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Cover Page Footnote

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A DEMOCRATIC VIEW OF PUBLIC EMPLOYEE SPEECH RIGHTS

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The question of the scope of public employee free speech rights is of obvious importance. Such cases are frequently litigated.[1] The speaker's continuing employment is commonly at stake. The appropriate functioning of the government agency may be at issue as well. But government agencies are intended to operate not only with internal efficiency, but with proper accountability to the public. And such accountability requires an appropriate degree of agency openness, transparency, and meaningful disclosure on publicly significant matters. Adequately assuring the democratic accountability of government agencies, it turns out, requires greater protection of public employee speech than is currently available.

This Article takes a close look at the current federal constitutional free speech rights of government employees, in so far as such speech may be subject to discipline by the government employer in question. Crucially, the current judicial test for the scope of such rights tries to distinguish speech made in one's role as a public employee from speech made in that person's role as a citizen, relying in turn upon various non-equivalent, non-exhaustive, multi-factor tests.[2] The courts thus attempt, in effect, to artificially divide the speaker into two separate and distinct personas, that of public employee, and that of citizen.

The courts then ask various alternative sets of questions as to, for example, whether the speech in question should be characterized as within the scope of the speaker's genuine job responsibilities; or pursuant to, or in the course of employment; or owing its existence to, or otherwise caused by, the speaker's government employment. An affirmative answer to any of these inquiries flatly dooms the speaker's free speech claim at the very start, with no other circumstance then being taken into account.[3]

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1. Westlaw listed 3,751 federal court citations to the leading case as of April 27, 2020.
2. *See infra* notes 33–41 and accompanying text.
3. *See infra* notes 44–64 and accompanying text.

Often, this gate-keeper inquiry as to speaker-role is thought to focus on any relation between the public employee's speech and the employee's "chain of command" within the government agency in question.[4] But this focus turns out, in practice, to be no more generally useful than any number of alternative approaches to implementing the current constitutional test.[5] Instead, the diverse judicial approaches to public employee speech generate a disturbing series of ironies, paradoxes, incongruities, and counterintuitive results.[6]

This gate-keeper speaker-role inquiry thus relies upon an often crude and artificial attempt to divide the speaker into a public employee as distinct from a citizen. The crucial problem here is that government employees differ precisely in their outlook, values, beliefs, and motivations with respect to their obligations as democratic citizens.[7]

A democratic system of government, if it is to be meaningful, requires certain sustaining attitudes, behaviors, practices, and institutions, particularly with respect to well-grounded government employee speech on matters relating to responsive, open, transparent, and accountable democratic government.[8] A meaningful democracy thus requires, in particular, broad public employee free speech rights.

As it turns out, the relationship between a properly functioning democracy and a broader compass for public employee well-grounded free speech is reciprocal. For true, or at least responsibility-grounded, public employee speech, greater free speech rights tend to advance democracy. And while free speech rights promote democratic accountability, freedom of speech conceived of as well as promoting either the search for truth, or else as promoting self-realization and genuine[9] personal autonomy, similarly tend to promote democratic institutions and values as well.[10]

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4. *See infra* notes 66–77 and accompanying text.
5. *See generally* Section I *infra*.
6. *See infra* notes 86–106 and accompanying text.
7. *See infra* notes 117–126 and accompanying text.
8. *See infra* notes 127–142 and accompanying text.
9. *See infra* notes 143–150 and accompanying text.
10. For a range of perspectives on the scope and limits of government employee free speech rights, *see generally* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 (2016); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U.L. REV. 1007 (2005); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2008); Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631 (2012); Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1 (2013).

I. SPEAKING AS A PUBLIC EMPLOYEE AS SUPPOSEDLY OPPOSED TO SPEAKING AS A CITIZEN

The cases have made at least passing reference to a purported distinction between speaking as a public employee and speaking as a citizen for some time.[11] Only more recently, however, has the Court focused on this distinction as a functional, and indeed often decisive, gate-keeping element of public employee free speech cases.[12]

The crucial case in this regard, *Garcetti v. Ceballos*,[13] has been frequently cited.[14] The logic of *Garcetti* will be central to much that follows below. The *Garcetti* majority opinion is multi-faceted and complex. For the moment, though, we can say simply that *Garcetti* explicitly imposes a distinctive speaker-role requirement if even the mere possibility of free speech protection for a public employee speaker is to remain open. Crucially, the speech must have been made in the speaker's role, or capacity, as a citizen,[15] as explicitly distinct from that speaker's role, or capacity, as a government employee.[16]

After *Garcetti*, speaking not as a government employee but instead as a citizen is a gatekeeping or threshold requirement for any possible free speech protection. Pursuant to prior case law[17] and to *Garcetti* itself, there would then remain two further hurdles the speaker must then clear. [18] The first such hurdle requires a showing by the speaker that the speech in question addressed a matter of public interest or concern, as distinct from a matter of merely private or personal concern.[19] Without such a showing, free speech protection even for a public citizen is generally unavailable.[20] The final hurdle then involves an interest balancing test.[21]

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11. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 146–47 (1983).

12. *See* Garcetti v. Ceballos, 547 U.S. 410, 424–26 (2006).

13. *Id.*

14. Westlaw listed 3,936 total case citations and 3,500 secondary source citations to *Garcetti* as of April 13, 2020.

15. Or, presumably, as an alien. *See generally* R. George Wright, *Undocumented Speakers and Freedom of Speech: A Relatively Uncontroversial Approach*, 45 GONZ. L. REV. 499 (2009).

16. *See Garcetti*, 547 U.S. at 424–26.

17. *See, e.g.*, authorities cited *supra* note 11.

18. *See Garcetti*, 547 U.S. at 418–19.

19. *See Garcetti*, 547 U.S. at 418 (citing Pickering v. Bd. of Educ. v. Twp. High Sch. Dist. 205, 391 U.S. 563 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983)). For discussion, see *infra* note 112 and accompanying text.

20. *See* authorities cited *supra* note 19.

21. As classically, but too narrowly, formulated, "[t]he problem in any case is to arrive at a balance between the interests of the [speaker], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Garcetti*, 547 U.S. at 417 (quoting *Pickering*, 391 U.S. at 568. The reference to "any case" is only to cases that survive the earlier steps under *Connick* and *Garcetti.*

There is much to explore in the entire *Garcetti* case. However, it is more useful to consider the issues and problems that flow from *Garcetti*'s initial threshold role-requirement, under which the speech must have occurred in the speaker's role as a citizen, and not as a public employee.[22] The best source for some initial sense of these issues and problems is the case law that has sought to interpret and implement *Garcetti*'s distinction in this respect.

Probably the most authoritative interpretation of *Garcetti* is found in the Court's own later case of *Lane v. Franks*.[23] *Lane* seeks to clarify *Garcetti* in at least one context. In particular, *Lane* holds that

> [t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.[24]

Lane thus clarifies the *Garcetti* speaker-role inquiry in one quite specific context. But merely reiterating the purported distinction between speech as a public employee and speech as a citizen does not do much to clarify the distinction itself.

In fact, *Lane* seems to focus not on the full scope of a public employee's job responsibilities, which may occasionally include the extraordinary, but more narrowly on the employee's "ordinary" job responsibilities.[25] Thus, it is currently unclear whether truthful testimony under oath, perhaps even pursuant to subpoena, can qualify for possible free speech protection for those for whom such testimony is somehow determined to be within the scope of their "ordinary" job responsibilities.[26] Broadly speaking, then, *Lane* does not attempt to more usefully clarify the *Garcetti* speech-role holding, and may even add further complications thereto.

The problems created by the *Garcetti* speech-role distinction begin with the question of who is to determine any such issue in any given case. There are broad legal and public policy implications of issues of free speech and administrative effectiveness, so it is not surprising that some courts have treated public employee speech issues, including speaker-role issues, as questions of law.[27] But speaker-role issues seem as well to often require consideration of

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22. *See Garcetti*, 547 U.S. at 424–26.

23. Lane v. Franks, 573 U.S. 228 (2014).

24. *Id.* at 238; *see also* Lett v. City of Chicago, 946 F.3d 398, 401 (7th Cir. 2020) (citing *Lane*, 573 U.S. at 238).

25. *See, e.g.*, Mayhew v. Town of Smyrna, 856 F.3d 456, 463 (6th Cir. 2017); Boulton v. Swanson, 795 F.3d 526, 534 (6th Cir. 2015).

26. *See* authorities cited *supra* note 25; Bott v. Bradshaw, 791 F. App'x 41, 45 (11th Cir. 2019) (per curiam) (unpublished opinion) ("[O]ne of [the speaker's] essential job duties entailed providing testimony regarding her investigation of and interaction with criminal defendants.").

27. *See, e.g.*, Moss v. City of Pembroke Pines, 782 F.3d 613, 618 (11th Cir. 2015); *see also* the references to Fifth, Tenth, and D.C. Circuit Court opinions in *Mayhew*. *Mayhew*, 856 F.3d at

questions of fact, including what a public employee was realistically required to do on a recurring basis. So, it is also not surprising that other courts have treated speaker-role issues as mixed questions of law and fact.[28] This entirely understandable circuit split amounts to one of the avoidable costs of undertaking the speaker-role inquiry in the first place.

On the merits, then, of *Garcetti*'s speaker-role elements, the courts acknowledge at least that "determining if an employee is speaking as a private citizen 'can be challenging.'"[29] Plainly, this issue "is not susceptible to a bright line rule."[30] Of course, some plainly useful legal tests are, to one degree or another, not reducible to clear, bright line status. How much murkiness and indeterminacy we should tolerate in a legal test should depend not only on the degree of such murkiness and indeterminacy, but as well on how uniquely useful the test in question really is. A test that adds little real constitutional value to the overall determination should be dispensed with. And a test that tends in some instances to misconstrue or even impair the constitutional values at stake should be dispensed with all the more readily.

Even the Court itself in *Garcetti* recognized, to begin with, that many speaker-role cases involve multiple factors tugging in opposite directions, toward an employee speaker-role and as well toward a citizen speaker-role, respectively.[31] Worse, though, the Court has also acknowledged that in a particular case, a public employee may speak, simultaneously, as both a public employee and as "a concerned citizen, seeking to express his views on an important decision of his government."[32] This sort of mixed-motive case impliedly concedes, at a minimum, that the speaker-role status need not be dichotomous, or binary.[33]

More typically, though, the courts do treat speaker-role questions as though they were inevitably binary, but often complex. Thus, the courts have often adopted one version or another of an admittedly non-exhaustive multi-factor test

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462. The Sixth Circuit has broadly declared that "whether a public employee's speech is protected is a question of law for the courts to decide." Haddad v. Gregg, 910 F.3d 237, 244 (6th Cir. 2018) (citing *Mayhew*, 856 F.3d at 462–64). At the state court level, *see* Sprague v. Spokane Valley Fire Dep't, 409 P.3d 160, 174 (Wash. 2018).

28. *See* the references to Third, Seventh, Eighth and Ninth Circuit Court opinions in *Mayhew*. *Mayhew*, 856 F.3d at 462; *see also* Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1233 (W.D. Wash. 2020).

29. *See* Jones v. Wilson Cnty., 723 F. App'x 289, 292 (6th Cir. 2018) (unpublished opinion) (quoting *Mayhew*, 856 F.3d at 464)).

30. Waronker v. Hempstead Union Free Sch. Dist., 788 F. App'x 788, 791 (2d Cir. 2019) (unpublished opinion) (quoting Ross v. Breslin, 693 F.3d 300, 306 (2d Cir. 2012)); Montero v. City of Yonkers, 890 F.3d 386, 397 (2d Cir. 2018) (quoting *Ross*, 693 F.3d at 306).

31. *See* Garcetti v. Ceballos, 547 U.S. 410, 411 (2006).

32. *Garcetti*, 547 U.S. at 429 (Stevens, J., dissenting) (quoting Madison Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n, 429 U.S. 167, 174–75 (1976)).

33. Mixed speaker motive cases are presumably common. It would hardly be surprising if some single instance of speech reflected, to one degree or another, both one's role as a government employee and one's role as a concerned citizen. *See, e.g.*, Mpoy v. Rhee, 758 F.3d 285, 292–93 (D.C. Cir. 2014).

for speaker role-status.[34] These multi-factor tests vary in their focus and formulation.

As a mere sampling of the varied multi-factor speaker-role tests, consider, for example, the Sixth Circuit's focus, among other factors, on "the speech's impetus; its setting; its audience;[35] and its general subject matter—'who, where, what, when, why, and how' considerations."[36] Alternatively, the Eleventh Circuit focuses on "the employee's job description, whether the speech occurred at the workplace, and whether the speech concerned the subject matter of the employee's job."[37] Or consider the Third Circuit's declaration that "[w]hether an individual spoke as an employee requires examination of the content, form, and context of the relevant speech."[38]

Remarkably, this latter formulation is also precisely how the Court has characterized the supposedly quite different judicial inquiry into whether the speech in question addresses a matter of public interest and concern or not.[39] Thus some courts decide the speaker-role question under *Garcetti* with precisely the same formal legal test used for whether the speech at issue addresses a matter of public interest and concern or not.[40] This in itself impeaches the claim that *Garcetti*'s speaker-role inquiry adds distinct, otherwise unattainable constitutional value to the pre-existing tests for public employee freedom of speech. The speaker-role inquiry would, at best, be largely redundant.

Of course, other multi-factor tests for speaker-role do not, on their face, merely duplicate portions of other aspects of public employee free speech tests.[41] But then, we are left with a variety of alternative multi-factor balancing tests,

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34. *See, e.g.*, *Haddad*, 910 F.3d at 246–47 (citing *Mayhew*, 856 F.3d at 464); *Mayhew*, 856 F.3d at 464 (citing Handy-Clay v. City of Memphis, 695 F.3d 531, 540 (6th Cir. 2012); *see also* King v. Bd. of Cnty. Comm'rs, 226 F. Supp. 3d 1328, 1334 (M.D. Fla. 2016) (citing Alves v. Bd. of Regents of Univ. Sys. of Ga., 804 F.3d 1149, 1161 (11th Cir. 2015)). *See also* Plouffe v. Cevallos, 777 F. App'x 594, 603 (3d Cir. 2019) (unpublished opinion).

35. The 'audience' for the speech will, by way of further complication, consist of an immediate audience, perhaps an official questioner, and anyone else in the room. But there may also be a much broader, indirectly targeted audience, consisting of, for example, remote government officials, journalists, activists, and ordinary citizens. The possible complications are apparently endless.

36. *Haddad*, 910 F.3d at 246–47 (quoting *Mayhew*, 856 F.3d at 464).

37. *Alves*, 804 F.3d at 1161 (citing Moss v. City of Pembroke Pines, 782 F.3d 613, 618 (11th Cir. 2015)). As noted at various points below, each of these factors invites further important qualifications and distinctions.

38. *Plouffe*, 777 F. App'x at 603 (citing Rankin v. McPherson, 483 U.S. 378, 384–85 (1987)).

39. *See, e.g.*, *Rankin*, 483 U.S. at 384–85; *see also supra* note 19 and accompanying text.

40. *See Rankin*, 483 U.S. at 384–85; *see also* Connick v. Myers, 461 U.S. 138, 147–48 (1983); City of San Diego v. Roe, 543 U.S. 77, 83 (2004); Lane v. Franks, 573 U.S. 228, 241 (2014). Of course, an inquiry into the speech's "content, form, and context" could vary in its course and meaning in the two very different judicial inquiries, but the overlap should typically be quite substantial.

41. *See supra* notes 35–37 and accompanying text.

post-*Garcetti*, that cannot be translated into, or somehow reduced to, one another.

To further complicate matters, there are also a number of perhaps non-decisive single-factor guides to deciding whether a given speech was uttered as a public employee or else as a citizen. Not surprisingly, these single-factor guides generally do not claim to be exhaustive, or invariably sufficient even where they would apply. Consider, to begin with, the suggestion that one relevant factor is "whether the speech was made inside or outside of the workplace."[42] The aim here is likely to replace the vague idea of the scope of one's employment, ordinary or otherwise, with a simpler, largely visual or geographic inquiry. One problem, though, is that this test, focusing on a physical workplace, is ill-suited to an era of cyber communications and working from home.[43]

But more basically, the mere physical location of one's speech, in or outside of one's physical workspace, can hardly be a reliable guide to whether one's speech fell within the scope of one's legitimately described job responsibilities. Some speech within the workplace is clearly unrelated to one's job.[44] Thus it has been claimed that "[m]erely because an employee's speech was made *at* work and *about* work does not necessarily remove that employee's speech from the ambit of constitutional protection."[45] And on the other hand, a government employee's core job responsibilities may often carry that party outside of their physical workplace, and into much more broadly used public or private spaces.[46]

A bit even less manageable single-factor consideration contrasts speech that "is itself ordinarily[47] within the scope of an employee's duties"[48] with employee speech that "merely concerns those duties."[49] The line between speech within the scope of one's duties and speech merely concerning or addressing one's duties is at best dubious. Many jobs, for example, will require the employee to

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42. Henderson v. City of Flint, 761 F. App'x 618, 623–24 (6th Cir. 2018) (quoting Hand-Clay v. City of Memphis, 695 F.3d 531, 540–41 (6th Cir. 2012)).

43. *See* Catie Edmondson & Katie Benner, *After Days of Anxiety and Confusion, Government Workers Told to Stay Home*, N.Y. TIMES (Mar. 16, 2020), www.nytimes.com/2020/03/16/us/politics/coronavirus-government-work.html.

44. *See, e.g.*, *Rankin*, 483 U.S. at 381.

45. Thomas v. City of Blanchard, 548 F.3d 1317, 1323 (10th Cir. 2008) (emphasis in original) (citing Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007)).

46. *See, e.g.*, Bott v. Bradshaw, 791 F. App'x 41, 45 (11th Cir. 2019); *see also* Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708, 711 (10th Cir. 2010) (using a banquet hall as the physical setting).

47. This language again appears to rely upon a distinction between an employee's 'ordinary' as opposed to 'extraordinary,' unusual, or ad hoc duties. One might imagine that some unusual job duties could also be genuine, bona fide duties. *See, e.g.*, Mayhew v. Town of Smyrna, 856 F.3d 456, 465 (6th Cir. 2017) (quoting Weisbarth v. Geauga Park Dist., 499 F.3d 538, 544 (6th Cir. 2007)).

48. Lane v. Franks, 573 U.S. 228, 240 (2014); *see also* Henderson v. City of Flint, 751 F. App'x 618, 623 (6th Cir. 2018); *Mayhew*, 856 F.3d at 463; Sprague v. Spokane Valley Fire Dep't, 409 P.3d 160, 174 (Wash. 2018).

49. *See* authorities cited *supra* note 48.

verbally address, to their superiors, speech on one or more of their other job responsibilities.[50] Worse, a government employer might, even in good faith, require all employees to bring all job-related concerns first to internal agency personnel.[51]

A further single-factor approach seeks to determine whether the employee speech was "part and parcel"[52] of the speaker's "daily responsibilities,"[53] or expressing the "employee's concern about his ability to 'properly execute his duties.'"[54] How much the phrase 'part and parcel' clarifies the scope of an employee's job responsibilities, or their ordinary job responsibilities, is unclear. One might also wonder, more fundamentally, whether expressing one's concerns about one's ability to execute one's overall job responsibilities will always fall within one's job responsibilities.[55]

Often, courts inquire as well into whether the government employee's speech was undertaken "pursuant to"[56] some version of the employee's job responsibilities. Similarly, courts ask whether the speech in question "owes its existence to"[57] the relevant job responsibilities. The latter formulation is of special interest as a clear source of problems.

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50. Imagine, for example, a variation on *Connick* in which a government employer required or encouraged employee feedback regarding one or more aspects of the employee's work. *See also Weisbarth*, 494 F.3d at 542 (involving a mandatory employee interview with a hired consultant re workplace morale).

51. The potential for abuse therein should be clear.

52. The vague metaphor of being 'part and parcel' normally refers to some standard feature that cannot be avoided within the scope of some specified activity. *See Be Part and Parcel of Sth*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/dictionary/english/be-part-and-parcel-of-sth?q=be-part-and-parcel (last visited Oct. 20, 2020). This phrase apparently peaked in the year 1840, with a stable usage rate from 1860 to the present day. *See* the results at https://books.google.com/ngrams (enter "part and parcel" into the search bar).

53. Waronker v. Hempstead Union Free Sch. Dist., 788 F. App'x 788, 792 (2d Cir. 2019) (relying on Montero v. City of Yonkers, 890 F.3d 386, 398 (2d Cir. 2018)) (internal citation omitted).

54. Groenewold v. Kelley, 888 F.3d 365, 371 (8th Cir. 2018) (quoting Lyons v. Vaught, 875 F.3d 1168, 1174 (8th Cir. 2017)); Matthews v. City of New York, 779 F.3d 167, 173 (2d Cir. 2015) (quoting Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010)).

55. A logical paradox does indeed seem to be vaguely lurking here.

56. This language derives from *Garcetti*. *See* Garcetti v. Ceballos, 547 U.S. 410, 421(2006); *see also* Mogard v. City of Milbank, 932 F.3d 1184, 1189 (8th Cir. 2019) (citing *Garcetti*, 547 U.S. at 418); *Waronker*, 788 F. App'x at 791–92 (citing cases); *Montero*, 890 F.3d at 395 (citing *Garcetti*, 547 U.S. at 424); Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1233 (W.D. Wash. 2020) (quoting *Garcetti*, 547 U.S. at 421).

57. This language also derives from *Garcetti*. *See Garcetti*, 574 U.S. at 421–22; *see also* Barrow v. City of Hillview, 775 F. App'x 801, 812 (6th Cir. 2019) (unpublished opinion) (quoting *Garcetti*, 574 U.S. at 421); *Groenewold*, 888 F.3d at 371 (citing cases); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 543 (6th Cir. 2007); *Kennedy*, 443 F. Supp. 3d at 1234 (citing cases); King v. Bd. of Cnty. Comm'rs, 226 F. Supp. 3d 1328, 1334 (M.D. Fla. 2016) (quoting Alves v. Bd. of Regents of the Univ. Sys. of Ga., 804 F.3d 1149, 1162 (11th Cir. 2015)).

One immediate such problem is that the idea of speech 'owing its existence' to job responsibilities requires a prior judgment as to the scope of those responsibilities. Judgments as to the scope of job responsibilities can be made narrowly or broadly.[58] So the 'owing its existence' test itself depends on other potentially controversial and more basic considerations.

Worse, the 'owing its existence' test leads to doubtful results. Consider the problem of speech that is "in direct contravention to" the orders of the speaker's supervisors.[59] Such speech can causally owe its existence, in the senses of but-for causation, or else substantial factor causation,[60] to one's job responsibilities.[61] But to add to the analytical hopelessness, the speech at issue may be causally attributable as well to personal or public spirited motivations reflecting the speaker's sense of the rights and duties of citizenship.[62] Public-spiritedness can be a but-for cause or a substantial causal factor in such speech. This will often be true of typical mixed-motive cases.[63] These problems of causation will be especially common, and particularly acute, when the employee's core job responsibilities themselves include honest and forthright speech to outsiders, or to the general public.[64]

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58. *See King*, 226 F. Supp. 3d at 1334 (quoting *Alves*, 804 F.3d at 1162). Crucially, Lane itself recognizes that speech based on information one has acquired as a public employee, and by virtue of, or causally attributable to, that employment, does not invariably disqualify the speech from being protected as citizen-speech. *See* Lane v. Franks, 573 U.S. 228, 240 (2014).

59. *See, e.g.*, Greisen v. Hanken, 925 F.3d 1097, 1111 (9th Cir. 2019) (quoting Dahlia v. Rodriguez, 735 F.3d 1060, 1074–75 (9th Cir. 2013) (en banc)); Lincoln v. Maketa, 880 F.3d 533, 539 (10th Cir. 2018) (citing Jackler v. Byrne, 658 F.3d 225, 241–42 (2d Cir. 2011)).

60. For background, *see* Michael Moore, *Causation in Law*, THE STAN. ENCYCLOPEDIA OF PHIL. (archived Fall 2019 ed.), https;//plato.stanford.edu/entries/causation-law (Oct. 3, 2019); Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879, 885–86 (2019); Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2164 (2017).

61. *See Greisen*, 925 F.3d at 1111 (quoting *Dahlia*, 725 F.3d at 1074–75); *see also Lincoln*, 880 F.3d at 539 (citing *Jackler*, 658 F.3d at 241–42).

62. Consider the case of a public employee whose sole job is to report on the status of the town's only water supply. Discovering that the water source contains a deadly poison, the employee might well speak first to a supervisor, and then to outsiders, especially if the supervisor downplays the threat. The employee's personal desire to act as a responsible citizen could be both a but-for cause and a causally substantial factor for speaking both internally and externally. This scenario is very loosely inspired by HENRICK IBSEN, AN ENEMY OF THE PEOPLE, available at www.gutenberg.org/files/2446/2446-h/2446.h.htm (rev. ed. of May 1, 2019) (1882). *See Lane*, 573 U.S. at 240 (discussing the non-dispositive nature of acquiring the crucial information in the course of employment). Importantly, the speaker's role and functions as a public employee will normally be a necessary cause of the speech in question, but certainly not a sufficient cause of that speech, independent of the speaker's prior background, values, beliefs, and attitudes toward citizenship in particular.

63. *See supra* note 33 and accompanying text.

64. *See, e.g.*, Powers v. Northside Indep. Sch. Dist., 951 F.3d 298, 308 (5th Cir. 2020); Haddad v. Gregg, 910 F.3d 237, 241 (6th Cir. 2018); Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1235 (W.D. Wash. 2020) ("[T]he question of what speech is public vs. private becomes especially difficult when an essential part of the employee's job *is* expression.") (emphasis in original).

Perhaps, though, the difficulties inherent in these kinds of speech causation issues can be bypassed. A number of the cases have focused instead on the idea of the public employee's "chain of command."[65] Let us assume that the scope of a speaker's chain of command can be identified. A problem with then asking whether an employee's speech was within or outside that chain of command is that the courts have divided over the weight, and indeed the relevance, of that consideration.

Thus, some courts hold that speech outside the chain of command can still be unprotected as mere employee speech, as opposed to citizen speech.[66] But speech outside the chain of command may well also be protected at this stage.[67] Thus, some courts treat venturing outside of, or perhaps consciously defying, one's chain of command as a non-dispositive consideration.[68] Other courts, however, reject chain of command considerations as even a relevant factor.[69] In these cases, the proper focus is not on the speaker's chain of command, or on "the recipient of the communication but on whether 'the speech stemmed from and was of the type that the employee was paid to do, regardless of the exact role of the individual or entity to which the employee has chosen to speak.'"[70]

One source of the continuing uncertainty regarding any possible relevance of the speaker's chain of command is that there are significant differences between one's chain of command and the scope of one's workplace. Certainly, not everyone at one's workplace is anywhere in one's chain of command.[71] And one's chain of command may extend far beyond the geography of one's

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65. *See, e.g.*, Mogard v. City of Millbank, 932 F.3d 1184, 1190 (8th Cir. 2019) ("Under *Garcetti*, a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command") (quoting Lyons v. Vaught, 875 F.3d 1168, 1175 (8th Cir. 2017))); *see also* Bradley v. W. Chester Univ. of the Pa. State Sys. of Higher Educ., 880 F.3d 643, 653, 653 n.50, 51 (3d Cir. 2018) (citing contrasting approaches to speech deemed within or else outside the speaker's chain of command).

66. *See, e.g.*, cases cited *supra* note 65.

67. *See, e.g.*, Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708, 715 (10th Cir. 2010); Charles v. Grief, 522 F.3d 508, 514 (5th Cir. 2008) ("[The public employee's] decision to ignore the normal chain of command . . . is a significant distinction. We conclude that [the] speech is not left unprotected."); Dahlia v. Rodriguez, 735 F.3d 1060, 1074 (9th Cir. 2013) ("[W]hether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties."); Thomas v. City of Blanchard, 548 F.3d 1317, 1325 (10th Cir. 2008).

68. *See* authorities cited *supra* note 67.

69. *See, e.g.*, Trimble v. Bd. of Cnty. Comm'rs, 728 F. App'x 789, 795 (10th Cir. 2018) (unpublished opinion) (citing Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 747 (10th Cir. 2010)).

70. *Id.*

71. Presumably, many of the people at one's government workplace are neither one's own supervisors nor one's subordinates.

workplace.[72] As well, we can easily imagine a public employee alienating a direct supervisor by political speech having nothing to do with any employment-related matter.[73] This could be true even of confidential advisors or policymakers.[74]

So even if the distinction between speech within and outside of one's chain of command is deemed relevant, any such classification may, depending upon the local federal circuit court's perspective, point in any direction.[75] But this problem does not seem resolvable, in any stable way, within *Garcetti*'s threshold distinction between public employee speech and public-spirited citizen speech.[76] As it stands, this distinction invites, even as it seeks to discourage, a government employer's strategically expanding an employee job description and responsibilities.[77] The *Garcetti* speaker-role test can itself then be modified, consciously or unconsciously, by judicial interpretation.

Consider, for example, a subtle, but potentially significant, expansion of the scope of unprotected speech. Some courts have said that "if an employee engages in speech during the course of performing an official duty and the speech *reasonably contributes to or facilitates* the employee's performance of the official duty, the speech is made pursuant to the employee's official duties."[78]

Now, this language may seem entirely in keeping with sound public policy and respect for freedom of speech. But consider that many job performances involving speech may be genuinely furthered by merely introductory, apparently digressive, or mere leave-taking speech not itself addressing the job-performance subject at issue. People do not always converse most effectively through rigorously ordered bullet-points. The overall job-focused conversation

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72. For example, a local postmaster in Portland, Oregon may have an effective chain of command that ends in the White House. *See generally* Myers v. United States, 272 U.S. 52 (1926) (reviewing presidential removal cases).

73. Consider, for example, a variation on the circumstances in *Rankin v. McPherson*. *See generally* Rankin v. McPherson, 483 U.S. 378 (1987) (intending speech for a particular co-worker rather than for any supervisor).

74. Imagine, for example, a confidential or policy-making federal employee who comments to a supervisor about a controversial state election race, particularly where that federal agency does not typically interface with the state office in question.

75. *See supra* notes 65–74 and accompanying text.

76. *See supra* note 11 and accompanying text.

77. *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (objecting to any public employer's attempt to game the Garcetti threshold test, and thereby successfully punish the employee, "by creating excessively broad job descriptions"); *see also* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 636 (2019) (Alito, J., concurring) (discussing the denial of certiorari based on *Garcetti*) (quoting *Garcetti*, 574 U.S. at 424)).

78. Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708, 713 (10th Cir. 2010) (quoting Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007)) (emphasis added).

may be enhanced by what amount to non-linear conversational digressions, polite references, and asides.[79]

Relatedly, some courts have interpreted *Garcetti* to allow consideration of whether the relevant speech or course of conduct was "intended . . . to serve *any purpose* of the employer."[80] Again, this interpretation seems entirely reasonable on its face. But consider that beyond its own distinctive functions, government agencies typically have broader purposes as well. Among these further purposes may be that of providing competent service that is free of gross corruption or inefficiency, and furthering the values of governmental transparency and accountability in a responsive democracy.[81]

These would certainly be worthy agency goals and purposes,[82] whatever their priority for the agency. The problem, though, is that much classic whistle-blower speech is intended to serve two kinds of purposes. Such speech is often intended by the speaker to address a serious public policy problem, uttered in whatever forum, but the speech is also intended by the speaker to address job-focused questions of competence, corruption, inefficiency, transparency, or public accountability.[83] Literally, then, whatever the venue or context of such speech, it would also be intended to promote an agency purpose[84] and thus be unprotected as employee speech.[85]

Finally, then, and most fundamentally, the *Garcetti* speaker-role test clearly generates legal results that are often contrary to the intuitions and common sense of the public, the government agency, and the employee-speaker. The *Garcetti* speaker-role test generates results, on its own logic, that turn out to be ironic, counterintuitive, or paradoxical to a reasonable observer.

Consider, for example, the situation described by then-Judge Neil Gorsuch in a case[86] that was initially briefed before the decision in *Garcetti*, but in which the parties then later discussed the implications of *Garcetti*.[87] Understandably, the employee speaker and the government employer essentially had to switch sides post-*Garcetti*.[88] The government employer had initially argued, sensibly, that the employee had spoken without any authority to do so.[89] The speaker,

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79. On the other hand, government employees should not be permitted to insulate their verbal sabotage or dereliction by gratuitously inserting irrelevant, or largely irrelevant, controversial political speech.

80. Corn v. Miss. Dep't of Pub. Safety, 954 F.3d 268, 277 (5th Cir. 2020) (quoting Anderson v. Valdez, 845 F.3d 580, 596 (5th Cir. 2016) (emphasis added).

81. *See infra* note 130 and accompanying text.

82. *See supra* text at note 80.

83. *See supra* note 80 and accompanying text.

84. *See supra* note 80 and accompanying text.

85. *See supra* note 80 and accompanying text.

86. Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007).

87. *See id.* at 1329–30.

88. *See id.*

89. *See id.* at 1329.

equally sensibly, had initially argued pre-*Garcetti* that her job responsibilities required her to report alleged agency misdeeds to federal authorities.[90]

Ironically, after *Garcetti*, both parties found it expedient to switch their major themes.[91] The employer argued in a reply brief that the speech was engaged in pursuant to the speaker's official job title and responsibilities.[92] The speaker, with equal irony, then argued that her reporting of official violations was undertaken "solely in her capacity as a citizen, not as an employee."[93]

No doubt it is perfectly ordinary for parties to tailor their litigating positions to the language of new binding authorities. But *Garcetti* required, in this instance, objectively humiliating complete reversals of the parties' basic analyses. In large measure, the *Garcetti* inquiry into speaker-role stands common sense, and basic intuitions, on their respective heads.

In another case, the government employer had hired a consultant to obtain employee opinions.[94] The employee-speaker argued that her honest conversation with this consultant, hired precisely to undertake job-related interviews with the employees, was for this reason protected speech.[95] But however common-sensical this line of reasoning might be, it ironically undermines the speaker's case, at the speaker-role threshold, under *Garcetti*.[96] The speech at issue "owe[d] its existence"[97] to the speaker's job responsibilities.[98] The court summarized the overall posture of the case in these terms: "The fact that [the employee-speaker] was allegedly fired for voicing her concerns over departmental morale and performance issues when explicitly asked to do so by an agent of the [employer] thus tends to make [the employer's] action more constitutionally defensible in this instance, albeit also more difficult to understand."[99] The inquiry under *Garcetti* into speaker-role status thus depends upon setting common-sense intuitions aside. The sense of anti-intuitiveness, irony, and paradox pervades this employee-role versus citizen-role inquiry. Most administrative malfeasance will be known by other administrative actors only pursuant to their status and role as a government employee.[100] Quite naturally, government employee speakers often refer to or emphasize, in their

90. *See id.* at 1330.

91. *See id.*

92. *See id.*

93. *Id.*

94. *See* Weisbarth v. Geauga Park Dist., 499 F.3d 538, 542–43 (6th Cir. 2007).

95. *See id.* at 543.

96. *See id.*

97. *Id.* at 544. *But see supra* notes 58–64 and accompanying text.

98. *See Weisbarth*, 499 F.3d at 544.

99. *Id.* at 545. The court then rightly drew the further inference that these circumstances essentially ruled out the speaker's case under *Garcetti*. *See id.*

100. *See, e.g.*, Thomas v. City of Blanchard, 548 F.3d 1317, 1324 (10th Cir. 2008) ("He was aware that the certificate . . . was fraudulent only because of his official duty as a housing inspector.").

public speech, their employee status. This is quite understandably done in order to explain the situation, and to establish some credibility before a public audience of outsiders.[101]

Additionally, the *Garcetti* speaker-role inquiry may incentivize some forms of what might be seen as employee insubordination.[102] Even job descriptions adopted in good faith, and not unduly expanded by employers, can be remarkably unclear in their moral and civic implications.[103] And finally, the *Garcetti* test also provides legal incentive, often perversely, for conscientious public employees to first take their concerns to outsiders, rather than to obtain any internal agency responses first.[104] Speaking first to the outside public, though, does not ensure that one will be held to have spoken as a citizen.[105] But speaking first to one's supervisors, as common sense might suggest, unfortunately minimizes one's free speech rights under *Garcetti*.[106]

II. HOW THE GARCETTI TEST GOES WRONG: CONCEPTIONS OF BUREAUCRATS, CITIZENS, DEMOCRACY, AND MEANINGFUL FREEDOM OF SPEECH

Diagnosing *Garcetti*'s basic error requires examining the opinion's underlying assumptions. The essence of *Garcetti* lies in its initial attempted distinction between speaker roles. *Garcetti* relies on some sort of rough dichotomy between a person's speech in their role as a public employee, and their speech, perhaps identical in content, as a citizen.[107] No doubt, the law often benefits from simple binary distinctions. There is certainly something to *Garcetti*'s binary speaker role classification. But as it turns out, the *Garcetti* binary unfortunately validates one particular understanding of what it is like to be a government employee, at the expense of another, and perhaps worthier,

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101. *See, e.g.*, Mpoy v. Rhee, 758 F.3d 285, 291 (D.C. Cir. 2014); *see also* Haddad v. Gregg, 910 F.3d 237, 248 (6th Cir. 2018) ("[H]e had extensive knowledge of the issues on which he spoke—knowledge based on his employment and unique knowledge gleaned from his position.").

102. This was loosely suggested by facts akin to those in *Dahlia v. Rodriguez*. *See* Dahlia v. Rodriguez, 735 F.3d 1060, 1075 (9th Cir. 2013) ("[W]hen a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties.").

103. *See, e.g.*, Buddenberg v. Weisdack, 939 F.3d 732, 735–36 (6th Cir. 2019) (explaining that an agency fiscal management officer is under no duty as an employee to report general internal agency ethical violations or allegations of discrimination); Javitz v. Cnty. of Luzerne, 940 F.3d 858, 866–67 (3d Cir. 2019) (reporting a crime detected within one's 'ordinary' job duties was not itself also within the scope of one's 'ordinary' job duties, despite a county ethics code encouraging such reporting).

104. Consider, for example, the circumstances outlined in Mogard v. City of Milbank, 932 F.3d 1184 (8th Cir. 2019). *See* Mogard v. City of Milbank, 932 F.3d 1184, 1189–90 (8th Cir. 2019) (speaking in one capacity or another, as public employee or as citizen, to community leaders). This parenthetical seems very vague to me.

105. *See id.*

106. *See id.* at 1190 (noting the implications of speaking within one's chain of command under *Garcetti*).

107. *See supra* notes 11–16 and accompanying text.

understanding. For many speakers, the *Garcetti* binary requires a self-alienation, or an artificial, indeed arbitrary, splitting of the integrated self.

The origins of the Court's analytical division of the self actually predate *Garcetti*. Even as early as 1968, the Court impliedly distinguished speakers in their roles as citizens, with interests in commenting on matters of public concern, from speakers in their roles as public employees.[108] This distinction between a person's supposedly separate speaker roles is implied as well in successive cases down to the present.[109] Only when the speaker is somehow deemed to have spoken in their role as a citizen rather than as a public employee, is further constitutional analysis the required. [110]

The next step under *Garcetti*, and the first step under prior cases[111] is that of determining whether the citizen-speech in question addressed a subject of public interest or concern.[112] Such a subject would be distinct from a personal or private concern.[113] That particular determination has been judicially made by reference to as many as seven distinct factors.[114] One or more of these factors seem open to manipulation by the government employer after the speech has already been made.[115] At present, the appellate courts are split on whether the

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108. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

109. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 675–76 (1996); Connick v. Myers, 461 U.S. 138, 140 (1983); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Garcetti v. Ceballos, 547 U.S. 410, 419 (2006); Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 299 (2007); Lane v. Franks, 573 U.S. 228, 236–37 (2014). More recently, *see, e.g.*, Henry v. Johnson, 950 F.3d 1005, 1011–12 (8th Cir. 2020); Baloga v. Pittston Area Sch. Dist., 927 F.3d 742, 753 (3d Cir. 2019).

110. *See supra* Section I.

111. *See supra* notes 19–20 and accompanying text.

112. *See supra* notes 19–20 and accompanying text. The Court has recognized that public employees, in their supposedly distinct role and capacity as citizens, may make truthful or well-grounded assertions relating not to mere personal grievances, but to matters of genuine public interest, on which the speaker may bring special expertise. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 82 (2004). The "interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Id.* In fact, it is the public's interest in responsive, effective, efficient government, as inseparably linked with the openness and transparency promoted by appropriate employee speech rights, that should predominate. The protection-worthiness of speech on matters of public interest then depends upon an interest balancing test under Pickering v. Bd. of Educ. of Twp. High Sch. Dist. of 205. *Pickering*, 391 U.S. at 568. Too often, the courts narrow down the government's interest into mere institutional or operational efficiency, thus underplaying the government's own presumed interest, along with that of the public, in its own appropriate democratic responsiveness. *See Roe*, 543 U.S. at 82; *Pickering*, 391 U.S. at 568 (focusing narrowly on governmental efficiency).

113. *See supra* notes 19–20 and accompanying text. Courts normally fail to consider, in a close case, whether the employee could have easily, cheaply, and authentically reformulated their speech so as to more clearly implicate the public interest. *See* R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 27 (1987).

114. *See, e.g.*, Harnishfeger v. United States, 943 F.3d 1105, 1115 (7th Cir. 2019) (quoting Kristofek v. Vill. of Orland Hills, 832 F.3d 785, 796 (7th Cir. 2016)).

115. *See id.* In particular, employee morale and some forms of alleged workplace disruption can be strategically manipulated by the employer after the speech in question.

government must show at least some degree of actual speech-caused disruption,[116] or whether some likely disruption of some degree can suffice.[117]

The case law thus relies fundamentally on a particular understanding of what motivates a government employee. For purposes of *Garcetti*'s speaker-role distinction, a government employee is presumed to resemble what we might call neutrally a bureaucrat, at one level or another, rather than what we might call, in contrast, a person who is more motivated, in the moment, by that person's citizenship or public service values.

Certainly, there is much support in the social science literature for thinking of public employees as in general tending more toward the "bureaucratic" end of the motivational spectrum.[118] But at the time of any given speech and more broadly, some government employees instead place greater value on a "[d]esire to serve the public interest,"[119] on being "loyal to society as a whole,"[120] and on "loyalty . . . to the 'general welfare' as they see it"[121]

Government employees who are more motivated by broad public service values follow some version of what we might call Confucian,[122] Greek democratic,[123] or classical Roman[124] ideals of the worthy public employee. Thus, for example, Cicero in particular argues that qualified persons "should renounce all hesitation, seek entry to public office, and administer the state. In no other way can a city-state be governed, or greatness of spirit made

116. *See, e.g.*, Melton v. City of Okla. City, 879 F.2d 706, 715–16 (10th Cir. 1989).

117. *See, e.g.*, Gillis v. Miller, 845 F.3d 677, 685–87 (6th Cir. 2017) (citing supporting cases from other circuits).

118. *See, e.g.*, EAMONN BUTLER, PUBLIC CHOICE: A PRIMER 88–89 (2012) (describing bureaucrats as seeking "to maximise their personal ambitions. They may well seek to do a good job and to serve the public diligently; but like the rest of us, they also seek income, wealth, ease, tenure, seniority, leisure and comfort; and in their case, perhaps discretionary power and deference too"); GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 55–62 (2002); *see also* ANTHONY DOWNS, INSIDE BUREAUCRACY 84 (1967) (recognizing bureaucratic motivational roles of seeking power, income, prestige, leisure, personal or programmatic loyalty, and pride in technical competence).

119. Downs, *supra* note 118, at 84.

120. *Id.* at 88.

121. *Id.*

122. *See, e.g.*, CONFUCIUS, THE ANALECTS BOOK 20, § 2, at 81 (Raymond Dawson trans., 2008) (~500 BCE) ("Zizhang asked Master Kong: 'What sort of person must one be so that one may take part in government?' 'If one honours the five excellences and puts away the four abominations, one may take part in government,' said the Master.").

123. *See, e.g.*, Thucydides, *Pericles' Funeral Oration*, *in* HISTORY OF THE PELOPONNESIAN WAR: BOOK II, 143, 147 (Rex Warner trans., 1954) (reprint ed., 1984) (~400 BCE) (emphasizing the Athenian pride in public-spirited participation in the affairs of state); *see also* Melissa Lane, *The Idea of Accountable Office in Ancient Greece and Beyond*, 95 PHIL. 19, 20 (2020) (referring to Athenian accountability procedures for "misuse of . . . powers").

124. *See, e.g.*, CICERO, ON OBLIGATIONS 26 (P.G. Walsh trans., 2000) (~44 BCE); MARCUS TULLIUS CICERO, ON THE COMMONWEALTH 126 (George Holland Sabine & Stanley Barney Smith trans., 1929) (reprint ed.) (~44 BCE).

manifest."[125] And Cicero's dialogic character Laelius declares that "service to the state I consider the most glorious function of the wise and the chief mark or duty of the good."[126]

In our own cultural context, exposing administrative pathologies, including misfeasance and corruption,[127] often depends on speech by insiders. This sort of speech, where it is reasonably well-grounded[128] and not protected by whistle blower statutes,[129] is essential to a responsive and accountable representative democracy.

Democracy in particular, among other possible governmental systems, is crucially dependent upon appropriate degrees of bureaucratic openness, transparency, and accountability.[130] Thus, David Heald has argued that transparency allows the 'ruled' to observe the actual conduct and behavior of the

125. CICERO, ON OBLIGATIONS, *supra* note 124, Book I, § 74, at 26.

126. MARCUS TULLIUS CICERO, ON THE COMMONWEALTH *supra* note 124, Book I, § XX, at 126.

127. Hannah Arendt argues that unless they are properly monitored, bureaucrats may promote a system in which "neither one nor the best, neither the few nor the many, can be held responsible." HANNAH ARENDT, CRISES OF THE REPUBLIC 137 (1972). Of late, "the public views the federal government as a chronically clumsy, ineffectual, bloated giant that cannot be counted upon to do the right thing, much less to do it well. It does not seem to matter much to them whether the government that fails them is liberal or conservative." PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 4 (2014). U.S. rankings among other nations have also recently fallen as to "voice and accountability, government effectiveness, regulatory quality, and control of corruption." *Id.* at 12; *see also* NIALL FERGUSON, THE GREAT DEGENERATION: HOW INSTITUTIONS DECAY AND ECONOMIES DIE 100–03 (reprint ed. 2014); Niall Ferguson, *Whither American Exceptionalism?*, *in* AMERICAN EXCEPTIONALISM IN A NEW ERA 71, 84 (Thomas W. Gilligan ed., 2017) www.hoover.org/sites/default/files/research/docs/amerex_ch7.pdf at 84. For elaborations of typical bureaucratic pathologies, many but not all of which can be addressed through greater protection of responsible government employee speech, *see* authorities cited *supra* note 118. On government corruption in particular, *see* BRIAN W. HOGWOOD & B. GUY PETERS, THE PATHOLOGY OF PUBLIC POLICY 142–45 (1985) (emphasizing the cost and disadvantages of institutional, bureaucratic measures that are intended to reduce bureaucratic corruption); Jordan Gans-Moore, et al., *Reducing Bureaucratic Corruption: Interdisciplinary Perspectives on What Works*, 105 WORLD DEV. 171, 171 (2018) (finding separate anti-corruption agencies as an ineffective approach); Ting Gong & Sunny L. Yang, *Controlling Bureaucratic Corruption*, OXFORD RSCH. ENCYCLOPEDIAS (June 25, 2019), https://oxfordre.com/politics/view/10.1093 (discussing corruption as undermining regime legitimacy).

128. Insider government employee speech would be of no special value only if all government agencies were utterly open and transparent in all their operations, which is neither possible nor desirable at all stages of the decision-making process. *See* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 180–81 (2007).

129. The main, however remarkably practically limited, federal statute is the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8)–(9). At the state level, *see* the latest compilation by the National Whistleblower Center. NAT'L WHISTLEBLOWER CTR., www.whistleblowers.org (last visited Oct. 20. 2020).

130. *See, e.g.*, David Heald, *Varieties of Transparency*, 135 PROC. OF THE BRITISH ACAD. 25, 25-27 (2006); *see also* Vermeule, *supra* note 128, at 180–81.

'rulers,' with democratic regimes relying in particular on transparency in order to promote democratic accountability.[131]

More elaborately, Professor Adrian Vermeule has argued that

> [i]n a democratic polity, the hinge that connects accountability and deliberation is transparency. Transparency in and of itself is plausibly a democratic virtue. Citizens who are entitled to at least an indirect share in the making of the laws, and who will be bound by the laws, should also be able to observe their delegated representative-lawmakers at work.[132]

Professor Vermeule's logic actually extends beyond legislators in particular to bureaucratic policy-making and decision-making, and the examples he refers to are matters largely of bureaucratic decision-making.[133] Professor Vermeule concludes that "[w]hatever the intrinsic weight of transparency as a democratic good, . . . it is certainly an indispensable institutional precondition to the achievement of other democratic goals."[134]

The relationship between bureaucratic openness and accountability on the one hand and the health of democracy on the other has long been recognized.[135] Crucially, effective public monitoring[136] of the workings of administrative agencies, as distinct from merely their formal output,[137] is necessary for meaningful democracy. The democratic public clearly has a right to seek out and select from diverse non-official sources of public information.[138]

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131. *See* Heald, *supra* note 130, at 27. By themselves, legislatures and private parties cannot ensure an appropriate response to administrative misfeasance and corruption, given the problems of their own competing priorities, lack of access, and lack of expertise and insider knowledge. *See* THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 239 (1996).

132. Vermeule, *supra* note 128, at 180.

133. *See id.* at 180–81 (discussing the identities of spies and specific military deployment locations as exempted).

134. *Id.* at 181.

135. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 60 (Lester G. Crocker trans., 1967) (~1762) (discussing the relationship between the 'government,' in the sense of administrative officials, and the 'sovereign,' in the sense of the people expressing their common interests); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 203 (George Lawrence trans., 1969) (1850) ("I can imagine no one more . . . accessible to all, attentive to requests, and civil in his answers than an American public official."); 2 MAX WEBER, ECONOMY & SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 985 (Gunther Roth & Claus Wittich eds., 1978) (1921) (discussing democracy, openness, accessibility, and reducing governmental 'authority' for the sake of accommodating 'public opinion' to the extent feasible).

136. *See* Christiano, *supra* note 131, at 201.

137. *See, e.g.*, the conveniently classified proposed and final federal administrative rules available at www.regulations.gov (allowing for public comment where appropriate). REGULATIONS.GOV, www.regulations.gov (last visited Oct. 20. 2020).

138. *See, e.g.*, Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, 120 POL. SCI. Q. 187, 189, 193, 196 (2005); ROBERT A. DAHL, THE PAST AND FUTURE OF DEMOCRACY 11–12, www.circap.org/uploads (1999). For commentary, *see* David Held, *The*

Public access to diverse voices, including those of experts, is thus crucial to meaningful democracy.[139] Access to such voices, including those of experts inside, as well as outside, governmental bureaucracies requires a regime of meaningfully free speech. As John Rawls has argued, "to restrict or suppress free political speech . . . always implies a partial suspension of democracy."[140] Professor Ronald Dworkin similarly argues that democratic popular sovereignty requires "that the people rather than the officials be masters."[141] Popular sovereignty in this sense then indispensably requires variously sourced freedom of speech that is critical of government actors.[142]

A democratically responsible government thus requires meaningful freedom for speech that is critical of government officials, practices, and policies.[143] The Supreme Court itself has at least acknowledged this very function.[144] Now, it is also true that many writers have emphasized other sorts of free speech purposes or functions.[145] Probably the main approaches to the value of free speech other than promoting democracy are those that emphasize, respectively, either the pursuit of truth,[146] or the value of personal growth and meaningful autonomy.[147] In a sense, these are rival approaches to the value of freedom of speech. But the deeper truth, at least for own concerns, is that views emphasizing the pursuit of truth and autonomous self-realization are important complements to a focus on promoting democracy as a free speech purpose.

Possibilities of Democracy, 20 THEORY & SOC'Y 875, 883 (1991) (quoting ROBERT A. DAHL, DEMOCRACY, AND ITS CRITICS 233 (1989)).

139. *See* authorities cited *supra* note 138.

140. JOHN RAWLS, POLITICAL LIBERALISM 354 (rev. ed. 2005).

141. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 363 (2000).

142. *See id.* at 365, 367, 369.

143. *See, e.g.*, Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U.L. REV. 1097, 1102–03 (2016); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482, 488–89 (2011) ("[T]he best possible explanation of the shape of First Amendment doctrine is the value of democratic self-government.") (citing JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY app. I, at 472–77, 486–90 (William Rehg trans., 1996) (1992). A similar judgment is offered by James Weinstein. *See* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491 (2011); *see also* Frederick Schauer, *Free Speech and the Argument From Democracy*, 25 NOMOS: LIBERAL DEMOCRACY 241, 247 (1983) (citing Alexander Meiklejohn) (emphasizing the principle that "all relevant information is made available to the sovereign electorate").

144. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.") (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

145. *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 119 (1989).

146. *See, e.g.*, William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 4, 22-23, 25-27, 30-32 (1995).

147. *See, e.g.*, Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.-R. – C.L. L. REV. 443, 500–01, 503 (1998).

In our context, pursuing the truth about government bureaucratic operations, and the truth about the real costs and benefits of government programs, is inherently part of meaningful democratic accountability. The pursuit of truth and meaningful democracy are thus crucially inseparable.[148] And no less separable are democracy and the pursuit of autonomous self-realization, understood as the "the most conducive environment for human flourishing."[149] Nor need there be any serious conflict when both the pursuit of truth and concern for self-realization and autonomy are jointly linked to the pursuit of democratic self-government.[150]

III. CONCLUSION

The current law of public employee speech rights amounts to a near-perfect storm of jurisprudential undesirability. The Supreme Court's imposition of a gate-keeping requirement that the speech has been made in one's role as citizen, and not in one's role as a government employee, has led to disturbing, and specifically, democracy-undermining results. The case law manages to combine murkiness with adverse impacts on the public accountability, openness, and transparency essential for genuine democracy. The cases commonly display ironic, paradoxical, deeply incongruous, and broadly counterintuitive reasoning and results. These outcomes indicate that the Court should revise its current approach to public employee speech so as to better protect democratic values.

148. Thus, secrecy and closure tend to "silence . . . the voice of the critic and hide the knowledge of the truth." Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 195 (2006) (quoting English case authority) (quotation marks omitted). Knowledge of governmental truth thus enhances democratic government legitimacy. *See id.*

149. Alex Ingrams, *Administrative Reform and the Quest for Openness: A Popperian Review of Open Government*, 52 ADMIN. & SOC'Y 319, 322 (2019).

150. As implicitly recognized in Tom Christiano's focusing on all three of these values in Tom Christiano, *Democracy*, THE STAN. ENCYCLOPEDIA OF PHIL., at § 2.1.1. (July 27, 2006) https://plato.stanford.edu/entries/democracy.