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### Not as Bad as You Think: Why *Garcetti v. Ceballos* Makes Sense

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**NOT AS BAD AS YOU THINK:  
WHY *GARCETTI V. CEBALLOS* MAKES SENSE**

*Kermit Roosevelt III\**

INTRODUCTION

In 2006, *Garcetti v. Ceballos*<sup>1</sup> introduced a new refinement to analysis of government employee speech rights. Prior to that decision, an employee’s claim that termination or other job-related sanction infringed her First Amendment rights was governed by what was frequently called the *Connick-Pickering* analysis.<sup>2</sup> If the employee’s speech was on a matter of private concern, then it was unprotected. If it was on a matter of public concern—a category whose contours have remained vague<sup>3</sup>—it could be the basis for punishment only if the employer’s interest in governmental efficiency outweighed the individual’s interest in speech.<sup>4</sup> *Garcetti* added a new threshold inquiry. First Amendment protection attaches, the Court said, only when employees speak “as citizens,” and not when they speak “pursuant to their official duties.”<sup>5</sup>

The reaction to *Garcetti* has generally been negative<sup>6</sup>—unwarrantedly so, I believe. In this Article, I will describe the deci-

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1 547 U.S. 410 (2006).

2 The name comes from two Supreme Court decisions, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 142 (1983).

3 See *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (acknowledging that “the boundaries of the public concern test are not well defined”); Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 101–02 (2006) (stating that *Connick* “provided little guidance as to how to draw the lines between what is ‘a matter of public concern’ and what is ‘a matter of private interest.’”).

4 How this balancing is to be conducted is also not clear, but it presumably means that employees may be disciplined for speech that poses a substantial threat of interfering with the operation of the government employer. The Court has noted that employers’ predictions about disruption deserve substantial deference. See *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (“[W]e have given substantial weight to government employers’ reasonable predictions of disruption, even when the speech involved is on a matter of public concern . . .”).

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

6 See, e.g., Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick’s Unworkable Employee/Citizen Speech Partition*, 8

sion and how I believe it should be understood. I will then consider several of the main objections to *Garcetti* and some important issues that it leaves unresolved. Last, I will suggest a path for the Court to take going forward.

### I. THE *GARCETTI* DECISION

Richard Ceballos was a calendar deputy in the Los Angeles District Attorney's office.<sup>7</sup> In February 2000, a defense lawyer approached him to suggest that a warrant used against his client was obtained through a perjured affidavit. Ceballos investigated this claim and ultimately agreed. He conveyed his concerns to his superiors and memorialized them in a disposition memorandum recommending dismissal of the case. His superiors called a meeting to discuss the affidavit, at which the discussion "allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case."<sup>8</sup> Ceballos's superiors ultimately decided to go forward with the prosecution. The defense moved to challenge the warrant, and Ceballos

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J.L. SOC'Y 45, 83–86 (2007) ("[T]he *Garcetti* majority is content to draw a line that will have the effect of shutting out some employees who expose government wrongdoing before any *Pickering* balancing analysis can be undertaken."); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 670, 683 (2008) (characterizing the *Garcetti* ruling as "an all-or-nothing approach"); Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1470–74 (2007) (criticizing the holding in *Garcetti* as "denigrat[ing] both the individual and the public interests in favor of public employers' interest in unfettered control over employees' job performance"); Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 144–53 (stating that "[t]ethering public employee speech rights to the 'liberties the employee might have enjoyed as a private citizen' seems to submerge the instrumental value of those rights"); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 569–81 (2008) (asserting that the *Garcetti* opinion "is fundamentally inconsistent with the self-government rationale of the First Amendment"); Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2119 ("[T]he distinction between speech 'as an employee' and speech 'as a citizen' is ultimately not as useful."); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1192–1202 (2007) (stating that "the preferable course of action would have been to retain the standard the lower courts had been following for decades, while perhaps re-emphasizing the importance of the government's interest in this particular context"); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1809–13 (2007) (proposing that a different analysis should be applied to public employee speech cases, where a court "determine[s] whether the constitutional rights of the individual cannot be recognized without substantially disrupting the public employer's enterprise").

<sup>7</sup> *Garcetti*, 547 U.S. at 413.

<sup>8</sup> *Id.* at 414.

testified in the support of their motion, but the trial court rejected the challenge.

Following these events, Ceballos claimed, his employers retaliated against him for the memo in various ways, including reassigning him and denying him a promotion. He sued on the theory that this treatment violated his First Amendment rights. After losing at the district court level, he prevailed on appeal. The Ninth Circuit applied the *Connick-Pickering* analysis, finding that the content of the memo was on a matter of public concern and that there was no evidence it had disrupted the operation of the district attorney's office.<sup>9</sup>

The Supreme Court, however, reversed the Ninth Circuit. Public employee speech doctrine, it observed, reflected two "overarching objectives."<sup>10</sup> First, it sought to allow the government employer to operate: "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions."<sup>11</sup> Second, and in some tension with the first objective, it "recognized that a citizen who works for the government is nonetheless a citizen."<sup>12</sup>

Fundamentally, these overarching objectives amount to an attempt to promote two different kinds of equality simultaneously. First, the Court wants to promote equality between government and private employers with respect to control over the workplace and employee performance: the government employer should have managerial authority that at least resembles that of the private employer. Second, it wants to maintain equality between government employees and other citizens: government employees should not be worse off in constitutional terms, i.e., they should not be required to surrender their First Amendment rights as a condition of public employment.<sup>13</sup>

An obvious tension exists between these two kinds of equality, at least superficially. (I will suggest that thinking more carefully about the scope of First Amendment rights can eliminate or at least reduce the tension.)<sup>14</sup> If the government employer has the same power over at-will employees as the private employer, then public employees seem to have lost their First Amendment rights. Conversely, if public employees have the same speech rights as ordinary citizens, the gov-

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9 Ceballos v. Garcetti, 361 F.3d 1168, 1173–80 (9th Cir. 2004).

10 *Garcetti*, 547 U.S. at 418.

11 *Id.*

12 *Id.* at 419.

13 For a valuable attempt to reformulate employee speech doctrine in terms of this equality, see Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, WM. & MARY L. REV. (forthcoming 2012).

14 See *infra* Part III.

ernment employer has drastically less managerial authority than the private employer.

Since it is not possible to attain both kinds of equality simultaneously, the *Connick-Pickering* analysis attempts to set rules for when each kind should prevail. The government employer cannot visit negative consequences on employees for speech on a matter of public concern (i.e., public employees are equal to ordinary citizens) unless it has “an adequate justification for treating the employee differently from any other member of the general public.”<sup>15</sup> Such a justification will, or may, exist when the speech “affect[s] the entity’s operations,” especially if it affects operations in a way that a private citizen could not (such as disrupting the workplace). Hence the government employer still has authority to protect the efficiency of its operations (i.e., government employers are similar to private employers).

This analysis manages to carve out areas where one form of equality will prevail. For speech not on a matter of public concern, there is no protection: government employers are fully equal to private employers. And for public concern speech that does not affect the employer’s operations, adverse treatment is prohibited: public employees are equal to ordinary citizens. But the margins of the realms of managerial authority and citizen speech are difficult to delimit. In many cases, there is an unavoidable conflict,<sup>16</sup> and it is unsurprising that in practice the attempt has ended up with an unclear balancing test.

*Garcetti*, in the Supreme Court’s view, was an easier case. The “controlling factor,” the Court said, was “that his expressions were made pursuant to his duties as a calendar deputy.”<sup>17</sup> This fact removed his expression from the *Connick-Pickering* realm: “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.”<sup>18</sup>

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15 *Garcetti*, 547 U.S. at 418.

16 See Kermit Roosevelt III, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L. J. 1233, 1239–41 (1997) (discussing the differences between government and private employees). In particular, there is no way to get around the fact that an employee who, speaking as a citizen, criticizes her superior, has to go back and work for that person. How to deal with this is perhaps the hardest issue presented by public employee speech cases.

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

18 *Id.*

II. THE EASY CASE FOR *GARCETTI*

The Court did not give an elaborate explanation for why speech produced pursuant to official duties should be unprotected. It gestured in two directions. First, it suggested that speech produced pursuant to official duties was in some sense government speech. The Court's new rule, it said, "simply reflects the exercise of employer control over what the employer itself has commissioned or created."<sup>19</sup> Second, it suggested that this kind of speech should be conceptualized as job performance rather than speech. "When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance."<sup>20</sup>

Both of these rationales have some superficial plausibility. An individual speaking for the government cannot claim a First Amendment right to say what he wants; when the government hires someone to speak for it, it can of course specify the content of that speech. (A president's speechwriter, for example, has no First Amendment right to write speeches criticizing presidential policies.) And for the second, the reasoning is almost syllogistic. The First Amendment should not prevent an employee from being fired for poor job performance. Sometimes, job performance will take the form of speech. Thus, when speech is job performance and it is bad, the First Amendment should not prevent termination on those grounds. (Firing an employee whose reports are poorly reasoned or factually flawed should not raise a First Amendment issue.)

*Garcetti's* facts do not fit especially well with the government speech rationale. Ceballos was presumably supposed to exercise independent judgment in writing his disposition memo, so the case did not present a situation in which a government employee, hired to say one thing, said something else instead. But they do fit fairly well with the job performance one. Ceballos analyzed the facts and law relevant to the procurement of the warrant and believed that misconduct had occurred. His superiors disagreed; they thought his memo was bad analysis.<sup>21</sup> It would be odd if the First Amendment prevented

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<sup>19</sup> *Id.* at 422.

<sup>20</sup> *Id.*

<sup>21</sup> This, at least, is the impression one gets from the Supreme Court's recounting of the facts.

government employers from favoring employees who gave them good memos and disfavoring those who gave them bad ones.<sup>22</sup>

Nonetheless, academic reaction to *Garcetti* has been largely negative. The decision has “made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers,”<sup>23</sup> writes Paul Secunda. Sheldon Nahmod calls it “unsound as a matter of First Amendment policy because it under-protects public employee speech that is vital to self-government.”<sup>24</sup> Critics of *Garcetti* tend to raise five main objections. Speech pursuant to official duties may still be valuable from a First Amendment perspective, they say; it should not be excluded from the Amendment’s protection. The line the decision draws between job-performance and non-job-performance speech is unclear. It creates an anomaly by forcing employees to take their complaints outside official channels if they wish to receive First Amendment protection. It may allow employers to exert broader control by defining employees’ duties broadly. And it may threaten academic freedom, since teachers and professors speak pursuant to their duties.

These are all reasonable concerns, warranting response.<sup>25</sup> I will attempt to address them in the third Part of this Article. First, though, I want to consider the premise that underlies them all: that allowing a government employer to discipline or terminate an employee for speech amounts to stripping that speech of First Amendment protection and thereby making the public employee worse off than the ordinary citizen.

This premise seems to be generally taken for granted. And indeed, there is a fairly straightforward way of framing the issue that generates it. The government can take away the jobs of public em-

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22 Critics of *Garcetti* presumably do not want to prevent government employers from basing decisions on the quality of work; they only want to prevent retaliation for exposure of misconduct. A whistleblower statute is a tool designed specifically to do that, and I think it is probably a better solution than the much broader First Amendment. As a general matter, it seems obvious that judgments of the quality of work should be left to employers, even when the work takes the form of speech.

23 Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 77 *FIRST AMENDMENT L. REV.* 117, 117 (2008).

24 Nahmod, *supra* note 6 at 563. For more favorable assessments, see Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 *BERKELEY J. EMP. & LAB. L.* 175 (2008); Lawrence A. Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33 (2008).

25 Their proponents, of course, also owe a response to the worry that giving First Amendment protection to official duty speech will prevent employers from favoring or disfavoring employees based on the quality of their work when the work consists of nondisruptive speech about matters of public concern.

ployees, but not ordinary citizens, for things they say. Thus, they have lesser First Amendment rights.

But there is also a way of framing the issue that generates the opposite conclusion. Government employees cannot be fined or thrown in jail for speech any more than a private citizen. The government cannot use its coercive powers against them. So how are their First Amendment rights lesser?

Because they can lose their jobs for speech that their employer does not like, is the obvious response. But so of course can private citizens. An at-will private employee has *no* constitutional protections, not even the somewhat anemic *Connick-Pickering* balancing test, against dismissal for speech her employer dislikes. If we compare public employees to private *employees*, rather than to private *citizens*, the public employees actually look better off in terms of protection for speech.

Again, there is an obvious response: that is simply a consequence of the state action requirement. First Amendment rights run only against the government. At this point, though, the obvious response starts to look a little like question-begging. Yes, with minor exceptions, the Constitution protects individuals only against state action.<sup>26</sup> But why should it protect equally against state action in every form? Why should it be indifferent as to whether the state acts as a sovereign, making and enforcing laws, or as an employer, evaluating job performance? In fact, it is not. The Court has acknowledged that its employee speech jurisprudence gives the government greater latitude when acting as employer.<sup>27</sup> Nor is this the only example: the Supreme Court's Dormant Commerce Clause doctrine explicitly exempts states' non-sovereign activities from constitutional scrutiny through the "market participant exception."<sup>28</sup> So it is worth asking whether, why, and how the First Amendment should constrain the government acting as employer.<sup>29</sup>

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26 The Thirteenth and Twenty-First Amendments, for example, contain constitutional restrictions that bind private parties.

27 See *Waters v. Churchill*, 511 U.S. 661, 671–72 (1994) (“[T]he government as employer indeed has far broader powers than does the government as sovereign.”). It has not explained why, and that is one of the things I hope to accomplish in this Article.

28 For a description of the doctrine, see generally Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. CHI. L. REV. 615 (1993).

29 When the Supreme Court, in the mid-twentieth century, began to define the speech rights of public employees, it skipped this issue entirely. The principle that government employees should not have to surrender First Amendment rights as a condition of public employment tells us nothing until we figure out what their First Amendment rights are, in the first place.

### III. WHY PROTECT AGAINST THE NONSOVEREIGN GOVERNMENT?

#### A. *General Answers*

Why should individuals have constitutional rights against the government when it acts outside its sovereign capacity? At a high level of generality, I find this a difficult question. There is likely not a single answer that works for every constitutional right and every nonsovereign context. In this Section I am going to focus on government employment and the First Amendment, since that is where I hope a theoretical investigation will produce a doctrinal payoff.<sup>30</sup> (Analysis of Fourth Amendment rights in public schools, for instance, might look very different.) Though a successful answer will have to focus on a specific right and a specific context, I will start by looking at some attempts to provide an answer on a more general level.

##### 1. *The Constitution Says So*

The problem with this answer is that it is clearly false. The Constitution does not say that the rights it confers bind the government uniformly in every context. The First Amendment, in fact, seems to say the opposite. It specifies one branch of the federal government—Congress—and one form of government action—the making of laws.<sup>31</sup> There are textual justifications, the Due Process or Privileges or Immunities Clause of the Fourteenth Amendment, for imposing similar requirements on states. And there are plain practical justifications for extending the ban on speech restrictions to the executive and the judiciary. But it is simply not true to say that a government employer firing an employee falls within a prohibition on Congress making a law in any plain or straightforward way. As far as the text of the Constitution goes, the natural reading suggests that termination of government employment should not raise any First Amendment issues.<sup>32</sup>

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<sup>30</sup> For a similar investigation, articulated in terms of the unconstitutional conditions doctrine, see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1028–35 (2005).

<sup>31</sup> See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

<sup>32</sup> This view is encapsulated in Justice Holmes’s famous observation that a police officer fired for speech “may have a constitutional right to talk politics, but he has no right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

## 2. *The Government Is the Government*

Another potential answer comes not from the text of the Constitution but from the state action doctrine, which is a deep-rooted principle of our constitutional law. The Constitution does not protect us against private parties, this doctrine holds. It does protect against the state, and why should it matter in what form state power is exercised?<sup>33</sup>

The state action doctrine is notorious for the puzzles it creates, and this Article is not the place to attempt to resolve them. I will suggest, though, that trying to divide actors into conceptual categories of “state actors” and “private parties” is probably not the right way to go about the analysis. If we want to decide the scope of constitutional rights in unclear cases—that is, whether certain individuals can claim rights in certain situations and against certain actors—we will do better to ask what purpose those rights serve, and whether that purpose would be promoted by extending the rights to this set of circumstances.<sup>34</sup>

I will try to do that in the following Section. Here, I want only to point out that the fact that a government employer is, in some sense, “the government” does not necessarily lead to the conclusion that it should be subject to the same constitutional constraints as the government acting in its sovereign capacity. The state actor/private party distinction does correspond to some real differences that are relevant to the scope of constitutional rights. But with respect to many of them, the government as employer falls on the private party side of the line. I will examine a few of these differences to demonstrate that point.

One difference between the government and private actors is that the government is authorized to demand obedience to its lawful commands and back those demands with force. It has a coercive power that private parties do not, and so it poses a greater threat to liberty. The government can put you in jail, while private parties

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<sup>33</sup> See OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 62 (1996) (suggesting that the employer/sovereign distinction provides no grounds for disparate powers).

<sup>34</sup> This is essentially the methodology that interest analysis uses to determine the scope of rights in the field of conflict of laws. I have suggested elsewhere that it can profitably be applied to decide the extraterritorial scope of constitutional rights. See Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2066 (2005) (applying methodology to speech clause). The issue of government employment speech is essentially the same: it is the question of what sorts of government action are constrained by the First Amendment.

cannot. But of course the government as employer cannot put you in jail either. It cannot do to you anything more than a private employer could.

Another difference between the government and private actors is that the reach of government is broader. If some private party (an employer or school administrator, for instance) tries to impose rules I don't like, I can decline to deal with him: I can quit the job, or attend a different school. But I cannot escape the government's rules in that way; I cannot opt out of state or federal laws.<sup>35</sup> Here again, though, the non-sovereign government looks more like the private party. Government employment is not inescapable in the way that laws and regulations are.<sup>36</sup>

One might also suppose that there is a difference between the state and private actors in that the things the Constitution forbids are only bad when the government does them. Put in formal terms, this is either a libertarian shibboleth or a restatement of the state action doctrine: private parties may interfere with your enjoyment of rights, but only the government can violate them.<sup>37</sup> In less formal terms, it has some appeal. Invidious discrimination by the government is anathema, but private discrimination (in, e.g., dinner party invitations or Boy Scout leadership) is tolerated, even constitutionally protected.<sup>38</sup> Still, the distinction has normative force in only limited contexts. An unreasonable seizure by the government is bad and violates the Fourth Amendment. But unreasonable seizures by private parties are also bad; we call them theft. Our interests in life, liberty, and property are protected against private parties by statutes, and no one thinks that private murder is less pernicious because it is not a due process violation. This distinction turns out to mark a difference in only a limited set of cases; it is not successful as a general answer.<sup>39</sup>

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<sup>35</sup> I can, of course, move to a different state or even a different country. But exiting the political community is a very costly way of avoiding regulation.

<sup>36</sup> Public schooling is a different issue, since it is costly to opt out, and perhaps the inescapability of government authority provides a better justification for constitutional rights against government educators than it does against government employers.

<sup>37</sup> See *The Civil Rights Cases*, 109 U.S. 3, 17–18 (1883) (articulating this doctrine).

<sup>38</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (affirming Scouts' right to exclude gay scoutmasters).

<sup>39</sup> In fact, it should probably make us look more closely at situations where constitutional restraints on government do not parallel statutory restraints on private parties. Sometimes this will make sense; other times it will not. In the First Amendment context, governmental interference with the marketplace of ideas is a core First Amendment violation, but the Amendment itself has been held to forbid state attempts to prevent private parties from distorting public debate, which is peculiar.

The most significant distinction between the government and private parties is that the government is our creation and our agent. We have an interest in controlling its behavior, no matter the form, that we don't with private parties. But this observation, though true and important, does not take us all the way to a conclusion. It tells us why we might think that constitutional rights extend to nonsovereign government actions, but not whether they should. To answer this second question, we need to think more about what particular constitutional rights—here, the First Amendment—are for.

*B. What the First Amendment Is for*

Speaking at a high level of generality, we can divide accounts of the First Amendment into two main categories.<sup>40</sup> Speaker-centered theories suggest that the value and purpose of the speech right is its contribution to free expression as a means of individual human flourishing. Free expression is important to those who engage in it, on this account, and we protect it primarily to protect their interests.

Listener-centered theories, by contrast, focus more on the interests of those who receive speech than those who create it. Protecting speech is important, on this account, because receiving information is valuable. Most centrally, listener-centered theories tend to suggest, a free flow of information is essential to allow the people to monitor their government and debate policy.

The Supreme Court has never endorsed one theory to the exclusion of the other.<sup>41</sup> It tends to nod more towards the listener-centered view, but while it sometimes says that political speech is at the core of First Amendment protection,<sup>42</sup> it extends “full” protection

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<sup>40</sup> For a more elaborate discussion of these two models of the First Amendment, see Roosevelt, *supra* note 16, at 1250–52.

<sup>41</sup> Frequently, discussions will include both. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 428–29 (2006) (Souter, J., dissenting) (“This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker’s interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose.”).

<sup>42</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (characterizing free speech as “the matrix, the indispensable condition, of nearly every other form of freedom”); see also *Carey v. Brown*, 447 U.S. 455, 467 (1980) (characterizing speech about public affairs as resting on “highest rung of the hierarchy of First Amendment values”); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (noting that “speech concerning public affairs is . . . the essence of self-government”).

to nonpolitical speech.<sup>43</sup> Still, it is worth considering the theories separately in terms of their implications for appropriate protection of government employee speech.

From the speaker-centered perspective, the rationale for prohibiting employment decisions based on speech is not at all clear. Yes, speech is a nice means of self-actualization, and yes, employees who cannot be fired for their speech are made better off by that rule. But private sector employees get along well enough without it, and it seems a little bit strange that speech protection should be, in effect, a perk of government employment. We do not seem to think that being fired for speech is such a terrible thing that it should never happen to anyone (if we did, we would presumably have statutory prohibitions on analogous private conduct), and it is not obvious from the speaker-centered perspective why such a firing is any worse when done by the government. It is not obvious, that is, why the government, when it acts like a private employer, should not be treated like one.<sup>44</sup>

In terms of the actual contours of First Amendment rights, then—what we might call constitutional meaning<sup>45</sup>—it is not clear to me that the speaker-centered perspective gives us an argument for constitutional protection of public employee speech at all. A fortiori, *Garcetti* is correct from this perspective. But it is worth remembering that we craft doctrinal rules to do things other than precisely track constitutional meaning.<sup>46</sup> There might well be a case to make that effective protection of other constitutional rights—freedom of religion, or racial equality, or prohibitions on partisan hiring for non-policymaking jobs—requires protection for limited kinds of speech. There might even be an argument that the need to protect these limited kinds of

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43 See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (stating that “our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection”).

44 See *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (noting that Congress “wished the Postal Service to be run more like a business” (citation omitted) (internal quotation marks omitted)). It is an interesting question, and one I have not resolved to my satisfaction, whether it might be worthwhile distinguishing between the government as employer in the execution of its sovereign functions—e.g., as the employer of police officers and prosecutors (such as Ceballos)—and the government as employer in the execution of non-sovereign functions—e.g., as the employer of doctors and professors in state-run hospitals and schools.

45 See KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 22–36* (2006) (explaining the difference between doctrine and meaning).

46 *Id.*

speech supports broader prophylactic protection for employee speech: First Amendment freedoms, the Court has noted, “need breathing space.”<sup>47</sup> All the same, the narrow *Garcetti* carveout for speech that constitutes job performance seems quite unobjectionable from this perspective.

Things look somewhat different from the listener-centered perspective. Here, in deciding the scope of First Amendment rights the goal should be to protect the flow of information to the public, especially the information that is most valuable to self-governance: arguments about policy and information about the workings of government. From the speaker-centered perspective, I said, there is no obvious reason why the government as employer should be treated differently from a private employer: the sovereign/non-sovereign distinction may be more important than the government/non-government distinction. But from the listener-centered perspective, there are reasons for treating the government employer differently from the private employer.

First, there is the problem the Court has alluded to as “leveraging” of the employer-employee relationship.<sup>48</sup> The concern here is that the employer will use his power over the employment relationship to regulate unrelated speech—that a state teacher, for instance, might be punished for writing a letter to the editor critical of the governor, even if the area of criticism has nothing to do with education. When, as in my example, this leverage is deployed in favor of the government (and perhaps even with the government’s knowledge and approval), the effect is to give the sovereign the ability to regulate speech in a way that it could not through the exercise of its sovereign powers.

That is troubling, from the listener-centered perspective, because the sovereign is using its powers to skew public debate by suppressing criticism, and I think it is sensible to say that the First Amendment limits the government employer’s ability to do this.<sup>49</sup> Still, it is not the

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<sup>47</sup> NAACP v. Button, 371 U.S. 415, 433 (1963).

<sup>48</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (“The First Amendment 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.”).

<sup>49</sup> Imposing this limit is basically what the *Connick-Pickering* test attempts to do: if the speech is on a matter of public concern, it cannot provide a basis for dismissal unless it interferes with the employer’s operations. The restriction of First Amendment protection to speech on matters of public concern is hard to explain as an interpretation of the Amendment’s meaning, and perhaps it is best understood as an underenforcing doctrinal rule. The Court may have drawn the doctrinal line more narrowly than the best understanding of the First Amendment’s scope, that is, because it believed that abusive government action

most significant difference between the government and the private employer. Indeed, much the same danger exists with private employers—one could imagine a corporation that fired its employees for speaking out against the political party with which it had allied itself, or which it had captured. This is slightly different, because the corporate employer is not a direct extension of the sovereign, but one can imagine connections close enough to be troubling.<sup>50</sup>

The most significant difference between the government and the private employer is that government employees have superior information about the workings of government. Disclosing that information to the public is part of the core of the listener-centered First Amendment: it allows citizens to monitor and evaluate the performance of the government. (The role of the First Amendment, from this perspective, is to reduce agency costs.)<sup>51</sup> Government employers who are not doing a good job have an obvious incentive to try to suppress such disclosure, and threatening adverse treatment of employees who speak out is a potent way of doing so. The First Amendment should stop them.

Of course, private employees also have superior information about the workings of their businesses, but protecting their disclosures is not as important, for two reasons. First, citizens who worry that a corporation is mismanaged, or acting contrary to their interests, or insufficiently transparent for them to know if either of those conditions obtains, don't have to deal with it. They can avoid its products as consumers; if they are shareholders, they can sell their shares. Citizens cannot exit from their relationship with the government in the same way. Their tax dollars will go to support government agencies no matter what they want. Second, and relatedly, citizens have no legitimate claim to control the behavior of private

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is much more likely and much more harmful (at least as far as leveraging is concerned) with respect to speech on matters of public concern. Attempting to prevent speech-based sanctions for speech not on matters of public concern would probably incur costs that outweigh its benefits. For a discussion of underenforcing doctrine, see generally Roosevelt, *supra* note 45, at 25–26.

50 One response to this problem might be to say that the First Amendment should play some role in that context as well. State laws allowing recovery for defamation of public figures without a showing of actual malice are unconstitutional because they produce a climate unacceptably hostile to speech. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (holding that such laws are “constitutionally deficient” because they fail “to provide the safeguards of freedom of speech”). We might say the same thing about state laws allowing corporations (at least, for-profit corporations) to fire employees for political speech. With defamation, at least truth was a defense; with at-will employment, there is no defense at all.

51 See Roosevelt, *supra* note 16, at 1243–49 (framing the issue in terms of agency costs).

employers, except to the extent that they have rights as corporate shareholders. The government, by contrast, is the agent of the people and should be responsive to their will. It is supposed to be doing what we want, and reports from the front lines can tell us whether it is doing so or not.

The consequence of this analysis is the following. A look at the theoretical underpinnings of the First Amendment suggests that there is a good reason to treat the government employer differently from the private employer. But it is a relatively narrow one. Speech from employees to the general public, which will allow the public to monitor the government's performance, is the speech we should be most concerned about protecting.<sup>52</sup> There is a secondary concern about speech that is unrelated to the workplace, in that we do not want the sovereign government to be able to leverage the employment relationship in order to silence speech it disfavors. In the next Section, I will use the perspective developed here to shed light on *Garcetti* and the problems that have emerged in its wake.

#### IV. GARCETTI AND ITS DISCONTENTS

##### A. *How to Read the Decision; Where to Draw Lines*

What we make of *Garcetti* will obviously be affected by how we read it. Justice Souter's dissent, for instance, based several criticisms on the apparent view that *Garcetti* stands for the proposition that speech about the employee's professional duties is unprotected.<sup>53</sup> *Garcetti* explicitly disavows this interpretation, calling it "non-dispositive" that Ceballos's speech "concerned the subject matter of . . . [his] employment."<sup>54</sup> So what speech does *Garcetti* mean to place beyond the bounds of First Amendment protection? As I have suggested already,

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<sup>52</sup> The Supreme Court has repeatedly recognized the value of such speech. See, e.g., *Garcetti*, 547 U.S. at 419 ("Yet the First Amendment interests at stake extend beyond the individual speaker."); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were . . . [public employees] not able to speak on [the operation of their employers] . . . , the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." (citation omitted)); see also *Waters v. Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work. . . .").

<sup>53</sup> Souter objected, for example, that "[t]he effect of the majority's constitutional line between these two cases, then, is that a . . . schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants." *Garcetti*, 547 U.S. at 430 (Souter, J., dissenting).

<sup>54</sup> *Id.* at 421.

I take *Garcetti* to stand for a relatively narrow principle: employees may be evaluated and rewarded or punished based on their job performance, even if that job performance takes the form of speech. The facts of the case fit well with this understanding: certainly it was understood that Ceballos would be evaluated based on the quality of his memos. And there are repeated statements to that effect in the opinion. “Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case,” the Court noted.<sup>55</sup> He “wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do;”<sup>56</sup> he “went to work and performed the tasks he was paid to perform;”<sup>57</sup> he was “simply performing his or her job duties.”<sup>58</sup> The case presents a question of “First Amendment claims based on government employees’ work product.”<sup>59</sup> In the end, the Court concluded, “[t]he fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”<sup>60</sup>

The narrow reading of *Garcetti*, then, would take it to be removing First Amendment protection from speech that constitutes work product or job performance—speech that an employer could reasonably be expected to evaluate for its quality in a performance review. This seems like a manageable line to draw, and nothing in the facts or reasoning of *Garcetti* require us to push any farther.

That said, the rationale does support a bit of an expansion of the unprotected category. The basic idea seems to be that employers should not be prohibited from evaluating employees based on speech, when that speech is relevant to job performance. Work product, like Ceballos’s memo, is the most obvious example of such speech. But employees know, or should know, that they are evaluated based on many things other than work product. A private law firm associate who writes impeccable briefs but is abrasive to the support staff might find himself in trouble at performance review time. An employee who uses an intra-office complaint system to file repeated and baseless grievances is not performing as well as one who does not. So ultimately the conceptual line that *Garcetti* suggests is perhaps better characterized as the line between an individual speak-

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55 *Id.*

56 *Id.*

57 *Id.* at 422.

58 *Id.* at 423.

59 *Id.* at 422.

60 *Id.*

ing as an employee, in the course of his job performance, and one who seeks to step outside the role of employee and speak as a citizen.

The Court did use that formulation as well.<sup>61</sup> And as a normative matter, thinking about the meaning of the First Amendment, it seems quite reasonable. If First Amendment protection of public employee speech should be focused on protecting employees' ability to inform the public about the workings of government, then speech they produce in their role as employee is peripheral.<sup>62</sup> The problem is that this line is much harder to draw. Lower courts have come up with a large number of factors to consider. These include whether the employee was required to produce the speech, or paid for it; the subject matter; whether speech was made up the chain of command; whether it was made at the workplace; whether it purported to represent the views of the employer; whether it derived from special knowledge acquired as an employee; and whether a non-employee could have engaged in equivalent speech.<sup>63</sup>

Some of these factors, like whether the speech was presented as representing the employer's views, seem sensible. Others, such as the subject matter, are largely irrelevant. And treating the use of knowledge gained as an employee as an indicator of employee speech is probably counterproductive; it will tend to remove protection from the most valuable speech, i.e., employee speech that discloses otherwise unknown information about the government's workings. Assessments of the performance of the federal circuits in drawing the lines suggested by *Garcetti* tend to be critical.<sup>64</sup> What is clear is that the employer/citizen divide has proved to be anything but a bright line.

The lack of a bright line raises familiar vagueness concerns. As a general matter, a prohibition will be held unconstitutionally vague if its scope is sufficiently unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>65</sup> The concern is especially acute in the First Amendment context, for

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61 See, e.g., *id.* ("[Ceballos] did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case . . . . [He] acted as a government employee.").

62 Some employees might have the job of communicating to the public, in which case their work product might serve that function. But such an employee is probably best conceived of as speaking for the government, in which case the government would be allowed to dictate the content of the speech.

63 See *Decotiis v. Whittemore*, 635 F.3d 22, 32 (1st Cir. 2011) (listing these factors).

64 For a useful survey, see Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011).

65 *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

when the boundary between the protected and the proscribed is unclear, speakers tend to err on the side of safety. Self-censorship suppresses valuable speech. Consequently, the Supreme Court has noted that with respect to speech, “the [vagueness] doctrine demands a greater degree of specificity than in other contexts.”<sup>66</sup>

If federal judges cannot agree on the meaning and scope of the *Garcetti* rule, it pretty clearly lacks the specificity that the First Amendment requires of statutes. That does not make it incorrect, much less unconstitutional, but it does suggest that it is not a good doctrinal choice. Given the confusion in the circuits, *Garcetti* has turned out to be a bad thing in terms of First Amendment values.<sup>67</sup> The uncertainty it has created is likely to lead public employees to refrain from valuable speech.

Two solutions suggest themselves. First, the Court could limit *Garcetti* according to the narrow reading suggested above: work product, on the basis of which an employee would normally expect to be evaluated for promotion or retention, is unprotected. (It is hard to imagine not following *Garcetti* at least this far. Whatever the *Garcetti* critics want, they cannot intend to apply *Connick-Pickering* analysis to work product: that would make it unconstitutional to promote the deputy who offers legally correct analysis over the one who errs.) Second, the Court could retain the broader understanding of *Garcetti*, under which all speech created in the role of employee is unprotected, but balance out the chilling effect by creating a safe harbor for clearly identified citizen speech. (This might be something like speech directed to the public or other private citizens, engaged in outside the workplace, and prefaced with a “speaking as an ordinary citizen” disclaimer.) Such a safe harbor would allow the production of the speech that I have suggested is most valuable from the First Amendment perspective: speech that informs the public about the workings of the government.

Let us suppose that either of these solutions were adopted—or in other words, set aside the problem of vagueness that has developed. Is *Garcetti* still a bad decision, worthy of the criticism it has received? I

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<sup>66</sup> *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

<sup>67</sup> There have been some examples of what I consider clear errors. In *Brammer-Hoeller v. Twin Peaks Charter Academy*, for instance, the Tenth Circuit, after noting that not “all speech about the subject matter of an employee’s work [is] necessarily made pursuant to the employee’s official duties,” went on to hold that teachers’ discussions of student behavior and school curriculum—made during off-campus meetings not sponsored by the school—constituted expression pursuant to official duty because the teachers were “expected to regulate the behavior of their students” and “paid to execute the Academy’s curriculum.” 492 F.3d 1192, 1204 (10th Cir. 2007).

think not, and in the following Sections I will attempt to respond to the main objections its critics have made.

## B. Objections

### 1. Public Employee Speech Is Valuable

A common complaint about *Garcetti* is that it strips First Amendment protection from speech that is valuable, both to the speaker and to society. For the former, as Justice Souter put it in dissent, “it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day.”<sup>68</sup> And for the latter, the Court has recognized in a majority opinion that “[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”<sup>69</sup>

But on closer inspection, neither of these concerns provides a strong basis to object to the principle underlying *Garcetti*. Public employees probably do value the right to speak about their work, but *Garcetti* does not remove protection from speech *about* one’s job. It removes protection from speech that *constitutes* one’s job. Public employees may also derive satisfaction and self-actualization from their job performance, but that should not be a basis for prohibiting employers from evaluating that performance. As noted earlier, if the only interest at stake is that of the individual employee—if we adopt a speaker-centered view of the First Amendment—the case for any First Amendment rights against the employer strikes me as weak.<sup>70</sup>

What about the second concern, the contribution to public debate? That takes us to the listener-centered model of the First Amendment, and it identifies the speech I have said is most important, the disclosure of information that helps the public monitor the government. But again, this speech is not actually threatened by *Garcetti*. *Garcetti* does not reach speech to the public, unless producing such speech is the employee’s job (in which case the speech is actually the government’s speech). The *Garcetti* exception is primarily about intragovernmental job performance speech: speech from one

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68 *Garcetti v. Ceballos*, 547 U.S. 410, 431 (2006) (Souter, J., dissenting).

69 *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

70 *See supra* Section III.B.

state actor to another, undertaken to further the government's purposes.<sup>71</sup>

This speech is of course valuable; that is why the government employer pays people to produce it. But its value is not really a First Amendment value. Job performance speech allows the government to function—it is the disposition memos of deputies like Ceballos, the internal memoranda of lawyers in the Department of Justice and elsewhere, the reports of subordinates in every agency. It might also include reports to superiors about problems in the operations of government. If these reports are accurate, they are a good thing for government efficiency. But government efficiency is not a First Amendment value. In fact, it is the value that is usually opposed to First Amendment claims in the employee speech context. The fact that *Garcetti's* rule might reduce the efficiency of government operations is not an objection that sounds in the First Amendment.

Nor, upon reflection, should it be especially plausible. The case against *Garcetti* relies at least implicitly on a narrative about good employees who report real problems to their superiors and are punished for it, or good employees who refrain from reporting such problems out of fear of retaliation.<sup>72</sup> If punishment were prohibited, the narrative suggests, employees would be free to speak their minds and corrective action would follow.

One problem with this narrative as a source of the *Garcetti* critique is that it is not entirely clear that *Garcetti*, properly understood, applies to this speech. Reporting problems in the government workplace is not, for most employees, the creation of work product, so it falls outside the narrow reading I have offered. It is, however, generally speech undertaken in the role of employee, so it fits within the broader reading. (The line between employee and citizen roles is hard to draw, but one useful question to ask is whether an ordinary citizen, in possession of the same information but not working for the

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71 Characterizing the speech at issue as intragovernmental offers another straightforward argument for *Garcetti*. Governments may in some circumstances have First Amendment rights. See David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1638–40 (2006) (discussing the notion of granting constitutional protection for government speech and how courts have approached such a notion); Kermit Roosevelt, *States as Speakers*, 14 GOOD SOC'Y 62, 62–63 (2005) (considering the status of the government's First Amendment speech rights). I could imagine states objecting to federal regulation of their communication to citizens. But the idea that the First Amendment regulates communication within a *single* governmental entity is very odd.

72 *Garcetti's* critics tend to imagine an employee whose speech is unwelcome, as Justice Stevens put it in dissent, "because it reveals facts that the supervisor would rather not have anyone else discover." *Garcetti*, 547 U.S. at 426 (Stevens, J., dissenting).

government, could have engaged in the same speech. With respect to complaints to superiors, the answer will generally be no.) But even if we suppose that *Garcetti* allows punishment for such speech, the *Garcetti* critique encounters another difficulty. It is not at all clear that allowing punishment for such speech reduces efficiency, nor that First Amendment protection is a solution.

This is not to say that retaliating against employees for bringing up inconvenient truths is not a bad thing. Of course it is; no one thinks that employees reporting waste or misconduct should suffer for that. But in response to the narrative about the good employee reporting real problems, there is a counter-narrative about the flaky or disgruntled employee who presents baseless or trumped-up complaints.<sup>73</sup> It would be difficult to determine which is in fact more common, and people's estimates of relative frequency probably depend on their priors.<sup>74</sup> The question for us is who should sort the truth-teller from the troublemaker—or rather, whether the First Amendment requires that it be a judge and not the employer.

The benefits of requiring judges to make the decision are not overwhelming. Many government employers, after all, are interested in improving the operations of their agency and will do a good job of deciding which complaints are worth acting on, which should be ignored, and which indicate problems with the employee raising them. If an employee brings concerns to a good employer, there is no need for judicial supervision.

What about the bad employers? There surely are some of them too, but the “good employee gets fired, but the First Amendment could fix it” narrative is not as convincing on inspection as it might seem. First, firing a truth-telling employee seems like a very silly thing for a nefarious employer to do, since it increases the likelihood the employee will complain to the public or to higher-ups. Perhaps adverse treatment short of termination is more likely, but even that increases the probability of broader complaint. Second, protecting the employee from adverse treatment will not help much in terms of government efficiency. The nefarious employer may be prevented from punishing the truth-telling employee, but he certainly won't be

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<sup>73</sup> As applied to *Garcetti* itself, the “good employee” narrative describes a courageous deputy who uncovered misconduct and sought to remedy it, while the “bad employee” one shows us a misguided subordinate who reached an erroneous conclusion and refused to accept correction from his superiors.

<sup>74</sup> See RICHARD A. POSNER, HOW JUDGES THINK 93–121 (2008) (considering the sources of judges' ideologies, including education and experience).

induced to take action on the complaints.<sup>75</sup> So First Amendment protection for this kind of speech seems likely to give few benefits, even in terms of government efficiency (which, I have said, is not a First Amendment value anyway).

The costs, however, will clearly be very high. *Garcetti's* critics do not generally explain in detail what they would substitute for its rule. But it surely cannot be the *Connick-Pickering* test. That would prevent employers from firing or reassigning employees whose memos address issues of public concern and are nondisruptive, but are riddled with errors of legal analysis. (Ceballos's superiors, remember, concluded that he was wrong, as, eventually, did the trial court.)<sup>76</sup>

What is the alternative? Justice Souter's dissent offers examples of people he evidently feels should not face discipline: a principal who makes a "fair but unfavorable comment" while reviewing a teacher's performance, or deputy in Ceballos's position whose judgment is "sound and appropriately expressed."<sup>77</sup> The implicit suggestion is that people who do a bad job—the principal whose evaluations are unfair, or the deputy whose judgment is unsound—may be fired, but the people who are doing a good job may not be. This is a good principle of management, but it is a very strange application of the First Amendment. The First Amendment generally does not allow the government to evaluate the quality of speech, so this would be quite a radical departure from the ordinary analysis—and a dangerous one, if not tightly confined.<sup>78</sup> It would also make every employment decision about the quality of speech-based work product into a First Amendment case, which seems like a tremendous and unwarranted increase in judicial workload. And it would require the creation of constitutional standards for evaluating speech-based work products, which is something judges are not likely to be particularly good at—not as good, at any rate, as the superiors within a given workplace.

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<sup>75</sup> Speech to non-nefarious higher-ups might get results, but it need not be protected: non-nefarious higher-ups will not fire the truth-teller and can protect him from the nefarious superior. Speech to the public might also produce remedies, and it should be protected because it fulfills the First Amendment purpose of informing the public about the workings of government.

<sup>76</sup> *Garcetti*, 547 U.S. at 414–15.

<sup>77</sup> *Id.* at 431–32 (Souter, J., dissenting).

<sup>78</sup> Bright lines do not only serve to notify individuals of whether their conduct is protected or not. They also enhance doctrinal stability. The idea that even "protected" speech can be punished if it is, in some undefined way, low quality could prove very dangerous to existing First Amendment freedoms if it spread beyond the context of public employee speech. The watered-down First Amendment served up in one dish may find its way to another.

In sum, it is true that government employee job performance speech can be valuable. But its value to the employee does not make a powerful case for First Amendment protection. The *Garcetti* carve-out is narrow, and it is an odd theory of the First Amendment that makes protection of this speech—effectively, a constitutionalization of speech-based performance reviews—a perk of government employment. Nor does its value to the government employer suggest that First Amendment protection is appropriate: the employer is much better than a judge at deciding whether particular speech is good job performance or not. Last, while government employee speech can be very valuable to the public, *Garcetti* does not affect speech to the public.

## 2. *It Is Anomalous to Drive Speech Outside the Chain of Command*

One consequence of *Garcetti* is that speech such as Ceballos's memo is unprotected if offered to the employer as work product, but protected (at least by the *Connick-Pickering* test) if delivered to the public instead. This strikes some as odd. Justice Stevens, dissenting, objected that “it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”<sup>79</sup>

But further reflection suggests that these consequences are not so anomalous as they might seem. A narrow reading of *Garcetti* would not actually reach an employee's complaints to superiors, as long as delivering such complaints was not part of the employee's job and an expected basis for evaluation. The broader reading would include them within the unprotected category. This makes some obvious sense: complaints to superiors can certainly distinguish a good employee from a bad one. (Valuable and accurate complaints are desirable; overblown, inaccurate or self-serving ones are not.) So there are legitimate reasons that employers might want to reward or punish employees based on such speech. The question is whether there are First Amendment reasons to prevent employers from taking this speech into account in personnel decisions.

I do not think such reasons are particularly strong. Speech to superiors, dealing with workplace issues, can be very valuable to the government employer. But as argued in the preceding section, the

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<sup>79</sup> *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

First Amendment is not intended to increase government efficiency. It is intended to facilitate public oversight of government, and that purpose is not served by intra-governmental speech. The line between talking frankly to superiors and voicing concerns publicly marks a real distinction from the First Amendment perspective.

Nor, in fact, are the efficiency concerns necessarily as weighty as they might seem. Some critics have suggested that the *Garcetti* rule, by driving employees to address the public instead of superiors, “leads to a tremendous waste of judicial resources on unnecessary litigation that might have been resolved internally.”<sup>80</sup> It is imaginable that this waste will occur, but it requires a quite specific set of circumstances: an employer who would not discipline an employee for speaking internally (and will even take corrective action) but will retaliate if the employee goes to the public, and an employee who is unable to accurately predict either response. This should be a relatively rare state of affairs, so *Garcetti* is unlikely to impose significant new costs on the judiciary.

On the other hand, protecting such speech will impose significant costs. If we use the *Connick-Pickering* test, employers bear the cost: they will simply be prohibited from evaluating employees on the basis of their complaints, as long as they are nondisruptive and address matters of public concern. If we adopt a new one, to allow employers to disfavor employees who bring baseless or self-serving grievances, judges must develop and administer standards to determine when an employee’s complaints may be considered a negative in performance evaluation. This task seems likely to be quite demanding, and also not one that judges are particularly good at—again, not nearly as good as employers.<sup>81</sup>

### 3. *Employers Can Manipulate the Rule*

Another common concern raised by critics is that *Garcetti*’s rule, by stripping protection from speech produced in furtherance of official duties, allows employers to extend their control over employee speech. For the bad boss who wants to be able to fire employees for

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<sup>80</sup> Secunda, *supra* note 23, at 127.

<sup>81</sup> An example is *Vila v. Padrón*, 484 F.3d 1334, 1339 (11th Cir. 2007), where a college legal officer expressed concerns that various actions by the college were illegal. That was her job, the court ruled, and hence her expressions were unprotected. *Id.* This is the sort of fact pattern that triggers anti-*Garcetti* intuitions—how can it be right to allow this woman to be fired for pointing out lawbreaking? But further thought may dampen the response. Surely the college should be able to fire her for providing bad legal advice. And do we really want courts deciding whether it was good or bad?

what they say, the trick seems simple: just make everything they say part of their job description. If you are worried about subordinates disclosing wrongdoing or waste, require everyone to make such reports.<sup>82</sup>

This possibility has been taken seriously enough, at least by a blogger, as to be offered as genuine advice for employers.<sup>83</sup> But upon closer inspection it seems unlikely to be a serious threat to First Amendment values. First, the *Garcetti* Court itself warned lower courts against allowing manipulation: “We reject, however, the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.”<sup>84</sup> Lower courts have proven themselves capable of detecting manipulative behavior or arguments.<sup>85</sup>

Second, an artificially broad definition of duties should raise red flags for the bad boss’s superiors. Unless they are in on it too—unless the rot goes all the way to the top, in which case no internal speech will be effective anyway—they are unlikely to approve what looks like a plain attempt to insulate the bad boss from oversight. And last, this kind of behavior, even if it succeeded, would not affect speech to the public, which is the public employee speech that has the greatest First Amendment value.<sup>86</sup>

Employers, whether public or private, should be receptive to employee disclosures of wrongdoing, as a matter of good management. And good management should be facilitated by grievance systems and whistleblower statutes, as indeed it is. Those systems may not

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82 As Justice Souter put it, “I am pessimistic enough to expect that one response to the Court’s holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview.” *Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting).

83 See Daniel A. Schwartz, *First Amendment Claim Denied Where Employee’s Duties Included Raising Issues About Patient Safety*, CONN. EMP. L. BLOG (Oct. 9, 2007), <http://www.ctemploymentlawblog.com/2007/10/articles/decisions-and-rulings/first-amendment-claim-denied-where-employees-duties-included-raising-issues-about-patient-safety/> (advising “employers that are considering revising an employee’s job [description] . . . to include a reference to reporting safety or other concerns”).

84 *Garcetti*, 547 U.S. at 424–25.

85 In *Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009), for instance, the Seventh Circuit rejected an employer’s argument that state employees who wrote a letter protesting a no-bid contract were fulfilling a broad statutory duty to report anticompetitive practices. See also, e.g., *Williams v. Riley*, 392 Fed. Appx. 237, 241 n.2 (5th Cir. 2010) (“It is clear to us that *Garcetti* would not allow employers to create a formal policy, fire employees for following that policy, and then obtain protection from retaliation claims by asserting a qualified immunity defense-claiming a First Amendment free fire zone.”).

86 The bad boss could, imaginably, charge all his subordinates with reporting wrongdoing to the public, hoping thereby to strip this speech of protection. But even if courts were not able to see through the ruse, the end result would probably be an increase in public oversight sufficient to make it hard to fire truthful employees.

work as well as they should, and if they do not, they should be strengthened. But layering the First Amendment on top of administrative and statutory schemes for protecting employees is a mistake. The problem of superiors retaliating against subordinates who disclose their misconduct to other governmental actors is not really a First Amendment problem, and unsurprisingly, the First Amendment is not very good at solving it.<sup>87</sup>

#### 4. *What About Academia?*

The *Garcetti* Court explicitly reserved the question of whether its new rule could be applied in the academic context, noting that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”<sup>88</sup> The Court was prudent not to decide an issue not presented by the case before it, but the most natural conclusion is that the *Garcetti* rule should apply to teaching and scholarship.<sup>89</sup> These kinds of speech fall within the narrow reading of *Garcetti*: they are work product, on the basis of which an employee would expect to be evaluated.<sup>90</sup> Deciding that teaching and scholarship are protected by the First Amendment is less likely to improve the functioning of public schools and universities than to prevent them from functioning entirely.

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87 Paul Secunda, after canvassing some of the other protections available to wrongfully terminated employees, observes that employees who choose such routes still “are not receiving the First Amendment protection to which they are entitled.” Secunda, *supra* note 23, at 133. I certainly share the intuition that employees fired for disclosing misconduct are entitled to something. (Secunda discusses *Morales v. Jones*, 494 F.3d 590, 592 (7th Cir. 2007), in which the court of appeals reversed a jury verdict in favor of police officers retaliated against for informing a district attorney that the chief of police had harbored a felon.) I think they are entitled to a neutral decisionmaker’s assessment of whether the retaliatory action was justified. But that describes an employment grievance procedure or arbitration, see Secunda, *supra* note 23, at 133–34, much better than it does the First Amendment. In particular, the commonsense point that employers should be able to fire employees for doing a bad job is very hard to reconcile with the First Amendment’s general refusal to consider the quality of speech.

88 *Garcetti*, 547 U.S. at 425.

89 The Court may need to decide this issue relatively soon, as it seems to have engendered a circuit split. Compare *Adams v. Trustees of UNC Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (holding that *Garcetti* does not apply to academia), with *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008) (holding that it does apply); *Borden v. Sch. Dist. of Twp. of East Brunswick*, 523 F.3d 153, 159 (3d Cir. 2008) (same).

90 Educators may also speak as citizens. There is a concern about government influence over their speech in that capacity—the fear of what the Court has called “leveraging.” But since the protection of this speech is not affected by *Garcetti*, I do not discuss it here.

The point, again, is that the academic environment is one in which assessments of quality are vitally important. There may be no such thing as a false idea, as far as the First Amendment is concerned,<sup>91</sup> but in reality there is such a thing as a bad article or a soporific lecture, and schools cannot function if they are denied the ability to make that judgment. The math teacher who decides to lecture on political science instead may be discussing matters of public concern in a nondisruptive manner, but he is doing his job badly. The teacher who stays on topic but offends students is also doing a bad job. (Or perhaps not—perhaps she is shocking them into a higher state of consciousness. But surely school officials, rather than judges, should make that call.)<sup>92</sup> And the professor who produces tedious, tendentious, and unimaginative scholarship should not get tenure.<sup>93</sup>

In one sense, it is hard to imagine what the people who suggest that *Garcetti* should not apply to the academic context have in mind. Tenure decisions simply cannot be performed according to *Connick-Pickering* analysis. In another sense, though, it is relatively easy. They think that scholars should be free to explore controversial subjects, to criticize the government or other powerful figures, to follow their research wherever it leads. (The case for autonomy in teaching, rather than scholarship, is weaker, I think, and in the remainder of this section I will focus on scholarship.) That is true, just as it is true that employees who report wrongdoing should not face retaliation.<sup>94</sup> But just as the First Amendment was not the solution to the bad boss outside the groves of academe, it is not the solution within them either.

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91 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (“The First Amendment recognizes no such thing as a ‘false’ idea.”).

92 Thus, I think cases such as *Hardy v. Jefferson Community College*, 260 F.3d 671, 682 (6th Cir. 2001), in which an interpersonal communications teacher successfully invoked the First Amendment as protection against discipline for using derogatory language in class while discussing insults, are wrong. School officials may be narrowminded and parochial; they may make bad decisions about how to educate. But they are closer to experts in education than judges are, and they are responsible to local communities in a way that judges are not. There are certainly limits that the Constitution places on their control over schools; they cannot engage in religious indoctrination, for instance, or compel oaths of loyalty. But absent some special circumstance, I find it hard to imagine that the Constitution prevents them from assessing teacher performance based on teaching.

93 In a rather astonishing decision, the Fourth Circuit held that a professor who had included a book in his tenure file could then invoke the First Amendment against the university when it denied him tenure in part because of reservations about its quality. *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 554–55, 565 (4th Cir. 2011).

94 Indeed, the case for protecting scholarship is stronger. Scholarship, unlike most public employee speech work product, is generally directed to the public, or at least to nongovernmental actors, which gives it a First Amendment value that intragovernmental speech lacks.

The ideal of independent and untrammelled scholarship is generally described as academic freedom. This sort of individual academic freedom has never been clearly recognized as a First Amendment right.<sup>95</sup> What protects academic freedom, in private universities as well as public ones, is the tenure system. And while it is possible (though, I argued, inadvisable) to layer the First Amendment on top of whistleblower protection statutes and employee grievance rights, the choice with tenure is either-or. The operation of the tenure system in a public university, where state actors sit in judgment on the merit of an individual's speech, is wholly incompatible with ordinary First Amendment analysis, or even the somewhat different *Connick-Pickering* test. Applying *Garcetti* to academia is actually *necessary* if public universities are to have a tenure system.

So scholarship should be deemed unprotected, at least as far as employment decisions by public universities are concerned. This is not to say that a tenure denial could never raise First Amendment concerns. Denying the math professor tenure because she criticized the governor in a letter to the editor would; that is leveraging. And some degree of political partisanship in the assessment of academic merit would probably be unconstitutional, as if the only complaint about the economist were that his theories were contrary to the official Republican Party line. But in many fields, disentangling political elements from assessments of merit is quite hard. University committees are probably better than judges at doing this, and tenure review, like partisan gerrymandering, might well be an area in which the lack of judicially administrable standards counsels underenforcement.<sup>96</sup> On the whole, I think the best way to conceive of scholarship from the First Amendment perspective is to think of it as akin to the fighting words in *R.A.V. v. City of St. Paul*.<sup>97</sup> It is generally unprotected, which is to say that universities are free to assess its quality and reward or punish employees on that basis, consistent with their own tenure

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<sup>95</sup> See Rosenthal, *supra* note 24 at 93–100 (discussing the “collide” between managerial prerogative and academic freedom). The Court has discussed academic freedom in the context of a university's right to judge the qualifications of its professors, *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring), and select its student body, *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003). But this is a right of the school as a whole against outside regulation; it is not a right that individual professors may wield against the school.

<sup>96</sup> See *Veith v. Jubelirer*, 541 U.S. 267, 306 (2004) (holding that political gerrymandering claims are no longer justiciable).

<sup>97</sup> 505 U.S. 377 (1992). In that case, the Court struck down a ban on fighting words on the grounds that even though the broad category was unprotected, the ordinance at issue discriminated among unprotected speech in an impermissible way. *Id.* at 381.

rules, but there are some criteria that cannot be used to evaluate it, such as avowedly partisan or religious ones.

#### CONCLUSION

Public employee speech can indeed be very valuable. But its value is not always a First Amendment value, and the First Amendment is not always its best means of protection. The speech reached by even a broad reading of *Garcetti* is likely to be of low First Amendment value; it is likely to be intragovernmental speech rather than speech that allows the public to monitor government. And trying to protect it by means of the First Amendment presents some formidable problems. Generally speaking, our First Amendment doctrine is good at making the government keep its hands off. It is not good at supervising nuanced and context-sensitive judgments about the quality of speech or its social appropriateness; indeed, the Court's decisions repeatedly proclaim that the Amendment does not allow the government to make such judgments.<sup>98</sup> But the government cannot be hands-off with its employees and agnostic as to the quality of their work product: employers must be able to evaluate employee job performance. *Garcetti*'s carveout is sensible in terms of both First Amendment values and managerial efficiency.

This is not to say that all is well in the world of employee speech rights. The line that *Garcetti* suggests has proven hard to draw. Courts are making mistakes, and even if they do not, dim lines chill speech. The problem could be mitigated by restricting *Garcetti* to plain examples of work product, on which employees would reasonably expect to be evaluated. Or, the solution I prefer, the problem of the blurry line between speech as a citizen and speech as an employee could be solved by creating a safe harbor for employees who want to speak as citizens. Such a safe harbor could require that the employees speak to the public, do so outside the workplace, and make clear that they are not speaking for their employer. Speech in this safe harbor would, ideally, be protected not by the anemic *Connick-Pickering* balancing test but by something closer to the ordinary First Amendment analysis, with carveouts for speech that either demonstrably disrupts working relationships or suggests an unfitness for the job.<sup>99</sup> This would be a space where we could approach true parity

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<sup>98</sup> See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (“[N]o such thing as a ‘false’ idea.”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (“[On]e man’s vulgarity is another’s lyric.”).

<sup>99</sup> See *Roosevelt*, supra note 16 (describing safe harbor).

between government employees and ordinary citizens.<sup>100</sup> This approach would use the First Amendment to protect speech that has First Amendment value. It would leave protection of other speech to devices that are tailored to the needs of the different circumstances in which it occurs.

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<sup>100</sup> Thus I endorse fundamentally the same baseline norm as Kozel, *supra* note 13. I differ, I think, in that I believe that full parity requires some narrowing of the occasions for speech.