquiries designed to smoke out illegitimate decision-making bases and to

distinguish them from permissible rationales. While hardly perfect, such inquiries are intrinsically different from those that second-guess a decision maker's substantive judgments.

V. An Alternative to Garcetti

A. Determining Whether Discipline Is Based on Work Product Quality

1. *What is a work product quality based assessment?* Public employers should be free to discipline employees for poor work product quality. The difficulty is in providing that freedom without granting carte blanche to employers to retaliate against work product speech for other reasons. The most serious concern, in light of special value, is that employers will attempt to distort work product speech. In other words, as Cynthia Estlund puts it, they will punish employees for "doing the job [they were] hired to do—indeed, perhaps for doing the job too well."[164] This could entail "honestly criticizing the performance of [their] superiors or other public officials."[165] It could also entail honestly and competently issuing reports that reflect the professional norms of the position—whether legal, scientific, or otherwise—for which one was hired.

Estlund's work helps us to see how one might frame the distinction between distorting speech versus punishing speakers for poor quality speech. She explains that "[e]mployees whose jobs require the exercise and expression of judgment or the disclosure of information on matters of public concern should enjoy a reasonable expectation that they will not be penalized for expressing that judgment and disclosing that information in a responsible manner."[166] She also stresses that employers can defend themselves on the basis that the employee's "speech, though on matters of public concern and uttered in the course of her job constituted poor job performance."[167]

Estlund frames her approach as somewhat of a hybrid due process and First Amendment claim. Rather than having courts conduct the proposed inquiry, she would have courts require impartial ad-

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[164] Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L Rev 1463, 1475 (2007).

[165] Id.

[166] Id at 1477.

[167] Id at 1479.

ministrative hearings. The hearing right would stem from a "convergence of legitimate employee expectations and the constitutional value of speech on matters of public concern."[168] Estlund's proposal is an important one, and it is far preferable to a world in which public employees have no constitutional right to challenge work product speech based discipline. That said, administrative hearings suffer from potential shortcomings relative to judicial forums, as Estlund acknowledges.[169] Additionally, it is important to establish that a middle ground—one between adjudicators abstaining entirely from reviewing work product speech based discipline and their probing the substantive merits of work product quality—can be found in the judicial realm itself. And it is equally important to understand that the free speech value of public employee work product is strong enough to fuel a First Amendment claim in its own right, ideally toward the end of overturning *Garcetti* or, at a minimum, toward narrowing *Garcetti*'s reach. For that matter, even a hybrid due-process/First Amendment analysis is stronger if underscored partly by free speech reasoning that could stand on its own.

Thus, while the inquiry that Estlund suggests can be justified partly through employees' reasonable expectations that they will not be punished for doing their jobs "too well," the same inquiry is warranted on First Amendment grounds alone in light of the special value of public employee speech and antidistortion concerns.

2. *How will courts determine whether discipline was based on quality?* The prospect of judges asking if employment decisions were quality based inevitably conjures concerns about judicial intrusion and competence. But the judiciary has a number of tools at its disposal to make this determination without either overreaching or rubber-stamping employer decisions.

The easiest case, of course, is when the fact of a non-quality-based decision can be discerned from the employer's own explanation. For instance, an employer might explicitly discipline a scientist hired to conduct research because he reached a conclusion incompatible with

[168] Id at 1480.

[169] Id at 1490–96. The point is not that administrative proceedings are clearly inferior. As Estlund details, each option entails trade-offs. The point is that, insofar as there are reasonable arguments in favor of judicial rather than administrative tribunals, it is important to understand the former's feasibility. Such understanding also sheds light on the capacity of courts to review any administrative proceedings.

an administration's policy goals. Or a public employer might discipline an employee charged with investigating internal corruption because she "ruffled feathers" by finding corruption by higher-ups. Such rationales would amount to admissions that employers punished employees for doing the very jobs for which they were hired. As such, they would not constitute quality-based determinations.

In some instances, a public employer might justify disciplining an employee for a legitimate reason, but the employee might contest the veracity of the explanation. In such situations, courts can consider whether the employer's claim is pretextual.

While establishing actual purpose is notoriously tricky, it is a task that courts take on in multiple contexts, including constitutional cases and employment cases. Courts regularly ask, for example, whether laws are based on the content of speech on their face or in their underlying purposes.[170] Indeed, then-professor Elena Kagan argued in 1996 that the most important aspects of First Amendment doctrine are "best understood and most readily explained as … [indirect] motive hunting" devices.[171] She suggested, for example, that the only sensible justification for the presumption against facially content-based laws is the view that "content-based regulation [usually] emerges from illicit motives."[172] By the same token, she deemed courts' application of strict scrutiny to such laws to be "best understood as an evidentiary device that allows the government to disprove the implication of improper motive arising from the content-based terms of a law."[173]

In the equal protection context, courts regularly make explicit inquiries into whether government intentionally discriminated on the basis of race or some other suspect or quasi-suspect category. Indeed, the Supreme Court has developed a robust body of constitutional doctrine to address challenges to the effect that laws or other acts that are neutral on their face are discriminatory in purpose and effect.[174] And in statutory cases, courts routinely examine whether neutral

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[170] See, for example, *Bartnicki v Vopper*, 532 US 514, 526 (2001) (citing *Ward v Rock Against Racism*, 491 US 781, 791 (1989)).

[171] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U Chi L Rev 413, 414 (1996).

[172] Id at 451.

[173] Id at 453.

[174] See, for example, *Rogers v Lodge*, 458 US 613, 618 (1982).

explanations for employee discipline are pretexts for discrimination.[175] Courts thus are well versed in evaluating neutral explanations by public and private entities, including employers, to determine whether they are pretexts for forbidden purposes.

Among the factors to which an employer might point to rebut an impermissible motive claim is that the employer's quality assessment was made using standard evaluative procedures, including review by supervisors with expertise in the relevant field. The employer might also benefit from a workplace history of effective whistle-blower protections to which the employee bringing suit had access. The very fact of such procedures ought not to be decisive. But their availability and efficacy can be material to a court's analysis.

This feature of the proposed inquiry has the obvious benefit of incentivizing employers to create effective workplace speech protections. Among the more criticized aspects of the *Garcetti* decision is its reference to statutory and regulatory whistle-blower protections. The Court suggested that any hole that its decision left in workplace speech protections was covered in large part by statutory and regulatory measures.[176] As critics—including the dissenters in *Garcetti*—pointed out, this aspect of the majority opinion painted an unrealistically rosy picture of the breadth and effectiveness of nonconstitutional whistle-blower protections.[177] The approach proposed here, in contrast, makes no factual assumptions about the existence or effectiveness of workplace speech protections. It simply recognizes that such protections, where they do exist, may shed light on the sincerity of employers' claims.

B. THE BIGGER DOCTRINAL PICTURE

The treatment of public employee speech that does not constitute work product is beyond the scope of this article. The only impact that the approach set out in this article would have in this realm is to increase the amount of speech labeled non-work product. Such an increase would follow both from my admonition to err on the side of deeming speech non-work product in questionable cases, and from the constraint that work product speech must be conducive to

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[175] See, for example, *Reeves v Sanderson Plumbing Products, Inc.*, 530 US 133, 141–43 (2000).

[176] *Garcetti*, 547 US at 425–26.

[177] See id at 439–41 (Souter, J, dissenting).

quality-based assessments. Once speech is deemed non-work product, though, I assume here that the *Connick-Pickering* test would continue to apply.

My proposed approach to work product speech itself intersects with *Connick-Pickering* in two respects. First, when a court finds that discipline for work product speech did *not* stem from a judgment of work product quality, judicial review would simply proceed under the *Connick-Pickering* test. Second, in performing the *Connick-Pickering* test, courts should adopt a strong presumption against finding a sufficient efficiency interest when the claimed interest is based on the communicative effects of an employee's conveying information or opinion in conformity with her job requirements. This presumption is called for in light of the strong free speech value of such conveyances, and the close relationship between punishing such speech and distortion. The presumption also poses little risk to the legitimate exercise of managerial discretion. Indeed, courts applying *Connick-Pickering* necessarily will have concluded that discipline was not based on work product quality.

VI. If All Else Fails: Coping with Garcetti

My proposed approach marks less of a break from the status quo than would an approach that draws no distinction between work product speech and other public employee speech. My approach's chance of adoption by the Supreme Court, while still slim, thus may be greater than that of a more radical alternative to *Garcetti*.

It seems most realistic, however, to expect *Garcetti* to stay with us for some time. The most constructive suggestions for mitigating its harms thus are those designed to limit its reach. The same arguments that support *Garcetti*'s overruling support the lesser measure of narrowing its scope. *Lane v Franks* also provides a useful starting point for limiting *Garcetti*. And the lower court cases explored in Part II provide instructive examples—both positive and negative—of approaches to defining work product speech.

My primary suggestion is that courts should apply *Garcetti* only to relatively clear cases of work product speech.[178] While defining

[178] Kermit Roosevelt, though mostly supportive of *Garcetti*, similarly concludes that it should extend only to "work product." See Roosevelt, 14 U Pa J Const L at 645–49 (cited in note 17).

such speech is a fact-sensitive exercise, courts could institutionalize the clarity requirement. They might, for instance, create a presumption against finding something to be work product speech whenever the question is a close one. Courts ought also to draw on *Lane*'s references to "ordinary job responsibilities," and conclude, as some lower courts have speculated, that speech activity must indeed be part of one's typical daily job responsibilities to qualify as work product speech. It is true that *Lane* did not turn solely on the fact that Lane's testimony was not among his ordinary job responsibilities. The Court in *Lane* referenced several material facts, concluding that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes."[179] Nonetheless, much of *Lane*'s reasoning—including its emphases on the dangers of employer efforts to suppress information damaging to itself, the special value of public employee speech content, and the risks of reading *Garcetti* so broadly as to undermine that value—conduces to such a reading.

Courts also might carve out an exception to *Garcetti*, a presumption against its application, or at least a factor weighing against its application whenever truthful reporting of corruption or serious governmental misconduct is at issue. In so doing, courts would be taking a page from the Fourth Circuit, which held that public employee "'speech about serious governmental misconduct . . . is protected.'"[180] There are two independent reasons for courts to adopt this approach. First, such speech plainly has high checking value. Second, courts should look skeptically upon governmental pleas to control speech about its own misconduct.

Courts ought also to reject some factors as irrelevant to defining work product speech. Most importantly, courts should deem the fact that information was learned on the job irrelevant to this inquiry. As we have seen, and as the *Lane* Court recognized, public employees' privileged access to information is a core part of their special First Amendment value. Furthermore, because most speech anywhere near the category of work product speech will include information learned on or through the speaker's job, it is hard to see how that factor will help courts to distinguish work product speech from other speech.

[179] *Lane*, 134 S Ct at 2378.

[180] See text accompanying note 79.

Additionally, the Court in *Lane* made clear that the *Garcetti* language on which lower courts have relied in considering information's origin—namely, *Garcetti*'s reference to speech that "'owes its existence to [the] employee's professional responsibilities'"[181]—does not mean what those lower courts have taken it to mean. Given the special value at stake, the factor's low probative worth, and the problematic reading of *Garcetti*'s language from which the factor is typically drawn, courts should stop treating the fact that information was learned through one's job as relevant to the *Garcetti* inquiry.

VII. Conclusion

While it is no easy task to situate the First Amendment within the context of public employee speech, it is not impossible to do so wisely. The Court in *Garcetti* erred insofar as it suggested that any level of judicial review over managerial discipline for employee work product speech would intolerably compromise managerial control. What is called for is employer autonomy for particular *types* of decisions about work product—specifically, those based on work product quality—with judicial review to determine if particular employer decisions fall into that category. This approach hones in on employers' most pressing managerial needs, but also protects those aspects of employee discretion and independence that are essential to preserving the special constitutional value of public employee speech.

[181] *Lane*, 134 S Ct at 2376. See also Part II(A)(1) (discussing this aspect of *Garcetti* and lower court interpretations of the same).