NEOFORMALIST CONSTITUTIONAL CONSTRUCTION AND PUBLIC EMPLOYEE SPEECH

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ABSTRACT

This Article examines, evaluates, and prescribes improvements to a familiar form of constitutional construction favored by neoformalists—the preference for rules over standards. Constitutional law development can be understood as being composed of two judicial tasks—interpretation and construction. Judicial interpretation of the Constitution involves determining the semantic meaning of the words contained in the document. Once that semantic meaning is determined, the interpreted meaning must be constructed into legal doctrine for application in court. Sometimes, that construction involves the articulation of the legal doctrines based on the interpreted constitutional text that will govern a particular case and those similar to it. Legal neoformalists and legal realists disagree as to how this latter form of construction should occur—the former preferring rules and the latter preferring standards—but this portion of the "construction zone" is where the rules-versus-standards debate resides. This Article refers to the formalist, or "rules," side of the debate as neoformalist constitutional construction. Neoformalist constitutional construction has many critics and defenders. But few, if any, scholarly treatments seek to evaluate it in the real world of judging, or seek to tease out its ideal conditions. This Article fills that gap by examining neoformalist constitutional construction on its own terms—whether it actually serves neoformalist values, and under what conditions it might do so optimally. Employing a case study, this Article shows that neoformalist constitutional construction is bound to fail, absent changes to two judicial practices: one, the inordinate deference that lower courts grant to Supreme Court dicta; and two, the tendency of Supreme Court justices to over-justify their rulings.

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INTRODUCTION

Legal theory can be organized around many ongoing disputes. One of the most well-known is the dispute between legal formalists and legal realists. This dispute has both descriptive and normative dimensions.[1] The descriptive dimension involves explanations for judicial decisions, pitting judging based on applying objective legal sources to facts against judging that is influenced by extra-legal factors, such as policy, politics, fairness, and institutional concerns.[2] The normative dimension has at least two prominent strands—one that involves interpretative methodologies, and another that involves the judicial craft—how judges should frame and compose their decisions.[3] In constitutional law, the former dimension plays out through debates over originalism versus living constitutionalism. The latter pits the preference for appellate judges to set forth their holdings in categorical rules

1 *See* Thomas C. Grey, *The New Formalism*, 1–2, 9–10 (Stanford Pub. Law and Legal Theory, Working Paper No. 4, 1999), https://ssrn.com/abstract=200732 (last visited March 6, 2018) (contrasting the discredited descriptive dimension with four versions of the normative dimension).

2 *See, e.g.*, BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 200–02 (2010) (critiquing the distinction and arguing for a more nuanced view of the history of the formalist/realist debate); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 122 (2010) (reviewing and critiquing Tamanaha's book, but agreeing with the point that "mechanical jurisprudence," or what Leiter terms "vulgar formalism," was not a widely-held view, even in formalism's early heyday).

3 *See* Grey, *supra* note 1, at 2 (terming the former "originalism" and the latter "objectivism").

against the preference for more flexible standards—the "rules versus standards" debate.[4]

The descriptive dimension of formalism in its least flexible form—that of so-called "mechanical jurisprudence"—has been discredited, if it ever truly existed in the first place.[5] But both strands of the normative dimension of formalism are very much alive, and have recently been placed under the label, *neoformalism*.[6] Many scholars have addressed, and continue to address, the interpretive strand of the normative dimension, mostly through scholarship on constitutional originalism,[7] and responses to this scholarship. This Article, however, focuses attention on the judicial craft strand, taking as its starting point Justice Antonin Scalia's most influential articulation and defense of this strand's values.[8]

Justice Scalia's "law of rules" formulation—which prefers that appellate judges set down categorical rules, rather than more flexible standards, where possible—occupies a particular place within the originalist methodology of which he was also a strong proponent.[9] Originalist scholars have shown that constitutional law development can be understood as being composed of two judicial tasks—interpretation and construction.[10] Judicial interpretation of the Constitution, for most modern originalists, at least, involves determining the semantic meaning of the words contained in the document. Once that semantic meaning is determined, the interpreted meaning must be constructed into legal doctrine for application in court.[11]

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4 *See id.* at 2–3 (arguing that there is tension between the textualist/originalist desire to comport with original meaning which could require the use of standards, versus the objectivist's desire for clear rules).

5 *See infra* Section II.A.

6 *See, e.g.*, Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 187–88 (2006) (outlining the idea of neoformalism and distinguishing it from the earlier, discredited form); *see also* Grey, *supra* note 1, at 2 (same).

7 *See infra* Section II.A and sources cited therein.

8 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (discussing a preference for predictability in judicial decisions and for the use of firm rules).

9 *See id.* at 1184 (linking the two explicitly).

10 *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (claiming constitutional construction is required because of the limits stemming from the document itself); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (charting the history of originalism); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (claiming that constitutional construction is both ubiquitous and inevitable). This distinction was originally derived from contract theory, but it has become a staple of originalist reasoning. *See* Solum, *supra* at 467 (describing the birth of the "New Originalism," and its incorporation of the distinction).

11 *See* Solum, *supra* note 10, at 468–69 ("In some cases, giving the text legal effect might be unmediated; we read the text and put it into effect. But in other cases, the legal effect of the text is mediated by doctrines of constitutional law. The text of the First Amendment includes the phrase 'freedom of speech' but constitutional decisions are mediated by a plethora of constitutional doctrines,

Sometimes, that construction involves gap filling or the resolution of vagueness, ambiguity, or other under-determinacy in the semantic meaning of the text.[12] Other times, it involves the articulation of the legal doctrines based on the constitutional text that will govern a particular case and those similar to it.[13] Legal formalists and legal realists disagree as to how this latter form of construction should occur—the former preferring rules and the latter preferring standards[14]—but this portion of the "construction zone" is where the rules-versus-standards debate resides. Accordingly, this Article will refer to the formalist, or "rules," side of the debate as *neoformalist constitutional construction*.[15]

The literature contains many critiques of neoformalist constitutional construction,[16] along with some defenses of it on normative grounds from commentators other than Justice Scalia.[17] But few, if any, scholarly treatments seek to evaluate neoformalist constitutional construction in the real world of judging, or to tease out its ideal conditions.[18] This Article fills that gap by examining neoformalist constitutional construction on its own terms—whether it actually causes the predictability, uniformity of application, and cabining of extra-legal factors in judicial decision making

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including, for example, rules against prior restraints, rules governing public forums, and a complex doctrine governing obscenity. When courts devise these doctrines as part of the process of determining the legal effect of the 'freedom of speech,' they are engaging in constitutional construction—in the sense stipulated here.").

12 *Id.* at 469–72 (outlining several different forms of under-determinacy).

13 *Id.* at 474 (defining "Constitutional Construction" as "[a]n activity that is part of constitutional practice and aims at the determination of the legal content of constitutional doctrine and/or the legal effect to be give the constitutional text.").

14 Grey, *supra* note 1, at 2, 9.

15 In truth, developing categorical rules is one part of neoformalist constitutional construction, with the others being more contested, and at times shading away from originalism and neoformalism and toward living constitutionalism and legal realism. *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 724–25, 738–39 (2011) (pointing out that originalist construction, as a way of resolving under-determinacy in the text, can shade into living constitutionalism); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1509–10 (2012) (same). For that reason, only the "rules vs. standards" question is examined here under this label, though other forms of construction certainly fit within its bounds.

16 *See, e.g.*, Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 PUB. INT. L.J. 175, 175 (2010) (refuting the proposition that clear rules are more advantageous than vague standards).

17 *See, e.g.*, Stephanos Bibas, *Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules*, *in* 187 HERITAGE FOUND. SPECIAL REP., THE LEGACY OF JUSTICE ANTONIN SCALIA: REMEMBERING A CONSERVATIVE LEGAL TITAN'S IMPACT ON THE LAW 5 (Elizabeth H. Slattery ed., 2016), *available at* https://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the (last visited Oct. 27, 2018) (praising Justice Scalia's neoformalist criminal law jurisprudence).

18 Raban, *supra* note 16, at 186, appears to come the closest, but his analysis is a conceptual one, rather than a case study, as here, that tracks a change from a standards regime to a rule regime, and thus can draw comparative conclusions.

that it promises, and under what conditions it might do so optimally.

Part I develops the theory of neoformalist constitutional construction and situates it within the primary neoformalist theory of constitutional judging, which prominently relies on an "interpretation-construction distinction." Part I also identifies the assumptions about judging and judicial behavior underlying neoformalist constitutional construction, illustrating that the normative theory is at least partially based on a realist descriptive account of judging, tempered by a formalist optimism about judicial behavior. It then connects these assumptions with the thorny problem of distinguishing the holding of a case from its dicta. Understanding this connection is vital to understanding the success or failure of neoformalist constitutional construction.

Next, in Part II, the Article reviews its test case, *Garcetti v. Ceballos*,[19] a case which made a profound alteration to the doctrine of public employee free speech rights.[20] This case is selected because it is nearly universally viewed as an example of what this Article terms neoformalist constitutional construction.[21] The case employs a categorical rule of decision in a doctrinal space that previously was governed only by a balancing test standard.[22] That is, it openly and deliberately pursues the values and employs the principal method of neoformalist constitutional construction.

Part II analyzes the *Garcetti* decision in detail, isolating its holding from both the dicta found in Justice Kennedy's majority opinion and the many propositions and characterizations of the Court's decision found in the dissents. Building on this analysis, Part III shows that the use of a categorical rule to resolve *Garcetti* and to cabin lower court decision making in the public employee speech context was defensible in its conception, but in its implementation led to judicial behavior diametrically opposed to what neoformalist theory would have predicted.

Part IV then postulates a reason for this unexpected result, along with a prescription for reform. Neoformalist constitutional construction cannot

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19 547 U.S. 410 (2006).

20 *See generally* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 ED. L. REP. 357 (2011) (reviewing the then-extant Court of Appeals decisions applying *Garcetti* in the public education context and finding a marked trend toward reduced speech rights for public educational employees).

21 *See, e.g.*, Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS J. 1173, 1194–98 (2007) (criticizing *Garcetti* for creating a formalist rule with "an underlying categorization that is more ambiguous than the prior standard"); Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 911–912 (2011) (classifying *Garcetti* as a neoformalist decision).

22 *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 563 (2008) (arguing that the Court should not have replaced the *Pickering-Connick* balancing inquiry with the *Garcetti* test).

succeed at serving its professed values unless the lower courts observe and adhere to the categorical rules that the Supreme Court adopts, but the analysis of Part IV shows that this adherence is impaired due to two flaws in the Supreme Court's decision making.[23] One is the Court's failure to anticipate or appreciate the inordinate deference the lower courts grant to the Court's extraneous rhetoric—its dicta,[24] and the compounding effect of the Court's overjustifying its rulings, which it did in *Garcetti*. The other is the failure of the lower courts to properly appreciate their duty to act as a check on the Court's power from below, by adhering to strong stare decisis norms. These two problems must be solved for neoformalist constitutional construction to succeed on its own terms. Absent such changes, and especially in developing rights-limiting speech doctrines, as in *Garcetti*, the Court should prefer standards to rules.

I. NEOFORMALIST JUDGING

The debates between legal formalists and legal realists form some of the most important, capacious, and longstanding disputes in legal theory. In constitutional law, the disputes take both descriptive and normative forms, and each of these forms has more than one dimension, with each of these dimensions forming several sub-disputes. This Part briefly summarizes these forms and dimensions, situating the rules-standards debate that is the subject of this Article in its proper place within the overall "formalist-realist divide."[25]

A. Judging in the "Construction Zone"

Broadly, the descriptive form of the formalist-realist debate pits depictions of judging as mostly a rule-application process, where extra-legal factors (i.e., those outside the facts of the case and the governing law) do little to no adjudicatory work, against depictions of judging as a process involving

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23 In addition to the flaws in judicial practices Part IV identifies, it is surely true that political preferences, strategic thinking, and other explanations might be identified as impediments to rule-following in the lower courts. Neoformalist constitutional construction is in part directed at minimizing, or even eliminating, these influences. If it does not do so, then it may be true that flaws in the judicial craft and judicial practices are to blame, as posited here, or it may be true that political ideology, strategic thinking, and other explanations are simply insurmountable elements of judging. This Article proceeds from the former, more optimistic, view and leaves the evaluation of that view to later empirical research.

24 *See* Pierre N. Leval, *Judging under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1274–75 (2006) (arguing that, contrary to common judicial practice, lower courts "may not treat the Supreme Court's dictum as dispositive"); Scalia, *supra* note 8, at 1177 (taking it as given that lower courts give deference to the Supreme Court's "*mode of analysis*" in particular cases, regardless of the "the theoretical scope of a 'holding'").

25 *See* TAMANAHA, *supra* note 2, at 1–3 (coining this term to name the overall debate).

both legal and extra-legal factors, such as politics, policy, judicial attitudes, institutional norms, and other considerations, each of which might drive the decision under the right circumstances.[26]

Descriptive legal formalists—mostly the group known as the "classic" legal formalists of the late nineteenth century—posited that judging is (at least mostly) a rule-application process, and that judges in most cases apply known legal standards to resolve each case on its unique facts[27]—Chief Justice Roberts's "umpire" analogy is the popularized version of this theory.[28] Descriptive legal realists, including the recently burgeoning group of empirical social scientists studying judicial decision making, see judging as much more (or even completely) influenced by factors outside the facts of the case before the court and the applicable law.[29] Their accounts have shown that societal factors, judicial political preferences, collegial "peer" effects, and institutional concerns, among other influences, have effects on the outcomes of cases.[30]

As a descriptive matter, few today dispute that the legal realists have the better case, at least when the subject of analysis is the appellate courts. Very few dispute the mountains of empirical evidence that stand in support of the proposition that appellate judging is not merely about the facts of a case and the applicable law, but also involves nonlegal factors both intrinsic to the judge (e.g., political leanings) and extrinsic to the judge (e.g., the institutional role orientations of collegial court judges).[31]

The normative form of the debate has three primary dimensions, all today grouped under the label, "neoformalism."[32] The interpretive

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26 *Id.*

27 Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999).

28 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr, Nominee, Chief Justice of the United States). As far as I can tell, the first use of the adjectival form of "umpire" in legal scholarship was Judge Marvin Frankel's. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). Many have criticized the Chief Justice's formulation, *see, e.g.*, Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 124–25 (2010) (arguing that, although trial court judges resemble umpires in many ways, Supreme Court Justices are better compared to the Commissioner of Baseball); *see also* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 2 n.3 (2009) (listing articles that critique the analogy in this way); Zelinsky, *supra*, at 113 n.4 (same), but it certainly speaks to one popular conception of the proper judicial role. That conception is descriptively formalist.

29 *See generally* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE (Charles Gardner Geyh ed., 2011) (collecting scholarship on the topic).

30 *See generally* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002) (commenting extensively on the state of the scholarship and predicting emerging directions).

31 *Id.* at 833–39, 841–42.

32 *See* Solum, *supra* note 6.

dimension involves the proper methods for deriving meaning from legal sources, and this dimension has received a great deal of recent attention from originalist constitutional law scholars, along with their theoretical opponents.[33] The applicative dimension encourages lower courts to strive to apply clear rules from prior precedent and constitutional or statutory text, rather than to seek fulfillment of extra-legal goals, such as fairness or pragmatism.[34] The constructive dimension encourages courts to fill interpretive gaps in fidelity to the text and structure of authoritative sources, and to develop doctrines of application wherever possible as rules, rather than as standards.[35]

Interpretive neoformalists favor objective and predictable means of interpretation. In the area of constitutional law, they generally favor some form of originalist reasoning.[36] They generally believe that the text of the Constitution, read in light of the meaning that educated readers of that text would have understood contemporaneously to its adoption, can supply the necessary content to resolve most constitutional questions.[37] In other words, interpretive legal formalists reject the proposition that the Constitution should be construed against its objectively determinable meaning to do justice, conform with contemporary values, or serve important policy concerns. Interpretive legal realists, in contrast, generally favor some combination of methods that includes considerations of justice, contemporary public policy, and contemporary social standards in interpreting constitutional text, and this method is therefore often labeled as "living constitutionalism."[38]

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33 *Compare* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 418–20 (2013) (defending originalism as an interpretive theory), *and* Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 524–36 (2013) (same), *with* Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 947–50 (1998) (critiquing originalism on indeterminacy grounds), *and* Redish & Arnould, *supra* note 15, at 1511 (critiquing originalism on conceptual clarity grounds).

34 *See*, *e.g.*, Christopher J. Peters, *Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication*, *in* GENERAL PRINCIPLES OF LAW: THE ROLE OF THE JUDICIARY 23, 24 (Laura Pineschi ed., 2015) (defining Justice Scalia's formalism as "the idea that judges and other decisionmakers should decide particular cases, to the extent possible, by the mechanical application of existing legal rules.").

35 *See* Grey, *supra* note 1, at 2 (situating rule articulation within neoformalism). *See generally* Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018) (developing a theory based on fidelity to text and structure).

36 *See* Barnett, *supra* note 10, at 620–21 (outlining the shift from originalism to new originalism); Grey, *supra* note 1, at 1–2 (explaining the four main sects of neoformalist constitutional interpretation); Solum, *supra* note 6, at 187–88 (providing an overview of originalism's history).

37 Solum, *supra* note 33, at 456–57 (understanding new originalism as a theory concerned with the public meaning at the time of framing and ratification).

38 *See* Solum, *supra* note 6, at 156 (explaining that legal realism generally eschews stare decisis in favor of policy or balancing relevant interests).

The primary objection to originalism from living constitutionalists is that the Constitution's text often has a semantic meaning that is vague, ambiguous, or otherwise under-determinate. The response of originalists to this critique has been to draw from contract law theory and divide constitutional meaning-making into two phases: interpretation and construction.[39]

Interpretation involves deriving the semantic context of legally operative texts—for purposes of this discussion, the Constitution.[40] The currently dominant group of originalists sees the original, publicly-understood meaning of the words the Framers used as the best guide to this semantic content. Today's originalists generally concede that this semantic content will sometimes be under-determinate of the legal question before the court, though they disagree as to how often this will be so, and what to do when the under-determinacy problem presents itself. [41]

One prominent strand of originalists favors a second step at this point: construction.[42] Whereas interpretation involves determining the semantic meaning of the text, construction involves determining the legal consequences of that meaning. Where the meaning is not fully determined through interpretation, construction attempts to complete the meaning using other sources, such as structure and extant precedent.[43] Where the meaning is fully determined, or once these additional sources have completed the meaning-making job, construction uses that meaning to develop rules of decision for a pending case and those cases similar to it that will arise in the

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39 *See* Barnett & Bernick, *supra* note 35, at 1 (arguing that judges enter into a fiduciary relationship with private citizens when they take their oath to uphold the Constitution, requiring them to engage in interpretation and construction, seeking to give legal effect to both the "letter" and "spirit" of the Constitution); Solum, *supra* note 33, at 457 (defining "constitutional interpretation" as "the activity that discerns the communicative content (linguistic meaning) of the constitutional text" and "constitutional construction" as "the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text").

40 *See* Solum, *supra* note 33, at 459 (defining this as "Public Meaning Originalism," the idea that "the communicative content of the constitutional text is fixed at the time of the origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens.").

41 *See id.* at 464 (defending the grouping of originalist strands together even though they may disagree about how best to ground the theory).

42 *See* Barnett & Bernick, *supra* note 35, at 3 (arguing New Originalism diverges from Old Originalism by separating "interpretation" from "construction").

43 *See* Solum, *supra* note 33, at 457 (defining construction as "the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text"). It is not the purpose of this Article to take issue with this activity being placed under the label of "construction," but one could make the case that, because the various ways of resolving under-determinacy in text are all aimed at meaning-making, they are all more usefully termed "interpretation," leaving only the judicial doctrinal choices this Article engages for the "construction zone." Later work will attempt to tease out these distinctions further.

future.[44] All of this additional work has been described as existing in a "construction zone"—a space where constitutional meaning either is under-determined or is fully determined by text and/or precedent and must now be applied to an actual case through a rule of decision.[45]

This latter, doctrinal-development dimension focuses more on the judicial craft than on the meaning of legally authoritative texts, and it is the subject of the inquiry this Article undertakes.[46] That inquiry properly begins with the assumptions underlying the preference for rules over standards in doctrine development.

Neoformalists, most recently represented on the Court by Justice Antonin Scalia,[47] seem to concede the descriptive legal realist case that judging is often influenced by factors beyond the facts of a case before a court and the applicable law, but also seem to be very troubled by this fact.[48] These scholars and judges see value in a system of law that is as predictable and uniform in its application as possible, and they see value in placing limits on the discretion of judges to achieve these ends. Accordingly, they advocate that articulating clear, inflexible legal rules in appellate courts that can simply be applied in the lower courts has the best potential to minimize the effect of extra-legal factors on judging.[49] Simply put, if a judge has fewer (or no) degrees of freedom in arriving at a decision, then there will be less (or no) room for extra-legal factors to operate, resulting in greater predictability, at least for those who take the time to educate themselves on the law. As applied to constitutional law, we might term this judicial craftwork, *neoformalist constitutional construction*.

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44 Solum, *supra* note 6, at 208 (arguing that it is a "realist caricature of formalism" to see formalism as treating all precedents as if they possessed the power to guide the Court without any need for reason and judgment).

45 Solum, *supra* note 33, at 458.

46 In truth, developing categorical rules is one part of neoformalist constitutional construction, with the others being more contested, and at times shading away from originalism and neoformalism and toward living constitutionalism and legal realism. *See, e.g.*, Colby, *supra* note 15, at 763–64 (pointing out that originalist construction, as a way of resolving under-determinacy in the text, can shade into living constitutionalism); Redish & Arnould, *supra* note 15, at 1509–10 (same). For that reason, only the "rules vs. standards" question is examined here under this label, though other forms of construction certainly fit within its bounds.

47 *See* Scalia, *supra* note 8, at 1187 ("All I urge is that [standards-based] modes of analysis be avoided where possible; that the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.").

48 *See id.* at 1186–1187 (explaining how the law will always have need of balancing tests and totality of the circumstances tests).

49 *Id.* at 1187.

Legal realists, represented recently on the Court by, among others,[50] Justice Stephen Breyer,[51] see futility in attempting to reduce legal doctrine to a system of easily applicable rules, and therefore usually[52] favor an approach to judicial lawmaking that relies on flexible standards that allow for the consideration of unique facts and equities, or a balancing of interests. The virtue of this approach, it is generally agreed, is that, as each case comes to court, the judge is empowered to seek a result that is more fair and just, in light of the unique facts of the case.

As Justice Breyer points out, developing bright-line rules can be helpful to lower courts and litigants, but there will always be cases that fall on the wrong side of a bright line, and judges should have the ability to seek just results in such cases, considering not only the text, structure, and legislative history of the law in light of the facts of the case, but also its purpose and its likely socio-legal consequences.[53] Justice Scalia's response to this line of argument forms the theoretical basis for neoformalist constitutional construction.

B. "Law of Rules" Values

In his famous article defending the "rules" side of the rules-standards debate, Justice Scalia set forth two primary goals, along with a preferred method for achieving these goals.[54] The goals of any constructive doctrine development exercise, according to Justice Scalia, should be the fostering of predictability in the law, such that legal actors may order their conduct to avoid running afoul of legal standards; and fostering the uniform application of the law in the lower courts, such that legal disputants will be able to formulate expectations of how their cases will come out once litigated.[55]

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50 *See* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1092–93 (1989) (arguing that Justice Stevens holds a legal realist view on judicial deliberation).

51 *See, e.g.*, Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 99 (2006) ("I believe that no single theory can provide answers to all of the questions that come before us as judges. Perhaps I have reached this conclusion because, unlike many judges, I am prepared to live with uncertainty and ambiguity. Critics do not like this approach because they want a bright-line rule and the guidance that a bright-line rule provides. While a bright-line rule often provides some guidance, when many cases come near the edges of the bright-line rule it can provide little or no guidance at all.").

52 The word "usually" is used here and in the discussion of Justice Scalia below because, as others have pointed out, the Justices certainly do (or did, in the case of Justice Scalia) deviate from their professed philosophies. *See, e.g.*, William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1138–39 & 1139 n.37 (1992) (offering examples of Justice Scalia's diversions from his positions).

53 *Id.*

54 *See generally* Scalia, *supra* note 8.

55 *Id.* at 1178–79.

The mechanism that Justice Scalia favored for fostering these two ideals was the cabining of judicial discretion thorough the promulgation of categorical rules of decision in the appellate courts wherever possible.[56] Underlying this proposal, as outlined above, is the descriptive legal realist assumption that judges, left with too many degrees of decisional freedom, will decide cases based on extra-legal factors, or will misapply the law to achieve their own preferred outcomes.[57] But it should be obvious that also underlying Justice Scalia's preferred method for counteracting this behavior is the descriptive legal formalist assumption that judges will follow and faithfully apply a categorical rule once articulated.

In other words, the constructive strand of neoformalism depends on the applicative strand—the cabining of judicial discretion that is vital to the achievement of legal predictability and uniformity of application cannot happen in a regime devoid of strong stare decisis norms, including both a norm of following binding precedent from higher courts and a norm of critically analyzing prior appellate decisions to determine just what is binding in them, and what is dicta. Through the application of a strong distinction between holding and dicta, the lower courts cabin their own discretion, and they make possible the success of categorical rules. Absent this application, a categorical rule becomes no more than a suggestion or a starting point for judicial adventurism. Adherence in the lower courts to a strong distinction between holding and dicta is therefore a necessary assumption grounding the neoformalist values of fostering predictability and uniformity, which themselves ground the neoformalist preference for rules over standards in most cases. If that descriptive legal formalist assumption does not hold, then neoformalist constitutional construction cannot succeed.

C. The Thorny Problem of Holding and Dicta

The requirement to adhere to controlling precedent is a foundational aspect of the United States legal system, and one that distinguishes common-law systems such as those in the United States and England from civil law systems, such as are prevalent in Continental Europe.[58] Indeed, within forty-

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56 *Id.* at 1187.

57 *See id.* at 1180 ("It is a commonplace that the one effective check upon arbitrary judges is criticism by the bar and the academy. But it is no more possible to demonstrate the inconsistency of two opinions based upon a 'totality of the circumstances' test than it is to demonstrate the inconsistency of two jury verdicts. Only by announcing rules do we hedge ourselves in.").

58 *See, e.g.*, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1186 (2006) ("Reliance on precedent seems here to stay, as even its fiercest critics regretfully concede."); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000) (arguing that at least the consideration of precedent from a court at the same level as the deciding court is a constitutional compulsion, and pointing out the distinction in approaches between common law and civil law systems); Solum, *supra* note 6, at 156–57, 186–189 (2006) (distinguishing between the

eight hours of the first law school class, a law student in a common law jurisdiction likely understands the simple concept that lower courts must apply the "holdings" set down by higher courts in cases embracing appropriately similar facts, and may treat as merely persuasive the "dicta" found in these opinions.

A good deal of research—some ancient, some very recent—focuses on the surprising difficulty that both courts and scholars have in distinguishing the holding of a case from its dicta.[59] Although this literature is voluminous, the competing accounts of how we should separate holding from dicta can be usefully grouped into two schools of thought. One school, which I will dub the *traditionalist* school, seeks ways of determining the holdings of prior cases that grant little to no deference to the deciding judges in those cases, particularly as to which facts were material to those judges' decisions in the cases.[60] This school represents by far the most influential view of the distinction, one which remains enshrined in the definitions of the terms "judicial dictum" and "obiter dictum" in *Black's Law Dictionary*.[61]

This approach is associated with the nineteenth century work of Professor Wambaugh, who viewed a holding as the court's decision or disposition, plus all statements in the case "necessary" to the decision.[62] Professor Wambaugh operationalized his view through a simple "but-for" test: to determine whether a judicial statement is part of the holding or is dicta, one should simply ask whether, absent the statement in question, the decision could be

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Supreme Court's responsibilities relating to its own precedent, which it is free to overrule, and lower courts' responsibilities relating to the same precedent, which they are bound to follow, and arguing that the Supreme Court's should more strictly adhere to its own precedents).

59 *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959–60 (2005) (developing a new test for determining the actual holding of a case and applying the test to several familiar constitutional law cases); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 220–21 (2010) (arguing that faulty attention to judicial statements—what courts say—as opposed to actual holdings—what courts do, leads to the elevation of dicta to binding precedent); *see also* Leval, *supra* note 24, at 1250 ("Although I think most agree in the abstract with the proposition that dictum does not establish binding law, this rule is honored in the breach with alarming frequency."); Solum, *supra* note 6, at 186–89 (reviewing the realist-formalist debates over the proper conception of a judicial holding).

60 The most comprehensive account of these various accounts is that of Abramowicz & Stearns, *supra* note 59. Abramowicz and Stearns do not divide the schools of thought as I do, but their analysis accounts for the same distinction, and their own proposed method does an admirable job of attempting to bridge the differences between these competing accounts.

61 *Judicial Dictum*, BLACK'S LAW DICTIONARY (7th ed. 1999) ("An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision."); *Obiter Dictum*, BLACK'S LAW DICTIONARY (7th ed. 1999) ("A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).—Often shortened to *dictum* or, less commonly, *obiter*.").

62 EUGENE WAMBAUGH, THE STUDY OF CASES § 13 (2d ed. 1894).

the same.[63] If so, the statement in question is dicta.

The principal problem with this approach is its inability to deal with alternative justifications for the same outcome. Where such alternative justifications exist, applying Wambaugh's test would reveal that neither was strictly necessary to the outcome. Accordingly, each would be viewed by Wambaugh as dicta, leaving the case without *any* holdings.[64] Another problem is the fact that courts often do not resolve a case on the narrowest grounds conceivable, so it will often be possible to whittle down a court's actual holding to a narrower one than the court intended through speculation, and this possibility may leave later courts and academics, rather than the deciding court, in control of the scope of the decision.[65]

Another non-deferential view, offered in response to Wambaugh's and more amenable to the alternative holdings problem, sought to arrive at a sufficient *post hoc* factual and legal justification for the outcome of the case.[66] Professor Dorf has argued that this approach sought to "reconcile" the principles of law stated in the case with the facts of the case.[67] Professors Abramowicz and Stearns term this theory the "facts-plus-outcome" approach or the "reconciliation" approach. This approach went beyond the strictly "necessary" proposition to include within the holding all statements that could be reconciled with the decision, in light of the facts of the case (or in Dworkinian terms, the propositions which "fit and justify" it).[68] Due to the tendency of later courts to focus on particular facts that support a desired rationale and to minimize the impact of facts that contradict it, this approach drew criticisms based on indeterminacy. The main weakness of these non-deferential approaches was that, since they afforded little to no deference to the deciding court in its determination of how broadly or narrowly to address the facts of the case, they were therefore better potential constraints on the deciding court than on later courts. A workable approach to holding and

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63 Abramowicz & Stearns, *supra* note 59, at 1056 (explaining Wambaugh's approach, and terming it the "necessary" approach).

64 *Id.* at 1056–57 (quoting United States v. Johnson, 256 F.3d 895, 915 n.8 (9th Cir. 2001) (en banc)). A holding-dicta traditionalist would likely concede this point and say that the privilege of making law judicially requires a court to choose among possible alternative justifications, but, given the strong norm of avoidance of reversal among lower courts, this prescription would seem unrealistic.

65 *Id.* at 1058.

66 *Id.* at 1045.

67 *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2020 (1994) (critiquing this approach as overly constrained and unreflective of actual judicial practices).

68 *See id.* (critiquing this approach as overly constrained and unreflective of actual judicial practices). *But see* Abramowicz & Stearns, *supra* note 59, at 958 n. 11 (citing Professor Dorf's recent article critiquing this particular theory as the only "major law review article in the past fifty years exclusively focused on offering a broad theoretical treatment of the distinction between holding and dicta"); *id.* at 1050 (citing Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 29–33 (1989)) (likening the reconciliation approach to Dworkin's "fit and justification" model of constitutional interpretation)).

dicta should constrain both.

Another school of thought has afforded more deference to the deciding court in determining—through the reasoning of its opinion—just which of the case's facts were material to the decision and which were incidental to it or distinguishable from it. The oldest approach within this school, associated with Professor Goodhart, viewed the binding, precedential legal holding as the material facts of the case, as chosen by the deciding judge, that were associated with the outcome of the case.[69] Thus, rather than deriving a binding rule through a *post hoc* justification for the decision in light of *all* of the facts of the case, Goodhart's conception of a holding looked to the court's articulation of its rationale, read in light of the court's articulation of the material facts, to derive a binding, precedential rule.

However, recognizing that opinions may appear differently in different case reporters, and that some opinions go unreported, Goodhart set up a test for materiality in the form of a rebuttable presumption either for or against materiality:

> If the opinion does not distinguish between material and immaterial facts then all the facts set forth in the opinion must be considered material with the exception of those that on their face are immaterial. There is a presumption against wide principles of law, and the smaller the number of material facts in a case the wider will the principle be. Thus if a case like *Hambrook v. Stokes*, in which a mother died owing to shock at seeing a motor accident which threatened her child, is decided on the fact that a bystander may recover for injury due to shock, we have a broad principle of law. If the additional fact that the bystander was a mother is held to be material we then get a narrow principle of law. Therefore, unless a fact is expressly or impliedly held to be immaterial, it must be considered material.[70]

Using this presumption, Goodhart argued, would allow for a later court to determine the materiality of the case facts, even where the deciding judge had failed to do so explicitly. But Goodhart's approach would always defer to the deciding judge's determination of materiality if offered, and the test above was designed to direct later courts to view the prior case's rule in as

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69 Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930). Although Professor Goodhart used only the term "ratio decidendi" in his title, his discussion throughout the article was focused in what we today would term the holding, due to later incorporation of the terms into one concept). *See* Abramowicz & Stearns, *supra* note 59, at 1048 (discussing the early distinction between holding—the precise decision in the case—and ratio decidendi—"the generally applicable rule of law upon which the opinion says the holding rested," and pointing out that the distinction has blurred (internal quotation marks omitted) (quoting KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 14 (Paul Gewirtz, ed., Michael Ansaldi, trans., 1989)).

70 Goodhart, *supra* note 69, at 178 (footnotes omitted). For criticism of Goodhart's theory, compare A.W.B. Simpson, *The* Ratio Decidendi *of a Case*, 20 MOD. L. REV. 453 (1957) (critiquing Goodhart's approach as circular), and Julius Stone, *The* Ratio *of the* Ratio Decidendi, 22 MOD. L. REV. 597, 605 (1959) (critiquing Goodhart's approach as inherently indeterminate), with A.L. Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117, 117 (1959) (responding to these critiques).

narrow terms as possible in the event of no designation of materiality in the opinion.[71] Thus, although broader than the more traditionalist, non-deferential approaches, Goodhart's approach would nevertheless tend toward a narrow view of the propositions of a prior case that could be considered binding.

Two other approaches within this more deferential school—both offered in much more recent times—seek to resolve both the alternative holdings problem created by the traditionalist approaches and the obvious competing problem of the blurring of lines between deciding cases and prospectively legislating, a likely risk where later courts afford the deciding judge total discretion in determining which facts before him were material to the outcome. The first, from Professor Dorf, argues that the determination of which propositions should be counted as part of the holding of a decided case should proceed along lines similar to those followed in analyzing issue preclusion.[72] Key to this approach is the later court's determination that the prior court carefully considered the proposition in question, and that it was treated by that court as essential to the disposition, not in the logical, but-for sense, but in the sense of "the *process* by which the court decide[d] the case."[73]

Along similar lines, Professors Abramowicz & Stearns developed another test in the deferential school, attempting to capture the strengths of these early approaches, while accounting for their weaknesses, and to give a more defined and more easily applicable form and shape to sophisticated deferential approaches such as Professor Dorf's.[74] Although the authors do not give it a name, for purposes of quick reference here, I will refer to it as the "decisional path" approach. Under the decisional path approach, propositions count as part of the holding if they lie along the "decisional path" of reasoning chosen by the court, and they "(1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment."[75]

The first prong of the decisional path approach requires that a proposition must have been actually decided in the case to be part of the holding. This requirement ensures that mere errant statements in the majority opinion are not mistaken for holdings.[76] The second prong requires that, even if a proposition is actually decided, its resolution must also be based on the actual facts of the case. This requirement recognizes that legislative-type holdings[77] making broad pronouncements and resolving issues of law

71 Goodhart, *supra* note 69, at 178.
72 Dorf, *supra* note 67, at 1999.
73 *Id.* at 2045.
74 Abramowicz & Stearns, *supra* note 59, at 961–62, 1065.
75 *Id.* at 1065.
76 *Id.* at 1066.
77 *See* Solum, *supra* note 6, 186–89 (developing the idea of legislative holdings).

not presented squarely in the case's facts not be counted as part of the holding.[78]

The third prong requires that any actually decided proposition based on the facts of the case actually lead to the court's ultimate decision resolving the issues of the case before it, if the proposition is to be considered part of the holding.[79] This prong ensures that discussions of hypothetical alternatives to the court's judgment, as well as refutations of challenges presented by dissenters based on assumptions of what the next case may provide (discussions that Professor Dorf refers to as "asides"[80]), are not misconstrued as the holding of the case.[81]

Underlying all of these prongs is the requirement that any proposition must lie along the court's "decisional path." This overarching requirement actually functions as a moderating force, rather than as a strict limitation, as the other prongs do. The decisional path may include propositions that, while not "necessary" to the court's ultimate resolution of the case, nevertheless led to it. Thus, the decisional path approach attempts to capture the "carefully considered" propositions that are the target of Professor Dorf's preclusion-based approach, but with a more defined set of factors aimed at easier and more consistent application.

We need not declare an ultimate winner in these ongoing debates for the purposes of this Article. It suffices to recognize that each approach seeks to hem in the holding of the case to that which addresses the material facts before the court. Where they differ is in their tolerance for the deciding court's discretion in treating some facts as material or non-material in arriving at its decision. The broadest, and most recent, approaches presumptively grant near total deference to the deciding court, with the limitation on that discretion being the court's depth of consideration of the propositions related to the facts the court treats as material.

We now move from defining the parameters of the analysis this Article offers to its test case, *Garcetti v. Ceballos*. The following Part reviews *Garcetti*'s origins and its content with an eye toward isolating its holding from its dicta. Going forward, we can afford the neoformalist approach its most favored posture by analyzing the performance of the *Garcetti* rule under what is arguably the broadest and most deferential modern approach to holding and dicta—the decisional path approach—understanding that the *Garcetti* rule would be more difficult to defend on the neoformalist grounds of predictability, uniformity, and the cabining of judicial discretion in the lower courts under any of the stricter approaches.

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78 Abramowicz & Stearns, *supra* note 59, at 1068.

79 *Id.* at 1066.

80 Dorf, *supra* note 67, at 2006.

81 Abramowicz & Stearns, *supra* note 59, at 1065.

II. FIRST AMENDMENT SPEECH RIGHTS IN PUBLIC EMPLOYMENT

A. The Basic Doctrine

Under the "unconstitutional conditions doctrine," the government may not condition the provision of a public benefit—including public employment—on the recipient's relinquishment of a constitutional right.[82] Nevertheless, courts have permitted the government, acting in its role as an employer,[83] to limit public employees' speech rights that would otherwise be protected in a non-employment setting.[84] In most cases, these limitations have focused on managerial interests.[85] Until recently, such limitations have largely emerged through case-by-case balancing pitting employee speech interests (and the listening/reading interests of the public) against employer managerial interests, rather than through categorical rules excluding certain speech from protection in all cases.[86]

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82 *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04 (1967) (holding that a public university cannot condition employment as a professor on the professor's signing of a "Loyalty Oath"); Kathleen A. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415–16 (1989) (outlining the state of the "unconstitutional conditions" doctrine). *But see* Bauries & Schach *supra* note 20, at 359 (arguing that courts have too broadly applied the *Garcetti* rule, further curtailing public employee speech rights); Secunda, *supra* note 21, at 908–10 (arguing that the Supreme Court's line of decisions in *Pickering*, *Connick*, and *Garcetti* have weakened the unconstitutional conditions doctrine to the point of near obliteration).

83 It is also well-settled that the government does not always act in its traditional sovereign capacity, and when it acts in some other role, such as the role of an employer, an arts patron, or a property manager, the government can restrict speech in ways that serve the important governmental interests incidental to these roles. *See* Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 742 (2014) (explaining that the Supreme Court has never recognized an individual's absolute First Amendment right to academic freedom when balanced against government interests).

84 *See, e.g.*, Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) ("[S]peech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation."); Williams v. Dall. Ind. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007) (dismissing high school football coach's First Amendment claims regarding a memorandum he had written concerning potential financial malfeasance on the part of school administrators, as the memorandum was written in the course of his job performance); Mayer v. Monroe Cty. Cmty. Sch. Co., 474 F.3d 477, 479–80 (7th Cir. 2007) (affirming that a school district can decline to renew a teacher's contract for advocating her viewpoint on antiwar demonstrations in a classroom setting).

85 *See, e.g.*, Boring v. Buncombe Cty. Bd. of Educ., 136 F.3d 364, 370 (4th Cir. 1998) ("We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum."); *see also* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 39 (2008) (arguing that *Garcetti* is the latest in a series of Supreme Court decisions elevating "managerial prerogative" to constitutional status).

86 One might categorize an element of the *Pickering* analysis—the requirement that a public employee's speech be made on a "matter of public concern"—as a categorical rule, but the bulk of the analysis involves a balance between the speech interests of the employee and the managerial interests of the employer. *See* Connick v. Myers, 461 U.S. 138, 154 (1983) (expressing skepticism about the public concerns expressed by an assistant district attorney who was fired after distributing a questionnaire regarding office morale, but ultimately resolving the case based on the managerial interests of the

Pickering v. Board of Education,[87] the leading case on public employee speech rights, illustrates the standards-based approach. In *Pickering*, a local teacher sent a letter to a newspaper criticizing the Board of Education's prior handling of previous proposals to increase the Board's revenues, urging the rejection of a pending bond issue.[88] The Board terminated Mr. Pickering, stating that his letter was "detrimental to the efficient operation and administration of the schools of the district."[89] On certiorari, the Court held the termination unconstitutional, explaining that, absent substantial justification, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[90] To operationalize the "substantial justification" inquiry, the Court balanced the interests of the Board as an employer and the interests of Mr. Pickering as a participant in public debate, along with the interests of the public—the consumers of the speech. The Court ultimately concluded that the Board could state no interest sufficient to overcome the interest of Mr. Pickering in participating as an ordinary citizen in an important public debate, and the interests of the public in learning the thoughts of a teacher within the system on an issue important to public education.[91]

Following *Pickering*, the Court entertained few public employee First Amendment retaliation claims relevant to this discussion.[92] However, one significant case, *Givhan v. Western Line Consolidated School District*,[93] further clarified that neither the situs nor the target of the speech in question is dispositive when determining whether the speech is protected. In *Givhan*, the Court held that an employee's internal complaints to her principal about possible race discrimination in personnel decisions at her school site constituted protected speech, and that the school's managerial interests could not override the plaintiff's interests in weighing in on an important topic.[94]

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employer).

87 391 U.S. 563 (1968). For a thoughtful summary of the pre-*Garcetti* jurisprudence, beginning with *Pickering*, see generally Robert M. O'Neil, *Academic Speech in the Post*-Garcetti *Environment*, 7 FIRST AMEND. L. REV. 1 (2008).

88 *Pickering*, 391 U.S. at 564.

89 *Id.*

90 *Id.* at 572–74.

91 *Id.* at 574–75.

92 One major precedent, *Connick v. Myers*, 461 U.S. 138, 154 (1983), held that while the plaintiff's speech did not have much public concern character to it, the employer's interest in managing the workplace outweighed whatever public and speaker interests did exist. Two other major precedents, *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (following *Connick*) and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (following *Pickering*), illustrated ways in which the government could prevail in the balance, but they both continued the *Pickering* approach to balancing.

93 439 U.S. 410 (1979).

94 *Id.* at 415–16.

Thus, under the pre-*Garcetti* precedent, the fact that speech on a matter of public concern is made while an employee is at work, to a superior, or otherwise through internal channels, does not render the speech unprotected. *Garcetti* reaffirmed and adopted this framework as the foundation for its own ruling.

B. Garcetti v. Ceballos *and Its Categorical Rule of Exclusion*

1. The Garcetti *Rule*

Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, at the request of defense counsel, reviewed for accuracy an affidavit used to obtain a search warrant in a pending case.[95] Ceballos concluded that there were unsatisfactory inaccuracies in the affidavit, and concluded that the evidence obtained pursuant to the warrant should be suppressed. He relayed his findings to his superiors in the form of a "disposition memorandum"—essentially, a legal memorandum outlining the facts and his legal conclusions.[96] His superiors decided to proceed with the prosecution. Called to the stand in a motion to suppress hearing, Ceballos testified for the defense concerning the affidavit, but the trial court ultimately denied the motion.[97] According to Ceballos, afterwards, he was subjected to a variety of retaliatory employment actions, including reassignment from his position and the denial of a promotion.[98]

Ceballos sued, asserting a violation of his First Amendment rights.[99] On appeal from summary judgment, the court of appeals applied the *Pickering/Connick* test and found Ceballos's memo—by then the only speech at issue—to be "inherently a matter of public concern" because it "recited what [Ceballos] thought to be governmental misconduct."[100] The Ninth Circuit then proceeded to the interest-balancing portion of the *Pickering/Connick* test and found that Ceballos's interest in his speech outweighed the government's interests, noting that the government "'failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office' as a result of the memo."[101] In other words, the Ninth Circuit analyzed the case as it would have analyzed any other—by balancing the relevant interests.

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95 *Id.* at 413–14.
96 *Id.* at 414.
97 *Id.* at 414–15.
98 *Id.* at 415.
99 *Id.*
100 *Id.* at 416 (quoting Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004)).
101 *Id.* (quoting *Ceballos*, 361 F.3d at 1180).

When the Supreme Court reviewed the case, drawing from the unconstitutional conditions doctrine, the Court explained that protecting public employees' rights to speak out on matters of public concern "limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."[102] The Court reaffirmed that the public's interest in receiving information about the functioning of government from those most qualified to provide it is substantial.[103] Nevertheless, the Court also noted that public employers have a countervailing interest in policing speech that, due to the employee's role, may contain confidential information, may be premature or factually incorrect, or may be damaging to the employer's standing in the community.[104]

Ordinarily, these claims would set the stage for a balancing of interests that would ultimately leave the speech either protected or unprotected, but in *Garcetti*, the Court took another path and instead adopted a new categorical rule:[105] "We hold that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[106] The Court reasoned that, since Ceballos "wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do," he was not speaking as a citizen.[107] In essence, the speech in question—Ceballos's disposition memo, was Ceballos's work product as a government employee, not his own speech, and was therefore unprotected.

2. Garcetti*'s Holding*

Despite the diversity among the approaches to holding and dicta reviewed above,[108] each modern approach focuses in one way or another on

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102 *Id.* at 419.

103 *Id.* at 419–20.

104 *Id.* at 422–23; *see also* Robert C. Cloud, *Public Employee Speech on Matters Pursuant to Their Official Duties: Whistle While You Work?*, 210 EDUC. L. REP. 855, 857–58 (2006) (discussing the rights and authority employers have to limit speech in certain circumstances).

105 Professor Sheldon Nahmod has referred to this *ex ante* version of balancing of interests, done in pursuit of the development of a generally applicable categorical rule, as "categorical balancing." Nahmod, *supra* note 22, at 569–70 ("What the Court does when it balances categorically is weigh what it considers to be the relevant interests, social and individual, at a fairly high level of generality, and then by balancing those interests, arrive at a generally applicable rule to be applied in later cases without further balancing." (footnote omitted) (citing T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 977, 979, 981 (1987)).

106 *Garcetti*, 547 U.S. at 421.

107 *Id.*

108 This body of scholarship on the holding-dicta distinction continues to grow. *See, e.g.*, Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 126–27 (2009) (arguing for broader

two elements: (1) the facts of the prior case decided, and (2) the court's pronouncements of its decision, along with the court's selection of which facts to emphasize in making its way to the holding.[109] Under the decisional path approach—arguably the most deferential approaches to the deciding court, and thus, one more likely than the others to yield a more capacious holding—the court lays out a "decisional path" consisting of factual and legal propositions that ultimately make up the ratio decidendi of the case, and as long as those propositions are actually considered and decided, they are part of the holding.[110]

In *Garcetti*, the facts the Court considered included stipulations that (1) the memorandum that Mr. Ceballos drafted recommending dismissal of the case was the only speech at issue, and (2) Mr. Ceballos drafted the memorandum pursuant to an official duty to draft legal memoranda.[111] Following a recitation of these facts, the Court reviewed both *Pickering* and *Givhan* to support the propositions that it was immaterial that Mr. Ceballos spoke at work to his superiors (as Givhan did), and that it was immaterial that Ceballos spoke about matters related to his job (as both Pickering and Givhan did).[112] Following this review, the Court distinguished Ceballos from these two plaintiffs on the basis that neither Pickering nor Givhan were hired to make the speech that led to their discipline.[113] Then, the Court clearly stated its ultimate rule: "We hold that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[114]

According to the Court, "The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy."[115] The Court cited this factor—that the memorandum was drafted as a

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categories of interpretation of case law than more formalistic distinctions like holding and dicta); Leval, *supra* note 24, at 1269 (arguing that lower courts afford dicta more weight than the Court realizes); Stinson, *supra* note 59, at 220 (arguing that closer attention must be paid to the holding-dicta distinction in interpreting judicial opinions). All these articles were published after Abramowicz & Stearns, *supra* note 59.

109 *See supra* note 59 and accompanying text.

110 Abramowicz & Stearns, *supra* note 59, at 1065 (discussing the effects of the decisional path approach).

111 *Garcetti*, 547 U.S. at 421 ("Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.").

112 *Id.* at 420–21 (citing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979); Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1967)).

113 *Id.*

114 *Id.* at 421. Professor Solum has rightly admonished readers of legal opinions to be wary of judicial statements that begin with "We hold that . . .," as they are usually indicative of judicial overreach into legislative territory, Solum, *supra* note 6, at 188, but in this case, the Court's statement was in fact its resolution of the sole issue in the case as presented.

115 *Garcetti*, 547 U.S. at 421.

requirement of Ceballos's job—as *the* factor "distinguish[ing] Ceballos' case from those in which the First Amendment provides protection against discipline."[116] Thus, a simple and faithful reading of the case would see the binding rule emerging from it as creating a categorical exemption from First Amendment protection for speech made "pursuant to official duties";[117] in other words, for speech that is an employee's work product.[118] Through the establishment of a categorical rule of decision where a more flexible standard both preexisted and would likely (but not certainly) have led to the same result in the case before the Court, the Court ostensibly made the adjudication of public employee speech matters less subject to the discretion of lower court judges and juries.

As the scholarship on precedent teaches, Justice Kennedy's repeated use of the phrase "pursuant to official duties" and its variants must be read in light of the facts before the Court.[119] As outlined above, the two most relevant facts in the *Garcetti* case, according to the Court, were that (1) Mr. Ceballos's memorandum was the only speech at issue; and (2) Mr. Ceballos drafted the memorandum as a requirement of his job. When the Court stated, "We hold that, when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline,"[120] the Court did so in the context of these stipulated facts. The Court made this clear by preceding the statement of its holding with the limiting justification, "The controlling factor in Ceballos' case is that his expressions were made *pursuant to his duties* as a calendar deputy."[121] Finally, citing both *Pickering* and *Givhan* as authority, the Court also made it clear that its stated holding was *not* to be construed to bar First Amendment protection for statements merely *related to* work, or for statements made *while at work*, or for statements made only *to coworkers or*

116 *Id.*

117 It is true that the mere utterance of "We hold that" before a statement is insufficient to convert it from dicta to holding. Leval, *supra* note 24, at 1257–58. Nevertheless, reading the binding rule in *Garcetti* as such is only bolstered by the fact that the Court preceded its "pursuant to official duties" statement with "We hold that . . ." *Garcetti*, 547 U.S. at 421.

118 *See Garcetti*, 547 U.S. at 422 (using the term "work product" to describe Ceballos's memorandum).

119 Such an approach would be entirely consistent with the dominant approaches to distinguishing between holding and dicta, each of which requires that a proposition be linked to the facts before the court at the time it rendered its decision in order to be considered part of the binding holding of the case. *See* Abramowicz & Stearns, *supra* note 59, at 1045–65 (reviewing the dominant approaches); Bayern, *supra* note 108, at 167–73 (2009) (proposing a new approach based on judicial intent, but limiting any expressions of intent to those within the facts of the case).

120 *Garcetti*, 547 U.S. at 421 (emphasis added).

121 *Id.* (emphasis added); *see also id.* ("Ceballos drafted his memorandum because that is what he was employed to do.").

superiors.[122] Thus, any reading of the case to bar protection for speech "related to" or "in the course of" employment would be directly foreclosed by the Court's statements of what it was *not* holding, both of which immediately preceded the "We hold that . . ." statement.[123]

With the above discussion in mind, the Court's use of the phrase, "speaks pursuant to his official duties" to delineate the category of unprotected speech it recognized amounted to a public employee's written or verbal work product—nothing more. The Court took great pains to distinguish Mr. Ceballos from Mr. Pickering, who spoke *about his workplace*, relating *matters of which his employment gave him unique knowledge*, and who *identified himself as a teacher* in doing so, and Ms. Givhan, who spoke *about her workplace*, *while at work*, relating *matters about which she learned by virtue of her employment*, and who spoke *only internally to her supervisors*.[124] The simple fact distinguishing Mr. Ceballos from these other two defendants is that neither Mr. Pickering's nor Ms. Givhan's speech amounted to their work product.[125]

This interpretation makes considerable sense. Public employees should not be able to claim that the work product they produce for their public employers constitutes their own personal speech. Were this so, then as Justice Kennedy pointed out, we would be faced with the familiar problem of "constitutionalizing the employee grievance."[126] Barring First Amendment protection for a public employee's work product accordingly fits within the general landscape of policies underlying the protection of most public employee speech.[127] And because work product is an easily defined category of expression for most employees, it also makes sense to set that speech aside categorically as unprotected, rather than to do so case-by-case.

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122 *Id.* at 419, 421 (citing and reaffirming Givhan v. W. Line Consol. Sch. Dist. 439 U.S. 410, 414 (1979) (standing for the proposition that speech made while at work, even if made only internally to supervisors or coworkers, remains subject to First Amendment protection) and Pickering v. Bd. of Ed., 391 U.S. 563, 573 (1967) (standing for the proposition that speech made relating to work, remains subject to First Amendment protection)).

123 *See Givhan*, 439 U.S. at 415–16 (upholding First Amendment protection for a public school employee who complained of race discrimination in school personnel decisions while at work, and stated her complaints only internally to her supervisors).

124 *Garcetti*, 547 U.S. at 421; *Givhan*, 439 U.S. at 415–16.

125 *Garcetti*, 547 U.S. at 421 ("Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do."). Another way of saying this is that drafting the memorandum is what he contracted with his employer to do. *See* SAMUEL ESTREICHER & GILLIAN LESTER, EMPLOYMENT LAW 35–36 (2008) (discussing the employment relationship as a contractual relationship with duties on each side of the bargain).

126 *Garcetti*, 547 U.S. at 420; *see also* Connick v. Myers, 461 U.S. 138, 155 (declining to protect the plaintiff's speech in part because it mostly stated a private employee grievance).

127 *See* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 645–48 (2012) (discussing the lines drawn by different courts on whether a public employee's speech is protected by the First Amendment).

3. Garcetti*'s Errata and the Phenomenon of Over-Justification*

Illustrating a more recent phenomenon in Supreme Court judicial craft, Justice Kennedy thoroughly justified his majority's decision, making numerous arguments against both the dissenters and the respondents in an effort to support and insulate the *Garcetti* holding and its categorical rule. For example, in addressing the respondent's brief, Justice Kennedy rejected "Ceballos's proposed contrary rule" (i.e., the application of the *Pickering* test), on the basis that it would mandate ongoing and intrusive "judicial oversight of communications between and among government employees and their superiors in the course of official business."[128] Several courts have picked up on the use of the employment law term of art "in the course of"[129] and concluded that any communication uttered while working is exempt from First Amendment protection.[130] Justice Kennedy repeated this dictum in another form while defending the scope of the Court's actual holding against the contrary view of the Ninth Circuit majority.[131]

One factor motivating the court of appeals to apply the *Pickering* test was a "perceived anomaly" in First Amendment jurisprudence that would otherwise have resulted—that an employee's statement on a matter of public concern at work would be unprotected, but the same employee's identical public statement outside of work would arguably qualify for protection.[132] In answering this concern, Justice Kennedy stated that the *Pickering* test still applies to employees speaking "outside the course of performing their official duties."[133] By negative implication, this choice of phrasing once again called up the familiar, and much broader, term of art associated with workers' compensation, rather than the Court's much narrower, "pursuant to" holding.[134]

Finally (as to the majority's dicta), and most troublingly, in emphasizing the rule that public employees may not claim First Amendment protection to speech that amounts to their own job duties, the Court stated: "Restricting speech that *owes its existence* to a public employee's professional responsibilities

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128 *Garcetti*, 547 U.S. at 423.

129 This term calls up, for example, the definition of a compensable injury found in many state workers' compensation statutes. *E.g.*, MICH. COMP. LAWS § 418.301(1) (2011) ("An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act.").

130 *E.g.* Mayer v. Monroe Cty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).

131 *Garcetti*, 547 U.S. at 423 ("Employees who make public statements *outside the course of* performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." (emphasis added)).

132 *See id.* at 423–24 (addressing the "perceived . . . anomaly").

133 *Id.* at 423.

134 *See also id*. at 426 ("Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.").

does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[135] Characterizing what the Court, in the immediately preceding paragraph, had carefully described and cabined as the job-required speech of the employee as instead any speech that "owes its existence" to the employee's employment sounds like a "but-for" test. If any speech that "owes its existence" to a government employee's employment is speech "pursuant to" that employee's "official duties," then any speech that the employee makes at work, that relates to the employee's job in any way, that the employee repeats from what he heard at work, or that the employee makes based on information he learned at work, all qualifies as speech made "pursuant to official duties." This formulation would have abrogated *Pickering*.

Illustrating the problems inherent in over-justification, the dissenters largely focused on these statements, often to the exclusion of the holding, to make their points. Justice Stevens, for example, authored a brief dissent. In it, he criticized the "categorical difference between speaking as a citizen and speaking in the course of one's employment" as "quite wrong."[136] As authority for his argument, Justice Stevens cited *Givhan*, which the majority took pains to reaffirm in its own opinion. Importantly, both the majority and the Stevens dissent cited *Givhan* for the identical proposition that an employee does not lose First Amendment protection merely by speaking at work, even internally, and even on a matter related to work, such as race discrimination in the employer's practices.[137] This cross-citation of the same case for the same proposition indicates that the majority and Justice Stevens were talking past one another, but Justice Stevens's failure to recognize that the majority's decision made no change to *Givhan* (indeed explicitly reaffirming it), coupled with his use of the "course of employment" language found in Justice Kennedy's dicta, provided fodder for later courts' confused applications of the rule.

Justice Souter's lengthy dissent, joined in full by Justices Stevens and Ginsburg, gave significant attention to the holding, contending that the majority's categorical rule leaves much room for judicial mischief through its failure to articulate a test for whether speech is "pursuant to" one's employment duties.[138]

Justice Souter proposed his own preferred rule for the case, that an employer's "substantial interests in effectuating its chosen policy and objectives" can be outweighed by "private and public interests in addressing

135 *Id.* at 421–22 (emphasis added).

136 *Id.* at 427 (Stevens, J., dissenting).

137 *Id.* at 420–21 (majority opinion); *id.* at 427 (Stevens, J., dissenting).

138 *Id.* at 428–44 (Souter, J., dissenting).

official wrongdoing and threats to health and safety," and when they are, "public employees who speak on these matters *in the course of their duties* should be eligible to claim First Amendment protection."[139] Justice Souter's preferred rule, if adopted, would actually shrink some of the *Pickering* protection left undisturbed by the majority's holding. If read literally, it would place a public employee's expression made "in the course of duties" outside the protection of the First Amendment unless it addresses "a matter of unusual importance and satisfies high standards of responsibility."[140]

Based on Justice Souter's articulation of an alternative rule, then, one must conclude that either (1) Justice Souter misapprehended the scope of the majority's categorical rule, which limited its exemption to expression made "pursuant to" one's job duties; or (2) Justice Souter (and those joining his dissent) would prefer a much broader First Amendment exemption for expression made "in the course of duties," with a limited exception for speech addressing matters of "unusual" public importance.[141] Thus, both the majority and Justice Souter's dissent favored categorical exemptions from First Amendment protection for public employee speech, but possibly due to their inordinate focus on dicta to the exclusion of holding, or possibly due to an increased concern for what Professor Rosenthal has termed "managerial prerogative" [142] in all but the most important cases, the dissenters would propose a much broader exemption.[143]

Justice Breyer declined to join Justice Souter's dissent along with the other three dissenters, writing for himself.[144] From his first statement of the issue before the Court, Justice Breyer perpetuated the elevation of the "in the course" dictum first uttered in the majority opinion, framing the issue as the protection owed to speech that "takes place in the ordinary course of performing the duties of a government job."[145] Interestingly, though, Justice Breyer also proposed a categorical rule, and one that read as even broader than the one proposed by the other dissenters, which itself was broader than the majority's rule.

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139 *Id.* at 428 (emphasis added).

140 *Id.* at 435.

141 *See also id.* at 437 ("[The majority's cited case] is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.").

142 *See generally* Rosenthal, *supra* note 85 (referring to managerial prerogatives that ensure political officials are held politically accountable for the operations of their public offices).

143 The dissenters largely are the subject of sympathetic commentary in the scholarly studies of *Garcetti*. No such commentary, to my knowledge, has acknowledged either (1) that the dissenters themselves propose a categorical rule, or (2) that the rule they propose seems to sweep far expression within its scope (at least in cases where the narrow exception does not apply) than the rule adopted by the majority.

144 *Garcetti*, 547 U.S. at 444–50 (2006) (Breyer, J., dissenting) (writing separately to explain his difference in opinion from both the majority opinion and Justice Souter's dissent).

145 *Id.* at 444.

Under Justice Breyer's rule, which incorporated the "in the course" language, public employee speech that occurs "in the course of ordinary job-related duties" qualifies for First Amendment protection if it addresses a matter of public concern, but "only in the presence of an augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."[146] Like the rule proposed by the other three dissenters, Justice Breyer's proposed rule did not contain any requirement that the speech in question be mandated by the job in question—only that the speech in question "takes place" while a public employee is performing his or her "ordinary job duties."[147] Under this formulation, as under the formulation proposed by the other dissenters, an employee may have a job that does not require any speech at all, yet may still be denied the protection of the First Amendment if the employee simply speaks while working, and neither the Constitution nor state-created professional obligations places any special duty to speak in the public interest on that employee.[148]

III. CONSTITUTIONAL DECISION RULES AND JUDICIAL CRAFT

A. The Elevation of Errata in the Lower Courts

Like neoformalist constitutional construction itself, *Garcetti*'s rule is grounded in a preference for predictability and uniformity in the law and the cabining of judicial discretion.[149] It is therefore founded on the empirical

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146 *Id.* at 449–50 (affording constitutional protection for speech that occurs during the course of a governmental employee's job and involves a matter of public concern).

147 *Id.* (failing to mention a requirement for mandated employee speech).

148 *See id.* at 445 (listing what Justice Breyer believes is common ground). Although neither Justice Souter nor Justice Breyer claims that his rule is categorical, their use of absolutist terms such as "unless," *id.* at 435 (Souter, J., dissenting), and "only," *id.* at 445 (Breyer, J., dissenting), compels this conclusion. Perhaps if either were in the majority, he would have proposed a less restrictive rule, but the willingness of each to base a substantial portion of his opinion, as well as his proposed alternative rule, on the "in the course" dictum of the majority opinion, rather than on the narrower "pursuant to" exemption, suggests otherwise.

149 *See id.* at 423 (majority opinion) ("Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."); Rhodes, *supra* note 21, at 1194 (stating Garcetti's rule superficially promotes predictability).

assumption that lower courts will faithfully apply categorical rules of decision once these decision rules are established.[150] In effect, all categorical rules assume the adherence of the lower courts to a strict version of stare decisis. Without this assumption, the theoretical justifications for preferring categorical rules over standards collapse.

However, a survey of the lower court cases applying *Garcetti* reveals that this assumption was misplaced. In case after case, the lower courts have read *Garcetti* to exclude far more speech from the First Amendment's protection than the Court obviously meant to exclude. The tool they have used to accomplish this expansion of the exclusionary holding is, in most cases, the dicta and other errata scattered throughout the majority and dissents in the case. Below, I outline the general trends in the use of these phrases, leading to a discussion of the Court's most recent consideration of the issue in *Lane v. Franks*,[151] through which the Court supplied the lower courts with a useful, but far too circumspect, corrective. The discussion below takes the two most quoted errata and shows how the lower courts have used them to reach results contrary to what neoformalist would expect (or hope) to see.

1. The "Course of Performing" Dictum

Beginning with what I will term the "course of performing" dictum, the Court in *Garcetti*, after setting forth its categorical exclusion of speech made "pursuant to official duties" from the First Amendment's protection, proceeded to defend that rule against counter-arguments offered by the dissents and the appellee, Ceballos.

The Court introduced the "course of performing" dictum in framing the appellee's argument: "Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors *in the course of official business*."[152] The Court continued, framing the lower court's error in applying the *Pickering* test in the following way:

> The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements *outside the course of performing their official duties* retain some possibility of First Amendment protection because that is the kind of

150 *See, e.g.*, Scalia, *supra* note 8, at 1176–77 (implying this assumption in distinguishing between judicially crafted rules and standards).

151 134 S. Ct. 2369, 2379 (2014).

152 *Garcetti*, 547 U.S. at 423 (emphasis added).

> activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.[153]

Reading the language quoted might lead one to conclude that the Court was expressing the grounds for a negative inference—by saying that employees speaking "outside the course of performing their official duties" may retain First Amendment protection, perhaps the Court was implying that any employee speaking while within the course of performing official duties cannot access such protection.

But this interpretation would place the *Garcetti* rule directly at odds with *Givhan*, cited approvingly by the *Garcetti* Court, which approved First Amendment protection for speech made while the speaker was at work, and only to her supervisor, not to mention *Rankin v. McPherson*,[154] which approved protection for employees talking politics while working. Further, this interpretation would contradict the last sentence of the passage above, which clearly defines the speech excluded as that which is "pursuant to employment responsibilities," and which has no relevant citizen-speech analogue. Finally, it would contradict the carefully circumscribed holding of the case, as outlined above. It would be odd to think that the Court would deliberately set forth a circumscribed holding, even using the words, "We hold that" to introduce it, and then set forth a directly contrary one only a few paragraphs later.

Nevertheless, Justice Stevens, writing in dissent, adopted this interpretation. He framed the basis for his dissent in the terms of the quote above, rather than in the terms of the Court's holding, stating, "The notion that there is a categorical difference between speaking as a citizen and *speaking in the course of one's employment* is quite wrong."[155] Justice Souter's dissent also adopted this framing, in stating its alternative preferred holding, "[A]n employee commenting on subjects *in the course of duties* should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."[156]

Also, Justice Breyer, in dissent, adopted this mistaken interpretation. He framed the issues in the case as, "whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) *takes place in the ordinary course of performing* the duties

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153 *Id.* at 423–24 (emphasis added) (internal citations omitted) (citing Cabellos v. Garcetti, 361 F.3d 1168, 1176 (9th Cir. 2004); then citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968); and then citing Rankin v. McPherson, 483 U.S. 378 (1987)).

154 483 U.S. 378, 390–92 (1987).

155 *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) (emphasis added).

156 *Id.* at 435 (Souter, J., dissenting) (emphasis added).

of a government job."[157] He reiterated this misconception in stating his preferred alternative holding:

> I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) *takes place in the course of ordinary job-related duties*. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs.[158]

Thus, not only the dicta in the majority opinion, but also the errata in dissent, supplied ammunition for courts seeking to expand the boundaries of *Garcetti*'s exclusion.

Considering the above, it is little wonder that the "course of performing" erratum has been a popular one with lower courts, and that its application almost always leads to the employee-plaintiff's loss, where a "pursuant to official duties" rule would have left open the possibility of protection. In *Williams v. Dallas Independent School District*,[159] for example, the Fifth Circuit denied First Amendment protection to a high school athletic director who was terminated allegedly in retaliation for writing a memorandum to the school administration questioning the use of athletic funds.[160]

The Fifth Circuit acknowledged that the speech in question was not speech *required* of an athletic director, but framed its task in the case as one to "determine the extent to which, under *Garcetti*, a public employee is protected by the First Amendment if his speech is not necessarily required by his job duties but nevertheless is related to his job duties."[161] Citing the majority opinion, the *Williams* court stated the very broad proposition, neither held nor even stated in *Garcetti*, that "Activities undertaken in the course of performing one's job are activities pursuant to official duties."[162] The Fifth Circuit's opinion ends with the statement, "We thus hold that Williams's memoranda to the office manager and principal Wright were written in the course of performing his job as Athletic Director; thus, the speech contained therein is not protected by the First Amendment."[163]

Although the circuits have not interpreted the decision uniformly, and some circuits have faithfully read the holding as a narrow First Amendment exception keyed to a public employee's work product,[164] other federal

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157 *Id.* at 444 (Breyer, J., dissenting) (emphasis added).

158 *Id.* at 449–50 (emphasis added).

159 480 F.3d 689 (5th Cir. 2007) (per curiam).

160 *Id.* at 690–91. The memorandum also included veiled charges of internal corruption, citing a "network of friends and house rules." *Id.* at 691.

161 *Id.* at 693.

162 *Id.* (citing *Garcetti*, 547 U.S. at 421).

163 *Id.* at 694.

164 *See, e.g.*, Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006) (holding that much of plaintiff's speech made while working was protected because it was not required as part of her job duties but

appellate decisions have made mistakes similar to that of the Fifth Circuit. For example, in *Weintraub v. Board of Education*,[165] the Second Circuit denied First Amendment protection to a teacher who had allegedly been retaliated against for filing a union grievance. The court cited the Fifth Circuit's decision in *Williams* and concluded that the teacher's "speech challenging the school administration's decision to not discipline a student in his class" was "'undertaken in the course of performing,' his primary employment responsibility of teaching."[166]

Similarly, in *Brammer-Hoelter v. Twin Peaks Charter Academy*,[167] the Tenth Circuit denied First Amendment protection to teachers at a public charter school, who had expressed concerns over "the Academy's expectations regarding student behavior,"[168] "the Academy's curriculum and pedagogy,"[169] and "money [spent] on instructional aids, furniture, and classroom computers."[170] The court evaluated each of these categories of speech and concluded that, because each related to the job requirements of the teachers and was uttered through a grievance at work, the speech was made "pursuant to" duties.[171] To set these conclusions up, the court, like the Fifth Circuit in *Williams*, conflated the *Garcetti* "in the course" dictum with the "pursuant to" term in the Court's holding, concluding that "if an employee engages in speech *during the course of performing* an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties."[172]

2. The "Owes Its Existence" Dictum

The Court introduced the "owes its existence" dictum in seeking to justify the rule it had laid down only a few paragraphs before that public employees do not receive the protection of the First Amendment for speech they make pursuant to their official duties. The justification sought to show that the speech excluded merely constituted the public employee's work product, and therefore it was immaterial whether the employee himself also had some personal expressive interest in making it. But Justice Kennedy chose to

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remanding for a determination of the extent of the jury's reliance on paperwork completed in relation to harassment complaints, where the filling out of such paperwork was one of plaintiff's job duties).

165 593 F.3d 196, 205 (2d Cir. 2010).

166 *Id.* at 203 (quoting *Williams*, 480 F.3d at 693).

167 492 F.3d 1192 (10th Cir. 2007).

168 *Id.* at 1204 (providing an example of a matters discussed pursuant to the plaintiffs' duties as teachers).

169 *Id.* (identifying subject matter that the plaintiff discussed).

170 *Id.* (detailing the plaintiff's complaint about the Academy).

171 *Id.* (concluding that expressing complaints about some tasks was done "pursuant to" duties).

172 *Id.* at 1203.

articulate this justification in terms that obfuscated the rule it sought to justify:

> The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that *owes its existence to a public employee's professional responsibilities* does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.[173]

Obviously, even a conservative reading of the phrase "speech that owes its existence to a public employee's professional responsibilities" has the potential to sweep within the Court's exclusion speech that, for example, merely reveals an employee's knowledge of his work or work environment, as Pickering's speech did. But the Court made clear multiple times that it was not taking speech such as Pickering's out of the protection of the First Amendment. A reading of the entire quoted section above reveals that the Court here was attempting to distinguish a public employee's verbal and written work product from other speech the employee might make, whether at work or elsewhere. But a reading of the emphasized phrase without this context allows for a much broader exclusion.

The "owes its existence" dictum has found its way into several lower court opinions applying *Garcetti*, so much so that it has been the only erratum to date that has led to a corrective ruling by the Supreme Court, discussed below. Two examples will illustrate its use.[174] In *Fox v. Traverse City Area Public Schools Board of Education*,[175] a teacher was disciplined for complaining to her supervisors that, as a special education pull-out teacher, she was required to supervise more students than the maximum allowed under applicable law.[176] No party to the case contended that Ms. Fox's job duties required her to make such complaints, or to monitor the number of students she was

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173 Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (emphasis added).

174 To be sure, several circuit court majorities pushed back against this trend, and several other circuit court dissenters have pointed out how unwise it is to read the Supreme Court's exclusion more broadly than the facts of the *Garcetti* case would permit. Most notably, a majority in the Third Circuit recently, in no uncertain terms, rejected the efforts of a school district to elevate the "owes its existence" dictum to a holding, stating:

> These arguments ask us to read *Garcetti* far too broadly. This Court has never applied the "owes its existence to" test that Appellants wish to advance, and for good reason: this nearly all-inclusive standard would eviscerate citizen speech by public employees simply because they learned the information in the course of their employment, which is at odds with the delicate balancing and policy rationales underlying *Garcetti*.

Dougherty v. Sch. Dist. of Phila., 772 F.3d 979, 989 (3d Cir. 2014). The existence of this decision and a small number of others is encouraging, but their existence does not detract for my central point, which is that, unless all, or at least most, lower court judges are as disciplined as this Third Circuit panel, a categorical rule promulgated by the Supreme Court is likely to be of little use in simplifying decisions, fostering predictability, and cabining judicial discretion, and may in fact do more harm than good.

175 605 F.3d 345 (6th Cir. 2010).

176 *Id.* at 347.

required to supervise for compliance with the law. Nevertheless, the Sixth Circuit held that, because "her complaint about class size 'owe[d] its existence to' her responsibilities as a special education teacher," her speech was unprotected.[177]

A recent Ninth Circuit case illustrates the mischief of this particular dictum in allowing courts to equate any public employee speech "ow[ing] its existence to" the employee's official duties with "government speech,"[178] which is thought to be exempt from First Amendment scrutiny.[179] In *Johnson v. Poway Unified School Dist.*, a teacher, dissatisfied with what he viewed as his colleagues' promotion of various Eastern religious traditions on their classroom bulletin boards,[180] decided to place symbols of Christianity on his own classroom's bulletin board. The school's policy was to allow teachers to decorate their own bulletin boards at their discretion, subject to the ultimate control of the school principal. The teacher sued for violation of his First Amendment speech and religious rights after being disciplined for hanging the Christian symbols. Ultimately, the case was disposed of under the Religion Clauses, but as to Mr. Johnson's speech claim, the court held simply that the speech on his classroom bulletin boards, because it "owed its existence to his official job duties," was "government speech," citing the "owes its existence" dictum.[181]

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177 *Id.* at 349 (quoting Weisbarth v. Geauga Park Dist., 499 F.3d 538, 544 (6th Cir. 2007)).

178 *See* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 970 (9th Cir. 2011) (holding that a teacher's discretionary use of his classroom bulletin boards was the "government speech" of the district and not the personal speech of the teacher). To be sure, other cases have mentioned the *Garcetti* majority's citation to *Rosenberger v. Rectors of the University of Virginia*, and have represented it as the Court's holding, but none of these cases justified the disposition on a government speech rationale. *See Garcetti*, 547 U.S. at 422 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (quoting Rosenberger v. Rectors of the Univ. of Va., 515 U.S. 819, 833 (1995))); Whitfield v. Chartiers Valley Sch. Dist., 707 F. Supp. 2d 561, 576 (W.D. Pa. 2010) (mentioning the *Garcetti* majority's citation to *Rosenberger*); Doucette v. Minocqua, Hazelhurst & Lake Tomahawk Joint Sch. Dist. No. 1, No. 07-cv-292-bbc, 2008 WL 2412988, at *5 (W.D. Wis. June 12, 2008) ("Thus, the Court appears to be saying that when a public employee speaks pursuant to her job duties, she is in essence speaking on behalf of the government and the government should have complete authority over its own speech."); *see also* W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 299 (4th Cir. 2009) (citing *Garcetti*, 427 U.S. at 421–23) (claiming *Garcetti* held "that speech made by [a] government employee pursuant to official duties is government speech" in a non-employment-related traditional government speech case).

179 *See generally* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008) (discussing how protection of free expression is contingent on the source of the expression).

180 The display most prominently featured in the court's opinion was that of several Tibetan prayer flags. *See Johnson*, 658 F.3d at 973 (distinguishing the Tibetan flags that were displayed without religious intent from intentionally Christian displays).

181 *Id.* at 970 (citing *Garcetti*, 547 U.S. at 421–22). The *Garcetti* majority's government speech dictum, in which it referenced the principles of the government speech doctrine and cited *Rosenberger*, but did not hold that public employee speech is government speech, has not featured prominently in

B. Lane v. Franks*: A Useful, but Limited, Corrective*

The Roberts Court considered its second public employee speech case in October Term 2013. *Lane v. Franks* presented the First Amendment claims of Edward Lane, an Alabama public community college employee who was hired to manage a community outreach and education program with several employees. As one of his early tasks on the job, Lane audited the payroll and work records of all of his employees and discovered that, based on these records, Suzanne Schmitz, a then-sitting member of the Alabama Legislature, had been receiving a salary from the program but doing little to no work in exchange for it.[182]

Lane held a meeting with Schmitz at which he demanded that she begin doing work that would justify the salary, but she refused, so he terminated her employment.[183] Upon learning of her termination Schmitz threatened retaliation against Lane.[184] Eventually, the Department of Justice learned of Schmitz's no-show job, and because the program was funded in part federally, prosecuted her for fraud.[185] Lane was called as a witness during the trial, and he testified truthfully as to the facts set forth above. Following Lane's testimony, the program's entire twenty-nine-person workforce was laid off, with all but Lane and one other former employee being rehired.[186]

Lane sued the college's president, who ordered the layoffs and selective rehirings, asserting, among other claims, a claim that his First Amendment rights had been violated. His argument was that his testimony in Schmitz's trial was speech protected by the First Amendment, and that the college's president had impermissibly retaliated against him for this protected speech.[187]

The case ultimately reached the Supreme Court after the Eleventh Circuit Court of Appeals affirmed the District Court's grant of summary judgment against Lane.[188] The court of appeals based its decision substantially on *Garcetti*, along with some pre-*Garcetti* precedent that the court viewed as consistent with *Garcetti*.[189] Under the court's reading of *Garcetti*, which employed the "owed its existence" dictum of Justice Kennedy's majority opinion as a holding, the court held that, since Lane had only

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the appellate cases applying *Garcetti*, but it stands as yet another example of errant language that appellate courts, such as the *Johnson* court, can use to limit rights beyond *Garcetti*'s narrow exclusion.

182 Lane v. Franks, 134 S. Ct. 2369, 2375 (2014).

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.* at 2376.

187 *Id.*

188 Lane v. Cent. Ala. Cmty. Coll., 523 Fed. App'x. 709, 712 (11th Cir. 2013) (per curiam).

189 *Id.* at 711–12 (citing Garcetti v. Ceballos, 547 U.S. 410, 410 (2006)).

learned about Schmitz's no-show job by virtue of his employment as head of the program, his testimony "owed its existence to [Lane's] professional responsibilities," and was therefore unprotected under *Garcetti*.[190]

The Supreme Court unanimously reversed the court of appeals. Holding that the *Garcetti* decision removed from the protection of the First Amendment only from speech the employee was required to make as part of a job duty, the Court easily concluded that offering testimony in a criminal case did not meet this test for Lane.[191] He was not employed to testify in criminal trials, nor did his job duties even suggest that his employer would ever ask him to do so. Though Justices Thomas, Scalia, and Alito joined a separate concurrence to further clarify what the Court was not holding, all nine Justices concurred in the result and the Court's reasoning in full. In other words, with *Garcetti* on the books, *Lane* was an "easy" case—one that did not split the Justices on any important point.

C. The Lessons of Garcetti *and* Lane *for "Law of Rules" Values*

Lane illustrates, above all, that the interpretation of the Court's rule in *Garcetti* offered above is the correct one—only an employee's work product is excluded from First Amendment protection, and that this reading of *Garcetti* is not a controversial or non-obvious one.[192] Given the clarity of the *Garcetti* holding, and the care with which the Court's majority distinguished *Garcetti* from *Pickering* and *Givhan*, then, what explains the Eleventh Circuit's reading of the case? If neoformalists such as Justice Scalia, who signed on to the majority's categorical rule, are correct about the virtues of predictability, uniformity, and the cabining of judicial discretion when courts articulate

190 *Id.* at 711 (quoting Abdur-Rahman v. Walker, 567 F.3d 1278, 1286 (11th Cir. 2009)).

191 *Lane*, 134 S. Ct. at 2379.

192 That said, the Court's justices still seem to be unable to hold *Garcetti*'s errant language and its holding separate when they discuss the case. For a very recent example of this judicial carelessness, see *Janus v. Am. Fed. of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2492 (2018) (Kagan, J., dissenting). In describing the public employee speech analysis, Justice Kagan stated, "[T]he Court first asks whether the employee 'spoke as a citizen on a matter of public concern.' If she did not—but rather spoke as an employee on a workplace matter—she has no 'possibility of a First Amendment claim.'" *Id.* (quoting *Garcetti*, 547 U.S. at 418). This formulation would be broad enough to exclude the speech of Givhan and others like her, who speak on workplace matters that are also matters of public concern while working, where their speech is not made pursuant to their official duties, but is nevertheless uttered at work. The direct quotes come out of the section of *Garcetti* Justice Kagan was citing, which discusses the difference between *Pickering*, which involved speech on a matter of public concern, and *Connick*, which did not. *See Garcetti*, 547 U.S. at 418. But she cites *Garcetti*, rather than these two primary cases, for the point, and the "but rather" language is Justice Kagan's own formulation of the *Garcetti* exclusion. Urging a broader reading of the *Garcetti* exclusion would have potentially changed the *Janus* result, but using that particular formulation could also provide an opportunity for more out-of-context quoting by lower courts, leading to greater expansion of the *Garcetti* exclusion.

rules rather than standards, then the Court of Appeals should have avoided its error easily, even notwithstanding prior existing circuit precedent that appeared to contradict *Garcetti*'s narrow exemption.

The only plausible explanation is that the Court of Appeals read the "owes its existence" dictum in Justice Kennedy's majority opinion, found it to be consistent with the language of this earlier case law within the Circuit (case law that, by distinguishing *Pickering* and *Givhan*, *Garcetti* had abrogated), and applied it as a holding of the case. As illustrated above, a fair reading of *Garcetti* using even the broadest of the competing approaches to holding and dicta would never have included the "owes its existence" proposition within the *Garcetti* holding.[193] Therefore, since the *Garcetti* rule is in the nature of the rules that neoformalists favor and defend on the grounds of predictability, uniformity, and the cabining of judicial discretion, the Eleventh Circuit's decision, along with the other court of appeals decisions reviewed above applying other dicta from *Garcetti* as holdings, stands as stark evidence that employing a rule-based construction in *Garcetti* has failed thus far. It also forms a significant data point in argument against the use of rules in general to foster the neoformalist values of predictability, certainty, and cabining of judicial discretion.

The next Part considers a likely explanation for this disconnect between values and methods—the undue lawmaking deference that the lower courts afford all of the pronouncements in a Supreme Court opinion—and interrogates the common justifications for this practice. Based on the argument above, and the explanation considered below, the lower courts should reconsider their duty to check the Court's power from below. They can do so most effectively by applying the holding-dicta distinction to Supreme Court decisions, especially decisions that limit preexisting rights through the development of categorical rules of exclusion. But more importantly, the Court should be much more mindful of the ways in which it expresses and crafts its rule-establishing decisions.

IV. THE BREAKDOWN OF VERTICAL SEPARATION OF POWERS

A. Deference and Dicta

From the discussion above, one might conclude that neoformalist constitutional construction is illegitimate or futile, as evidenced by the courts of appeals' broad misapplications of *Garcetti*'s rule. Of course, *Garcetti* is one data point—a test case, chosen for its suitability to the inquiry here, particularly the fact that it articulated a categorical rule of exclusion where a

193 *See supra* Section I.C (reviewing the approaches to holding and dicta); *supra* Section II.B.2 (discussing the holding of *Garcetti*).

balancing test once would have governed the same question. But one case does not refute an entire theory. In fact, categorical rules do have the potential to operate, in some cases, to usefully constrain politically or strategically influenced lower court decision making, and to foster more predictability and uniformity in the law.[194]

But this potential is frustrated by the tendency of lower federal courts to treat the dicta in Supreme Court decisions as though it were binding, or at least to engage a presumption that, were the issue to come before the Court again, the dicta in the already decided case would dictate the result in that later case.[195] In other words, the normative case for neoformalist construction is impaired because the descriptive neoformalist account—that lower courts generally apply clear rules—appears to be incorrect, at least in the case where such rules are surrounded by dicta and other errata.

The literature contains several justifications for this lower court deference to Supreme Court dicta, each of which fails on further examination. Prior scholarship has contended that, due to its location at the very top of this hierarchical structure of American courts, its role as a definer of both codified and federal common law judicial procedural rules (the latter of which include the rules of stare decisis), and its limited docket of important, national questions, the Supreme Court may have the ability to designate its own statements as either holding or dicta without regard to the facts and issues before the Court.[196] When examined, though, each of these propositions is

194 *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 882 (1990) (providing an example of a case that promulgated a categorical rule that usefully constrains lower courts). *Smith*, authored by Justice Scalia, articulated a categorical rule of exclusion from constitutional protection under the Free Exercise Clause. That Clause's protections do not extend to those who violate religiously neutral criminal laws of general applicability, regardless of the burdens imposed on religious exercise. *Id.* at 881–82. In the years following, the lower courts have mostly faithfully followed this rule, and it has clarified and made predictable at least one limitation (that of the general criminal law) on the scope of religious protections. The Court has also not had to revisit the rule itself due to misinterpretation, as it did *Garcetti*. Its predictability and cabining of judicial discretion, rather, has led to legislative efforts to limit it, and litigation efforts to achieve the result it forbids through other constitutional strategies. *See, e.g.*, Richard Schragger, *The Politics of Free Exercise after* Employment Division v. Smith*: Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 CARDOZO L. REV. 2009, 210 (2011) (arguing that, due to the durability of *Smith*'s categorical exclusion, litigants have turned to creative speech and association arguments to support what would have been free exercise claims, pre-*Smith*).

195 *See* 5 AM. JUR. 2D *Appellate Review* § 520 (2018) (stating the proposition that federal appellate courts are "bound" by the "considered dicta" of the Supreme Court, particularly where it is of "recent vintage" and not "enfeebled by any subsequent statement."); Abramowicz & Stearns, *supra* note 59, at 1084 n.422 (citing *In re* McDonald, 205 F.3d 606, 612 (3d Cir. 2000) (making the point that federal judges should engage in such deference)); *see also* Scalia, *supra* note 8, at 1178–79 (making a similar point).

196 *See* Abramowicz & Stearns, *supra* note 59, at 1067 (discussing how, because the Supreme Court sits at the top of the judicial structure, it might require "greater latitude than other courts in determining the scope of its holdings" (citing Michael E. Solomine, *Supreme Court Monitoring of State Courts in the*

based on a flawed conception of the role of the judiciary, and particularly the Supreme Court, in a government of distributed powers.

First, the location of the Supreme Court at the top of the judicial hierarchy does not justify its assumption of powers not belonging to any of the lower echelons of that hierarchy. Rather, it simply justifies the broad geographical reach of the Supreme Court's actual holdings. Where the First Circuit's holdings bind only that circuit and the lower courts located within it, the holdings of the Supreme Court bind all lower federal and state courts. However, this familiar point does not compel the conclusion that the Supreme Court must therefore attempt in its decisions to resolve future questions of law unrelated to the cases it chooses for its docket, or that the Supreme Court is not required, as the other courts in the system are, to be a court.[197] Instead, it justifies restraint as to these future cases, which have not yet been argued or briefed for the Court, and which may not have drawn vigorous advocacy from the parties, due to an inability to affect their own case's outcome.[198]

Where lower courts apply Supreme Court dicta as equivalent to the Court's holdings, they cede power to the Court—the law development power that finds its best expression in case-by-case decision making in the lower courts. In other words, where lower courts allow propositions reaching matters outside the facts of a Supreme Court case to be considered part of the holding, they allow the Court to take issues away from the lower courts that these lower courts should rightly decide first, resulting in a transfer of judicial power from the lower courts to the Supreme Court.[199]

Twenty-First Century, 35 IND. L. REV. 335, 358–59 (2002))). *See generally* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinctions and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) (discussing the limited kinds of cases the Court can hear). Of course, even this view presupposes that the Court will so designate a controversial statement in question. It did so in *Garcetti*, but the later problems in applying the case ironically came from viewing non-designated statements as holdings. *See supra* Part III (discussing the misapplication of the "owes its existence" dictum that led to *Lane v. Franks*).

197 *Cf.* Eric J. Segall, *Is the Roberts Court Really a Court?*, 40 STETSON L. REV. 701, 702 (2011) (criticizing the Roberts Court for ignoring the judicial duties of transparency, communication, and grappling in good faith with prior precedent).

198 *See* Leval, *supra* note 24, at 1261–62 (discussing how a party may not vigorously "assert its best defense" on issues that have no bearing on the outcome of their particular case).

199 Of course, this problem, so framed, is not one of constitutional significance, as the Constitution does not require a system of lower federal courts. *See* U.S. CONST. art. III (requiring a Supreme Court, but not lower courts, as a judicial branch of government); U.S. CONST. art. I, § 8 (granting power to Congress to set up lower courts). Nevertheless, even without a lower federal court system, this power would not belong to the Supreme Court in the first instance, but to the state courts, who would, and do today (in most cases) have the same responsibility as the federal lower courts do to check the Court from below. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Second, the unquestioned role of the Supreme Court in promulgating procedural requirements for the federal courts is a poor basis for the expansion of the Court's role into a substantive legislative one. Such an expansion can be rejected solely based on the distinction between procedural and substantive rules, along with the reality that the Court does not even possess its procedural rule promulgation power absent compliance with the Rules Enabling Act, a delegation of legislative authority from Congress.[200] It is important to remember that the Supreme Court's role in promulgating procedural requirements is not truly a "legislative" role. The Federal Rules are subject to legislative approval, and the Court's rulemaking power is expressly limited to rules that do not "abridge, enlarge, or modify any substantive right."[201] Thus, the Court's rulemaking power, rather than forming an analogical basis for affording the dicta of its decisions (especially its decisions as to "substantive" law) greater deference, actually forms a basis for the opposite proposition.

A better argument for the quasi-legislative role of the Supreme Court focuses on the development of constitutional procedural requirements, such as those for justiciability, the *Miranda* warning, and the congressional duty to make an adequate record of constitutional violations before legislating prophylactically under Section Five of the Fourteenth Amendment (what Henry Monaghan famously termed the "constitutional common law").[202] However, the decisions of the Court establishing, for example, requirements of standing or the *Miranda* warning refute the argument that the Court therefore has the duty or power to act legislatively even in these areas. The standing cases, for example, all developed in the traditional judicial fashion—in cases that presented plaintiffs lacking concrete and particularized injuries that were causally linked to the alleged actions of a defendant, and/or which were subject to judicial redress.[203] And the same is true for *Miranda v. Arizona*,[204] the right to court-appointed counsel, et cetera. These decisions counsel for a stricter approach to holding and dicta in the lower courts, not a more deferential one.

Finally, the limited nature of the Supreme Court's docket is no justification for allowing it to assume a more legislative role by requiring lower courts to treat its dicta as binding (or by way of its equivalent, the preservation of a norm among lower court judges to do so). As an initial

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200 28 U.S.C. §§ 2071–2072 (2012).

201 28 U.S.C. § 2072(b).

202 *See generally* Henry Paul Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1976) (establishing, defining, and defending the idea of constitutional common law).

203 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 62 (4th ed. 2011) (discussing standing doctrine).

204 384 U.S. 436 (1966).

matter, one must recognize that the size of the Supreme Court's docket is overwhelmingly discretionary—the Court could, at any time, increase the number of cases far beyond the 80 or so it currently decides each year. Thus, if the Court collectively feels constrained in fulfilling its iterative law-development role, it has the remedy within its own grasp.[205]

Beyond this simple practical concern, though, lies a more theoretical justification for the limited docket of the Court. The finite nature of judicial resources and the limited time in which the Court must do its business ought to operate as an assurance that the Court will select for its review only truly "national" questions—circuit splits, important issues of rights violations in the states, and structural constitutional issues—not mere "error correction" cases.[206] The idea that only the Court's holdings in such cases should be treated as binding places an important check on the temptation of any Supreme Court Justice to prospectively "settle" all conceivable aspects of such national issues for all time, even where the case does not present most of them.

These points take on special significance where the Supreme Court decides a case by articulating a rights-limiting categorical rule, as it did in *Garcetti*. Prior to the Court's decision in *Garcetti*, a plaintiff in Mr. Ceballos's shoes would have had to fight an uphill battle to have his claim recognized.[207] The well-understood interests of a public legal employer to ensure the correctness and competence of the written legal work of its employees would have provided it with broad discretion to regulate that work, and the *Garcetti* defendants would almost certainly have won their Supreme Court case on that ground.

But the defendants would have had to make their showing of a managerial interest strongly enough to override Mr. Ceballos's speech interests and the corollary interests of the public in receiving that speech. At a minimum, the employer would likely would have had to establish that the content of the speech damaged the mission of the District Attorney's Office

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205 *But see* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1219–20 (2012) (presenting an empirical analysis tending to show that the shrinking docket is the result of ideological polarization and the removal by Congress of much of the Court's mandatory appellate jurisdiction). Notwithstanding this study and others like it, the Court's members do retain significant discretion to increase their docket. They need only come to agreement to do so, and if they do not, at least in part due to political ideology trumping the need for law development, then expanding the scope of their lawmaking power in individual cases by softening the distinction between holding and dicta would seem a particularly poor remedy.

206 *See* Chad Oldfather, *Error Correction* 85 IND. L.J. 49, 49 (2010) (discussing how courts move on from cases without errors).

207 *See* Nahmod, *supra* note 22 (discussing how the *Garcetti* decision limited the First Amendment); Secunda, *supra* note 21 (discussing how *Garcetti* adopted the foundational principle that public employees must either be categorized as employees or citizens).

in fact, rather than in theory or assumedly, as the *Garcetti* Court opined.[208] In reducing the inquiry to a single question—whether Mr. Ceballos spoke pursuant to an official job duty—the Court made it so no plaintiff in Mr. Ceballos's shoes would ever have the right to demand such a showing. In so doing, the Court limited the rights of all such prospective First Amendment plaintiffs from the rights that they possessed under the status quo ante. The Court certainly had the power to make such a change, which merely was a choice between the constructive elements of rules and standards. But how the Court chose to defend and justify its rule only amplified the concerns discussed above relating to the lower courts' undue deference toward Supreme Court dicta.

B. Vertical Separation of Powers

The Honorable Pierre Leval, a judge on the Second Circuit, commented in a public address on the tendency of lower courts to apply Supreme Court dicta as case holdings: "Anything the Supreme Court says should be considered with care; nonetheless, there is a significant difference between statements about the law, which courts should consider with care and respect, and utterances which have the force of binding law."[209] Judge Leval justified this distinction based on the constitutional functions of the judicial branch, and that more familiar, "horizontal" view of the separation of powers is almost all of the justification that was necessary.

But the separation of powers also has a "vertical" dimension within the judiciary, which, unlike the legislative and executive branches, is composed of a hierarchy of decision makers, each beholden to the one above it.[210] This vertical separation of powers dimension calls upon the members of the lower echelons in the hierarchy to "check" those on the higher echelons when they act outside their authority. In the judiciary, that "check" exists in an adherence to the distinction between holding and dicta.

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208 *See* Scott R. Bauries, *The Logic of Speech and Religion Rights in the Public Workplace*, 19 MARQUETTE BEN. & SOC. WELFARE L. REV. (forthcoming 2018) (criticizing the *Garcetti* decision on this basis).

209 Leval, *supra* note 24, at 1274 (2006).

210 *Cf.* Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999). Professor Nourse introduces the conception of the separation of powers in a vertical dimension, which illustrates effects that shifting duties among the three federal branches have on the states and the people and aids in understanding how horizontal conflicts might be resolved more realistically. *Id.* at 751–52. The vertical view offered in this Article is distinct from Nourse's conception because it focuses on internal verticality within one branch. But it is also consistent with Nourse's overall project—as higher courts assume legislative authority by articulating legal rules beyond the cases and controversies before them, whether through the consideration of non-pertinent hypotheticals or the phenomenon of over-justification, this shift in power has the effect of moving law development away from the people. Lower courts can help police this shift by checking the higher courts from below within their own vertical dimension.

Where the Supreme Court goes beyond a case that it, in its discretion, has accepted for review, the Court has assumed a power that it does not possess—the power of generative, rather than iterative, lawmaking.[211] The judicial power under the Constitution is not one of prospective, general lawmaking—that power is clearly and explicitly designated as a power of the legislative branch.[212] Of course, all courts make law, but their efforts in doing so are efforts at resolving "cases" and "controversies" one by one—the power that the Constitution explicitly designates as "the judicial power."[213] Where judges make law, then, they properly do so iteratively, as a means of resolving particular disputes, not generatively, as a means of prospectively governing transactions and occurrences unlike the ones necessitating the court's decision.[214]

Similarly, where appellate courts dress their holdings up with justifications that either muddy the waters, as Justice Kennedy's opinion in *Garcetti* did, or take account of hypothetical issues not before the court, they assume power to, essentially, decide matters without taking full responsibility for deciding them.[215] Vertical stare decisis, then, can operate as a limiting principle in the realm of categorical rules.[216] All that needs happen is for lower courts to read appellate courts' rules—and especially the Supreme Court's rules—carefully and hold those courts to what they have established, and no more. In this way, the lower courts can act as a check on the Supreme Court, and the circuit courts, when those courts seek to frame their decisions articulating rules in ways that obfuscate what those rules actually are. Cabining rhetoric above is a necessary precondition for cabining discretion below.

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211 *See* Leval, *supra* note 24, at 1250 ("We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding—in disguises, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess.").

212 *Id.* at 1259.

213 *Id.*

214 For a thoughtful discussion of generative lawmaking within a dispute resolution process, see generally Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

215 *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

216 Leval, *supra* note 24, at 1282.

C. Neoformalist Constitutional Construction and the Judicial Craft

However, it is not clear that the lower courts are up to this task. The pervious Sections discuss several justifications that commentators have offered for allowing the Supreme Court to define its holdings as broadly as it chooses. As the analysis shows, each of these justifications fails, but the fact that these justifications exist lends credence to the idea that lower courts are currently oriented to give undue respect to every Supreme Court utterance.[217] The broad misapplication of the *Garcetti* rule in the lower courts supports this view.[218] In the context of categorical rule development, this deference is dangerous, as it presents the possibility—even the likelihood—that any errant statement in a majority opinion seeking to justify the Court's rule in another way can be construed as another dimension of the rule itself, even if a selectively quoted section of that justification contradicts the rule itself—as the "owes its existence" and "course of performing" *dicta* did in *Garcetti*.

Lane illustrates very clearly that this danger portends significant confusion and uncertainty in the application of a categorical rule in the lower courts—directly contracting the neoformalist values underlying the choice of rules over standards. Thus, appellate judges—and especially Supreme Court Justices—who seek to develop constitutional doctrine through categorical rules should take care to minimize fodder for the justifications above.

This is especially true where the Court articulates a categorical rule that limits constitutional rights protections. Because the *Garcetti* rule is a rights-limiting rule, the circuit courts' expansive applications of it had the especially pernicious effect of *further* limiting rights, and in a way that faithful readers of the *Garcetti* decision would not have been able to predict ex ante. Considering the goals of neoformalist constitutional construction—to foster greater predictability and uniformity in the law by cabining judicial discretion—this set of results ought to be of concern. If the Court's majority crafted the *Garcetti* rule with these neoformalist goals in mind, but the lower courts nevertheless went on to apply the rule directly contrary to the reservations, caveats, and boundaries the Court placed around the rule, then one might reasonably question the usefulness of categorical rule development in furthering neoformalist goals.

The remedy for this problem is judicial clarity. Those who truly adhere to the neoformalist values must nevertheless internalize a healthy skepticism of the lower courts' own adherence to their concomitant responsibility to check the Court from below through strong stare decisis norms and an adherence to the holding-dicta distinction. The mistake in *Garcetti* was in the majority's speaking only to the dissenters and the respondent, rather than to

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217 *Id.* at 1274.

218 *See supra* Part II (reviewing *Garcetti* and is misapplication in the lower courts).

the lower courts that would have to apply the case's rule. Greater attention to the task in which the Court was engaged—the development of a rule that would then have to be applied in numerous subsequent cases below—would likely have yielded an opinion of more brevity, and more clarity. Unless lower courts broadly show greater attentiveness to their duty to check the Court from below, the Court's remaining neoformalists (and those leaning that way) must do so for them.

CONCLUSION

The foregoing discussion is somewhat aimed at a judicial audience—particularly a judicial audience with neoformalist tendencies or sympathies, one that prefers rules to standards where possible. It argues for two changes in judicial practice. One is for appellate judges sitting in the "construction zone"—and especially Justices of the Supreme Court so situated—to take special care in crafting categorical rules of decision to be applied in the lower courts. Based on the *Garcetti* experience, lower courts can become confused by opinions that over-justify the Court's holdings, using inconsistent terms that either expand or contract what the Court intends to hold. In the case of a restriction on constitutional rights, the Court should take special care not to issue a holding that recognizes a restriction on rights, but then justify that restriction using language that arguably broadens it—no matter how clear the initial articulation of the restriction. This sort of judicial carelessness not only leads to misapplication in the lower courts, but this misapplication also has the deleterious effect of even further restricting rights.

This Article's argument also counsels for deliberate attention in the lower federal courts to rediscovering their vertical separation of powers function of checking the Court from below. The courts can do so by adhering to a stricter version of the holding-dicta distinction as to Supreme Court opinions than that which they have applied thus far to *Garcetti*. Such adherence might first be applied in the context of rights-limiting categorical rules, such as the rule recognized in *Garcetti*. There, the case for less deference to errata in the Supreme Court's opinions is by far the strongest, as any expansion of a rights-limiting rule inherently contracts the scope of rights even further.

Even outside the more obvious context of a rights-limiting categorical rule, however, it is important that lower court judges understand that separation of powers works both vertically and horizontally, and that the lower courts are often the sole means of checking otherwise unchecked expansions of lawmaking power in the Supreme Court. Even a decision that establishes a factor-based standard can needlessly decide issues that the case before the Court does not present or provide plausible grounds for lower courts to read the decision that way. It is important, when that occurs, for lower courts to recognize that their adjudicatory discretion has not been

constrained on these matters further than the facts of the case will permit.

But one might reasonably ask at this point whether the lower courts would even *want* to rediscover that power. Given the extremely lopsided treatment the *Garcetti* rule has received, with many more lower court decisions expanding on its terms than adhering to its narrow scope, it may be that the federal judiciary is content to allow the Court's errata to expand the Court's rulings whenever possible—at least until a corrective such as *Lane* comes along. In fact, based on *Garcetti*'s progeny, the majority of current judges may even be eager to see this happen. If so, then conscientious adherents to neoformalist preferences—at least when sitting in the portion of the "construction zone" where choices must be made between rules and standards—would do well to limit, or even completely eliminate or de-legitimate, errata in rule-choosing decisions, articulating the holding clearly and specifically, and eschewing all justifications not strictly necessary to it. Failing that, these adherents may see virtue in preferring standards to rules.