PUBLIC EMPLOYEE SPEECH AND MAGARIAN'S DYNAMIC DIVERSITY

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INTRODUCTION

The Supreme Court under Chief Justice John Roberts has been praised in many quarters as a committed ally of free speech.[1] Certainly, a number of Roberts Court decisions do protect speech. Putting aside the Court's controversial campaign finance decisions—the merits of which divide even free speech advocates[2]—the Roberts Court's speech-protective decisions include several cases in which it refused to create new categories of "unprotected" speech,[3] a decision striking a buffer zone around abortion clinics as too restrictive of protests,[4] and a case in which the Court rejected a provision conditioning certain federal funds on recipients' adopting a particular policy position.[5]

While I am mostly very pleased with the Court's speech-protective decisions,[6] I count myself among those who think that the Court has not, on balance, been a champion of free speech. I take this view in light of the vast deference that the Court has accorded the government to suppress speech in

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1. *See, e.g.*, GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT xiii–iv (2017) (noting that "[m]any free speech advocates revere the Roberts Court," and citing examples); Steve Chapman, *The John Roberts Court: Champion of Free Speech*, CHI. TRIB. (July 26, 2017, 2:48 PM), https://perma.cc/52RH-9FQ5 (praising the Roberts Court as a champion of free speech and citing others to this effect); Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & Pol'y 63, 65 (2016) (crediting the Roberts Court with having "created a sort of free speech 'Camelot'").

2. *Compare, e.g.*, Geoffrey R. Stone, *The Rift in the ACLU Over Free Speech*, HUFFINGTON POST (Sept. 8, 2014, 8:00 PM), https://perma.cc/8BL5-Z7JN (noting that he, a "card-carrying member of the ACLU for 40 years and a member of the ACLU's National Advisory Council . . . once shared the view that campaign finance regulations violated the First Amendment," but that he "has since come to a different set of conclusions") *and* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 732–33 (2011) (criticizing the notion that "spending money in election campaigns is speech" but writing that "even if one accepts [that] premise . . . two decisions of the Roberts Court suggest that what really animates its decisions is a hostility to campaign finance laws much more than a commitment to expanding speech") *with* Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. 77 (2010) (defending the *Citizens United* decision and arguing that its critics have been too dismissive of its first amendment reasoning) *and* Gora, *supra* note 1, at 66–67, 85–99 (celebrating the campaign finance decisions of the Roberts Court).

3. *See* United States v. Alvarez, 567 U.S. 709, 718–22 (2012) (declining to deem false speech categorically unprotected); Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 792–95 (2011) (rejecting California's position that the sale of violent video games to minors should be categorically unprotected); United States v. Stevens, 559 U.S. 460, 468–72 (2010) (refusing to deem depictions of animal cruelty categorically unprotected).

4. McCullen v. Coakley, 134 S. Ct. 2518, 2537–2541 (2014).

5. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 220 (2013).

6. I add the qualifier "mostly" because I too have strong reservations about the campaign finance decisions.

several contexts. These include those in which threats to national security are invoked,[7] those in which the government purports to act as a speaker itself,[8] or those in which the government acts in a managerial role, such as employer,[9] jailer,[10] or educator.[11]

This is not a mere matter of tallying free speech wins and losses. My concern is not simply the number of problematic cases, but the importance of the speech that they fail to protect, and the danger of the discretion that they accord the government. For example, *Holder v. Humanitarian Law Project*[12] impacts core political speech—ranging from the teaching of peaceful international conflict resolution to the writing of amicus briefs to the U.S. Supreme Court—coordinated with a designated foreign terrorist organization (FTO).[13] Despite the FTO label's ominous ring, courts have been highly deferential toward the government's designations,[14] just as the *HLP* Court was deeply credulous in evaluating Congress' assertions regarding the dangers of coordinated speech.[15] In another pair of cases, the Roberts Court took an expansive view of the speech forums that the government may claim as its own, rather than belonging to the public.[16] In so doing, the Court widened the space—both physical and virtual—in which the government may exclude speakers based on content or even viewpoint.[17]

I am not alone, of course, in noticing the anti-speech tenor of many Roberts Court decisions. Others have observed and lamented this reality, as well as the distance between it and the Roberts Court's reputation as a free speech stalwart.[18] And now, in a terrific new book called *Managed Speech:*

7. *See* Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 514–17, 523–29 (2017) (criticizing holding and analysis in Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), and citing criticisms by others).

8. *See* MAGARIAN, *supra* note 1, at 95–105 (criticizing decisions in Pleasant Grove City v. Summum, 555 U.S. 460 (2009) and Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015)).

9. *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 302–03, 310–12, 330–36 (2016) (criticizing Garcetti v. Ceballos, 547 U.S. 410 (2006)).

10. *See* MAGARIAN, *supra* note 1, at 70–73 (criticizing Beard v. Banks, 548 U.S. 521 (2006)).

11. *Id.* at 73–78 (criticizing Morse v. Frederick, 551 U.S. 393 (2007)).

12. 561 U.S. 1 (2010).

13. *See* Kitrosser, *Free Speech and National Security Bootstraps*, supra note 7, at 514–17.

14. *See id.* at 512–14, 528–29.

15. *Id.* at 514–17, 523–28.

16. *See* MAGARIAN, *supra* note 1, at 95–105 (discussing decisions in Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (involving monuments in a public park) and Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239 (2015) (concerning specialized license plate designs)).

17. *See* sources cited *supra* note 16.

18. *See, e.g.*, Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV. 553, 554, 558–62 (2017) (Chemerinsky calls the Roberts Court "a Supreme Court that is very protective of freedom of speech except when the institutional interest of the government as government are implicated. Then it's not at all protective of speech."); Ronald K.L. Collins, *Exceptional Freedom: The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 451–52 (2013) ("If the Roberts Court's new absolutism is a cause for elation in some First Amendment quarters, then its rulings on student speech, government employee speech, and prisoner speech, along

The Roberts Court's First Amendment, Professor Greg Magarian of the Washington University School of Law adds important new insights to the mix.[19] The Roberts Court, Magarian observes, is committed to "managed speech." "Managed speech describes a mode of First Amendment jurisprudence that seeks to reconcile substantial First Amendment protection for expressive freedom with aggressive preservation of social and political stability. . . . [It] concentrates managerial power over public discussion in the government or in favored private actors."[20] From this perspective, it makes perfect sense for the Roberts Court to fiercely protect the government's ability to control speech within public spaces and government operations. And the Court's many decisions favoring private speakers for the most part can be explained either as bolstering powerful interests or as very narrowly applying, extending, or qualifying precedent.[21] In contrast to managed speech, Magarian supports an approach that he calls "dynamic diversity," which "seeks to maximize . . . diversity of ideas" and diversity of speakers in public discussion.[22] We should value dynamic diversity, he explains, because it protects free speech's role as "an engine of political and social change."[23] "*Dissent* lies at the heart of dynamic diversity."[24]

In this Article—prepared for a symposium to honor Professor Magarian's book—I use the concepts of dynamic diversity and managed speech as jumping off points to consider the constitutional value of speech produced by public employees in the course of doing their jobs ("public employee work product speech") and the Roberts Court's approach to the same. In Part I, I posit that, despite dynamic diversity's repeated emphasis on public discourse, its underlying reasoning contains the seeds of strong support for the notion that public employee work product speech—including that conveyed internally—is of high First Amendment value. This is so for two reasons. First, much public employee work product speech does impact public discourse directly or indirectly. Second, even purely internal work product speech serves the ultimate end toward which dynamic diversity aims: "challenging stable institutions and testing new ideas."[25] Indeed, there is little more effective way to bake dialogic challenge into the

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with its anti-terrorism material support ruling must be cause for discontent."); Chemerinsky, *supra* note 2, at 724 (citing the Roberts Court's reputation among some as a free speech champion, and objecting that "the Roberts Court's overall record suggests that it is not a free speech Court at all").

19. MAGARIAN, *supra* note 1.
20. *Id.* at xv.
21. *Id.* at 228–34, 239.
22. *Id.* at xvii.
23. *Id.* at xvii.
24. *Id.* at xviii (emphasis in original).
25. *Id.* at xviii.

production of government ideas and actions than by placing expert career employees throughout the government and granting them some protection for their on-the-job speech. This conclusion is also buttressed by dynamic diversity's emphasis on the value and vulnerability of political dissent. First Amendment protections for work product speech also fittingly complement the structural checking mechanisms that the Constitution builds into the federal system. In Part II of the Article, I critique the approaches that the Roberts Court has taken to public employee work product speech, including its assessments of the speech's value and of the government's interests in controlling it. In making these critiques, I draw from the insights of Part I and from Professor Magarian's concept of managed speech.

I. DYNAMIC DIVERSITY AND THE FIRST AMENDMENT VALUE OF PUBLIC EMPLOYEE WORK PRODUCT SPEECH

As Professor Magarian explains it, dynamic diversity values public discussion predominantly because it is the "primary medium for challenging stable institutions and testing new ideas. . . . Action toward change can't happen without speech. At the same time, speech is relatively safe. It lets us hedge our bets at the margin where change challenges stability."[26]

Public discourse can only serve as a conduit for change when a diversity of speakers and ideas participate. Speech that dissents from conventional wisdom, presenting listeners with new information and perspectives, is especially valuable in this respect. Such speech also is highly vulnerable, given the challenge that it poses to the status quo.[27] Political dissent, in particular, is at heightened risk of government suppression.[28] Political dissent "stands at the center of . . . dynamic diversity," for both its high value and its susceptibility to repression.[29]

In championing diversity of both speakers and ideas, and emphasizing the importance of political dissent, Magarian widens the scope of existing, democratic governance-based theories of free speech in important ways. First, Magarian acknowledges that his theory is more inclusive than the self-governance theory of Alexander Meiklejohn, insofar as Meiklejohn favored diversity of ideas but not speakers. Indeed, Meiklejohn famously deemed it "'essential . . . not that everyone shall speak but that everything worth saying shall be said.'"[30] Magarian responds that speaker and idea diversity generally "complement one another," and that "[e]nabling broad-based

26. *Id.* at xviii.
27. *Id.* at xviii.
28. *Id.* at 34.
29. *Id.* at 34.
30. *Id.* at xvii (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960)).

participation in public debate should generate a wide range of ideas."[31] Second, in strongly valuing political dissent, dynamic diversity complements Vincent Blasi's important work stressing the value of free speech for "checking the abuse of power by public officials."[32] Yet dynamic diversity encompasses much more than abuse-checking speech insofar as it aims for a robust public discourse that includes a wide range of dissenters as well as the ideas and information with which they grapple. Third, Magarian combines his analyses of affirmative speech values with a healthy dose of government distrust, echoing Frederick Schauer's insight that all major free speech theories rightly share a core skepticism about government control of speech.[33] Indeed, Magarian repeatedly cites the heightened susceptibility of dissent to repression, given powerful actors'—including government's—investments in the status quo.[34]

Yet while dynamic diversity effectively justifies protections for a broad range of political dissent and much other speech, less clear are its implications for at least one important category of political speech: that made by public employees in the course of doing their jobs. As it stands, dynamic diversity's emphasis on public discourse makes it a somewhat counter-intuitive tool for defending public employee speech that is conveyed through internal channels. Work product speech is often, albeit not always, conveyed internally, as with internal memoranda or consultations. Magarian anticipates and addresses this point by citing Blasi's work on the checking value of speech, and explaining that "public employees can . . . perform the checking function within the government workplace."[35] This analysis does not tell us, however, whether dynamic diversity, in its own right, can support protecting internal workplace speech.

Yet despite dynamic diversity's repeated emphasis on public discourse, its underlying reasoning contains the seeds of strong support for the notion that public employee work product speech—including that conveyed internally—is of high First Amendment value. This is so for at least two reasons. First, much work product speech does make its way into public discourse either directly or indirectly. And a close look at the types of work product speech that are likely to trigger discipline reveals the ways in which such speech can manifest political dissent. Insofar as workplace speech indeed constitutes political dissent and impacts public discourse, dynamic diversity plainly has much to tell us about its value. Second, dynamic

31. *Id.* at xvii.

32. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527 (1977).

33. Frederick Schauer, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 33–34, 44–46, 86, 162–63 (Cambridge, 1982).

34. MAGARIAN, *supra* note 1, at xviii–xix.

35. *Id.* at 84.

diversity's discussions of speaker diversity and of the value and vulnerability of political dissent are equally applicable to internal government discourse. Indeed, these features of dynamic diversity dovetail very nicely with Professor Blasi's theory of checking value. Professor Magarian thus would be well justified to reference checking theory not simply as a supplement to dynamic diversity, but as a means to shed greater light on the latter's own potential reach. Aspects of the federal separation of powers also bolster the combined lessons of dynamic diversity and of checking theory to support work product speech protections at the federal level.[36]

In Section I.A, I elaborate on the relationships between public employee work product speech and public discourse, and explore the ways in which work product speech can manifest itself as political dissent. Once we recognize the role that work product speech can play as public political dissent, dynamic diversity helps us to see its deep First Amendment value. In Section I.B, I explain that dynamic diversity's underlying reasoning dovetails naturally with checking theory, and that the insights of the two theories together make a very strong case for protecting even purely internal work product speech. The case is further buttressed by aspects of the federal separation of powers.

A. *Work Product Speech and Public Discourse*

Public employee work product speech can very much impact public discourse, whether directly or indirectly. This is most obvious when the work product at issue is crafted for public view, such as where a government scientist is tasked with drafting a report on climate change for public consumption or a government economist prepares a budget document that will be released publicly. Somewhat more indirectly, internal workplace input can impact the statements and positions that the government takes publicly. A government lawyer may meet with supervisors, for example, to urge them to rethink a legal argument or factual assertion made in a brief that will itself become a part of the public record, or to reconsider calling certain witnesses in a public hearing. More broadly, internal whistleblowing—that is, internal reporting about fraudulent, abusive, or illegal practices—can substantially impact speech that does make its way to the public, even where the internal whistleblowing itself does not see the light of day. Internal reporting might, for example, help to stop faulty fact-finding practices that shape the information eventually used in public documents or statements. Internal reporting might also be directed against

36. *See infra* Section I.B.

improperly politicized hiring of or retaliation against civil servants. Such personnel practices themselves can affect the nature of government projects undertaken, or of factual or policy analyses conducted that eventually make their way to public view.

These examples also shed light on the different forms that dissent can take. In its most familiar guise, of course, dissent entails explicitly disputing particular practices or positions. But dissent can also manifest itself in the simple acts of public employees doing their jobs conscientiously and in accordance with the norms of their professions, despite pressure to place political directives above those norms. When employees engage in such behavior—for instance, when government auditors honestly and competently investigate and report in a manner consistent with professional reporting standards, or when government attorneys write memoranda consistent with their profession's ethical dictates—they help to maintain consistency between the functions government purports to perform and those that it actually performs. In so doing, public employees can disrupt government efforts to have it both ways by purporting publicly to provide a service while distorting the nature of that service.

Disrupting government information distortion, in short, is one important means by which public employees dissent. By "information distortion," I refer to the phenomenon whereby government purports to provide or subsidize information of a type that is defined by reference to professional or social norms, while manipulating the information in a manner antithetical to those norms. Distortion occurs, for example, where government hires climate scientists to make climate projections but insists that they alter their findings for political reasons as a condition of their continued employment. Distortion alters the very picture of reality against which the public can assess or respond to government actions and decisions.[37] By disrupting distortion—even when one does so unintentionally, through the simple act of performing one's job in keeping with professional norms and standards—one effectively engages in political dissent that directly or indirectly impacts information that makes its way to the public.[38]

Once we understand that much work product speech impacts public discourse, and that the work product speech most vulnerable to discipline

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

38. This paragraph and the one preceding it are adapted from Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 302–03, 325.

often constitutes political dissent, dynamic diversity's lessons about its value follow quite readily. After all, dynamic diversity places political dissent at its core.[39] It also emphasizes the importance of speaker diversity, the value of which may be at its apex where the speakers at issue are government employees. As Magarian puts it, "[p]ublic employees often have deeper insights than anyone into the government's workings and failings."[40] They also have subject matter expertise. And they are well situated to impact public discourse directly or indirectly, including by disrupting government efforts to distort public knowledge. Finally, as political dissent by persons in the government's employ, dissenting work product speech is as vulnerable to suppression as it is valuable.

B. Internal Work Product Speech

Even if we were to close our eyes to the broad and deep ties between work product speech and public discourse, we would still find seeds of substantial support for work product speech in dynamic diversity. While dynamic diversity indeed focuses on public discourse, its ultimate concern is speech as a medium for "challenging stable institutions and testing new ideas."[41] There are few more effective ways to bake dialogue and challenge into the production of government ideas and actions than by placing expert career servants throughout the government and granting them some protection for their on-the-job speech. From this perspective, public employees possess special value as speakers in two ways—through their unique insider knowledge and subject matter expertise, and through their access to unique channels of communication, including internal channels. As we have seen, these channels can encompass the simple acts of employees doing their jobs compatibly with the norms of their profession. They can also include special avenues to raise grievances, such as when agencies provide employees with special complaint procedures or privileged access to inspectors general.[42]

In a sense, I propose a friendly supplement to Magarian's concept of speaker diversity, one that explicitly acknowledges that diversity's value can flow not only from the unique views and knowledge of certain individuals, but from their special access to communication channels that enable them to challenge powerful institutions. This aspect of speaker diversity, combined with Magarian's embrace of political dissent and his view of speech as a means to "challenge stable institutions," provide a very

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39. MAGARIAN, *supra* note 1, at 34.
40. *Id.* at 90.
41. *Id.* at xviii.
42. Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 302, 331.

natural bridge to Blasi's checking theory of the First Amendment,[43] even for purely intra-governmental communications.

These free-speech-theory-based insights are bolstered further by constitutional structure. Most important for our purposes are those checks on presidential power that empower subordinates to dissent.[44] Elsewhere, I have discussed such checking mechanisms in depth.[45] I summarize them here, starting with those that draw directly on constitutional text. A number of textual details—including but not limited to the division of the appointments power between the president and the Senate, Congress's constitutional ability to delegate some inferior officer appointments away from the president, and the Opinions Clause, which confirms that the president may require written opinions from executive department heads—suggest an executive branch in which the president has substantial but not unfettered supervisory authority and in which his subordinates are potential checks against abuse or incompetence.[46]

The textual indications are bolstered by history from the framing and ratification period. For example, supporters of the proposed Constitution insisted that the Framers, in declining to annex a council to the president, had intentionally deprived the president of a group that would do his bidding and hide his secrets. Alexander Hamilton argued that the president not only would lack a council behind which to hide, but that his appointed subordinates, who were subject to Senate approval, would be unlikely to shield his bad acts.[47]

These structural aspects of the Constitution and its history confirm the dual role of public employees in the federal system. On the one hand, government employees are part of the executive branch and are charged with supporting its efficacy. On the other hand, government employees are crucial safety valves for protecting the people from abuse and incompetence, given their unique access to information and to a range of internal and external avenues for transmitting the same.

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

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43. *See* Blasi, *supra* note 32.

44. The remainder of this Section, including internal citations, is adapted from Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 329–30.

45. *See, e.g.*, HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY 143–72 (2015) (Chapter 7).

46. For elaboration on these points, see *id.* at 147–162.

47. THE FEDERALIST NO. 76, at 373 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

II. THE ROBERTS COURT AND PUBLIC EMPLOYEE WORK PRODUCT SPEECH

The question of public employee work product speech value became newly salient in 2006, in light of a major Roberts Court decision. In *Garcetti v. Ceballos*, a majority of the Court held that public employees are not entitled to any First Amendment protections against workplace disciplinary action for speech engaged in as part of their jobs—that is, for work product speech.[48] The Court offered its only elaboration on *Garcetti* to date in the 2014 case of *Lane v. Franks*.[49] There, the Court clarified that speech does not automatically constitute work product, and thus fall within the *Garcetti* rule, simply because it consists of information learned in the course of performing one's job duties.[50]

Garcetti and *Lane* are part of a line of cases that comprise the modern doctrine of public employee speech rights. Prior to the mid-20th century, courts invoked the rights/privileges distinction and recognized no first amendment entitlement against workplace discipline for public employees.[51] In 1968's *Pickering v. Board of Education*, the Supreme Court established both that public employees have some protection from being terminated or disciplined by employers for their speech, and that the government has broader discretion to punish speech when it operates as an employer than when it acts as sovereign.[52] In the years between *Pickering* and *Garcetti,* the Court established that employer discipline is permitted either: (1) where the speech at issue is about a matter of purely private concern,[53] or (2) where the speech is on a matter of public concern, but the employer's efficiency interests outweigh the interests of the employee "as a citizen, in commenting upon matters of public concern."[54] *Garcetti* added an additional, categorical step. That is, if the employee's speech constitutes work product, then it is entirely unprotected, regardless of its subject matter

48. 547 U.S. 410, 421 (2006).

49. 134 S. Ct. 2369 (2014).

50. *Id.* at 2379 ("[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech.").

51. *See* Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 147–48 (2006) ("To anchor the free speech rights of public employees to those of private sector employees vis-à-vis their employers would . . . take us back to the heyday of the 'rights-privileges' distinction and virtually wipe out public employee speech rights."). *See also* McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) (featuring Justice Holmes's now well-known observation that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

52. Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

53. Connick v. Myers, 461 U.S. 138, 142–43, 146–47 (1983).

54. *Connick*, 461 U.S. at 149–54, 140, 142 (quoting *Pickering*, 391 U.S. at 568); *Pickering*, 391 U.S. at 568.

or of what the outcome would be were the *Connick-Pickering* balance applied.[55]

Garcetti thus raised anew the question of why courts protect public employee speech in the first place. In particular, it posed a fresh subset of that question: whether public employee work product speech is as valuable, and deserves the same protection, as other public employee speech on matters of public concern. *Garcetti* also forces an assessment of the needs that lie opposite any free speech value—that is, government employers' interests in controlling work product speech.

In this Part, I apply Part I's insights to reflect on *Garcetti*'s (and *Lane*'s) understandings of free speech value. I also invoke Part I's analysis, as well as Magarian's conception of managed speech, to assess the *Garcetti* Court's approach to government's managerial interests. In Section II.A, I consider the Court's understandings of public employee speech value as reflected in *Garcetti* and *Lane* and their predecessor cases. Overall, the cases reflect a crabbed and somewhat confused conception of public employee speech value. Although the Court repeatedly cites the special free speech value that public employees bear by virtue of their unique knowledge and expertise, this appreciation is belied by the *Garcetti* rule itself. *Garcetti* also reflects the Court's failure to grasp the structural part of public employees' special value as speakers—that is, their privileged access not only to information, but to communication channels for conveying it. In Section II.B, I review the *Garcetti* Court's articulation of the government's interests in exempting work product speech from judicial review. The Court's discussion betrays some uncertainty over the nature of the relevant interests. More importantly, it reflects a dramatic over-reading of government employers' needs for exclusive managerial control over work product speech.

A. The Value of Public Employee Speech

1. Doctrinal Background

In explaining why it grants public employees any free speech protections at all, the Supreme Court since *Pickering* has repeatedly invoked two rationales. One, termed the "parity theory" by Randy Kozel,[56] is that government employees should not be robbed of "the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest."[57] The second justification, which I call the "special value"

55. *Garcetti*, 547 U.S. at 421.
56. Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 1990 (2012).
57. *Pickering*, 391 U.S. at 568.

rationale, suggests that public employees deserve free speech protections not because they are just like everybody else, but because they have something special to contribute to the speech marketplace. They "are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."[58] When it comes to the special value rationale, "[t]he 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."[59]

The parity rationale by itself explains very little. Among other difficulties, the *Connick-Pickering* test bears little resemblance to, and thus shows little parity with, the speech protections that apply in other settings. Nor does the parity rationale offer guidance as to what aspects of doctrine or theory we should look to for comparative purposes. The concept of parity, in short, does little work beyond contributing to the view that public employee speech warrants some First Amendment protection.[60] This leaves us with the special value rationale as the Supreme Court's only clearly articulated, substantive basis for protecting public employee speech.

The *Garcetti* Court itself cited approvingly to the special value rationale,[61] and insisted that its approach was not inconsistent with it.[62] The Court explained that "[r]efusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse."[63] Some commentators have taken this point a step further, suggesting that *Garcetti* predominantly impacts non-public speech,[64] and that such speech has little First Amendment value.[65]

58. City of San Diego, Cal. v. Roe, 543 U.S. 77, 82 (2004).

59. *Id.*

60. *See* Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 308; Kozel, *supra* note 56, at 1989–90, 2013–22 (deeming parity rationale incompatible with modern public employee speech doctrine and describing what a parity-based doctrine would look like); Estlund, *supra* note 51, at 149 ("When we scratch the surface of the [*Garcetti*] majority's recurring references to the 'liberties the employee might have enjoyed as a private citizen,' they appear to be less an aid to analysis than a rhetorical trope.").

61. *Garcetti*, 547 U.S. at 419–21.

62. *Id.* at 422 ("This result is consistent with our precedents' attention to the potential societal value of employee speech.").

63. *Id.*

64. *See* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 649 (2012) ("*Garcetti* does not reach speech to the public, unless producing such speech is the employee's job (in which case the speech is actually the government's speech)."); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 57 (2008) ("For public employees who take their concerns to the public, *Garcetti* should pose no bar to First Amendment protection . . . .").

65. *See* Roosevelt, *supra* note 64, at 653–54 ("[T]he First Amendment . . . is intended to facilitate public oversight of government, and that purpose is not served by intra-governmental speech. The line

The majority also tied its observation that employees remain free to participate in public debate to the parity rationale. It explained that work product speech, unlike participation in public debate, "owes its existence to a public employee's professional responsibilities;" suppressing it thus "does not infringe any liberties the employee might have enjoyed as a private citizen."[66]

The parity-based segment of *Garcetti*'s reasoning generated the uncertainty that led to *Lane v. Franks*. Some lower courts, relying on *Garcetti*'s statement that speech is unprotected when it "owes its existence" to the speaker's public employment, leaned heavily against protecting speech consisting of information learned in the course of such employment.[67] The Eleventh Circuit took this view in *Lane*, deeming a public employee's testimony, under oath, about financial fraud in the statewide youth program that he directed to be unprotected work product speech.[68]

The Supreme Court reversed the Eleventh Circuit, clarifying that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech."[69] The Court emphasized that "our precedents . . . have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those

between talking frankly to superiors and voicing concerns publicly marks a real distinction from the First Amendment perspective."); Rosenthal, *supra* note 64, at 59 ("When a public employee brings heretofore concealed misconduct into public view, he enables the process of political accountability to function. Such employees deserve First Amendment protection for just that reason. Public employees whose views remain hidden from public view, in contrast, contribute little to public discussion and debate.").

66. *Garcetti*, 547 U.S. at 421–22; *see also* Estlund, *supra* note 51, at 144–45 (citing "a recurring motif in the *Garcetti* majority opinion: the effort to anchor the free speech rights of public employees to the 'liberties the employee might have enjoyed as a private citizen,'" and explaining the restrictive effects of this motif).

67. Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 315 n.56 (quoting Abdur-Rahman v. Walker, 567 F.3d 1278, 1279, 1283 (11th Cir. 2009) (deeming reports unprotected because they concerned information learned through investigations performed "as part of [plaintiffs'] assigned duties"); *Abdur-Rahman*, 567 F.3d at 1289 (Barkett, J., dissenting) ("[T]he essence of the majority opinion, with its emphasis on *Garcetti*'s phrase 'owes its existence to,' appears to be that speech about anything a public employee learns about in the course of performing his job . . . is unprotected, because the speech would not exist without the job activity."); Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009) ("We have held . . . that a claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience' acquired through his job."). *But see* Dougherty v. Sch. Dist. of Phila., 772 F.3d 979, 989 (3d Cir. 2014) (clarifying, post-*Lane*, that *Gorum* does not stand for proposition that the special knowledge factor alone makes speech unprotected).

68. Lane v. Cent. Ala. Cmty Coll., 523 F. App'x 709, 712 (11th Cir. 2013), *aff'd in part, rev'd in part and remanded sub nom.* Lane v. Franks, 134 S. Ct. 2369 (2014) (relying solely on fact that Lane's testimony was about acts performed in his official capacity, although stating that that fact was "not dispositive" of conclusion that the testimony was unprotected).

69. Lane v. Franks, 134 S. Ct. 2369, 2379 (2014).

employees gain knowledge of matters of public concern through their employment."[70]

2. *Evaluating the Roberts Court's Approach to Special Value*

Among *Garcetti*'s most glaring problems is its crabbed vision of special value. The Court nods to precedent by acknowledging the unique knowledge and insights that public employees possess.[71] Yet in insisting that that value is not squandered because employees remain free to "participat[e] in public debate,"[72] the Court misconceives special value on both practical and theoretical levels. First, the Court seems not to appreciate the broad and deep connections between work product speech and public discourse. As we saw in Section I.A, much government work product speech either is prepared for public consumption or indirectly shapes the information that makes its way to the public. Relatedly, the Court overlooks the information-distorting effects that politicized employer control of work product speech can have on public debate. For example, where a government scientist is pressured to downplay or misrepresent their scientific findings because of superiors' concerns about their political implications, the public may be actively misled.[73]

Most fundamentally, the Court misses the fact that the special constitutional value of public employee speech stems from employees' privileged access not only to information, but to channels for conveying it. Among the most important of these channels is the simple act of crafting work product honestly and competently, even in the face of political pressure to deviate from professional norms or standards. By so doing, public employees can disrupt government efforts to distort information.[74] Other special channels include internal reporting avenues, ranging from informal meetings with superiors to the ability to file reports with agencies' inspectors general.[75] Given how little *Garcetti* actually said about the scope of the work product speech category,[76] and the broad interpretations rendered by some lower courts since *Garcetti* was decided,[77] public

70. *Id.*
71. *Garcetti*, 547 U.S. at 419–21.
72. *Id.* at 422.
73. *See supra* Section I.A.
74. *See supra* Part I.
75. *See supra* Section I.B.
76. *Garcetti*, 547 U.S. at 424 (noting that the parties did not dispute that the speech at issue constituted work product, and that the Court thus had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate").
77. *See* Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 314–23 (citing cases).

employees can find themselves without constitutional protection for using such internal channels—for instance, for reporting concerns through their chain of command rather than to the press.[78] In stripping public employees of constitutional protection for these varied means of communication, the Roberts Court undermined their crucial structural roles as internal checks on government power.

The Roberts Court has not, of course, borne only bad news for special value. In *Lane*, the Court contained some of the damage caused by *Garcetti* by refusing to accept the Eleventh Circuit's very broad definition of work product speech, which would have covered any speech conveying information learned on the job. In so doing, the *Lane* Court acknowledged the force of the special value rationale invoked in cases stretching back to *Pickering*, and correctly reasoned that the Eleventh Circuit's approach defeated the very feature—public employees' unique knowledge—that makes public employee speech so valuable.[79] Still, *Lane* is hardly a panacea. For one thing, it is subject to the possibility of a very narrow, fact-bound reading, although, as I have explained elsewhere, that reading would be a poor one.[80] More importantly, *Lane* does not cure *Garcetti*'s central problem, which is the latter's enervated conception of special value.

B. Government's Managerial Interests

Apart from minimizing the free speech interests at stake, the *Garcetti* Court invoked "the emphasis of our precedents on affording government employers sufficient discretion to manage their operations."[81] Employers, it added, "have heightened interests in controlling speech made by an employee in his or her professional capacity."[82]

The Court was less than precise, however, about the nature of the managerial interests at stake. As Kermit Roosevelt writes, the Court "gesture[s]" at two main manifestations of the interest.[83] The first—the "government speech" rationale—is the position that "speech produced pursuant to official duties [is] in some sense government speech.[84] When employees speak as the government, the government must have free reign

78. *See id.* at 320–22, nn.84–92 and accompanying text (citing cases).

79. Lane v. Franks, 134 S. Ct. 2369, 2379 (2014).

80. *See* Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 311–12 (noting that "*Lane is* potentially subject to a narrow reading, one that limits it to settings in which speech consists of 'truthful subpoenaed testimony' that is not part of the speaker's ordinary job duties," but explaining why that would constitute a poor interpretation).

81. *Garcetti*, 547 U.S. at 422.

82. *Id.*

83. Roosevelt, *supra* note 64, at 635.

84. *Id.*

to dictate, judge, or correct what they say.[85] The second managerial discretion argument—the "evaluation rationale"—is that spoken or written work product "should be conceptualized as job performance rather than speech,"[86] and courts are in no position—either constitutionally or as a practical matter—to second-guess supervisors' job performance evaluations.[87]

Neither of the Court's managerial rationales justify *Garcetti*'s sweeping categorical rule. The government speech rationale is wildly overbroad. While some public employment entails conveying messages that are dictated by one's superiors,[88] this is simply not true of much government work. Many government jobs—including Ceballos's assistant district attorney position[89] and Lane's role as program director[90]—call upon employees to exercise a nontrivial degree of independent judgment.[91] Were such employees required to parrot scripted messages in lieu of conveying their professional judgments, they would effectively be a party to information distortion.[92]

The evaluation rationale rests on more solid ground, but nonetheless is considerably overstated. Most importantly, it rests on the faulty assumption that judicial scrutiny of work product speech retaliation claims must entail substantive assessments of work product quality. To the contrary, judicial review of such claims can and should be designed to ferret out retaliation for reasons other than work product quality. Under this approach, courts would effectively leave non-pretextual decisions based on work product quality untouched. At the same time, they would evaluate purported quality-based decisions to determine whether they are pretexts for non-quality-based retaliation. Where work product speech is punished for reasons other than its quality, courts could proceed to apply the *Connick-Pickering* test. As I elaborated in an earlier article:

> a government lawyer's supervisor would[, under this approach,] have free rein to discipline her for turning in a memorandum "riddled with

85. Indeed, it is on this basis that Kermit Roosevelt dismisses concerns about *Garcetti*'s impact on public speech. He acknowledges that "[s]ome employees might have the job of communicating to the public." Roosevelt, *supra* note 64, at 647 n.62. He concludes, however, that "such an employee is probably best conceived of as speaking for the government, in which case the government would be allowed to dictate the content of the speech." *Id.*

86. *Id.* at 635.

87. *Id.* at 653.

88. *See* Norton, *supra* note 37, at 30–31.

89. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

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

91. *See* Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 325–28 nn.110–25 and accompanying text.

92. *See* Kitrosser, *The Special Value of Public Employee Speech*, *supra* note 9, at 333–34 (rejecting government speech rationale).

> errors of legal analysis." Similarly, a government scientist's superior would be free to discipline her for sloppy research methods or poorly written reports. On the other hand, retaliating against a government lawyer for her internal legal advice, not because the advice is unsound but because it provides a politically inconvenient answer, is not a work quality-based judgment. Nor would it constitute a work quality-based decision were a government scientist's supervisors to discipline her for reaching scientific conclusions in tension with an administration's policy agenda. On the other hand, [the failure of an employee who was hired to convey a specified message] to stick to her script could legitimately be deemed poor work quality warranting discipline.[93]

While distinguishing pre-textual reasons from real ones and smoking out illegal motives are not easy tasks, they are jobs that courts are well-equipped to perform. Indeed, courts regularly conduct such analyses in a range of settings, including constitutional and employment cases. Courts routinely ask, for example, whether laws are based on the content of speech facially or in their underlying purposes.[94] And in constitutional and statutory discrimination cases, courts often evaluate whether neutral explanations for workplace discipline or other actions are pretexts for discrimination.[95]

If the Roberts Court exaggerates government's managerial needs over the speech of its employees, Magarian's work helps us to see the links between that overstatement and the Roberts Court's larger commitment to managed speech. Indeed, the Court's unearned certainty, in *Garcetti*, that employers' evaluative needs cannot be reconciled with judicial review, parallels its credulity toward the government's sweeping national security arguments in *Holder v. Humanitarian Law Project*. And in its expansive conception of speech that effectively belongs to the government because it has "commissioned or created" it,[96] *Garcetti* anticipates the Robert Court's generous definition, in two subsequent cases, of "government speech."[97]

The Court's remarkable deference to government's claimed managerial needs, along with its clearing of wide zones of physical and virtual space for "government speech," is consistent with what Magarian calls the promotion of "social and political stability" at the expense of "modes of public discussion that threaten to destabilize existing arrangements of social and political power."[98] In *Garcetti,* we see that potentially destabilizing

93. *Id.* at 336 (internal citation omitted).
94. *Id.* at 340 nn.170–73 and accompanying text.
95. *Id.* at 340–41 nn.174–75 and accompanying text.
96. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).
97. *See* cases cited *supra* note 8.
98. MAGARIAN, *supra* note 1, at xv.

discussions internal to government are disfavored as well. Magarian's observations help us to make sense of why and how it is that the Roberts Court places so much faith in government's representations of its managerial needs, and of what is sacrificed in the process.

CONCLUSION

Of course, the Roberts Court did not invent the phenomenon of judicial deference to the government's claimed managerial needs. Highly deferential applications of the *Connick-Pickering* test by earlier Courts make that much clear.[99] Nor did the Roberts Court pioneer the government speech doctrine, which originated in the Rehnquist Court.[100] Yet in its categorical removal of work product speech from protection and its broadening of the field of government speech, the Roberts Court has taken these phenomena to new heights.

Magarian's work helps us to connect the dots between a number of cases, and to identify a commitment to managed speech as their joining thread. Such commitment evinces something more than a strict loyalty to precedent or to the notoriously opaque text and history of the first amendment.[101] Rather, it reveals certain practical and normative understandings of the respective roles played by powerful institutions and dissenters in discourse about matters of public importance. To borrow a phrase from the Roberts Court's namesake, the Court's public employment cases, along with a number of its other free speech cases, reflect something more than the mere calling of "balls and strikes."[102] Through his concept of managed speech, Professor Magarian helps us to understand what that "something more" might entail.

99. *See, e.g.*, Connick v. Myers, 461 U.S. 138, (1983).

100. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981) and Rust v. Sullivan, 500 U.S. 173, 194 (1919) to the effect that the government may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message"). Indeed, the *Garcetti* Court cited this aspect of *Rosenberger* in referring approvingly to government control over speech that "the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 422 (citing *Rosenberger*, 515 U.S. at 833).

101. For reference to this opacity, see, for example, Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State,* 6 J. NAT'L SEC. L. & POL'Y 409, 421–22 (2013), and sources cited therein.

102. *Roberts: "My Job Is to Call Balls and Strikes and Not to Pitch or Bat*," CNN (Sept. 12, 2005, 4:58 PM), https://perma.cc/CM39-XKGY.