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CONSTRAINING PUBLIC EMPLOYEE SPEECH: GOVERNMENT'S CONTROL OF ITS WORKERS' SPEECH TO PROTECT ITS OWN EXPRESSION

HELEN NORTON†

ABSTRACT

This Article identifies a key doctrinal shift in courts' treatment of public employees' First Amendment claims—a shift that imperils the public's interest in transparent government as well as the free speech rights of more than twenty million government workers. In the past, courts interpreted the First Amendment to permit governmental discipline of public employee speech on matters of public interest only when such speech undermined the government employer's interest in efficiently providing public services. In contrast, courts now increasingly focus on—and defer to—government's claim to control its workers' expression to protect its own speech.

† Associate Professor, University of Colorado School of Law. Many thanks to Rachel Arnow-Richman, Sam Bagenstos, Kathleen Bergin, Danielle Keats Citron, Caroline Mala Corbin, Roberto Corrada, Nestor Davidson, David Duff, Melissa Hart, Michael Healy, Danielle Holley-Walker, David Hudson, Thom Lambert, Marty Katz, Dayna Bowen Matthew, Scott Moss, Bob Nagel, Raja Raghunath, Lawrence Rosenthal, Nantiya Ruan, Paul Secunda, Michael Selmi, Phil Weiser, Mimi Wesson, and Greg Young for their insightful comments. This Article also benefited greatly from participants' comments at the 2008 *Jurisgenesis* conference, jointly hosted by the Washington University and St. Louis University Schools of Law, the University of North Carolina's 2008 First Amendment Law Review symposium, *Public Citizens, Public Servants: Free Speech in the Post-*Garcetti *Workplace*, the 2008 Northeast People of Color and the Law Conference, the Third Annual Colloquium on Current Scholarship in Labor and Employment Law, and a University of Colorado School of Law faculty workshop. Finally, thanks to the University of Colorado School of Law for its financial support for this project, to the *Duke Law Journal* for excellent editorial support, and to Katharine Decker for outstanding research assistance.

More specifically, courts increasingly permit government to control its employees' expression at work, characterizing this speech as the government's own for which it has paid with a salary. This trend frustrates a meaningful commitment to republican government by allowing government officials to punish, and thus deter, whistleblowing and other valuable on-the-job speech that would otherwise facilitate the public's ability to hold the government politically accountable for its choices. Courts also increasingly consider government workers to be speaking as employees even when away from work, deferring to the government's assertion that its association with employees who engage in certain off-duty expression undermines its credibility in communicating its own contrary views. Implicit in courts' reasoning is the premise that a public entity's employment relationship with an individual who engages in certain expression communicates a substantive message to the public that the government is entitled to control. Courts' unfettered deference to such claims would permit government agencies to fire workers for any unpopular or controversial off-duty speech to which the public might object, potentially enforcing orthodox expression as a condition of public employment.

To be sure, government speech is as valuable as it is inevitable. But taken together, these trends lead to the rejection of government workers' First Amendment claims in a growing number of cases that undermine workers' free speech rights as well as the public's interest in transparent government. Because of this shift's normatively troubling implications, this Article proposes a new constitutional framework for public employee speech cases that attends more carefully to what it is that government seeks to communicate and whether that message is actually impaired by employee speech. It thus proposes a less deferential approach to assessing government's expressive claims to its workers' speech both on and off the job, exploring both categorical and contextual frameworks for identifying more precisely the comparatively small universe of workers' speech that actually threatens government's own expression.

TABLE OF CONTENTS

INTRODUCTION

Courts assessing public employees' First Amendment claims increasingly engage in a key, but unexamined, doctrinal shift: although past courts focused on whether and when public employers' interest in managerial control and operational efficiency outweighed workers' speech interests, courts now concentrate on—and defer to—government's claim to control the speech of its workers to protect its own expression. A careful examination of this trend in light of the values underlying the government speech doctrine, however, reveals that courts too often permit government to assert control over employee speech that does not actually undermine its own expression. Courts' increased deference in this area thus effectively

works as a bludgeon against public employee speech when a scalpel offers a more appropriate tool for protecting government's legitimate expressive interests as well as workers' own free speech rights and the public's interest in transparent government. To this end, this Article proposes a less deferential approach to assessing government's expressive claims to its workers' speech both on and off the job, exploring categorical as well as contextual frameworks for identifying more precisely the comparatively small universe of worker speech that actually threatens government's own expression.

More specifically, as one component of courts' growing deference to government's expressive claims, courts increasingly permit government to control its workers' on-the-job expression by characterizing such speech as the government's own for which it has paid with a salary. As the Supreme Court held in *Garcetti v. Ceballos*,[1] public employees' speech made "pursuant to their official duties" receives no First Amendment protection from employer discipline[2] because the government should be permitted to "exercise . . . employer control over what the employer itself has commissioned or created."[3] Lower courts routinely apply this new bright-line rule to dispose of the First Amendment claims of a wide range of public employees punished for their on-the-job reports of safety hazards, ethical improprieties, and other government misconduct.[4] Examples include the rejection of First Amendment challenges by prosecutors disciplined for criticizing police work,[5] government workers fired after reporting public officials' financial or ethical improprieties,[6] and department heads terminated for criticizing administration priorities.[7] Courts' unblinking deference to such assertions thus frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices.

A few examples illustrate this trend. The Seventh Circuit, for instance, applied *Garcetti* to conclude that the First Amendment does

1. Garcetti v. Ceballos, 547 U.S. 410 (2006).
2. *Id.* at 421.
3. *Id.* at 422.
4. *See* cases cited *infra* note 16.
5. *See Garcetti*, 547 U.S. at 410.
6. *See* cases cited *infra* note 16.
7. *See* Chambers v. Dep't of the Interior, 515 F.3d 1362 (Fed. Cir. 2008).

not protect a police officer's reports that his supervisor was engaged in unlawful activity because the officer's statement was made pursuant to his duty to report possible wrongdoing.[8] As concurring Judge Rovner explained: "Detective Kolatski was performing his job admirably at the time of these events, and although his demotion for truthfully reporting allegations of misconduct may be morally repugnant, after *Garcetti* it does not offend the First Amendment."[9]

A wide range of public employees have met similar fates after reporting health and safety violations and financial irregularities to the displeasure of their supervisors. The Third Circuit, for example, applied *Garcetti* to conclude that the First Amendment does not protect internal reports of health and safety hazards—including elevated heavy metals levels—by state troopers and firearms instructors at the state's shooting range because the reports were made pursuant to their official duty to report operational problems and to maintain a safe worksite.[10] The Second Circuit similarly concluded that the First Amendment does not protect a special education counselor who complained about the lack of proper classes for special education students because her official duties required her to monitor her students' needs and progress.[11] Along the same lines, the Seventh Circuit applied *Garcetti* to hold that a prison guard's internal reports of a possible breach of prison security were unprotected because they took place pursuant to her official responsibilities to keep the prison secure.[12] And the Eleventh Circuit held that the First Amendment did not protect a university employee fired after reporting improprieties in the university's federal financial aid awards because her duties as a financial aid manager required her to flag such problems.[13]

In a related trend involving the First Amendment claims of public employees disciplined for off-duty speech, government increasingly considers its workers to be speaking as employees even when away from work, asserting that its association with employees who engage in certain off-duty expression undermines its credibility in communicating its own contrary views. Examples include

8. Morales v. Jones, 494 F.3d 590, 597 (7th Cir. 2007).

9. *Id.* at 599 (Rovner, J., concurring in part and dissenting in part).

10. Foraker v. Chaffinch, 501 F.3d 231, 247 (3d Cir. 2007).

11. Woodlock v. Orange Ulster B.O.C.E.S., 281 Fed. App'x 66, 68 (2d Cir. 2008) (summary order).

12. Spiegla v. Hull, 481 F.3d 961, 965–66 (7th Cir. 2007).

13. Battle v. Bd. of Regents, 468 F.3d 755, 761–62 (11th Cir. 2006) (per curiam).

firefighters fired for participating in a holiday parade that featured mocking racist stereotypes,[14] a university vice president disciplined for writing a newspaper column questioning gay rights,[15] and police officers discharged for appearing in or maintaining sexually explicit websites.[16] In response, courts often characterize such off-duty speech as harmful not because of what it reflects about the worker's own ability to perform her job, but rather because of what it communicates about the government agency as a whole. These decisions reflect courts' intuition that the public will inevitably associate public employees' off-duty expression with their governmental employers—just as voters often ascribe the views of a political candidate's associates to the candidate himself.[17]

Courts' unconstrained deference to such contentions, however, would permit government agencies to fire workers for any off-duty speech to which the public might object without any meaningful tether to the effectiveness of government operations. Indeed, absent any limiting principles, certain individuals may be unemployable for many government jobs purely because of their unpopular or controversial off-duty expression—for example, marching in a gay pride parade or blogging for or against either abortion or immigration reform. This trend threatens to gain momentum with employers' increasing ability to learn of workers' off-duty speech through YouTube, Facebook, and other social networking and communications technologies.[18] The effects of this trend may also widen because of the Court's willingness to extend its First Amendment doctrine governing public employees' speech to the

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14. *See* Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006).

15. *See* Scott Jaschik, *When Equity Official Takes Anti-Gay Stance*, INSIDE HIGHER ED, May 5, 2008, http://www.insidehighered.com/news/2008/05/05/toledo.

16. *See* City of San Diego v. Roe, 543 U.S. 77, 78 (2004) (per curiam); Dible v. City of Chandler, 515 F.3d 918, 922 (9th Cir. 2008); Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342, 1344 (11th Cir. 2006).

17. *See* Shankar Vedantam, *The Candidate, the Preacher, and the Unconscious Mind*, WASH. POST, May 5, 2008, at A2 (describing observers' tendency to ascribe the views of Barack Obama's pastor to the candidate himself).

18. *See* United States v. Wilcox, 66 M.J. 442, 446 (C.A.A.F. 2008) (discussing First Amendment implications of the military disciplining a servicemember for his Facebook page advocating white supremacy); TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 326 (2007) ("Indeed, workers, and job applicants in particular, would be well-advised to assume that anything they say or post in publicly accessible areas of the internet will become known to potential employers . . . .").

expression of private speakers who engage in contractual and other relationships with governmental bodies.[19]

Taken together, government's expansive claims to control public employees' expression mark a disturbing trend that imperils not only the free speech rights of more than twenty million government workers,[20] but also the public's interest in transparent government. This requires a new First Amendment framework that more carefully attends to what it is that government seeks to communicate—and whether that message is actually impaired by employee speech.

To this end, Part I describes courts' growing deference to government's expressive claims when assessing public employees' First Amendment challenges. Part II then focuses specifically on public employees' on-duty speech, exploring the theoretical and practical foundations of the government speech doctrine. After demonstrating the mismatch between current doctrine and government's actual expressive interests, it proposes to replace the *Garcetti* rule with a considerably less deferential approach that attends to the public's interest in transparent government. Part III then turns to public employees' off-duty speech, examining the theoretical and practical assumptions underlying government's concern that its association with an employee who engages in objectionable speech away from work may undermine its own communicative abilities. After describing courts' tendency to defer to this concern without articulating any meaningful limitations thereto, this Part proposes two possible replacements for the deferential status quo: a categorical and a contextual framework, both of which identify more precisely the comparatively small universe of off-duty speech that actually threatens government's legitimate expression. These approaches include attention to whether certain jobs trigger such strong associations with the government that public employees in those jobs can never escape their governmental role to speak purely

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19. *See* Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 299–300 (2007) (relying on public employee precedents for guidance in assessing First Amendment claims of a private school that had voluntarily joined a governmental athletic association); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (relying on public employee precedents for guidance in assessing First Amendment claims of an independent contractor); Lowery v. Euverard, 497 F.3d 584, 596–97 (6th Cir. 2007) (relying on public employee precedents for guidance in assessing First Amendment claims of student-athletes).

20. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT, HOURS AND EARNINGS FROM THE CURRENT EMPLOYMENT STATISTICS SURVEY (2008), *available at* http://data.bls.gov/PDQ/outside.jsp?survey=ce (reporting that federal, state, and local governments currently employ 22,703,000 workers).

as private citizens even when away from work, and whether the context of the off-duty speech otherwise leads the public reasonably to associate the expression with the government. The Article concludes by applying those principles to a series of fact patterns, and by addressing likely objections.

I. THE CURRENT LANDSCAPE: COURTS' EXPANSIVE DEFERENCE TO GOVERNMENT'S EXPRESSIVE CLAIMS WHEN ASSESSING PUBLIC EMPLOYEES' FIRST AMENDMENT CHALLENGES

The Supreme Court has long recognized that the First Amendment limits government's ability to punish public employee speech—although, as described in more detail below, the Court has granted government more power to regulate the speech of its workers than that of its citizens generally.[21] This Part describes courts' framework for assessing public employees' First Amendment claims, highlighting courts' expanding deference to government's assertions that its own expression may be impaired by its employees' speech both on-duty and off.

*A. Pre-*Garcetti*: The* Pickering/Connick *Balancing Test*

The longstanding test for assessing claims that the government has unconstitutionally punished public employees for their speech requires courts to weigh the individual employee's interest, as a citizen, in commenting on matters of public concern against the government's interest, as an employer, in efficiently providing public services.[22] Under this framework, courts first assess whether the

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21. *See infra* notes 37–38 and accompanying text. Private employers remain constitutionally free to control their workers' speech because the First Amendment does not constrain private actors. A patchwork of federal and state statutes provides some protection to private workers' whistleblowing or other speech on certain topics. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (2006) (protecting workers' speech opposing unlawful discrimination).

22. Connick v. Myers, 461 U.S. 138, 143 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The Court has held that a more rigorous standard should apply to sweeping statutory restrictions on public employees' speech than that applied by *Pickering* as a post hoc assessment of individual disciplinary actions. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1995) ("[T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." (quoting *Pickering*, 391 U.S. at 571)). In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court applied this test to strike down a statutory ban on government employees' receipt of honoraria for off-the-job expression, concluding that the government's operational interests were very

contested expression's subject matter touches upon a matter of public concern as a matter of law.[23] The Court has defined speech on a matter of public concern as speech that addresses "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[24] Note that, for these purposes, the subject matter of the speech determines its public or private nature, rather than its setting.[25]

If the speech in question does *not* touch upon a subject of public concern—for example, a public employee's personal grievance about her own working conditions that is primarily of value to the speaker as opposed to the listening public[26]—then courts routinely uphold the government's decision to discipline such private-concern speech without any additional analysis.[27] If, however, the plaintiff's speech

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weak in large part because "the vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside the workplace." *Id.* at 470.

23. *Connick*, 461 U.S. at 143; Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979). Controversy remains over whether the "public concern" test is an appropriate threshold inquiry in First Amendment disputes involving employees' off-duty—rather than on-the-job—speech unrelated to employment. *See, e.g.*, George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 145, 150–51 (2008) (questioning the relevance of the public concern inquiry).

24. City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam) (characterizing the plaintiff's sexually explicit website as failing to address a matter of public interest). Courts sometimes struggle to distinguish speech on matters of public and private concern. *See* Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988) (describing courts' difficulty in parsing speech on matters of public and private concern). *Compare* Pappas v. Giuliani, 290 F.3d 143, 155 (2d Cir. 2002) (Sotomayor, J., dissenting) (characterizing any speech referring to race relations—including hateful racial speech—as inherently of public concern), *with* Vinci v. Neb. Dep't of Corr. Servs., 253 Neb. 423, 433–34 (1997) (concluding that a public employee's use of a racial epithet was not a matter of public concern for First Amendment purposes).

25. *See Givhan*, 439 U.S. at 413 (holding that a teacher's private criticism to her principal about the school's desegregation efforts touched upon a matter of public concern even if not aired publicly).

26. *Connick*, 461 U.S. at 141; *see also Nat'l Treasury Employees Union*, 513 U.S. at 466 ("[P]rivate speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer.").

27. Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion) ("[W]e have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. Doubtless some such speech is sometimes nondisruptive; doubtless it is sometimes of value to the speakers and the listeners. But we have declined to question government employers' decisions on such matters."); *Connick*, 461 U.S. at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing

concerns a matter of public interest, then the dispute proceeds to a balancing inquiry. There the court weighs the value of the employee's speech against any detrimental impact on the government's efficient workplace operations, such as any adverse effect on the employee's own performance or the employer's ability to maintain discipline and harmony among co-workers.[28]

The Supreme Court first applied this balancing framework in *Pickering v. Board of Education*,[29] when it considered the First Amendment challenge of a public school teacher fired after writing a letter to the local newspaper criticizing the school board's handling of various revenue-raising proposals.[30] Upholding the plaintiff's claim, the Court concluded that his speech did not impair the government's interests in operational efficiency because it criticized board members with whom he was not in regular contact and thus did not threaten the school's interest in harmonious working relationships.[31]

Connick v. Myers[32] offers another illustration of this test in practice, in which the Court considered the First Amendment challenge of a prosecutor disciplined after circulating a questionnaire about office policies to her co-workers.[33] The Court characterized most of the questionnaire as a matter of private, rather than public, concern—that is, simply an extension of the plaintiff's personal dispute with her supervisor over her transfer—because it "pertain[ed] to the confidence and trust that [the plaintiff's] coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee."[34] After concluding that a single questionnaire item regarding improper coercion to engage in political activity did implicate a subject of public interest and thus triggered the balancing analysis, the Court held that the employer's concerns about the questionnaire's overall impact on harmonious working relationships

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their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

28. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564–65 (1973) (concluding that the Hatch Act's statutory ban on federal workers' partisan political activities is justified by the government's operational interest in a federal workforce free from political favoritism or the appearance of such favoritism); Pickering v. Bd. of Educ., 391 U.S. 563, 569–71 (1968).

29. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

30. *Id.* at 564.

31. *Id.* at 569.

32. Connick v. Myers, 461 U.S. 138 (1983).

33. *Id.* at 142.

34. *Id.* at 148.

outweighed the First Amendment value of that particular query.[35] In so holding, the Court in *Connick* made clear its deference to government employers' managerial judgments:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.[36]

By permitting government employers to discipline workers based on the content or viewpoint of their speech—for example, speech critical of the government—the *Pickering*/*Connick* analysis thus allows government to restrict its employees' speech in ways that would be "plainly unconstitutional if applied to the public at large."[37] In other words, the Court permits government considerably greater power to control the speech of its workers than the speech of the general public because the government's efficiency interest "is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."[38]

B. On-Duty Speech: Garcetti*'s New Bright-Line Rule*

The Supreme Court considerably expanded government employers' already-substantial power over public employee speech in *Garcetti v. Ceballos*, in which it established a new threshold inquiry that strips a wide swath of government workers' expression of any First Amendment protection. *Garcetti* involved a First Amendment challenge by a prosecutor disciplined for his internal memorandum criticizing a police department affidavit as including serious misrepresentations.[39] A divided Court held that public employees' speech made "pursuant to their official duties" receives no First

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35. *Id.*

36. *Id.* at 151–52; *see also* Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) ("[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, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.").

37. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995).

38. *Waters*, 511 U.S. at 675; *see also* Locurto v. Giuliani, 447 F.3d 159, 163 (2d Cir. 2006) (observing that, for First Amendment purposes, the government receives greater deference when acting as a market participant than when acting as a government regulator).

39. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

Amendment protection from employer discipline.[40] Its reasoning rested largely on its concern that "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."[41] In holding that a government employer should remain free to "exercise . . . employer control over what the employer itself has commissioned or created,"[42] the majority created a bright-line rule that treats public employees' speech delivered pursuant to their official duties as the government's own speech—that is, speech that the government has bought with a salary and thus may control free from First Amendment scrutiny.

Garcetti treated a public employee's constitutionally protected speech "as a citizen" as entirely separable from that employee's now-unprotected speech "pursuant to official duties."[43] In other words, according to the Court, those two categories of speech are mutually exclusive such that an employee's official-duties speech can never be characterized, for First Amendment purposes, as also expressing the employee's views as a citizen. The *Garcetti* majority made room for just one exception, which leaves open the possibility of a different standard for public educators' speech that raises academic freedom issues.[44]

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40. *Id.* Justices Stevens, Souter, Breyer, and Ginsburg dissented, offering three different views. Justice Stevens would require *all* claims involving employees' speech on a matter of public interest to proceed to balancing. *See id.* at 427 (Stevens, J., dissenting). Justice Souter, joined by Justices Stevens and Ginsburg, predicts that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety" should trump the government's interests when such speech is delivered pursuant to an employee's official duties. *Id.* at 435 (Souter, J., dissenting). Dissenting Justice Breyer, in contrast, would defer to government employers' judgment in the great majority of cases, permitting only employees' duty-related speech that presents "professional and special constitutional obligations" to proceed to balancing. *Id.* at 447–49 (Breyer, J., dissenting).

41. *Id.* at 423 (majority opinion).

42. *Id.* at 422.

43. *See id.* at 421 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . .").

44. *Id.* at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."). Speech on university governance issues, however, may be unprotected after *Garcetti* even if speech related to scholarship and teaching receives some sort of academic freedom protection. *See* Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a tenured professor's complaints about a university's use of grant funds because they were made

Since *Garcetti*, courts begin analyzing public employees' First Amendment claims by determining simply whether the contested speech was delivered pursuant to the plaintiff's official duties. If so, the First Amendment challenge fails, regardless of the strength of the public's interest in the expression or its impact, if any, on the efficiency of the government workplace. First Amendment claims that survive the *Garcetti* screen—that is, constitutional challenges involving government workers' speech that was not delivered pursuant to official duties—continue on to the longstanding *Pickering*/*Connick* inquiry. Examples include not only workers' speech on matters unrelated to their jobs, but also workers' reports of government wrongdoing to outside entities like the press[45] or law enforcement agencies[46] if such external reporting is not part of their official duties (even if it occurred while they were on duty).

Although public entities frequently hire workers specifically to monitor and flag dangerous or illegal conditions, *Garcetti* now

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pursuant to his official duties); Hong v. Grant, 516 F. Supp. 2d 1158, 1167–68 (C.D. Cal. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a professor's critical statements regarding the hiring and promotion of other professors and the use of lecturers because this speech was uttered pursuant to his official duty to participate in university governance). Moreover, whether academic freedom protections extend beyond postsecondary education to primary and secondary school teachers remains unclear. *Compare* Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) (applying *Garcetti* to conclude that an elementary school teacher's classroom speech occurred pursuant to her official duties and was thus unprotected), *with* Lee v. York County Sch. Div., 484 F.3d 687, 694–95 (4th Cir. 2007) (declining to apply *Garcetti* to a high school teacher's classroom speech because of academic freedom concerns).

45. *See* Hughes v. Region VII Area Agency on Aging, 542 F.3d 169, 184–87 (6th Cir. 2008) (proceeding to *Pickering* balancing after concluding that a public employee's official duties did not include responding to a reporter's questions about a supervisor's alleged sexual harassment).

46. *See, e.g.*, Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1331–33 (10th Cir. 2007) (finding the plaintiff superintendent's communications to the school board about possible violations of state and federal law to be unprotected because they were made pursuant to her official duties, but permitting the superintendent's claim involving her speech to the state attorney general on the same topic to proceed to *Pickering* balancing because this speech was not among her official duties); Freitag v. Ayers, 468 F.3d 528, 545–46 (9th Cir. 2006) (finding a corrections officer's reports of misconduct to her superiors unprotected under *Garcetti* because the internal reports were made pursuant to her official duties, but her communications with a state senator and the state office of inspector general on the same topic could proceed to balancing because they were not made pursuant to her official duties).

Indeed, although the *Garcetti* Court found Mr. Ceballos's internal criticism of the police unprotected by the First Amendment, it remanded his claim that his discipline was also motivated by his speech to a local bar association that was not among his official duties. *Garcetti*, 547 U.S. at 443–44 (Souter, J., dissenting).

counterintuitively—indeed, perversely[47]—empowers the government to punish them for doing just that. *Garcetti* thus undermines the government's accountability to the public even while it purports to protect the government's own expressive interests—expression initially recognized to have value only to the extent that it enhances government accountability. Indeed, lower courts now routinely apply *Garcetti* to dispose of the constitutional claims of public employees fired after their job-required reports regarding hazards or improprieties. These claims include police officers terminated after reporting public officials' illegal or improper behavior,[48] a wide variety of public employees discharged after detailing health and safety violations,[49] health care workers disciplined after conveying

47. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

48. *E.g.*, Callahan v. Fermon, 526 F.3d 1040, 1045 (7th Cir. 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a police officer's report to supervisors of a fellow officer's potential misconduct because the report was made pursuant to his official duty to report wrongdoing); Sigsworth v. City of Aurora, 487 F.3d 506, 510 (7th Cir. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a police officer's report to his supervisors about a fellow officer's misconduct in hampering the execution of arrest warrants because the report was made pursuant to his official duties); Sillers v. City of Everman, No. 4:08-CV-055-A, 2008 U.S. Dist. LEXIS 39187, at *7 (N.D. Tex. May 13, 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a police officer's report to supervising officers about unlawful acts committed by other police officers against citizens); Hoover v. County of Broome, No. 3:07-cv-0009, 2008 U.S. Dist. LEXIS 31485, at *15 (N.D.N.Y. Apr. 15, 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a correction officer's report about other officers' excessive use of force on a prison inmate); Baranowski v. Waters, No. 05-1379, 2008 U.S. Dist. LEXIS 21301, at *71 (W.D. Pa. Mar. 18, 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a police officer's complaints to his superiors about other police officers' potential misconduct in a shooting); Maule v. Susquehanna Reg'l Police Comm'n, No. 04-CV-05933, 2007 Dist. LEXIS 73065, at *39–41 (E.D. Pa. Sept. 27, 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a police chief's report of a local councilman's improprieties to the state police for criminal investigation); Wesolowski v. Bockelman, 506 F. Supp. 2d 118, 121–22 (N.D.N.Y. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a sheriff's department employee's report that a corrections officer beat an inmate); Burns v. Borough of Glassboro, No. 05-3034, 2007 U.S. Dist. LEXIS 42069, at *22–24 (D.N.J. June 11, 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a police officer's report to internal affairs that the chief sexually harassed another officer); Bland v. Winant, No. 03-6091, 2007 U.S. Dist. LEXIS 31094, at *12 (D.N.J. Apr. 27, 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a police representative's report to the prosecutor of a councilmember's arrest).

49. *E.g.*, Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008) (noting that the plaintiff, a police safety officer, concedes that, after *Garcetti*, the First Amendment does not protect his speech identifying a large number of cancers, miscarriages, birth defects, and other health problems suffered by individuals working a precinct with underground gasoline tanks when the reports are made pursuant to the plaintiff's official duties); Green v. Bd. of County

concerns about patient care,[50] primary and secondary school educators punished after describing concerns about student treatment,[51] and financial managers fired after reporting fiscal improprieties.[52]

Comm'rs, 472 F.3d 794, 799–801 (10th Cir. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a lab technician's speech seeking to correct deficiencies in a testing program because the speech was made pursuant to her official duties); McGee v. Pub. Water Supply, 471 F.3d 918, 920–21 (8th Cir. 2006) (applying *Garcetti* to conclude that the plaintiff's expressions of concern about environmental compliance were not protected by the First Amendment because they were made pursuant to his official duties as a county water supply district manager); McQuary v. Tarrant County, No. 4:06-CV-622-Y, 2008 U.S. Dist. LEXIS 26494, at *31 (N.D. Tex. Mar. 31, 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a medical liaison's letters to the county sheriff's department contending that various policies and procedures were in violation of the law because the speech was made pursuant to official duties).

50. *E.g.*, Davis v. Cook County, 534 F.3d 650, 653 (7th Cir. 2008) (applying *Garcetti* to conclude that the First Amendment does not protect a nurse's memo "reflect[ing] the concern of a conscientious nurse to ensure and contribute to the smooth functioning of the ER and to advocate for the well-being of the patients under her care" because these concerns were expressed pursuant to her official duties); Barclay v. Michalsky, 493 F. Supp. 2d 269, 271 (D. Conn. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a nurse's report that workers in a correctional facility's psychiatric ward were imposing excessive restraints on patients when the reports were made pursuant to her official duties); Coward v. Gilroy, No. 3:05-CV-285, 2007 U.S. Dist. LEXIS 30075, at *11–14 (N.D.N.Y. Apr. 24, 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a family care home operator's speech expressing concern about the quality of patients' health care); Logan v. Ind. Dep't of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 WL 1750583, at *2–3 (S.D. Ind. June 26, 2006) (applying *Garcetti* to conclude that the First Amendment does not protect a correctional facility health care administrator's reports about inmates' critically inadequate nursing care because such reports were made pursuant to her job duties).

51. *E.g.*, Pagani v. Meriden Bd. of Educ., No. 3:05-CV-01115, 2006 U.S. Dist. LEXIS 92267, at *10–12 (D. Conn. Dec. 19, 2006) (applying *Garcetti* to conclude that the First Amendment does not protect a teacher's report that another teacher had shared nude photos with students when such reports were made pursuant to her official duties); Houlihan v. Sussex Technical Sch. Dist., 461 F. Supp. 2d 252, 260 (D. Del. 2006) (applying *Garcetti* to conclude that the First Amendment does not protect a school psychologist's reports of Individuals with Disabilities Education Act noncompliance because the reports were made pursuant to the plaintiff's official duties).

52. *E.g.*, Thompson v. District of Columbia, 530 F.3d 914, 917–18 (D.C. Cir. 2008) (applying *Garcetti* to conclude that reports of corruption made by the D.C. Lottery's chief of security were made pursuant to his official duties and were thus unprotected); Vila v. Padrón, 484 F.3d 1334, 1339 (11th Cir. 2007) (applying *Garcetti* to conclude that a university vice president's objections to a wide range of internal misconduct—such as the university's failure to comply with proper bidding procedures when awarding contracts and its use of university funds to illustrate the poetry book of a trustee's daughter—were unprotected); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect an athletic director's reports of financial irregularities to the principal and athletic department office manager because the reports were prepared in the course of performing his job duties); Richards v. City of Lowell, 472 F. Supp. 2d 51, 80 (D. Mass. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect a city financial

Garcetti's holding that public employees' speech delivered pursuant to their official duties receives no constitutional protection thus means the end of most First Amendment claims brought by government workers disciplined for their on-duty speech.[53] If the plaintiff's speech survives *Garcetti*'s initial screen, however, the dispute then proceeds to the traditional *Connick*/*Pickering* inquiry, when—as the next Subpart describes—courts increasingly conclude that government's own expressive interest in controlling its public image eclipses workers' expressive interests even when their speech occurs away from work.

C. Beyond Garcetti*: Application of the* Pickering/Connick *Test to Off-Duty Speech*

Whereas *Garcetti* treats public employees' speech pursuant to their official job duties as the government's own and thus entitled to no First Amendment protection, courts increasingly hold that government may also control even its workers' off-duty speech to protect its own expressive interests. Courts permit government to punish employees for such speech to prevent the delivery of a message it fears would otherwise be sent by its association with the plaintiff through continued employment. In these cases, the government does not urge *Garcetti*'s application, acknowledging that the contested speech did not occur pursuant to the plaintiff's official duties. Instead, as part of the traditional *Pickering*/*Connick* balancing inquiry, these decisions appear to reflect courts' intuition that the public will inevitably associate government employees' off-duty expression with the agency that employs them in a way that may undermine government's ability to communicate its own views effectively.[54] Although this intuition is particularly powerful with

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manager's report of financial improprieties because such reports were made pursuant to his official duties); Levy v. Office of the Legislative Auditor, 459 F. Supp. 2d 494, 497–99 (M.D. La. 2006) (applying *Garcetti* to conclude that the First Amendment does not protect a state auditor's Toastmaster speech criticizing office policy as speech pursuant to the plaintiff's official duties because his government employer required participation in the Toastmaster program to improve public speaking skills).

53. *See, e.g.*, David L. Hudson, Jr., Garcetti*'s Palpable Effect on Public Employee Speech*, FIRST AMENDMENT CENTER, May 29, 2007, http://www.firstamendmentcenter.org/analysis.aspx?id=18606 ("*Garcetti* is the kiss of death for many First Amendment cases.").

54. Here I focus only on courts' conclusions that government workers' off-duty speech carries a public meaning that may compromise the effectiveness of the government agency as an institution, rather than on the distinguishable defense that a particular plaintiff's off-duty speech undercuts her own ability to perform her job effectively. For examples of the latter, see *infra* note 195 and accompanying text.

respect to workers' off-duty speech that expressly exposes their governmental role, lower courts have increasingly extended this rationale to permit the firing of government workers for off-duty speech that makes no reference to their governmental employer.

Consider first the Supreme Court's decision in *City of San Diego v. Roe*.[55] That case involved a police officer fired for maintaining a sexually explicit website that included a video of himself stripping off a police uniform and masturbating, advertisements for the sale of police uniforms and other police equipment, and an e-mail address and user profile identifying him as employed in law enforcement.[56] A unanimous Court rejected his First Amendment challenge, characterizing his expression as unprotected because it did not involve a matter of public concern.[57] Interestingly, even though courts generally rubberstamp the government's actions once they have characterized the contested speech as unrelated to a matter of public concern,[58] the Court here nonetheless went on to consider the strength of the government employer's expressive interests. Characterizing the plaintiff's off-duty speech as job-related because of his purposeful reference to his employment, the Court identified the speech as harmful *not* because of what it reflected about the officer's own ability to perform police work, but rather because of what it communicated about the police department as a whole:

> Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.[59]

Implicit in the Court's reasoning is the premise that a public entity's employment relationship with an individual who engages in certain

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55. City of San Diego v. Roe, 543 U.S. 77 (2004) (per curiam). *San Diego* may carry implications for public employees' substantive due process, as well as their free speech, rights. *See* 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, 127–35 (2006).

56. *San Diego*, 543 U.S. at 78.

57. *Id.* at 81–84.

58. *See supra* note 27 and accompanying text.

59. *San Diego*, 543 U.S. at 84.

expression—here, sexually explicit speech that implicated his law enforcement employment[60]—communicates a substantive message to the public that the government is entitled to control. Indeed, because the plaintiff's off-duty speech in *San Diego* intentionally implicated his employment, it presented an especially strong threat to the government's own expressive interests.

With little analysis, however, lower courts have significantly extended this holding to permit the firing of government workers for a variety of off-duty speech that makes no reference to the government for fear that the public will nonetheless ascribe this speech to the plaintiff's government employer.[61] The Ninth Circuit, for example, stretched *San Diego*'s reasoning when it rejected a First Amendment challenge by a police officer who had been fired for maintaining a sexually explicit website featuring his wife.[62] Although the website made no reference to law enforcement generally or to the plaintiff's employment specifically, the court concluded that the public would inevitably associate the plaintiff's off-duty expression with the police department that employs him:

> [I]t can be seriously asked whether a police officer can ever disassociate himself from his powerful public position sufficiently to make his speech (and other activities) entirely unrelated to that position in the eyes of the public and his superiors. Whether overt or temporarily hidden, Ronald Dible's activity had the same practical effect—it "brought the mission of the employer and the professionalism of its officers into serious disrepute." . . . The law and their own safety demands that [police officers] be given a degree of respect, and the sleazy activities of Ronald and Megan Dible could not help but undermine that respect.[63]

Courts have credited similar governmental concerns when rejecting the First Amendment claims of police officers fired for racist

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60. *Id.* at 79.

61. Co-workers, as well as the government agency itself, may share similar associational concerns. For example, a police officer may feel that other officers' offensive off-duty speech debases her own public image, devaluing her employment.

62. Dible v. City of Chandler, 515 F.3d 918, 928–29 (9th Cir. 2008); *see also* Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342, 1355–56 (11th Cir. 2006) (applying *San Diego* to uphold the termination of police officers for their off-duty appearance on sexually explicit websites).

63. *Dible*, 515 F.3d at 926, 928 (quoting *San Diego*, 543 U.S. at 81). *Dible* further notes that concerns about a heckler's veto "do not directly relate to the wholly separate area of employee activities that affect the public's view of a governmental agency in a negative fashion, and, thereby, affect the agency's mission." *Id.* at 928–29.

off-duty speech that referenced neither their employer specifically nor law enforcement generally. The Second Circuit, for example, denied an officer's First Amendment challenge to his discharge for mailing anonymous racist materials to various nonprofit organizations that had sent him fundraising solicitations, finding the termination justified to prevent the public from otherwise associating the officer's views with the police department as a whole.[64] The panel majority expressed concern not about the employee's own performance (indeed, the officer was assigned to a computer position that did not require public interaction) but instead about public perceptions of the rest of the department that could undermine the agency's effectiveness:

> For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York's citizenry that those are the opinions of New York's police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense.[65]

In sum, courts increasingly defer to government employers' claims that their expressive interests may be imperiled by their workers' off-duty speech.[66]

To be sure, government's expressive claims are at times substantial, as is the case with police departments' interest in credibly communicating their commitment to evenhanded law enforcement regardless of race. But absent limitation, courts' unexamined deference to government in these cases portends deeply troubling

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64. Pappas v. Giuliani, 290 F.3d 143, 146–48 (2d Cir. 2002).

65. *Id.* at 147; *see also* Locurto v. Giuliani, 447 F.3d 159, 178–79 (2d Cir. 2006) (upholding the firing of police officers and firefighters who engaged in mocking racial stereotypes in an off-duty holiday parade); Weicherding v. Riegel, 981 F. Supp. 1143, 1148 (C.D. Ill. 1997) ("Permitting a sergeant affiliated with the Klan to remain [employed by a state correctional center] could send the message that the facility condones or even supports the philosophy of the Klan. This could further exacerbate racial tensions in the prison and in the community.").

66. *See Locurto*, 447 F.3d at 179 ("[T]he disruption need not be actual; the Government may legitimately respond to a reasonable prediction of disruption."); *see also* Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) ("[W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation.").

implications for public employees' free speech rights.[67] If unconstrained, this trend would permit government agencies to fire workers for any unpopular or controversial off-duty speech to which the public (or the courts) might object, such as politically volatile opinions,[68] or sexually explicit speech that courts find "sleazy."[69]

II. GOVERNMENT'S EXPRESSIVE INTEREST IN ITS EMPLOYEES' ON-DUTY SPEECH

As described above, courts increasingly defer to government's expressive claims without examining when and why government expression appropriately merits governmental control free from First Amendment scrutiny. To fill this gap, this Part first explores the theoretical and practical foundations of the government speech doctrine, which exempts government's own expression from First Amendment scrutiny. It then critiques the Supreme Court's decision in *Garcetti* as reflecting a distorted understanding of government speech that overstates government's communicative claims to its employees' on-duty speech while undermining the public interest in transparent governmental speech.[70]

A. The Government Speech Doctrine and Its Purposes

As Thomas Emerson was among the first to explain, government must express itself if it is to govern effectively:

> [Government speech] enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts,

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67. *See* Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 133 (criticizing *San Diego* as "allow[ing] public employers to punish some off-duty speech that is ideologically obnoxious to them even without any impact on or link to its particular operations").

68. *See Dible*, 515 F.3d at 933–34 (Canby, J., concurring) ("A measureable segment of the population, for example, is vigorously antagonistic to homosexual activity and expression; it could easily be encouraged to mobilize were a police officer discovered to have engaged, off duty and unidentified by his activity, in a Gay Pride parade, or expressive cross-dressing, or any number of other expressive activities that might fan the embers of antagonism smoldering in a part of the population.").

69. *See id.* at 928 (majority opinion).

70. I earlier criticized *Garcetti* as a flawed government speech decision in an essay for the University of North Carolina's First Amendment Law Review symposium, *Public Citizens, Public Servants: Free Speech in the Post-*Garcetti *Workplace*. *See* Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMENDMENT L. REV. 75, 83–88 (2008).

> ideas, and expertise not available from other sources. In short, government expression is a necessary and healthy part of the system.[71]

Government speech is thus ubiquitous and necessary. Moreover, it valuably furthers citizens' capacity to participate in democratic self-governance by enabling them to identify and assess their government's priorities and performance.[72] Consider, for example, the insights into government policymaking provided to the public during the Vietnam War by the Pentagon Papers (a Department of Defense study that reviewed U.S. military and diplomatic policy in Indochina)[73] and, more recently, by the Department of Justice's legal memoranda outlining the Bush administration's views on the scope of executive power in the war against terrorism.[74] Government expression thus carries great instrumental value because it offers its listeners important information that furthers the public's ability to evaluate its government.[75] Government speech also facilitates

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71. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697–98 (1970) ("[Government speech] takes the form of oral communications, such as speeches, statements, press conferences, and fireside chats, as well as written communications, such as pamphlets, books, periodicals, and other publications. It utilizes all available media, including printing presses, radio and television, motion pictures, and still pictures, and it achieves its dramatic effects through confrontations in hearings, investigations, and debates."); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1825 (1987) ("[I]t is probably not too outlandish an exaggeration to conclude that government organizations would grind to a halt were the Court seriously to prohibit viewpoint discrimination in the internal management of speech."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980) ("If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs . . . government must be able to communicate.").

72. Shiffrin, *supra* note 71, at 604 ("Governments, then, can justify subsidizing the speech of public officials, not to reelect them or others, but because there is a substantial interest in hearing what they have to say. . . . [T]he public would have the advantage of knowing the collective judgment of the legislature and of knowing the views of its representatives, which would in turn be useful for evaluating them.").

73. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (rejecting the government's efforts to stop publication of the Pentagon Papers).

74. *See, e.g.*, Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Nov. 6, 2001), *available at* http://www.fas.org/irp/agency/doj/olc/commissions.pdf.

75. Government speech is by no means the only type of expression that derives its constitutional salience primarily, if not exclusively, from its instrumental value in facilitating listeners' informed decisionmaking. *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1268 (2005) ("[A] large number of the widely accepted justifications for freedom of speech are about the social and not individual value of granting to individuals an instrumental right to freedom of speech."). Commercial speech, for example, receives constitutional protection because of its value to recipients. *See* Bates v. State Bar, 433

significant First Amendment interests in sharing knowledge and discovering truth by informing the public on a wide range of topics.[76] As an illustration, recall the Surgeon General's groundbreaking 1964 report on the dangers of tobacco.[77]

Because government speech is so important to a thriving democracy, the constitutional standards for evaluating government's control of its own speech differ dramatically from those that apply to the government's regulation of private expression. On one hand, government cannot discriminate on the basis of viewpoint when regulating private speech unless its action satisfies the demanding requirements of strict scrutiny.[78] On the other, government's own speech "is exempt from First Amendment scrutiny,"[79] leaving the government generally free to adopt and deliver whatever message it chooses when it speaks on its own behalf.[80] Political accountability, rather than the Free Speech Clause, provides the recourse for those unhappy with their government's expressive choices.

U.S. 350, 364 (1977) ("[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." (citations omitted)); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (holding that commercial speech is entitled to some constitutional protection because the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

76. *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000) ("[G]overnment speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer."); Shiffrin, *supra* note 71, at 569 ("[S]peech financed or controlled by government plays an enormous role in the marketplace of ideas.").

77. *See* PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 25–32 (1964), *available at* http://profiles.nlm.nih.gov/NN/B/B/M/Q/_/nnbbmq.pdf (describing the adverse health effects of smoking).

78. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (recounting the First Amendment's bar on government's viewpoint-based discrimination against private speech); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (same). Governmental restraints on speech only rarely survive strict scrutiny. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding the government's ban on campaign speech within 100 feet of polling places); Buckley v. Valeo, 424 U.S. 1, 23–38 (1976) (per curiam) (upholding caps on campaign contributions).

79. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) (characterizing the Department of Agriculture's campaign promoting beef products as government speech).

80. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) (distinguishing the government's legitimate exercise of control over the views it itself expresses from the government's impermissible efforts to control the views expressed by private speakers).

The value of government speech turns primarily on its transparency,[81] rather than on its popularity or even its truthfulness.[82] Indeed, as the Supreme Court has acknowledged, both controversial and inaccurate views are not only unavoidable in a full and free public debate, but they often enhance the debate's quality.[83] The First Amendment thus poses no bar to government's own ability to express the view, for example, that climate change is not the result of human behavior or that Iraq harbors weapons of mass destruction;[84] nor should it bar government's decision to engage employees specifically to help deliver these views, and to discipline them if they undermine its delivery. In these cases, the government's transparent expressive choices not only expose its priorities and inform voter decisions, but also spur those with other views to "unearth and disseminate facts that deepen the understanding of both speakers and listeners."[85] Although the First Amendment does not demand that the government's speech be factually correct, note that other constitutional,[86] statutory,[87] or moral constraints may require such accuracy.

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81. In contrast to the emphasis on transparency in the government speech context, speech by anonymous *private* actors can be quite valuable indeed. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 337 (1995) (striking down Ohio's ban on the distribution of unsigned political leaflets).

82. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 990 ("As a general matter, the First Amendment does not require the speech of the state to be truthful and not misleading . . . .").

83. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–73 (1964) (describing the value of false speech in spurring contributions to the marketplace of ideas); *see also* Whitney v. California, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., concurring) ("We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors . . . ." (quoting Thomas Jefferson)).

84. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1133 (2006) (finding no First Amendment bar to government misrepresentations about Iraq's possession of weapons of mass destruction).

85. Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1203 (2009) ("False speech, therefore, is valuable because it is an essential part of a larger system that works to increase society's knowledge.").

86. Congress, for example, as part of its inherent investigative and oversight authority, has the constitutional power to compel the truthful testimony of executive branch officials (and others). *See generally* Nixon v. Adm'r of Gen. Servs., 433 U.S. 435 (1977) (describing Congress's inherent contempt powers); McGrain v. Daugherty, 273 U.S. 135 (1927) (same).

87. *See, e.g.*, Note, *Avoidance of an Election or Referendum when the Electorate Has Been Misled*, 70 HARV. L. REV. 1077, 1078–82 (1957) (describing statutes requiring truth in the government's statements accompanying propositions submitted to voters).

Constitutional constraints other than the Free Speech Clause may still limit governmental speech. For example, government expression that endorses religion may violate the Establishment Clause, and government speech that furthers race, national origin, or gender discrimination may violate the Equal Protection Clause.[88] Moreover, although the government does not violate the First Amendment's Free Speech Clause when it prevents private speakers from joining or altering its own speech,[89] I join those who conclude that government generally[90] possesses no First Amendment rights of its own,[91] leaving legislatures free to enact laws limiting government

88. *See* Anderson v. Martin, 375 U.S. 399, 402 (1964) (striking down, on equal protection grounds, Louisiana's law requiring that political candidates be racially identified on all ballots and nominating papers, and stating that "by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the state furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another"); Greene, *supra* note 76, at 37–38 (describing government speech that may violate the Equal Protection or Establishment Clauses, but not the Free Speech Clause).

89. In Hohfeldian terms, government may be understood as possessing not a right but a privilege to its own speech. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 38–44 (1913) (distinguishing "rights" from "privileges"); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 914 (2008) ("Existing First Amendment doctrine takes a rather clear position with respect to the Hohfeldian structure: a First Amendment right is a right against the government and only against the government.").

90. Note that the Court has suggested that certain institutions with unique communicative functions—such as universities or broadcasters—may have First Amendment interests regardless of their public or private character. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) (noting public and private broadcasters' First Amendment interests in journalistic freedom); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (observing that universities' academic freedom is "a special concern of the First Amendment").

91. *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 42–43 (1983) (arguing that government does not possess First Amendment free speech rights); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501–08 (2001) (arguing that recognizing government's own First Amendment rights is inconsistent with constitutional text and purpose). *But see* United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003) (declining to decide whether government entities have First Amendment rights); *id.* at 225 (Stevens, J., dissenting) (urging the Court to recognize public libraries as First Amendment rightsholders). Moreover, for arguments that state governments may assert First Amendment rights against federal efforts to regulate their speech, see generally David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1 (1999).

speech. Indeed, legislatures often do so—for example, by prohibiting government from engaging in electioneering speech.[92]

Government's claim to speech arises most frequently as a defense to First Amendment challenges by private speakers who seek to alter or join what the government contends is its own expression. Consider the following dispute as just one illustration:[93] A public school board passed a resolution opposing pending school voucher legislation and authorizing public communication of its opposition—along with a variety of materials supportive of its stance—on the district's website, as well as in e-mails and letters to parents and

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92. *See* EMERSON, *supra* note 71, at 708–09 ("[T]he government can restrict its own expression, or that of its agents (aside from their own private expression), without invading any First Amendment right."); KEVIN R. KOSAR, CONG. RESEARCH SERV., PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES 5 (2005) (describing various congressional appropriations laws that prohibit agencies' use of funds for "publicity or propaganda purposes"); YUDOF, *supra* note 91, at 170, 302 (describing statutory restrictions on government's partisan speech); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 376 n.18 (1983) (reviewing YUDOF, *supra* note 91) (discussing statutory and guarantee clause limits on official partisanship); Edward H. Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 586–98, 605 n.169 (1980) (same).

93. For another example, consider the Supreme Court's recent decision in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009). There, both the government and a private party asserted that privately donated, permanent monuments in public parks reflected their own expression. *Id.* at 1129–30. The Court ruled for the government, concluding that "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* at 1132.

As yet another example, states increasingly claim the messages displayed on specialty license plates as their own expression. Such claims have been met with mixed success in the courts because the circuits have split in their characterizations of specialty license plates as governmental or private speech. The Sixth Circuit, for example, concluded that Tennessee's issuance of a "Choose Life" license plate reflected the legislature's own pro-life views and thus constituted government speech within the state's power to control; it thus rejected the ACLU's First Amendment challenge to the state's refusal of its request for a "Pro-Choice" plate. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 379–80 (6th Cir. 2006). In contrast, the Fourth, Eighth, and Ninth Circuits have characterized the same plates as predominantly private expression, upholding First Amendment challenges to states' refusal to issue plates with competing messages. *See* Roach v. Stouffer, 560 F.3d 860, 867–68 (8th Cir. 2009); Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 960 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) (upholding the Arizona Life Coalition's challenge to Arizona's denial of its proposed "Choose Life" plate); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004) (upholding Planned Parenthood's First Amendment challenge to South Carolina's decision to issue a "Choose Life" but not a "Pro-Choice" plate). The Seventh Circuit concluded that specialty license plates do not constitute government speech, but it upheld the state's rejection of a "Choose Life" plate as a reasonable, viewpoint-neutral regulation of a nonpublic forum to ensure the appearance of government neutrality on abortion. Choose Life Ill., Inc. v. White, 547 F.3d 853, 863–67 (7th Cir. 2008).

school employees.[94] A proponent of the legislation then requested that he be allowed to post his pro-voucher materials on the district's website, and that he also be allowed to use the school's communication channels to distribute his pro-voucher materials to the school community.[95] When the district declined, he filed suit, arguing that his exclusion constituted viewpoint discrimination in violation of the First Amendment.[96] The school district successfully defended on the ground that the government speech doctrine permits it to communicate its own viewpoint without any obligation to allow others to join or distort that expression.[97]

Courts often struggle with cases like these.[98] Although the Supreme Court has yet to announce a definitive test for identifying government speech,[99] it highlighted two factors as key to its characterization of a promotional campaign as government speech in *Johanns v. Livestock Marketing Ass'n*:[100] whether the government established the overall message to be communicated and whether the government approved "every word" of the message ultimately disseminated.[101] Lower courts continue to rely on these and other factors when characterizing speech as private or governmental.[102]

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94. *See* Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 278–79 (4th Cir. 2008). In the interest of full disclosure, I served pro bono as counsel of record to *amici* in support of respondent school board in this case upon appeal. *See* Brief of Amici National School Boards Ass'n et al., in Support of Affirmance, Page v. Lexington County Sch. Dist. One, (4th Cir. 2008) (No. 07-1697).

95. *Page*, 531 F.3d at 277.

96. *Id.*

97. *Id.* at 285.

98. But not always. *See Pleasant Grove*, 129 S. Ct. at 1132 ("There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation.").

99. 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 19:25.50 (2007) ("The Supreme Court in *Johanns* did not offer a comprehensive analytical definition of 'government speech.'").

100. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

101. *Id.* at 562; *see also id.* at 553 ("The Beef Promotion and Research Act of 1985 . . . announces a federal policy of promoting the marketing and consumption of 'beef and beef products,' using funds raised by an assessment on cattle sales and importation. The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order or Order), and specifies four key terms it must contain . . . ." (citations omitted)).

102. A number of lower courts have synthesized various appellate decisions to create a four-factor test for characterizing speech as private or governmental: "(1) the central 'purpose' of the program in which the speech in question occurs; (2) the degree of 'editorial control' exercised by the government or private entities over the content of the speech; (3) the identity of the 'literal speaker'; and (4) whether the government or the private entity bears the 'ultimate responsibility' for the content of the speech." Sons of Confederate Veterans, Inc. v. Comm'r of

I have urged elsewhere that a public entity seeking to claim the government speech defense in disputes like these should establish that it expressly claimed the speech as its own when it authorized the communication and that onlookers understood the speech as the government's at the time of its delivery.[103] By identifying two points at which government must expose its expressive choices, this approach maximizes opportunities for the public to engage in undeceived credibility assessments and meaningful political accountability measures. First, requiring that government identify itself as the source of a message at the time of its creation forces government to articulate, and thus think carefully about, its expressive decisions. It also prevents after-the-fact manufacture of a government speech defense as an opportunistic reaction to thwart those challenging government's regulation of what is in fact private speech. Second, requiring the government to be functionally identifiable as the source of the message at the time of its delivery (which may take place some time after its authorization) further enhances the public's ability to evaluate the message's credibility and to hold the government accountable if it finds the message objectionable.

Because accountability efforts like petitioning and voting, rather than the First Amendment, remain the appropriate check on government speech, this approach emphasizes that government speech is most valuable and least dangerous when members of the public can identify the government as its source. If, on the other hand, the expression's government source is obscured because the government fails to identify the speech as its own either formally or functionally, then political accountability provides no meaningful safeguard. In that case, traditional First Amendment analysis (along

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Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002); *see also* Wells v. City & County of Denver, 257 F.3d 1132, 1140 (10th Cir. 2001). The continuing vitality of this four-factor test remains uncertain after *Johanns*. *See, e.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 963 (9th Cir.), *cert. denied*, 129 S. Ct. 56 (2008) (noting that "[t]here is some question as to what standard we should apply in differentiating between private and government speech" and concluding that *Johanns* is distinguishable but instructive); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006) (suggesting that the four-part test might have been overtaken by the Supreme Court's decision in *Johanns*).

103. *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 591–92 (2008). For other commentators' thoughtful discussion of the challenges posed by competing government and private claims to contested speech, see generally Bezanson & Buss, *supra* note 91; Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005).

with its suspicion of viewpoint-based distinctions) should then apply to any government constraints on the contested expression.

Under this approach, the school board's website and e-mails discussed above should be considered speech that the First Amendment permits the government to control as its own.[104] There the board publicly opposed pending legislation, and then communicated its opposition in e-mails, letters, and website postings that expressly identified their governmental origins.[105] In so doing, the board provided the public with valuable information about the opinions of a public education body on proposed education policy. Members of the public in disagreement could then seek to elect new board members.

But the Supreme Court has too often characterized speech as governmental without requiring government to signal the origin of its speech in a way that allows the public meaningfully to evaluate the message and its source. Consider, for example, *Rust v. Sullivan*,[106] in which the Court rejected a First Amendment challenge to federal regulations that barred family planning clinics from making any mention of abortion when providing federally funded counseling and referrals.[107] Although at the time it couched its holding in unconstitutional conditions terms,[108] the Court later described *Rust* as a government speech case: the government had made the expressive choice to promote only some types of family planning, and was thus free not only to express that view directly, but also to pay others—like clinic workers—to express that view on the government's behalf.[109]

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104. The Fourth Circuit reached the same conclusion after applying the *Johanns* factors described above. *See* Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 285 (4th Cir. 2008). The court distinguished the board's actions—in which it made clear its stance, and linked and cited to other materials that supported its position—from the creation of a chat room or other forum for the ventilation of individual views. *See id.* at 284 ("Had a linked website somehow transformed the School District's website into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different.").

105. *Id.* at 278–79.

106. Rust v. Sullivan, 500 U.S. 173 (1991).

107. *Id.* at 191.

108. *Id.* at 198–99.

109. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

The First Amendment permits government to choose to advocate a pro-life or a pro-choice view—or none at all[110]—because these choices provide the public with valuable information about its government. As a practical matter, this means that the First Amendment permits government to pay employees or other agents to help it deliver its chosen message.[111] But if the expression is to be characterized as government speech exempt from First Amendment scrutiny, the expression should be delivered in a way that allows the public to understand it as their government's viewpoint, so that the message's recipients can more accurately assess its credibility and voters may hold the government accountable for that viewpoint.

The contested regulations in *Rust*, however, did not require that the expression's governmental origins be disclosed;[112] the doctors, nurses, and other clinic employees who provided the counseling were advised to respond to abortion-related requests simply by saying that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[113] As commentators have observed, patients might well misunderstand health care professionals to be offering their own independent counsel, rather than speaking as agents required to convey the government's view that abortion is not a method of family planning to be discussed.[114] Because health professionals may be viewed as more credible than the government based on public perception of their expertise and objectivity, patients may have been misled into evaluating the counseling differently than they would have if the speakers had made clear its governmental source.

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110. Government's decision to remain neutral on a particular topic may reflect a strategic decision to conserve limited political capital or to reserve judgment on a controversy as the public debate continues; in any event, that decision also provides the public with valuable information about its government's expressive choices.

111. *See* Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 100 (1998) ("[T]he state cannot literally speak, but can speak only through the voices of others . . . .").

112. *Rust*, 500 U.S. at 180 (explaining that employees of clinics receiving federal funding were "expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request").

113. *Id.* (quoting 42 C.F.R. § 59.8(b)(5)). Although the regulations did not require that the government be identified as the message's source, the majority observed that "[n]othing in [the Title X regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200.

114. *See, e.g.*, Bezanson & Buss, *supra* note 91, at 1394–96 (arguing that patients could mistakenly attribute the government's views to their doctors); Robert C. Post, Essay, *Subsidized Speech*, 106 YALE L.J. 151, 172–75 (1996) (same).

Expressly signaling the message's governmental origins, in contrast, would have permitted listeners to evaluate its quality more accurately, as well as to engage in political accountability measures if they thought it appropriate to do so.[115] *Rust* thus illustrates the danger of treating expression that the government fails transparently to claim as its own as government speech free from First Amendment scrutiny.[116]

B. When Should the First Amendment Be Understood to Permit the Government to Claim—And Thus Control—the On-Duty Speech of Its Employees as Its Own?

As described above, the *Garcetti* rule works as a bludgeon against public employee speech when a scalpel offers a more appropriate tool for parsing government's legitimate expressive interests in its workers' on-duty speech. Because government speech is most valuable and least dangerous when its governmental source is apparent, the First Amendment should instead be understood to permit government to claim as its own—and thus control as government speech free from First Amendment scrutiny—only the speech of public employees that it has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to the public's meaningful credibility and accountability checks.[117] This is the case, for example, when a school board hires a press secretary or lobbyist to promote its anti-voucher position, a health department hires an employee to implement an antismoking promotional effort, a government clinic hires a counselor to advocate methods of family planning other than abortion, a school hires an educator to implement its abstinence-only youth campaign, an

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115. *See* R.J. Reynolds Tobacco Co. v. Shewry, 384 F.3d 1126, 1130 (9th Cir. 2004) (rejecting tobacco companies' First Amendment challenge to California's surtax on cigarettes that paid for a public health campaign criticizing the tobacco industry when the advertisements bore the transparently governmental tagline "Sponsored by the California Department of Health Services").

116. For a more recent example of the Supreme Court's failure to insist on functional transparency as a requirement of government speech, see *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005). That case characterizes beef advertisements authorized by Congress and developed under the supervision of the Secretary of Agriculture as government speech even though they did not indicate—and in fact obscured—their governmental origins to viewers; the ads bore only the tagline "Funded by America's Beef Producers." *Id.* at 555.

117. This formulation is also consistent with the factors identified by the *Johanns* Court as salient to a government speech inquiry because this formulation requires that the government first "establish" the message to be communicated by the employee, as well as control its ultimate delivery. *See supra* note 101 and accompanying text.

agriculture department hires a marketer to extol the benefits of beef, or a mayor commissions a muralist specifically to create patriotic art for the Fourth of July or art promoting equality to celebrate Dr. Martin Luther King's birthday. Each of these examples demonstrates the value of government speech, revealing to the public the expressive choices of the government and enabling voters to evaluate the message's credibility and take accountability measures as appropriate. As a result, government should be permitted to fire or otherwise discipline an employee hired to deliver such a transparently governmental message who carries out her communicative duties in a way that garbles, distorts, contradicts, or otherwise undermines that message.

In other words, courts should not apply traditional First Amendment analysis when they are convinced that the government itself is speaking—but courts should only be so convinced when the government transparently exposes its views. This approach, of course, describes a much smaller slice of public employee speech than does *Garcetti*'s "pursuant to official duties" test.[118] By treating as utterly unprotected any public employee's speech delivered pursuant to that worker's official duties, the *Garcetti* majority ignored the theoretical foundations of government speech as exempt from First Amendment scrutiny only because of its instrumental value to the public as listeners. As dissenting Justice Souter made clear, the public's interest in what Mr. Ceballos had to say about law enforcement in no way diminished because he uttered those views pursuant to his official duties—indeed, the public interest may be enhanced because of his proximity and expertise as a deputy district attorney.[119]

In this way, *Garcetti* fails to recognize that expression constitutes government speech exempt from First Amendment scrutiny only when it enhances listeners' ability to evaluate their government. The Court instead distinguished speech that the government has paid its employees or agents to deliver—and remains free to control—from speech delivered by those individuals in their private capacities: "[W]hen public employees make statements pursuant to their official

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118. As discussed *supra*, *Garcetti* is not the first of the Court's decisions to ignore the theoretical foundations of government speech—*Rust* and *Johanns* treated government speech similarly. *See supra* note 103 and accompanying text.

119. *See* Garcetti v. Ceballos, 547 U.S. 410, 430 (2006) (Souter, J., dissenting) (noting that *Garcetti*'s new "official duties" rule protects internal employee reports of a school's racist hiring practices when made by a teacher but not by a personnel manager, even though the distinction matters not to the expression's value to the public).

duties, the employees are not speaking as citizens for First Amendment purposes . . . ."[120] It thus indicated that the government "owns," for First Amendment purposes, speech for which it paid, permitting governmental bodies to "exercise . . . employer control over what the employer itself has commissioned or created."[121]

But a thoughtful application of this principle requires a deeper analysis of what the government employer has "bought." As Justice Souter observed in dissent, the prosecutor's office in *Garcetti* hired Mr. Ceballos not to deliver a specific government viewpoint about the infallibility of the police department's factual assertions, but instead to provide sound legal analysis and competent prosecution.[122] Yet the Court required no evidence that the government had received anything other than the proficient legal work and judgment for which it had paid.[123]

Lower courts now routinely apply the expedited review offered by *Garcetti* to dispose of government workers' First Amendment claims at great cost to the public's interest in government transparency[124]—precisely the value that the government speech doctrine seeks to protect. Indeed, public entities frequently hire workers specifically to flag dangerous or illegal conditions, yet *Garcetti* empowers the government to punish them for delivering just "what the employer itself has commissioned."[125] Although government can and should be held politically accountable for its

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120. *Id.* at 421 (majority opinion).

121. *Id.* at 422.

122. *See id*. at 437 (Souter, J., dissenting) ("Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden."). As the Court has observed, the prosecution's interest "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

123. *See* Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1475 (2007) ("[T]he claim rejected in *Garcetti* was as much about fairness, and about vindicating the employee's reasonable expectations about what the job required (and presumably therefore permitted him to do), as it was about his liberties.").

124. *See* Boyce v. Andrew, 510 F.3d 1333, 1349 (11th Cir. 2007) (Birch, J., concurring) ("In *Garcetti*, the Court has built upon *Pickering* and succeeding cases to give lower federal courts a distinction in analysis that expedites review of First Amendment, retaliation cases involving government employees . . . .").

125. *See Garcetti*, 547 U.S. at 422. Professor Rosenthal urges that "[a]n employee called upon to speak as part of his duties . . . is not exercising a 'liberty' interest" because such speech "is *supposed* to be performed in a manner consistent with management's wishes." Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 49 (2008).

operational performance as well as for its expressive choices, *Garcetti* treats a wide swath of public employee speech as entirely unprotected without any showing of an adverse effect on government operations. In fact, the government's accountability for its performance may well be undercut by the carte blanche *Garcetti* gives government to discipline workers who truthfully report irregularities and improprieties pursuant to their official duties. In short, rather than identifying a theoretically principled approach for capturing the value created by empowering government to control its own speech, *Garcetti* instead formalistically imposed a bright-line rule to avoid the often-challenging but entirely commonplace task of balancing constitutional interests.[126]

That the government cannot claim the speech of an employee as its own in a particular situation does not mean that that worker's First Amendment claim will necessarily prevail. Public employee expression that does not meet this demanding test for government speech should continue on to the traditional *Pickering*/*Connick* balancing of its value against its impact, if any, on government efficiency.[127] Public employee claims that involve speech on matters of public interest should fail under this balancing inquiry when the speech is intemperate or inaccurate, or when it distracts the employee from performing her job.[128] Indeed, speech delivered pursuant to a public employee's official duties carries significant potential to undermine governmental efficiency—for example, when the boorish

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126. *See Garcetti*, 547 U.S. at 434 (Souter, J., dissenting) ("[W]hen constitutionally significant interests clash, resist the demand for winner-take-all . . . ."); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1187 (2007) ("Eschewing the prevailing balancing standard governing [government employee free speech] claims, the Court adopted a new categorical rule banning any constitutional safeguards.").

As the *Garcetti* majority correctly emphasized, "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. . . . If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action." *Garcetti*, 547 U.S. at 422–23 (majority opinion). But the *Garcetti* Court then erred in failing to require the defendant to show that Mr. Ceballos's speech was flawed in any way. Instead, the majority's bright-line rule treated his speech pursuant to his official duties—no matter how temperate, accurate, or otherwise sound—as entirely unprotected by the First Amendment.

127. *See infra* note 128 and accompanying text.

128. Before *Garcetti*'s bright-line rule, courts generally characterized government workers' allegations of unsafe, illegal, or improper behavior as matters of public concern, but reached mixed results when weighing the value of that speech against its impact on the government employer's operations depending on its accuracy or tone. *See, e.g.*, Allred, *supra* note 24, at 62–63.

tone or factual inaccuracy of that speech disrupts workplace operations.[129]

C. Anticipating Objections

Subpart II.B urged that the First Amendment should be understood to permit government to claim as its own—and thus control exempt from judicial scrutiny—only the speech of public employees that it has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to meaningful credibility and accountability checks by the public. This Subpart anticipates and answers some likely objections.

1. *Concerns about Insufficiently Protecting Workers' Speech.* A return to *Pickering* balancing in most of these cases, as I have proposed, means that outcomes cannot be forecast with certainty. This may dismay free speech advocates who fear that the unpredictability of balancing may chill public employee speech. But this uncertainty is greatly preferable, in my view, to workers' all-too-certain losses as a result of *Garcetti.* Under *Pickering*, government employers were free to ignore internal whistleblowing, but had to think twice before punishing, and thus also deterring, it. After *Garcetti*, supervisors can discipline such speech with impunity, thus chilling valuable expression altogether to the public's detriment. Permitting claims involving contested speech that does not satisfy a more calibrated definition of government speech to proceed to a balancing inquiry encourages transparency while still attending to government's legitimate efficiency concerns.[130]

Moreover, this proposal's embrace of a slice, however narrow, of employees' on-duty speech that the government may claim as its own may trouble those free speech advocates who question the

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129. *See Garcetti*, 547 U.S. at 527 (Stevens, J., dissenting) (explaining that the *Pickering*/*Connick* balancing test allows employers to discipline employee speech that is inflammatory or misguided).

130. Moreover, the employee must ultimately prove, as an additional element of her First Amendment claim, that her expression was a substantial or motivating factor in her punishment by her governmental employer. If she establishes such causation, the government defendant may still escape liability by establishing the affirmative defense that it would have taken the same action against the plaintiff even absent her speech. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). For an example of this test, in which the court concludes that the plaintiff failed to prove that his speech played a role in a school board's decision not to renew his contract, see *Samuelson v. LaPorte Community School Corp.*, 526 F.3d 1046, 1054 (7th Cir. 2008).

appropriateness of *any* categorical treatment of employee speech as entirely the government's to control.[131] But these arguments underestimate government's, and the public's, substantial interest in the effective delivery of transparently governmental speech: because this speech is so valuable to the public, government should be permitted to protect it. To be sure, some cases may present factual challenges in determining whether an employee was indeed hired to deliver a transparently governmental viewpoint,[132] just as the current *Garcetti* rule itself sometimes presents challenges in determining whether an employee's contested speech actually occurred pursuant to her official duties.[133] But unless government is willing to articulate as its own—and thus be held politically accountable for—a view that it hires all employees to promote a message of government infallibility, the proposal here would valuably curtail lower courts' post-*Garcetti* rejection of claims by workers disciplined after reporting wrongdoing or other concerns about government operations.[134]

2. *Institutional Competence Concerns*. Even more likely are objections from *Garcetti*'s defenders that this proposal overstates courts' institutional competence to weigh the interests posed by these personnel disputes. These commentators support *Garcetti* as promoting a view of accountability that focuses on government's responsibility to the public for its effective operations. Lawrence Rosenthal's thoughtful justification of *Garcetti*, for example, includes the following:

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131. Justice Stevens's dissent, for example, indicates his support for a rule that would require *all* claims involving employees' speech on a matter of public interest to proceed to balancing. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting). Dissenting Justice Souter apparently agrees, but predicts that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety" should prevail after such balancing. *Id.* at 435 (Souter, J., dissenting). Dissenting Justice Breyer, in contrast, would defer to government employers' judgment in the great majority of cases, permitting only employees' duty-related speech that presents "professional and special constitutional obligations" to proceed to balancing. *Id.* at 447–49 (Breyer, J., dissenting).

132. *See* Chambers v. Dep't of the Interior, 515 F.3d 1362, 1365–66, 1368 (Fed. Cir. 2008) (discussing the firing of the Chief of the U.S. Park Police following a newspaper interview in which she expressed concern about budgetary requests for staffing and understaffing's adverse impact on public security).

133. *See* Christine Elzer, *The "Official Duties" Puzzle: Lower Courts' Struggle with First Amendment Protection for Public Employees After* Garcetti v. Ceballos, 69 U. PITT. L. REV. 367, 367 (2007).

134. *See supra* notes 48–53 and accompanying text.

> After all, if the First Amendment were understood to require that all speech-related disputes between public employees and their superior be referred to binding arbitration overseen by the judiciary, then politically accountable officials would be denied effective control over public institutions, a result that would seriously compromise the First Amendment's commitment to ensure that the functioning of public institutions be subject to effective political accountability. Precisely because the electorate is ordinarily entitled to judge the performance of public institutions, effective accountability demands that responsibility for that performance not become fragmented between politically accountable management and judicial overseers.[135]

As the *Garcetti* majority explained, "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."[136]

I share the view that government accountability should be the focus of this endeavor, but I do not agree that the *Garcetti* rule enabling unbridled managerial control over employee speech "pursuant to official duties" furthers such accountability. It allows elected officials to suppress whistleblowing and other on-the-job communications that would otherwise facilitate the public's ability to engage in political accountability measures, thus frustrating a meaningful commitment to republican government.[137] More specifically, judicial deference imposes unacceptable costs to accountability when conferred upon government employers who control employee speech in a way that undermines, rather than facilitates, transparent processes.[138] These include government

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135. Rosenthal, *supra* note 125, at 38.

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

137. Relying upon the public to hold government employers politically responsible for firing truthful whistleblowers and other employees engaged in valuable speech requires confidence that the public will learn about such actions and the underlying speech that triggered them. Except for high-profile whistleblowers, this may rarely be the case. *See* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1040 (2005) (observing that likelihood of political backlash against government officials who discipline employees for their speech is "most pronounced when the employee is fairly visible, generally meaning high-ranking, so that her dismissal causes a stir and creates the prospect of political backlash against the firing party").

138. Professor Rosenthal stresses the limited value of such speech to the public employee as speaker, urging that "[a]n employee called upon to speak as part of his duties . . . is not exercising a 'liberty' interest" because such speech "is *supposed* to be performed in a manner consistent with management's wishes." Rosenthal, *supra* note 125, at 49. In contrast, I am

employers who fire workers for their speech delivered pursuant to their official duties despite (or because of) its great value to the public's informed decisionmaking, or government employers who fail to identify the expressive interests they seek to protect in a way that furthers political accountability.[139]

3. *Efficiency Concerns*. *Garcetti*'s advocates also emphasize the efficiencies created by deferring to government employers' personnel decisions.[140] The more contextual inquiry proposed here demands more of courts and of government litigants than simply applying *Garcetti*'s bright-line rule to acquiesce in government's managerial judgments about official-duty speech. Dissenting Justice Souter, however, doubted that the demands of a more speech-protective rule were terribly substantial,[141] and, as Justice Ginsburg observed in a related context, arguments that contextual inquiries will open the floodgates of litigation have been "rehearsed and rejected before."[142] But even if *Garcetti*'s categorical approach reduces litigation and its attendant costs, it does so while imposing substantial costs of its own on workers' free speech rights and the public's interest in transparent government.[143] Indeed, as Alexander Meiklejohn explained, the First Amendment "does not balance intellectual freedom against public

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especially concerned with the *public's* interest in that employee's speech, especially when that employee delivers precisely the speech required by her job duties—for example, speech by public safety officers on matters of public safety and law enforcement.

139. *See* Andrew v. Clark, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring) ("[A]s the state grows more layered and impacts lives more profoundly, it seems inimical to First Amendment principles to treat too summarily those who bring, often at some personal risk, its operations into public view. It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.").

140. *See* Andrew Bernie, Recent Development, *A Principled Limitation on Judicial Interference:* Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)*, 30 HARV. J.L. & PUB. POL'Y 1047, 1048 (2007) (defending *Garcetti* as "a prudent exercise of judicial restraint that avoids the specter of judicial micromanagement of governmental affairs").

141. *Garcetti*, 547 U.S. at 435 (Souter, J., dissenting) ("First Amendment protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation.").

142. Wilkie v. Robbins, 127 S. Ct. 2588, 2613 (2007) (Ginsburg, J., concurring in part and dissenting in part).

143. Sheldon Nahmod also explains how government's efficiency interests receive sufficient protection through the long-existing doctrines of causation and qualified immunity. *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 587 (2008).

safety."[144] Meiklejohn's statement remains true if one were to substitute the term "litigation costs" for "public safety." Moreover, the *Garcetti* rule frustrates public safety as well as speaker autonomy when it squelches reports of government improprieties and other failures. For this reason, the judiciary's role in protecting constitutional interests ranks higher "on a scale of social values"[145] than does an interest in conserving judicial resources at all cost.[146]

Furthermore, just as *Garcetti*'s defenders may underestimate the First Amendment costs of its new rule,[147] so too may they overestimate the efficiency benefits of protecting managerial prerogatives. Toni Massaro, among others, contests the notion that deference to managerial judgments necessarily promotes efficient workplace operations:

> [A] hierarchical model of organizational structure is a poor model on which to base a theory of first amendment protection for public employees. Available studies suggest that participatory democracy within the workplace—including opportunities for employee expression—may promote worker satisfaction, increase overall workplace efficiency, and even increase employees' participation in political activity outside of work.[148]

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144. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 68 (1948).

145. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

146. *See* EMERSON, *supra* note 71, at 571 ("The hazards involved in a court's making determinations of this nature are admittedly formidable. But such a judgment is not totally beyond the reach of judicial capacity."); YUDOF, *supra* note 91, at 188–90 (describing courts' institutional capacity for and experience in scrutinizing government activities for violations of individual rights).

147. As philosopher Stephen Lukes explains in another context, "the most effective and insidious use of power is to prevent such conflict from arising in the first place." STEVEN LUKES, POWER: A RADICAL VIEW 27 (2d ed. 2005); *see also* EMERSON, *supra* note 71, at 563–64 ("Government employees may thus make important contributions to the discussion of public issues, and those contributions may become the more vital as the viewpoint of the speaker diverges from official policy."). Unblinking judicial deference to government control of employee speech similarly threatens to squelch dissent at great cost.

148. Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3, 5 (1987); *see also* EMERSON, *supra* note 71, at 564 ("[F]reedom of expression on the part of government employees can play an important role in counteracting those stultifying forces which customarily pervade bureaucracy. Organizational pressures toward dullness and conformity in the public service can perhaps be partly overcome by establishing firm principles that encourage, or at least protect, diversity in opinion and discussion."); Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1706 (2004) ("We argue that the law's suppression of worker voice

The proposal articulated here may thus boost government efficiency by requiring government to articulate the threat posed to workplace operations by an employee's speech.[149] Worker speech that actually threatens government efficiency can then be addressed by *Pickering*'s balancing analysis.

4. *The Availability of Nonconstitutional Protections for Public Employees' Speech*. Finally, the *Garcetti* Court defended its bright-line rule as posing relatively little cost to the public's transparency interests because statutory and common law remedies may protect whistleblowing and similar speech even if the Constitution does not.[150] In short, the majority trusts government to provide meaningful nonconstitutional protections for workers' valuable speech while on duty.

But as Justice Souter explained in his dissent[151] and as others have confirmed,[152] reality fails to support this confidence: such protections are incomplete, patchwork, and of decidedly limited utility.[153] Indeed, in the great majority of the decisions cited above,[154]

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and efforts to coerce attachment yields a dysfunctional workforce of disloyal and disengaged workers who offer relatively low productivity and poor morale.").

149. *See* David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1056 (2005) (explaining "the contributions a rights-based system can make to the efficiency and effectiveness of governmental activities").

150. Garcetti v. Ceballos, 547 U.S. 410, 425 (2005).

151. *Id.* at 439–41 (Souter, J., dissenting).

152. *See, e.g.*, LOUIS FISHER, CONG. RESEARCH SERV., NATIONAL SECURITY WHISTLEBLOWERS 2 (2005) ("[T]he agencies created by Congress to safeguard the rights of whistleblowers [] have not in many cases provided the anticipated protections . . . ."); Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After* Garcetti, 57 AM. U. L. REV. 1531, 1533 (2008) (describing limits of statutory protections for national security whistleblowers).

153. Federal workers' First Amendment remedies are already significantly limited. The Supreme Court held that federal employees cannot bring claims in federal court for damages for violations of their First Amendment rights because Congress provided federal employees with an effective alternative remedy under the Civil Service Reform Act. Bush v. Lucas, 462 U.S. 367, 388–90 (1983). Under the Civil Service Reform Act, federal workers seeking to bring a First Amendment claim must file an initial appeal of the agency action against them before an administrative law judge designated by the Merit Systems Protection Board (MSPB). That decision may be reviewed by the MSPB itself, and the Board's decision may be appealed to the Federal Circuit. But Professor Paul Secunda's review of these decisions concluded that federal workers' statutory remedies under the Act are largely meaningless as a practical matter, finding that no First Amendment *Pickering* claim filed by a federal employee against his or her agency has ever been successful on the merits before either the MSPB or the Federal Circuit. Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1103 (2008). State and local workers, in contrast, may bring First Amendment and other constitutional claims against their employers in federal court under 42 U.S.C. § 1983, but with

lower courts' application of *Garcetti* to reject the plaintiffs' First Amendment claims meant the end of the case because no statutory or other claims remained available.[155]

Nor does the fact that claims involving external whistleblowing may survive *Garcetti* and proceed to balancing (for example, an employee's reports of government misconduct to external media or law enforcement agencies that are not considered official duties) provide adequate alternative protections. A rule that requires employees to raise their concerns to an entity other than their employer is both unrealistic and perverse.[156] First, it assumes, with little foundation, that workers will be brave enough to risk their livelihoods to reach out to outside entities that may or may not be responsive to their reports. Second, forcing workers to air their concerns to outsiders may create substantial inefficiencies of its own, raising the public stakes in a way that may lead agencies to harden their positions and adopt a defensive posture. This might lower the possibility that the agency will simply respond with quick and quiet internal corrections.

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limitations (for example, the Eleventh Amendment limits the availability of damages against state but not local governments). *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Steffel v. Thompson, 415 U.S. 452, 472–73 (1974).

154. *See supra* notes 48–52 and accompanying text.

155. *See, e.g.*, Callahan v. Fermon, 526 F.3d 1040, 1045 (7th Cir. 2008); Ruotolo v. City of New York, 514 F.3d 184, 192 (2d Cir. 2008); Foraker v. Chaffinch, 501 F.3d 231, 247 (3d Cir. 2007); Morales v. Jones, 494 F.3d 590, 596 (7th Cir. 2007); Sigsworth v. City of Aurora, 487 F.3d 506, 509 (7th Cir. 2007); Vila v. Padrón, 484 F.3d 1334, 1339 (11th Cir. 2007); Spiegla v. Hull, 481 F.3d 961, 967 (7th Cir. 2007); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007); McGee v. Pub. Water Supply, 471 F.3d 918, 920 (8th Cir. 2006); Battle v. Bd. of Regents, 468 F.3d 755, 761–62 (11th Cir. 2006) (per curiam); Sillers v. City of Everman, No. 4:08-CV-055-A, 2008 U.S. Dist. LEXIS 39187, at *7 (N.D. Tex. May 13, 2008); Hoover v. County of Broome, No. 3:07-cv-0009, 2008 U.S. Dist. LEXIS 31485, at *20 (N.D.N.Y. Apr. 16, 2008); Baranowski v. Waters, No. 05-1379, 2008 U.S. Dist. LEXIS 21301, at *71 (W.D. Pa. Mar. 18, 2008); Maule v. Susquehanna Reg'l Police Comm'n, No. 04-CV-05933, 2007 U.S. Dist. LEXIS 73065, at *40 (E.D. Pa. Sept. 27, 2007); Wesolowski v. Bockelman, 506 F. Supp. 2d 118, 121–22 (N.D.N.Y. 2007); Barclay v. Michalsky, 493 F. Supp. 2d 269, 271 (D. Conn. 2007); Coward v. Gilroy, No. 3:05-CV-285, 2007 U.S. Dist. LEXIS 30075, at *12 (N.D.N.Y. Apr. 24, 2007); Linskey v. City of Bristol, Civil No. 3:05-cv-872(CFD), 2007 U.S. Dist. LEXIS 26986, at *13 (D. Conn. Mar. 30, 2007); Richards v. City of Lowell, 472 F. Supp. 2d 51, 80 (D. Mass. 2007); Pagani v. Meriden Bd. of Educ., No. 3:05-CV-01115, 2006 U.S. Dist. LEXIS 92267, at *8 (D. Conn. Dec. 19, 2006); Levy v. Office of the Legislative Auditor, 459 F. Supp. 2d 494, 499 (M.D. La. 2006); Logan v. Ind. Dep't of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 WL 1750583, at *1 (S.D. Ind. June 26, 2006).

156. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."); Nahmod, *supra* note 143, at 580 (discussing inefficiencies created by the *Garcetti* rule).

III. GOVERNMENT'S EXPRESSIVE INTERESTS IN ITS EMPLOYEES' OFF-DUTY SPEECH

Garcetti treats a public employee's speech as the government's when that employee speaks pursuant to official duties, but courts also increasingly consider government employees to be speaking "as an employee" even when off duty. Without expressly invoking the vocabulary of government speech, courts frequently permit government to control its workers' off-duty speech to protect its ability to communicate its own views. This Part thus focuses on situations in which the government seeks to prevent the delivery of a message it fears would otherwise be sent by its association with an employee who engages in certain speech. It starts by examining the foundations underlying that fear.

A. The Expressive Content of Government's Association with Employees Engaged in Certain Off-Duty Speech

As described above, courts are increasingly willing to conclude that employees' speech away from work that does not refer to or otherwise identify their employment may still affect their employment because of these associations.[157] Applying the *Connick*/*Pickering* balancing test, courts then generally defer to government's assertions that its interest in effective workplace operations outweighs the plaintiff's interest in her off-duty speech.[158] A growing body of social science supports courts' intuition that an organization's association with individuals engaged in certain speech can communicate a message that may undermine—or further—the organization's ability to communicate its own views effectively.

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157. On a spectrum of attenuation, government's concerns about the potentially damaging effects of employee speech are most direct when an employee speaks at work about work. Next, arguably, is speech at work not about work, followed by speech away from work about work. But furthest afield, assuredly, is speech away from work not about work.

158. Debate continues over whether the value of the employee's speech should be measured solely in terms of its value to the public in facilitating self-governance or also in terms of its value to the employee. The Court, however, values both private speaker and public listener interests when assessing the constitutionality of a statute that limits a broad category of speech by large numbers of government workers. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1995) ("[T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." (citing Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968))).

Indeed, social science reveals that onlookers often use the views of an entity's associates as a cognitive shortcut, or heuristic, for evaluating the entity itself. For example, political science research has long confirmed voters' frequent use of third-party endorsements and similar associations as heuristics to help predict a candidate's own views and behavior.[159] Voters often judge candidates based on the candidates' friends and relatives,[160] just as they frequently use the views of interest groups endorsing a candidate to determine the views of the actual candidate.[161]

Lawrence Lessig has explored similar sorts of expressive connections, describing the various techniques for changing a message's meaning based on its associations.[162] He describes, for example, the technique of "tying," which involves "attempts to transform the social meaning of one act by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have."[163] Common examples of "tying" include celebrity endorsements, but, as Lessig observes: "The link can transfer negative as well as positive value. A candidate for Congress ties her opponent to the President, hoping that negative views about the President will transfer to the opponent."[164]

Whereas the views of endorsers may often accurately predict the endorsee's own views, an emerging body of cognitive and social psychology research reveals that observers also frequently use the characteristics of a target's associates as a heuristic for drawing conclusions about the target herself in contexts in which such conclusions are likely to be inaccurate.[165] As one study demonstrated, friends, relatives, and roommates of stigmatized persons are more

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159. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 953 (2001) (describing observers' tendency to ascribe the views of candidates' associates to candidates themselves).

160. SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN POLITICAL CAMPAIGNS 71 (2d ed. 1994).

161. James N. Druckman, *Does Political Information Matter?*, 22 POL. COMM. 515, 515 (2005); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1158–59 (2003).

162. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1009 (1995).

163. *Id.*

164. *Id.*

165. *See, e.g.*, Kristina R. Olson et al., *Judgments of the Lucky Across Development and Culture*, 94 J. PERSONALITY & SOC. PSYCHOL. 757, 766 (2008) (concluding, in part, that children view targets as lucky or unlucky based on the behavior and experiences of the targets' family associates).

likely to experience social rejection themselves simply as the result of onlookers' observation of their relationship with those persons.[166] Observers often form negative impressions of an individual who is merely seen in the presence of a person perceived as stigmatized. Another study, for example, found that observers rated job applicants viewed while seated next to an overweight person more negatively than those viewed while seated next to a person of average size. Physical proximity alone was sufficient to create negative associations because negative perceptions remained even when the observers were instructed that the individuals seated next to each other did not know each other.[167] These findings lend weight to what many already suspect: one's associations with stigmatized persons may lead others to view the associated person negatively, too.

The point here is simply that onlookers often rely upon the qualities of an entity's associates as a heuristic for assessing the entity's own characteristics, not that they are right or wise to do so.[168] Social science thus confirms government's—and courts'—fear that the public will associate the objectionable or otherwise controversial off-duty speech of at least some public employees with the government that employs them.

This intuition is far from new. Indeed, the emerging trend regarding public employees' First Amendment claims offers just the most recent illustration of courts' longstanding sense outside of the employment setting[169] that an institution's association with individuals engaged in certain speech can communicate a message that may undermine that institution's ability to deliver its own views effectively.[170] For example, in *Hurley v. Irish-American Gay, Lesbian*

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166. Steven L. Neuberg et al., *When We Observe Stigmatized and "Normal" Individuals Interacting: Stigma by Association*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 196, 206 (1994) (concluding that straight male targets were more likely to be denigrated by observers when they were seen talking with a gay male friend than with a straight male friend).

167. Michelle R. Hebl & Laura M. Mannix, *The Weight of Obesity in Evaluating Others: A Mere Proximity Effect*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 28, 35 (2003).

168. Although beyond the scope of this Article, this troubling reality raises the question of whether the law should create incentives for such onlookers to be more discerning in the conclusions they draw from such associations.

169. The Supreme Court has never ruled on the expressive content, if any, of an organization's employment decisions. In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the Court found, with very little discussion, that a defendant law firm had failed to demonstrate that prohibiting it from sex-based discrimination when making its partnership decisions would undermine its expressive choices. *Id.* at 77.

170. Government's associational choices outside of the employment context may also communicate substantive messages, inviting further concerns about their potential expressive

and Bisexual Group of Boston,[171] a unanimous Court concluded that requiring the organizers of a St. Patrick's Day parade to include a group of gay and lesbian Irish Americans marching behind an identifying banner would impermissibly force the parade organizers to communicate a message of acceptance.[172] In so holding, the Court predicted that observers would draw certain conclusions about the organizers' views based on their public association with the marchers.[173]

Courts have also long acknowledged public schools' similar concerns about the expressive content of their associations, ruling that the First Amendment permits public schools to regulate student speech when the speech occurs in a context that would otherwise indicate the school's imprimatur or endorsement. In *Hazelwood School District v. Kuhlmeier*,[174] for example, the Court upheld a public school's refusal to publish in its newspaper articles discussing student experiences with birth control, pregnancy, and divorce.[175] Emphasizing educators' authority over school-sponsored publications "and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,"[176] the Court concluded that the school's action was justified, inter alia, by its interest in ensuring that "the views of the individual

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content. *See, e.g.*, Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 932–33 (2007) ("Because a naming gesture imputes social meaning to the physical public domain, acts of visible branding can infuse a public facility with strong associative values that affect public perceptions and permeate the collective public conscience. For example, both residents and outsiders are likely to view a community in which a public school is named for Robert E. Lee very differently from a community in which a public school is named for Martin Luther King, Jr.").

171. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

172. *Id.* at 559.

173. *Id.* at 574–75 ("[T]he presence of the organized marchers would suggest [the parade organizers'] view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. . . . GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."). Similarly, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006), the Court observed that some such choices are more communicative than others, distinguishing expressive decisions about whom to admit as a member or a leader or other insider from what it characterized as a law school's comparatively nonexpressive act of allowing military recruiters to use its facilities. *Id.* at 1309–10 ("Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive.").

174. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

175. *Id.* at 262–66.

176. *Id*. at 271.

speaker are not erroneously attributed to the school."[177] Rather than claiming the speech at issue as their own,[178] the schools in these cases assert—and courts often agree—that a school's association with the speaker in a context "so closely connected to the school that it appears that the school is somehow sponsoring the speech"[179] sends a message that the government is entitled to control.[180]

Similarly, in *Boy Scouts of America v. Dale*,[181] a divided Court concluded that requiring the Scouts to retain a gay scoutmaster would force them to communicate "that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[182] Even the dissent agreed that an organization's association with a member engaged in speech advocating a particular viewpoint could communicate the organization's acceptance of those views.[183] The majority and dissent, however, sharply differed as to whether Mr. Dale's status as gay, without more, would communicate any substantive message about the Scouts' views.[184] Deferring to the Scouts' own assessment that its association with Mr. Dale would impair its communicative interests, the majority departed from its approach in earlier expressive

177. *Id.* at 271.

178. Schools have claimed a wide variety of contested expression as their own. *See* Chiras v. Miller, 432 F.3d 606, 618 (5th Cir. 2005) (concluding that a school's choice of textbooks and other curricular materials constitutes government speech); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1016–17 (9th Cir. 2000) (concluding that the contents of a school's bulletin board commemorating Gay and Lesbian Awareness Month reflected the district's own expression even while inviting individuals to join and contribute to it, and thus rejecting a First Amendment challenge by a teacher who sought to post materials questioning homosexuality's morality).

179. Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002).

180. Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 370–71 (4th Cir. 1998) (en banc); *see also* Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570, 577 n.1 (6th Cir. 2008) ("For speech to be perceived as bearing the imprimatur of the school does not require that the audience believe the speech originated from the school, only that an observer would reasonably perceive that the school approved the speech.").

181. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

182. *Id.* at 653.

183. *Id.* at 702 (Souter, J., dissenting) ("It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right."); *id.* at 694–95 (Stevens, J., dissenting) (emphasizing that "Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message").

184. *Id.* at 697 (Stevens, J., dissenting) ("[I]t is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member.").

association cases in which it had carefully scrutinized the record for evidence of such impairment.[185] Indeed, with very little explanation, the *Dale* Court suggested that an organization's own subjective assessment provides the proper measure for determining whether its association with a particular individual will actually damage its expressive interests—that is, the Court deferred to the Scouts' prediction of such an impairment.[186] Contrast this test with the approach taken by the unanimous *Hurley* Court, which instead appeared to apply an objective standard, assessing whether a reasonable observer would understand the association to undermine the organization's speech.[187] In short, both *Dale* and contemporary public employment cases demonstrate courts' growing deference to parties' assertions that the views of their associates will be ascribed to them in ways that will undermine their ability to communicate their own views.[188]

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185. *Compare id.* at 653 (majority opinion) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."), *with* Roberts v. U.S. Jaycees, 468 U.S. 609, 626–27 (1984) (emphasizing that although the Jaycees had "taken public positions on a number of diverse issues, [and] . . . regularly engage[d] in a variety of . . . activities worthy of constitutional protection under the First Amendment," there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views").

186. *See* Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 601 (2001) (characterizing *Dale* as "totally undermin[ing]" *Roberts*); Tobias Barrington Wolff & Andrew Koppelman, *Expressive Association and the Ideal of the University in the Solomon Amendment Litigation*, 27 SOC. PHIL. & POL'Y 92, 101–03 (2008).

187. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 575 (1995); *see also* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 85–87 (1980) (predicting that reasonable observers would not attribute the views of leafleters to the owner of the mall, and thus rejecting the mall owner's First Amendment claim of compelled speech).

188. I discuss these cases not to suggest that governmental bodies have their own First Amendment rights to expressive association, but instead to illuminate when and under what circumstances courts have concluded that certain associations do send a substantive message about an organization's views. *See supra* notes 89–91 and accompanying text; *see also* Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1797–98 (2007) (expressing concern that *Rumsfeld* may be misunderstood as suggesting that public law schools have First Amendment rights of expressive association and that this misunderstanding would further diminish public employees' constitutional rights).

B. When Should the First Amendment Be Understood to Permit Government to Control Its Workers' Off-Duty Speech to Protect Its Own Expression?

As described above, courts increasingly defer to government's assertion that its association with employees who engage in certain off-duty expression undermines its credibility in communicating its own contrary views. But unexamined deference to government's fears about onlookers' reactions to workers' off-duty speech threatens to institutionalize the long-maligned "heckler's veto"[189] as a basis for government's employment actions. Indeed, the colloquy between the Ninth Circuit majority and concurrence in *Dible v. City of Chandler*[190] highlights this tension between government's employment interests and First Amendment values: whereas the majority emphasized the damaging effects of an officer's sexually explicit off-duty speech to the police department's effectiveness,[191] the concurrence focused on the First Amendment costs of indulging such public reaction.[192]

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189. *See* Ctr. for Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dep't, 533 F.3d 780, 787 n.4 (9th Cir. 2008) ("The term 'heckler's veto' first appeared in a footnote in *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). We use this term to describe restrictions on speech that stem from listeners' negative reactions to a particular message."). As the Supreme Court has made clear in other First Amendment contexts, "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); *see also* Bachellar v. Maryland, 397 U.S. 564, 567 (1970) ("[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers . . . ." (quoting Street v. New York, 394 U.S. 576, 592 (1969))).

190. Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008).

191. *Id.* at 928 ("[A]s soon as Ronald Dible's indecent public activities became widely known, officers in the department began suffering denigration from members of the public . . . .").

192. *Id.* at 933–34 (Canby, J., concurring) ("A measureable segment of the population, for example, is vigorously antagonistic to homosexual activity and expression; it could easily be encouraged to mobilize were a police officer discovered to have engaged, off duty and unidentified by his activity, in a Gay Pride parade, or expressive cross-dressing, or any number of other expressive activities that might fan the embers of antagonism smoldering in a part of the population."); *see also* Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985) ("Here not only was the perceived threat of disruption only to external operations and relationships, it was caused not by the speech itself but by threatened reaction to it by offended segments of the public. Short of direct incitements to violence by the very content of public employee speech (in which case the speech presumably would not be within general first amendment protection), we think this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech.").

To prevent the imposition of a certain orthodoxy of expression as a condition of public employment,[193] attention to First Amendment values requires that the circumstances under which government should be permitted to control the off-duty speech of its workers to protect its own expression should be rare and well-examined. The remainder of this Part explores what this might mean in practice, examining both categorical and contextual possibilities that illuminate the inescapable trade-offs between bright-line categorical rules and flexible multifactor assessments. Although there may be no completely satisfying solution, I find both proposals to be preferable to the status quo, which is far too deferential to government's claimed expressive interests. On balance, I prefer the contextual approach because it better comports with my sense that the threat posed to government's expressive interests varies significantly with the context of an employee's off-duty speech even within certain categories of employees closely identified with their governmental roles.

Before turning to this inquiry, however, several caveats are in order. First, I do not contest government's power to discipline workers for their speech—off-duty or otherwise—that is obscene, defamatory, or otherwise unprotected by the First Amendment when uttered by members of the public generally.[194] Nor do I quarrel with public entities' regulation of that limited universe of off-duty speech that actually undercuts the plaintiff's own ability to perform his job effectively—for example, a probationary prison guard's off-duty anti-Semitic outburst at a bank that signals his own inability to handle prisoners' provocative insults when on the job.[195] This Part's analysis

193. *See* Bieluch v. Sullivan, 999 F.2d 666, 673 (2d Cir. 1993) ("To hold otherwise [in a case involving the disciplining of a state trooper for off-duty speech on local political controversies] would seriously undermine the first-amendment rights of public employees. Whenever a government employee became personally involved in a controversial public issue, those on the opposite side of the issue could get the employee transferred or discharged simply by expressing a concern to the employee's superior that government functions were being threatened.").

194. Government—whether acting as employer or regulator—remains free to punish speech that is unprotected by the First Amendment, such as obscenity or fighting words. *See, e.g.*, Miller v. California, 413 U.S. 15, 24–25 (1973) (defining speech that rises to the level of obscenity as unprotected); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "'fighting' words" as unprotected). This Subpart focuses on employees' off-duty speech that would otherwise be entitled to full First Amendment protection if uttered by an individual not employed by the government.

195. Hawkins v. Dep't of Pub. Safety & Corr. Servs., 602 A.2d 712, 720 (Md. 1992). In other cases, courts similarly agreed that public employees' off-duty speech adversely affected their ability to perform their own jobs. *See* Piscottano v. Murphy, 511 F.3d 247, 252–53 (2d Cir. 2007) (concluding that corrections officers' association with a motorcycle club with a long history of criminal activity undermined their own effective job performance because it jeopardized their

focuses instead on the appropriate scope of government's power to control its employees' off-duty speech that may undermine its ability to communicate its own views. Under what circumstances, then, does the First Amendment permit government to protect its institutional expression by controlling its workers' off-duty speech? This query invites a wide range of possible responses.

On one end of the spectrum, those most interested in preserving government employers' managerial judgments might treat government workers as having waived their free speech rights, revisiting Oliver Wendell Holmes' conclusion that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[196] The Supreme Court, however, has long rejected that rule[197] for reasons that remain sound today: requiring public employees to relinquish their free speech rights as a condition of employment suppresses expression at a great cost to key First Amendment values in promoting individual autonomy, contributing

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working relationship with other officers and their ability to work in prisons populated by club members and rival club members); Melzer v. Bd. of Educ., 336 F.3d 185, 189–92 (2d Cir. 2003) (concluding that the plaintiff's active membership in an organization that sought "to bring about a change in the attitudes and laws governing sexual activity between men and boys. . . . had undermined his ability to serve as a teacher" because of students' and parents' concerns about his ability to perform his job duties); Tindle v. Caudell, 56 F.3d 966, 968–73 (8th Cir. 1995) (concluding that a police officer's racially offensive Halloween costume at a Fraternal Order of Police lodge damaged his working relationships with fellow officers). For an expression of concern that permitting even performance-based dismissals for public employees' off-duty speech poses unacceptable First Amendment costs, see *Hawkins*, 602 A.2d at 721–27 (Bell, J., dissenting).

To illustrate further the distinction between performance-based and expression-based justifications for government's discipline of employee speech, consider the military's prohibition of misconduct, including speech, that operates "to the prejudice of good order and discipline" (reflecting concern about speech that undermines servicemembers' actual performance) *or* that is "of a nature to bring discredit upon the armed forces" (reflecting concern about speech that undermines the military's expression of its own public image). 10 U.S.C. § 934 (2006). *Compare* United States v. Wilcox, 66 M.J. 442, 443–52 (C.A.A.F. 2008) (concluding that a soldier's Internet communications supporting white supremacy violated neither provision), *with id.* at 452–62 (Baker, J., dissenting) (maintaining that the facts supported a charge of discrediting the armed forces).

196. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

197. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions . . . ."); *see also* Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) ("The Court long ago rejected Justice Holmes' approach to the free speech rights of public employees . . . ."); Keyishian v. Bd. of Regents, 385 U.S. 589, 591–610 (1967) (rejecting *McAuliffe*'s reasoning).

to the marketplace of ideas, and facilitating citizen participation in democratic self-governance.[198]

On the other end of the continuum, one might instead entirely deny government the ability to control workers' off-duty speech.[199] This rule assuredly provides substantial protection for workers' free speech rights, but it fails to acknowledge that government does have important expressive interests that may sometimes be imperiled even by workers' off-duty speech: consider, for example, the message sent by a police chief who marches with the Klan while off-duty. This Part thus continues on to consider alternatives that more fully address and thus accommodate the significant interests of employees, government, and the public alike, seeking to identify more precisely the universe of off-duty speech that actually poses expressive threats to government's own speech.

1. *A Categorical Approach*. Consider the possibility that the speech of government workers who serve as the voice or the face of the government potentially poses such grave threats to government expression to justify government's control of even their off-duty communications. Under this view, certain positions trigger such high public expectations that those employees could never escape their governmental role to speak purely as private citizens even when off the job.[200]

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198. *See, e.g.*, Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1411 (1987) ("Most theoretical writings have suggested variants of four different values as critical to speech protection: individual development, democratic government, social stability, and truth." (citations omitted)); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980) ("Over the years, we have come to view freedom of expression as essential to: (1) individual self-fulfillment; (2) the advance of knowledge and the discovery of truth; (3) participation in decisionmaking by all members of society; and (4) maintenance of the proper balance between stability and change.").

199. *See, e.g.*, Kozel, *supra* note 137, at 1010 (proposing "full First Amendment protection to employee speech that occurs off the job and is directed at audiences broader than the workplace audience, while affording no First Amendment protection to employee speech that occurs on the job or is directed solely at workplace audiences").

200. This is something of a twist on social role theory, which posits that individuals often shape their behavior to fit the expectations of others with respect to various roles. *See, e.g.*, Richard E. Priehs, *Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?*, 21 JUST. SYS. J. 57, 59 (1999) ("Role theory posits that the behavior of the individual may be shaped by the demands and rules of others . . . ."); June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 9 (1974) (arguing that social role theory "portrays the individual as a mirror of others' expectations").

The off-duty speech of employees hired to represent legislators or other governmental officials provides one example.[201] As Judge Jack B. Weinstein observed with respect to a state legislator's community relations director fired for her off-duty protest of police practices that conflicted with the legislator's professed support for the police, the public may be unable to dissociate even the off-duty views of such employees from the views of their government employer:

> To summarize, legislative aides occupying positions in which their public speech may reasonably be associated with, or mistaken for, that of the legislator's may constitutionally be dismissed for their public speech. This rule applies even if the speech falls outside of the aide's public responsibilities. It is the perceived personal connection between legislator and staffer, and the legislator's resulting concern for his constituent relations, that is critical. . . .
>
> . . . . The close affiliation of aides and the legislators they serve generates a strong public perception of association between the two. This naturally leads the public to assume their views are identical.
>
> As a result, what legislative aides say may reasonably be understood by voters as an expression of the legislator's position. Even where a legislative assistant affirmatively states that a particular statement is made in a personal capacity, constituents may nonetheless perceive that the views of the aide were sanctioned by the legislator.[202]

Law enforcement officers likely fall into the category of quintessentially public servants.[203] The Second Circuit, for example, suggested that all speech by public safety officers communicates a substantive message about the department as a whole, upholding the New York Police and Fire Departments' firing of several employees for their off-duty appearance on a parade float that featured mocking stereotypes of African Americans:

> Police officers and firefighters alike are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to a community's view of

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201. Much of the *on*-duty speech of such employees may be considered government speech entirely within the government's power to control under the approach articulated in Part II, because such employees are often hired specifically to deliver the views of the government officials they represent.

202. Gordon v. Griffith, 88 F. Supp. 2d 38, 50, 57–58 (E.D.N.Y. 2000) (citations omitted).

203. Locurto v. Giuliani, 447 F.3d 159, 178–79 (2d Cir. 2006).

> the respect that police officers and firefighters accord the members of that community. . . .
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> . . . .
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> . . . [P]olice officers and firefighters who deliberately don "blackface," parade through the streets in mocking stereotypes of African-Americans and, in one firefighter's case, jokingly recreate a recent vicious hate crime against a black man, might well damage the relationship between the [police department] and [fire department] and minority communities.[204]

Under this view, public safety officers can never shed their roles as employees because "part of their job is to safeguard the public's opinion of them"[205]—a job duty that binds them at all times. Indeed, law enforcement agencies have uniquely strong expressive interests among government entities because of their reliance upon public trust and cooperation for their effectiveness.[206] To this end, police department codes of conduct and similar constraints often expressly signal expectations that govern even officers' off-duty actions—for example, requiring that their conduct be unsullied or beyond reproach.[207] Similarly, many jurisdictions consider police officers and other public safety officials as always on duty.[208] Although these

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204. *Id.* at 178–79, 182.

205. *Id.* at 178.

206. *See, e.g.*, Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. PERSONALITY & SOC. PSYCHOL. 482, 482–83 (1995) (concluding that the more trust and cooperation a government institution engenders, the more legitimate and thus the more effective it becomes).

Some courts of appeal continue to cite with approval Holmes's aphorism that a police officer may have a constitutional right to speak, but no constitutional right to be a policeman—even though the Supreme Court has explicitly rejected Holmes's approach as inconsistent with free speech values. *E.g.*, Dible v. City of Chandler, 515 F.3d 918, 931 n.9 (9th Cir. 2008); Pappas v. Giuliani, 290 F.3d 143, 147 (2d Cir. 2002). Although those courts' continuing embrace of Holmes's since-discredited observation may demonstrate a disquieting misunderstanding of contemporary First Amendment protections for government workers' speech, this trend may instead simply reflect courts' intuition that law enforcement agencies have particularly strong expressive interests in this context.

207. *See, e.g.*, Seegmiller v. Laverkin City, 528 F.3d 762, 765 (10th Cir. 2008) (describing a law enforcement code of ethics requiring officers to "keep [their] private life unsullied as an example to all and [to] behave in a manner that does not bring discredit" to the agency); Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342, 1346 (11th Cir. 2006) (describing police department code of ethics in which officers pledge to "keep my private life unsullied as an example to all").

208. *See, e.g.*, Young v. City of Providence, 404 F.3d 4, 16 (1st Cir. 2005) (characterizing department policy as requiring officers to be on duty at all times); Revene v. Charles County

regulations do not displace constitutional protections, they do illustrate the extent of public expectations triggered by the power and discretion conferred upon these officers,[209] and this power may well be relevant to the appropriate development of constitutional law doctrine.[210]

Primary and secondary school teachers may also fall within the category of quintessentially public servants because they too face strong public role expectations that they may not escape even when away from work.[211] Adeno Addis, for example, has characterized teachers, along with parents and peers, as among those figures who are expected to model behavior at all times—that is, "comprehensively influential individual[s]"—as opposed to the majority of workers, who carry merely "role-specific" expectations limited to their behavior while on the job.[212] Again reflecting these expectations, teachers' codes of conduct also often impose significant off-duty restrictions.[213]

Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989); Davis v. Murphy, 559 F.2d 1098, 1100–01 (7th Cir. 1977); Davenport v. Bd. of Fire & Police Comm'rs, 278 N.E.2d 212, 216 (Ill. App. Ct. 1972) ("[T]here is no distinction between 'off duty' or 'on duty' misconduct by a police officer. . . . By the very nature of his employment a police officer is in the eyes of the public and for the good of the department must exercise sound judgment and realize his responsibilities to the department and the public at all times."); Eubank v. Sayad, 669 S.W.2d 566, 568 (Mo. Ct. App. 1984) ("In a very real sense a police officer is never truly off-duty.").

209. The argument for maximizing governmental control over law enforcement—as opposed to most other government jobs—is bolstered by its paramilitary organization and its resulting reliance on structure, hierarchy, and order. *See, e.g.*, Robin D. Barnes, *Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1158, 1166 (1996).

210. Courts generally characterize police officers as holding positions that "invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy," Rosenblatt v. Baer, 383 U.S. 75, 86 n.13 (1966), and thus are considered public officials for purposes of triggering the actual malice standard in defamation cases. *See, e.g.*, Rattray v. City of Nat'l City, 36 F.3d 1480, 1486 (9th Cir. 1994); Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981); Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000); Tomkiewicz v. Detroit News, Inc., 635 N.W.2d 36, 42–43 (Mich. Ct. App. 2001); Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977); DeAngelis v. Hill, 847 A.2d 1261, 1263–64 (N.J. 2004); Hailey v. KTBS, Inc., 935 S.W.2d 857, 860–61 (Tex. App. 1996).

211. *See, e.g.*, Melzer v. Bd. of Educ., 336 F.3d 185, 198 (2d Cir. 2003) (holding that a teacher's position "by its very nature requires a degree of public trust not found in many other positions of public employment").

212. Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1381 (1996).

213. *See* Marisa Anne Pagnattaro, *What Do You Do when You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 681 n.378 (2004) (listing examples of teachers' codes of conduct governing off-duty behavior).

In other words, some public employees may be so closely identified with their government employer that their own views cannot be dissociated from those of the government. To be sure, this is—or should be—a relatively small number of government jobs (although there may be room for disagreement over precisely how small this universe should be).[214] Not all government workers are the same for these purposes, as some pose greater expressive threats than others because of the nature of their occupation.[215] A categorical approach should thus defer only to government's assertion of control over the off-duty speech of those employees considered quintessentially public servants. This framework would permit government to exert a great deal of control over the off-duty speech of employees in a few occupations, and very little control over the off-duty speech of all others.

The advantages and disadvantages of this approach include those of any bright-line rule. On the one hand, it is relatively predictable and easy to apply once a person identifies the category of quintessentially public servants, and thus communicates clear expectations to employers and employees alike. For example, law enforcement agencies could simply control the off-duty speech of police officers across the board; police officers would then know to adjust their expression accordingly. The off-duty speech of employees who do not fall into the category of inescapably public servants, in contrast, would remain protected. This type of approach has some precedent, moreover, as courts in other legal contexts have characterized certain workers as unable to escape their role as employees, permitting greater employer control over their speech. For example, private employers sometimes respond to an employee's claims of impermissible retaliation against statutorily protected speech with arguments that they "owned" a certain employee's

214. For example, although I expect that most courts and observers would characterize law enforcement officers as falling into this category, there may be less consensus as to whether elementary and secondary school teachers act as the face and voice of the government to the same degree.

215. Building inspectors, for example, likely more easily escape their government role in the public eyes when off duty. *See, e.g.*, Murray v. Jamison, 333 F. Supp. 1379, 1380–82 (W.D.N.C. 1971) (finding that firing a city building inspection dispatcher for his Klan membership violated the First Amendment). Of course, a building inspector who engages in race discrimination in the performance of his job can be fired without running afoul of the First Amendment.

speech because of her particular role, and thus the speech was not the employee's to be protected by statute.[216]

On the other hand, the predictability and comparative administrative ease offered by a bright-line approach must be weighed against its rigidity and attendant limits, which include the difficulty in identifying the right categories of employees to be treated as unable to escape their roles as government employees for First Amendment purposes. A categorical rule gives employers a great deal of control over the employees who fall within that category—control that may be unwise and unfair as both a constitutional and a practical matter. Indeed, this rule leads to the disquieting result that often underpaid police officers (and perhaps teachers) would face greater speech restrictions than other public employees. Should government be permitted to control all of police officers' or teachers' off-duty speech—whether racist, racially controversial, sexually explicit (or, in the judgment of the Ninth Circuit, "sleazy"),[217] coarse, politically volatile, or otherwise?[218] Consider a police officer who uses

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216. *See, e.g.*, Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 627–28 (5th Cir. 2008) (holding that a manager's speech related to legal implications of scheduling changes was not protected under the Fair Labor Standards Act unless he steps "outside of his . . . role of representing the company" to assert interests adverse to his employer); Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 376 (5th Cir. 1998) (holding in-house counsel's speech reporting discrimination by a client/employer was unprotected by Title VII because it divulged client confidences; speech "that breaches the ethical duties of the legal profession is unprotected under Title VII"); McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486–87 (10th Cir. 1996) (holding that a personnel director's speech informing her employer of possible FLSA violations was not protected against retaliation because she was not asserting FLSA rights or taking a position adverse to her employer's interests but "merely performing her everyday duties as personnel director"); Rachel S. Arnow Richman, *A Cause Worth Quitting For? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel*, 75 IND. L.J. 963, 983–85 (2000) (describing courts' difficulties in assessing whether in-house counsel can escape their role as attorneys—including their duty of undivided loyalty to their clients—to speak for themselves as workers to assert discrimination complaints against employers or clients).

Similarly, the handful of state statutes that provide protections for public and private employees' speech away from work generally include provisions that permit employers to control the off-duty speech of employees in certain jobs that require them to represent the employer at all times. *See, e.g.*, COLO. REV. STAT. § 24-34-402.5(1)(a) (2008) (permitting employer discipline of off-duty speech that is "reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer").

217. Dible v. City of Chandler, 515 F.3d 918, 928 (9th Cir. 2008) ("The law and their own safety demands that [police officers] be given a degree of respect, and the sleazy activities of Ronald and Megan Dible could not help but undermine that respect.").

218. Along the same lines, Scott Moss has observed that courts have too quickly deferred to certain government institutions as unique, thus underprotecting First Amendment rights. Scott

foul or profane language while off-duty or a teacher who while off-duty lobbies against or publicly criticizes education policy that he sincerely believes to be detrimental to students, such as a local district's commitment to an abstinence-only program or the federal government's No Child Left Behind Act. Such off-duty speech may further substantial First Amendment values not only in permitting the expression of individual autonomy, but also in contributing to the marketplace of ideas and facilitating citizens' participation in democratic self-governance.

Moreover, employees' off-duty speech can, and does, occur in a wide range of situations that vary in their capacity to threaten government's expressive interests. For example, the threat to government expression posed by an employee's off-duty racist speech may vary depending on the employee's occupation as police officer, high school teacher, cabinet secretary, personnel manager, desktop support technician, or motor vehicles clerk. Threats posed to government expression may similarly vary with the content of the contested off-duty speech: consider, for example the differing threats to government expression posed by an employee's off-duty use of racial epithets, appearance in a sexually explicit video, artistic expression that is racially explicit, participation in a gay pride parade, or politically controversial speech, like advocacy for or against abortion restrictions, same-sex marriage, or immigration reform. Along the same lines, the extent of any threat to government expression may depend on the comparatively private or public setting of the off-duty speech. Consider, for example, an employee's use of a racial epithet in a conversation with a friend at home or in a bar, as opposed to its use in a letter to the editor, at a sporting event, in a neighborhood argument, or on a blog, Facebook entry, or YouTube post. Government's variable expressive interests thus invite examination of a more flexible standard that relies on case-by-case consideration of context to identify those situations in which government's expressive fears are especially legitimate.

2. *A Contextual Approach*. Rather than assuming that the off-duty speech of government employees in certain jobs—but only in those jobs—necessarily poses a substantial threat to government's

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A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1671 (2007) (urging that "less institution-specific speech doctrine could take appropriate account of institutional difference without exaggerating those differences").

own expression, a more flexible standard would instead require the government to prove such a threat on a case-by-case basis. Under this approach, an employee's off-duty speech that does not explicitly associate itself with the government employer should generally be protected except in unusual circumstances. The remainder of this Subpart explores how government might show that a worker's off-duty speech actually undermined its own ability to communicate its views effectively.

a. Public Employee Off-Duty Speech That Makes Explicit Reference to the Government Employer. A government worker's deliberate choice to refer to her employment in off-duty speech is especially likely to lead the public to make such an association as well. This was the case, for example, in *City of San Diego v. Roe*, in which an officer's sexually explicit website included a video of himself stripping off a police uniform and masturbating, advertisements for the sale of police uniforms and other police equipment, and an e-mail address and user profile identifying him as employed in law enforcement.[219] In cases like these, government's fears that the public will associate the worker's views with the government are especially reasonable because the employee has made that link explicit.

Along these lines, observers are likely to attribute a law enforcement officer's speech while in uniform, even if off duty, to the agency that employs her.[220] Further emphasizing the power of the uniform and related indicia of law enforcement employment in linking the officer to the government that employs her, a number of courts have emphasized an officer's acts while in uniform as leading a reasonable observer to conclude that the officer is acting under color of state law for Section 1983 purposes, regardless of whether the government actually authorized those actions.[221] Indeed, the uniform

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219. City of San Diego v. Roe, 543 U.S. 77, 78 (2004) (per curiam).

220. *See, e.g.*, Moore v. City of Wynnewood, 57 F.3d 924, 933–34 (10th Cir. 1995) (holding that a police officer's remarks while in uniform and claiming to speak for the department impaired the city's interest in controlling who purports to speak on its behalf); Local 491, Int'l Bhd. of Police Officers. v. Gwinnett County, 510 F. Supp. 2d 1271, 1278–87 (N.D. Ga. 2007) (upholding a city's policy prohibiting officers from wearing uniforms at a county board of commissioners meeting); City of Indianapolis v. Heath, 686 N.E.2d 940, 946 (Ind. Ct. App. 1997) (upholding the discipline of a police officer for making anti-Semitic remarks about the mayor while in uniform as likely to impair "confidence in and trust of that agency among members of the community").

221. *See, e.g.*, Roe v. Humke, 128 F.3d 1213, 1215–16 (8th Cir. 1997) (holding that an officer was not acting under state law when committing a sexual assault because, inter alia, he was not in uniform, carrying his gun, or driving a police car); Pickrel v. City of Springfield, 45 F.3d 1115,

serves in many ways as a brand or trademark.[222] As is the case with strong brands, the connection between a police uniform and the police department itself is so substantial that observers will likely attribute even the off-duty speech of an officer in uniform to the department itself, just as they are likely to attribute the views expressed in a letter on department letterhead to the department.[223]

An employee's off-duty but very public expression identifying his employment relationship may similarly pose a substantial threat to government's own expression. Consider, for example, an officer's off-duty racist speech that directly references his law enforcement position in a way that casts doubt on the department's commitment to equality[224]—as was the case with an officer who wrote magazine

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1118–19 (7th Cir. 1995) (concluding that an off-duty officer working as a private security guard acted under color of state law by, inter alia, wearing his uniform, displaying his badge, and carrying his gun); Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (holding that an off-duty officer was acting under color of state law as a bank security guard when he flashed police identification while making a detention); Davis v. Murphy, 559 F.2d 1098, 1101 (7th Cir. 1977) (concluding that officers acted under color of state law in provoking a fight when, inter alia, they were carrying their guns and badges).

222. Trademarks are features that signal to the public the source of a service or product, and trademark infringement actions seek to prevent one party from capitalizing on the additional persuasive effects of having its product's source misattributed to another, potentially more credible, party. *See* Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 725 (2004); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005).

223. For an application of this principle to public employees' speech on government e-mail that may be the technological equivalent of letterhead, see *Bowers v. Scurry*, 276 Fed. App'x 278, 280–83 (4th Cir. 2008). That case rejected a First Amendment challenge by a university human resources employee who had been disciplined for sending her colleagues an e-mail that was critical of pay restructuring legislation that the university had specifically supported. The court specifically noted the danger that readers would mistakenly attribute her views to the university because the messages were sent via university e-mail and bore her signature stamp indicating her university position. *Id.*

224. The Nebraska Supreme Court, for example, upheld the Nebraska State Patrol's discharge of a trooper discovered to have joined the Klan—and, more specifically, to have participated in off-duty web discussions with others associated with the Klan in which he identified himself as employed in law enforcement in Nebraska. State v. Henderson, 762 N.W.2d 1, 3–18 (Neb. 2009). The state court held "that Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race." *Id.* at 17. The state supreme court addressed only whether the lower court had correctly vacated as contrary to public policy an arbitrator's reinstatement award, declining to "revisit the arbitrator's discussion of constitutional issues, although his conclusions on those issues [—that the State Patrol had violated the trooper's constitutional rights—] are highly suspect." *Id.* at 5. Central to the court's holding was its conclusion that the trooper's off-duty expression undermined the state patrol's ability to control its own image: "One cannot simultaneously wear the badge of the Nebraska

articles that identified himself as a police officer and "characterized inner-city minority residents as 'rats,' women with cats as mentally unstable, homeless people as 'criminals,' and children with problems as 'freaks.'"[225] Government's ability to establish an expressive threat will also often vary depending on the expression's public or private setting: the more public the off-duty expression and its link to government employment—for example, expression that is broadcast over the Internet or in a letter to the editor as opposed to a private conversation with a friend—the stronger the possibility that the public will associate it with the governmental employer in a way that undermines the agency's ability to communicate its own views effectively.[226]

b. Public Perception of the Speaker's Occupation or Position as Inescapably Governmental. As discussed above,[227] public employees in certain occupations may find it difficult to escape their governmental role even when off the job, such that onlookers readily associate speech with the government employer even if the employees themselves do not make the connection explicit. In contrast, observers may be less likely to attribute the speech of lower-level employees (or employees whose positions do not require policymaking or extensive public interaction) to the agency that employs them. Whereas the categorical approach described in the preceding Subpart explored occupational exceptionalism as the sole determinant of government's ability to control off-duty speech, a contextual approach might consider the nature of the speaker's occupation one of many factors in assessing the threat to the government's expressive interests. Government's showing would be considerably stronger—although perhaps not dispositive—when the plaintiff is a law enforcement officer, or when the plaintiff is in a leadership position or a position that requires significant public trust

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State Patrol and the robe of a Klansman without degrading what that badge represents when worn by *any officer*." *Id.* at 18.

225. Nixon v. City of Houston, 511 F.3d 494, 500 n.9 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2504 (2008); *see also* Eaton v. Harsha, 505 F. Supp. 2d 948, 949–74 (D. Kan. 2007) (upholding police officers' discharge for sending racially offensive e-mails to an African-American op-ed writer that identified their law enforcement employment).

226. *See* United States v. Wilcox, 66 M.J. 442, 443–52 (C.A.A.F. 2008) (concluding that a servicemember's private conversations supportive of white supremacy were considerably less likely to threaten the armed forces' expressive interests than his Facebook entry and other Internet communications on the same topic.).

227. *See supra* Part III.B.1.

and interaction such that the public may reasonably believe that she represents the government's views.[228]

Also relevant to this inquiry are the content of the contested speech and its conflict, if any, with the government's transparently claimed views. Attention to these factors recognizes that certain combinations of the employee's position and her expression's content pose greater expressive threats to government than others. The off-duty speech of a "quintessentially public servant" is most likely to pose a substantial threat to government's own expressive interests when it clashes with a message that government has articulated and for which it can thus be held politically accountable.[229]

Public safety agencies' mission statements declaring their commitment to nondiscriminatory law enforcement provide particularly strong examples of transparent government messages,[230] as a police department seeking to communicate that "We enforce the law without regard to race" may be considerably less believable when it employs officers who are Klan members or who otherwise engage in racist off-duty speech.[231] Police officers' racist speech that

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228. *See* Pappas v. Giuliani, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting) (distinguishing anonymous off-duty racist speech by an officer assigned to internal computer operations from public communications of racism, especially by beat cops or policy leaders).

229. As Justice Stevens pointed out in another context, an organization's concerns about expressive association are at their strongest when the organization advocates a specific viewpoint that it seeks to shield from distortion or interference by its association with a dissenting individual speaker. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 687 (2000) (Stevens, J., dissenting) ("[T]he organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.").

230. Many police department mission statements express a commitment to evenhandedness (even as they vary in the breadth of their commitment). *See, e.g.*, Porter County Sheriff's Dep't, Mission Statement, http://www.portercountysheriff.com/mission-statement.html (last visited June 21, 2009) (stating a commitment to treat "all citizens and fellow employees in a fair and equitable manner without regard to race, gender, religion, national origin, physical or mental disability or sexual orientation"); Ventnor City Police Dep't, Mission Statement, http://www.ventnorcitypolice.org/mission_statement.htm (last visited June 21, 2009) (stating a commitment to "faithful service to the public without regard to race, religion, ethnicity, gender, social status or political affiliation"); The Village of Niles, IL, Niles Police Department Mission Statement, http://www.vniles.com/Content/templates/?a=69 (last visited June 21, 2009) (stating commitment to "equally and fairly protect and serve all those people within its jurisdiction without regard to race, color, religion, ethnicity, gender, age or sexual orientation").

231. Consider, for example, a sheriff department's employee who gives a television interview publicly identifying his off-duty work as a Klan organizer as well as his employment in law enforcement. *See* McMullen v. Carson, 754 F.2d 936, 937, 940 (11th Cir. 1985) (describing a strong public reaction reflecting "the notion that Jacksonville blacks should resist arrest by Sheriff's personnel for fear of their lives" and holding "only that a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an

undermines confidence in the agency's declared commitment to evenhanded enforcement may be especially threatening in light of such agencies' equal protection obligations along with historic and continuing concerns about the role of race in the administration of justice.[232]

A court applying this principle might thus permit a police department to punish a police officer's off-duty participation in a Klan parade but not in a Martin Luther King, Jr. Day celebration (or in a peace rally, gay pride parade, or antiabortion demonstration) because of the different types of threats this speech poses to the government's communication of its own views. But although certain off-duty expression poses unique threats to law enforcement's institutional mission, not all unpopular or controversial messages delivered by off-duty officers necessarily conflict with an agency's own transparently articulated views—for example, sexually explicit but nonobscene speech, or certain controversial political views. Consider, for example, the facts in *Flanagan v. Munger*,[233] in which the police department disciplined officers for stocking sexually explicit films in their off-duty video store business after receiving complaints from the public.[234] The officers' expression conflicted with no specifically articulated government viewpoint—it was simply alleged to be "conduct unbecoming an officer."[235] Without some showing of specific harm to its own communicative abilities, government's concerns that the public will simply think less of an agency that employs an individual who engages in objectionable off-duty expression does not constitute the sort of substantial threat to government expression sufficient to justify control of employees' off-duty speech under a flexible contextual approach.

Such viewpoint-based distinctions in assessing expression's dangers—which are generally considered First Amendment

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organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has became known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties").

232. *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 165–66 (1968); Barnes, *supra* note 209, at 1084–88 (documenting the prevalence of law enforcement officers who are members of the Klan).

233. Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989).

234. *Id.* at 1567–68 (upholding an officer's First Amendment challenge to his discipline for stocking sexually explicit films in his video store as protected off-duty speech unrelated to employment).

235. *Id.* at 1560.

anathema[236]—will cause many to hesitate. But the Court's First Amendment doctrine already permits government employers to make viewpoint-specific distinctions when punishing on-duty speech that may disrupt workplace operations—such as speech critical of a government employer.[237] Even outside the context of government employment, Steven Heyman, among others, notes the limitations of an insistence on content neutrality as "fatally one-sided, for it fails to recognize that some kinds of speech . . . inflict serious injury precisely because of their content."[238] He goes on to argue that hate speech is especially damaging in this regard.[239]

In a related context, Caroline Mala Corbin has characterized government's interest in dissociating itself from harmful messages—like racist speech—as significantly stronger than its interest in distancing itself from merely "distasteful" expression, like certain sexually provocative speech or controversial political expression: "Government association with a pro-gun or pro-choice platform may be annoying for a reader with contrary views, but the government placing its imprimatur on a Nazi flag or a racial slur hurts."[240] For these reasons, off-duty viewpoints expressed by law enforcement officers that conflict with fundamental governmental commitments may be more damaging to the law enforcement mission than other views.[241] Indeed, such speech can be perceived as especially harmful

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236. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (recounting the First Amendment's bar on government's viewpoint-based discrimination against private speech); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992).

237. *See* Connick v. Myers, 461 U.S. 138, 143 (1983) (permitting discipline of an employee's speech that was critical of her employer).

238. STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 3 (2008); *see also* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 476–81 (arguing that certain racist speech is unusually harmful precisely because of its content); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 4–6 (1985) (arguing that a First Amendment insistence on content neutrality masks and reinforces substantive inequality among speakers).

239. HEYMAN, *supra* note 238, at 4.

240. *See* Corbin, *supra* note 103, at 685–89; *see also* Clare Huntington, *Family Law's Textures: Social Norms, Emotion, and the State*, 59 EMORY L.J. (forthcoming 2010) (manuscript at 40, on file with the *Duke Law Journal*) ("[T]he important question [is] whether the state, through the apparatus of public law, should seek to reinforce norms that are not consistent (as they so often are not) with principles of tolerance and equality. . . . Where the state gives sanction to social norms that ostracize, stigmatize, or the like, that is more troubling than where the state reinforces norms of parental concern, stability, and empathy.").

241. As Joseph Tussman observed in the context of government's educational expression, "The danger in the careless use of notions of neutrality and non-partisanship is that the concern for fairness may be taken as requiring the relinquishing of commitment." JOSEPH TUSSMAN,

when uttered by someone in a position of government power, even when off-duty. Drawing these distinctions, however, requires particular confidence in government's—and courts'—ability to sort the damaging effects of speech by content, an inquiry that can be difficult and uncomfortable.[242]

As is the case with the other considerations discussed in this Subpart, this factor may not be dispositive in and of itself. The absence of a transparent viewpoint that government seeks to protect may not always defeat the government's ability to establish an expressive threat. Government's decision to remain neutral or silent on a particular topic, for example, may reflect a strategic decision to conserve limited political capital or to reserve judgment on a controversy as the public debate continues; in any event, that decision also provides the public with valuable information about its government's expressive choices.[243] Normally, however, First Amendment transparency norms should require government to communicate clear expectations about the message that it seeks to protect—both to promote the government's accountability to the public for its expressive choices and to prevent the chilling of speech by employees uncertain about what they may say without fear of discipline. For these reasons, government's expressive concerns should be considered most weighty when it has provided clear notice of the expression that it seeks to safeguard. And in a multifactor contextual analysis of this sort, the degree of particularity required of such notice may well vary with the nature of the public employment. For example, as government alter egos, law enforcement officers, and other leaders might require less specific notice of their employers' expressive expectations than lower-level or less high-profile jobs.

Not surprisingly, the strengths and weaknesses of the contextual approach mirror those of most flexible standards. On one hand, the contextual approach permits courts to tailor their rulings to the often-unique facts of a given case. By adjusting for key distinctions in the type of public employment and the nature and setting of the

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GOVERNMENT AND THE MIND 80 (1977) (discussing how public schools must be nonpartisan yet not "neutral" in terms of their commitment to certain political values).

242. As Professor Corbin acknowledges, the distinction between "harmful" and "distasteful" speech is "hotly contested." Corbin, *supra* note 103, at 685–86.

243. Requiring organizations to speak clearly on certain topics may not be practical. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1542 (2001) (noting, in another context, that a similar requirement for private groups "misses the subtlety of speech, especially the way in which a group can 'speak' about a subject by insisting on silence about that subject").

employee's contested speech, this approach may enhance the possibility of a satisfying outcome.[244] On the other hand, its inherent flexibility leads to concerns about unpredictability and inconsistency.

C. Applications and Objections

For an illustration of how the choice between a categorical and contextual approach may lead to different outcomes, consider the differing opinions in *Pappas v. Giuliani*.[245] There the plaintiff police officer brought a First Amendment challenge to his discharge for mailing anonymous racist materials to various nonprofit organizations that had sent him fundraising solicitations.[246] The majority essentially adopted what I have called a categorical approach, characterizing the speech of a police officer as inevitably associated with the views of his department, regardless of context:

> For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York's citizenry that those are the opinions of New York's police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense.[247]

In contrast, then-Judge Sotomayor's dissent, using reasoning similar to my proposed contextual standard, focused on the specific factual context of the officer's speech, noting that his job involved neither policymaking nor public contact (he was assigned to a computer station), that his speech made no reference to his employment in law enforcement, and indeed that it was intended to be private and anonymous.[248] Under those circumstances, she would find no legitimate threat to the department's public image or to its credibility in communicating a commitment to racial evenhandedness.[249]

As another illustration of a tough case, consider the example of a prominent university human resources vice president who, on her own time and without identifying her job, wrote a newspaper column

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244. *See* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1302 (2008) (discussing the comparative costs and benefits of rules versus standards).

245. Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002).

246. *Id.* at 144–45.

247. *Id.* at 146–47.

248. *Id.* at 154–59 (Sotomayor, J., dissenting).

249. *Id.*

that questioned gay rights.[250] Does the First Amendment permit the university to discipline her to protect the credibility of its announced opposition to discrimination in all forms?[251] The factors shaping the extent of the threat posed by the employee's speech cut both ways. The university had engaged in transparent government speech for which it could be held politically accountable: commitment to a policy that bars sexual orientation discrimination. The worker's speech occurred off duty and did not reference her employer, although it occurred in a very public setting where many readers knew of her university position. Under either approach, the outcome may turn on just how prominent a role in the university she played: the higher her position, the more likely observers will associate her views with the university, and the more likely they will understand her to speak for the university even away from work.

Both the categorical approach and the flexible contextual approach have their strengths and weaknesses. Both approaches also remain vulnerable to the charge that they overstate courts' institutional competence to weigh the interests posed by these sorts of personnel disputes—and that instead courts *should* defer to government employers' managerial judgments about their own operational needs. But, as explained earlier,[252] unblinking judicial acquiescence to governmental employers frustrates what should be a foundational commitment to transparent government. Such deference undermines those values when it permits government employers to fire workers for their off-duty speech without identifying real threats to the government's own expressive interests for which it can be held politically accountable.

There may be no completely satisfying solution, but I find both the categorical approach and the flexible contextual approach to be preferable to the status quo, which is far too deferential to government's claimed expressive interests. On balance, the contextual approach better comports with the notion that the threat posed to government's expressive interests varies significantly with the context of an employee's off-duty speech even within certain categories of employees closely identified with their governmental roles.

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250. *See* Jaschik, *supra* note 15.

251. Of course, the First Amendment poses no bar to disciplining her for her conduct, rather than her speech, if she is found to have engaged in discrimination on the basis of sexual orientation while on the job.

252. *See supra* notes 54–69 and accompanying text.

The flexibility of a multifactor contextual standard invites charges that it is too difficult to apply and will generate unacceptably unpredictable results. Inquiries into whether and when employers can be said to "own" (and thus control) the off-duty speech of employees based on public perception, however, are not uncommon in other legal contexts.[253] Moreover, for an example of the Supreme Court's ability to apply a similar contextual inquiry to employee speech while at work, consider *Rankin v. McPherson*,[254] in which the Court found no substantial threat to the government's expressive interests after considering the plaintiff's position, the nature of her speech, and its setting.[255] There, the plaintiff, a nineteen-year-old clerk in the sheriff's department, was assigned to a work station that did not involve public contact in a job that required her to "type data from court papers into a computer."[256] She "was not a commissioned peace officer, did not wear a uniform, and was not authorized to make arrests or permitted to carry a gun."[257] She was fired for stating, after hearing of the assassination attempt on President Reagan, "[I]f they go for him again, I hope they get him."[258] The remark took place at work during a private conversation between the plaintiff and her boyfriend, who was also a co-worker.[259] Although the sheriff's department has a legitimate expressive interest in protecting the public's understanding of its transparent commitment to vigorous law enforcement,[260] under these circumstances, the plaintiff's speech posed little threat to that expression: the speech was uttered by a nonuniformed employee in a private conversation heard by no member of the public. As concurring Justice Powell observed, "The risk that a single, offhand

253. For example, private employers as principals are held to "own"—and thus be held legally responsible for—the defamatory or otherwise intentionally tortious speech of their employees and agents. RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006). This requires courts to determine whether "a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* § 2.03.

254. Rankin v. McPherson, 483 U.S. 378 (1987).

255. *Id.* at 379–94.

256. *Id.* at 380–81.

257. *Id.* at 380.

258. *Id.* at 381. Even though it occurred at work, the plaintiff's speech did not satisfy the test for government speech proposed in Part II because she was not hired to deliver a specific viewpoint on the part of the government; indeed, her speech would not even fall within *Garcetti*'s much more government-friendly "pursuant to official duties" test.

259. *Id.*

260. *See id.* at 401 (Scalia, J., dissenting) (emphasizing the sheriff's interest in maintaining a "public image consistent with his office's law enforcement duties").

comment directed to only one other worker will . . . undermine the mission of the office borders on the fanciful."[261]

In dissent, Justice Scalia bemoaned the effect of the majority's holding on what I have characterized as government's expressive interests:

> I, for one, do not look forward to the new First Amendment world the Court creates, in which nonpolicymaking employees of the Equal Employment Opportunity Commission must be permitted to make remarks on the job approving of racial discrimination, nonpolicymaking employees of the Selective Service System to advocate noncompliance with the draft laws, and . . . nonpolicymaking constable's deputies to express approval for the assassination of the President.[262]

Although Justice Scalia correctly identifies government's expressive interests, the examples he cites may or may not threaten those interests depending on the context. On one hand, they clash with transparently claimed government viewpoints. On the other hand, they pose considerably less risk to government's expressive interests if uttered off-duty by a low-level employee, especially when the employee is out of uniform or engaged in a private conversation rather than speaking in a public setting.

To be sure, a contextual approach still makes for hard cases. But one of my hopes is that courts will understand these as hard cases, rather than creating too-simplistic rules that obviate the need to engage in the challenging task of contextual inquiry.

CONCLUSION

Government workers speak in a wide variety of settings. Sometimes they speak for the government, sometimes they speak for themselves, and sometimes they speak for themselves in ways that reflect on their government employer. Justice Stevens recognized this complexity when he observed that the correct answer to the question whether the First Amendment protects public employee speech "is 'Sometimes,' not 'Never.'"[263]

In recent years, however, courts have increasingly answered "Hardly ever" to the question of whether the First Amendment

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261. *Id.* at 393 (Powell, J., concurring).

262. *Id.* at 400–01 (Scalia, J., dissenting).

263. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (Stevens, J., dissenting).

protects public employees' speech. Courts' expansive, but largely unexamined, deference to government's own expressive claims offers a helpful prism through which to understand this trend. For example, after *Garcetti* too quickly characterized employees' on-duty speech as the government's own and thus entirely within the government's power to control, lower courts now routinely apply *Garcetti*'s bright-line rule to reject the First Amendment claims of public employees punished after their on-the-job reports of safety hazards, financial improprieties, and a wide range of other legal and ethical misconduct. In other cases, courts too readily permit government to punish public employees for their speech away from work, deferring to government claims that even off-duty expression sufficiently reflects on the government to justify the government's control of that speech as well.

Taken together, these trends now lead to the rejection of public employees' free speech claims in a growing range of cases, threatening key First Amendment values. More careful attention to what it is that government seeks to express—and whether that expression is actually threatened by contested employee speech—can help capture and accommodate those interests more precisely while providing greater protection for workers' own free speech rights as well as the public's interest in transparent government.