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The Emerging First Amendment Law of Managerial Prerogative

Lawrence Rosenthal

ARTICLES

THE EMERGING FIRST AMENDMENT LAW OF MANAGERIAL PREROGATIVE

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In Garcetti v. Ceballos, *the U.S. Supreme Court, by the narrowest of margins, held that allegations of police perjury made in memoranda to his superiors by Richard Ceballos, a supervisory prosecutor in the Los Angeles County District Attorney's office, were unprotected by the First Amendment because "his expressions were made pursuant to his duties." The academic reaction to this holding has been harshly negative; scholars argue that the holding will prevent the public from learning of governmental misconduct that is known only to those working within the bowels of the government itself.*

This Article rejects the scholarly consensus on Garcetti. *It argues that the critics' claim that* Garcetti *undervalues the role of whistleblowers in enhancing the quality of public discussion and debate is misconceived because* Garcetti *is not properly understood as a whistleblower case. Moreover, although the Court's opinion is admittedly undertheorized, its holding is consistent with fundamental principles of First Amendment law. Rather than stifling public discussion and debate about public institutions,* Garcetti *rests on an understanding of the First Amendment's commitment to free speech as a means of achieving political accountability—an understanding with powerful roots in First Amendment jurisprudence. The Court's opinion contains an account—concededly undertheorized—of managerial control over employee speech as essential if management is to be held politically accountable for the performance of public institutions. This Article endeavors to fill out that account.*

* Professor of Law, Chapman University School of Law. The reader should know that as Deputy Corporation Counsel for the City of Chicago, I litigated many of the issues discussed in this Article on behalf of a public employer. In particular, I successfully pressed on the U.S. Court of Appeals for the Seventh Circuit much the same position as was ultimately adopted by the U.S. Supreme Court in *Garcetti v. Ceballos* in *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001). My thanks are owed to Cynthia Estlund, Steve Krone, Kurt Lash, Matt Parlow, and Paul Secunda for sage advice on prior drafts. I must also thank Jeremy Katz, Christine Ludwiczak, Amy Song, and the staff of the Chapman University School of Law's Rinker Law Library for highly capable research assistance. I am grateful as well for helpful comments made by my colleagues at a faculty workshop at Chapman University School of Law and the participants at the Colloquium on New Scholarship in Employment and Labor Law at the University of Colorado.

The Article begins with an exploration of Garcetti. *Part I demonstrates that* Garcetti *essentially abandons the Court's prior approach to the First Amendment rights of public employees by embracing a new inquiry that focuses on an identification of the scope of legitimate managerial prerogatives. Managerial prerogative, in turn, ensures that political officials have effective control over the functioning of public offices—and therefore are fairly held politically accountable for the operations of those offices. Part I concludes with a consideration of the future of public employee speech litigation in light of the emerging law of managerial prerogative.*

Part II considers the implications of this new law of managerial prerogative in another employment-related context—laws forbidding discriminatory harassment. There has been a powerful current of scholarly argument that the First Amendment places substantial limitations on the power of government to forbid sexually or racially harassing speech. At least four members of the Supreme Court have expressed significant support for this view. Part II demonstrates that under the concept of managerial prerogative embraced by Garcetti, *governmental power to forbid harassing speech in the workplace is largely unconstrained by the First Amendment.*

In Part III, the Article places Garcetti *within the context of a broader trend in recent First Amendment jurisprudence. Part III sketches the emerging doctrinal framework of this new First Amendment law of managerial prerogative and then, to illustrate the character of emerging doctrine, applies this framework to institutions of higher education and the concept of academic freedom—an issue noted but set aside in* Garcetti. *Part III argues that the emerging First Amendment law of managerial prerogative permits public universities to regulate academic speech in a manner that is consistent with scholarly norms as a means of achieving legitimate institutional objectives.*

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INTRODUCTION

In *Garcetti v. Ceballos*,[1] the U.S. Supreme Court, by the narrowest of margins, held that allegations of police perjury made in memoranda to his superiors by Richard Ceballos, a supervisory prosecutor in the Los Angeles County District Attorney's office, were unprotected by the First Amendment because "his expressions were made pursuant to his duties . . . ."[2] The academic reaction to this holding has been harshly negative; scholars argue that the holding will prevent the public from learning of governmental misconduct that is known only to those working within the bowels of the government itself.[3] Here, for example, is Erwin Chemerinsky's take:

1. 547 U.S. 410 (2006). Justice Anthony Kennedy delivered the opinion of the Court, joined by Chief Justice John Roberts, Justice Antonin Scalia, Justice Clarence Thomas, and Justice Samuel Alito. Dissenting opinions were filed by Justice John Paul Stevens, Justice David Souter, joined by Justice Stevens and Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. *See id.* at 412.

2. *Id.* at 421.

3. For the negative reaction in the academy, see Michael P. Allen, *George W. Bush and the Nature of Executive Authority*, 72 BROOK. L. REV. 871, 933–34 (2007); Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOC'Y 45, 83–86 (2007); Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2d 335, 340–41 (2006); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 670, 683 (2008); Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 144–53 [hereinafter Estlund, *Work and Citizenship*]; Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1470–74 (2007) [hereinafter Estlund, *Free Speech Rights that Work at Work*]; Joel Gora, *First Amendment Decisions in the October 2005 Term*, 22 TOURO L. REV. 917, 925–27 (2006); Scott 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, 1649–52 (2007); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 569–81 (2008); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS J. 1173, 1192–202 (2007); John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539, 559–64 (2007); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1809–13 (2007); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 572–75 (2008); Kathryn D. Cooper, Case Note, Garcetti v. Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 90–93 (2006); Elizabeth M. Ellis, Garcetti v. Ceballos*: Public Employees Left to Decide "Your Conscience or Your Job,"* 41 IND. L. REV. 187 (2008); Lara Geer Farley, Comment, *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights [*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)]*, 46 WASHBURN L.J. 603, 620–32 (2007); Shubha Harris, Case Note, *Silencing the Noise of Democracy—The Supreme Court Denies First Amendment Protection for Public Employees' Job-Related Statements in* Garcetti v. Ceballos, 33 WM. MITCHELL L. REV. 1143, 1167–85 (2007); Note, *The Supreme Court, 2005 Term*, 120 HARV. L. REV. 125, 277–82 (2006); Beth Anne Roesler, Student Article, Garcetti v. Ceballos*: Judicially Muzzling the Voices of Public Sector Employees*, 53 S.D. L. REV. 397 (2008); Jaime Sasser, Comment,

> The Court's opinion rests on a false and unprecedented distinction between individuals speaking as "citizens" and as "government employees." Never before has the Supreme Court held that only speech "as citizens" is safeguarded by the First Amendment. For example, in prior decisions holding that speech by corporations is constitutionally protected, the Court emphasized the public's interest in hearing the speech. The fact that corporations are not citizens did not matter because it is the right of listeners, according to the Supreme Court, that is paramount.
>
> Justice Kennedy's opinion thus signals a significant shift away from free speech rights for government employees and, even worse, a restriction on the ability of the public to learn of government misconduct. Many fewer whistleblowers are likely to come forward without constitutional protection.[4]

Ouch.

It is hard to dismiss the critics. The breadth of *Garcetti*'s holding is remarkable. Under *Garcetti*, any duty-related speech of a public employee is denied constitutional protection, no matter how valuable its contribution to public discussion and debate, and no matter how unpersuaded a court may be of the employer's justification for suppressing that speech. This outcome seems at odds with the Court's usual insistence that First Amendment doctrine reflect the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[5] The

*Silenced Citizens: The Post-*Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 788–92 (2007); Matthew R. Schroll, Note, Garcetti v. Ceballos*: Miscontruing Precedent to Curtail Government Employees' First Amendment Rights*, 67 MD. L. REV. 485 (2008); Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?:* Garcetti v. Ceballos *and the "Citizenship" Prong to the* Pickering*/*Connick *Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 622–25 (2008); Sarah F. Suma, Note, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under* Garcetti v. Ceballos, 83 CHI.-KENT L. REV. 369 (2008); Christie S. Totten, Note, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under* Garcetti v. Ceballos, 12 LEWIS & CLARK L. REV. 233 (2008); Julie A. Wenell, Note, Garcetti v. Ceballos*: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623, 635–46 (2007). For a defense of the decision of the court of appeals in *Garcetti v. Ceballos* that appeared before that decision was reversed by the Supreme Court, see Marni N. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 910–11 (2005).

4. Chemerinsky, *supra* note 3, at 340 (footnote omitted).

5. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). This statement, of course, has taken on iconic status in First Amendment jurisprudence. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534–35 (2001); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–47 (1995); FCC v. League of Women Voters of Cal., 468 U.S. 364, 382 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 927–28 (1982); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972). For this very reason, the only scholarly defense of *Garcetti* offered to date is easily refuted. Patrick Garry argues, "If society is concerned about oppressive governmental employment practices, just as if society is concerned about public

Court's opinion, moreover, makes little effort to reconcile its holding with general principles of First Amendment jurisprudence.

This Article rejects the scholarly consensus on *Garcetti*. The critics' claim that *Garcetti* undervalues the role of whistleblowers in enhancing the quality of public discussion and debate is misconceived because *Garcetti* is not properly understood as a whistleblower case. Ceballos did not take his case against the District Attorney's office to the public; therefore his speech could not have advanced the public's understanding and evaluation of the District Attorney's performance. Moreover, although the Court's opinion is admittedly undertheorized, its holding is consistent with fundamental principles of First Amendment law. Rather than stifling public discussion and debate about public institutions, *Garcetti* rests on an understanding of the First Amendment's commitment to free speech as a means of achieving political accountability—an understanding with powerful roots in First Amendment jurisprudence. The Court's opinion contains a sketch—concededly partial and somewhat obscure—of managerial control over employee speech as essential if management is to be held politically accountable for the performance of public institutions. This Article endeavors to fill out the sketch. It argues that *Garcetti* recognized a prerogative of public employers to regulate duty-related speech of public employees in order to ensure that these officials are accountable for the manner in which the offices that they hold discharge their public duties. After all, if the First Amendment were understood to require that all speech-related disputes between public employees and their superiors 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.

While this Article argues that *Garcetti* is anchored in fundamental principles of First Amendment jurisprudence, it refrains from claiming that *Garcetti* was a straightforward application of existing law. After all, Ceballos garnered the support of the court of appeals, as well as four

employees exposing governmental waste or corruption, then it can address the problems through the legislative process." Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 816 (2007). Of course, if public officials are able to prevent those most likely to know of government misconduct from disclosing what they know to the voters, the electoral process can hardly be expected to produce an accurate assessment of the need to protect public employee speech.

members of the Supreme Court.[6] That was no fluke; pre-*Garcetti* doctrine had lent considerable support to his position. Prior to *Garcetti*, when a public employee's speech addressed a matter of public concern, it was eligible for constitutional protection under a test that would "arrive at a balance between the interests of the [employee] . . . 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."[7] After *Garcetti*, however, a public employee's duty-related speech is categorically denied First Amendment protection.[8] *Garcetti* accordingly marks an important shift in First Amendment doctrine—albeit one that had been foreshadowed by a number of earlier doctrinal strands. *Garcetti* represents the first overt, if tentative and perhaps even cryptic, explication of a First Amendment law of managerial prerogative—a concept that will have important implications in a variety of contexts in which public institutions must manage speech within those institutions in order to achieve what are otherwise constitutionally legitimate objectives.

This Article begins with an exploration of *Garcetti*. Part I demonstrates that *Garcetti* essentially abandons the Court's prior approach to the First Amendment rights of public employees by embracing a new inquiry that focuses on an identification of the scope of legitimate managerial prerogatives. Managerial prerogative, in turn, ensures that political officials have effective control over the functioning of public offices—and therefore are fairly held politically accountable for the operations of those offices. This concern for maintaining political accountability is anchored in fundamental First Amendment principles. There is no constitutional value, however, in preserving political accountability for functions of public offices that the Constitution places beyond the control of the political process. It follows that managerial prerogative extends only to constitutionally permissible managerial objectives. Part I concludes with a consideration of the future of public employee speech litigation in light of the emerging law of managerial prerogative.

Part II considers the implications of this new law of managerial prerogative in another employment-related context—laws forbidding

6. For the decision of the court of appeals, see Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006). *Garcetti* was one of three cases during the October 2005 Term that were reargued after Justice Alito joined the Court, all of which were ultimately decided by 5-4 votes with Justice Alito in the majority. *See* Erwin Chemerinsky, *The Rookie of the Year of the Roberts Court & a Look Ahead: Civil Rights*, 34 PEPP. L. REV. 535, 538 (2007).

7. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465–66 (1995) (quoting Pickering v. Bd. of Educ. 205, 391 U.S. 563, 568 (1968) (alteration in original)); *accord, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983).

8. *See Garcetti*, 547 U.S. at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

discriminatory harassment. There has been a powerful current of scholarly argument that the First Amendment places substantial limitations on the ability of government to forbid sexually or racially harassing speech. At least four members of the Supreme Court have expressed significant support for this view. Part II demonstrates that under the concept of managerial prerogative embraced by *Garcetti*, governmental power to forbid harassing speech in the workplace is largely unconstrained by the First Amendment.

In Part III, the Article places *Garcetti* within the context of a broader trend in recent First Amendment jurisprudence. Part III sketches the emerging doctrinal framework of this new First Amendment law of managerial prerogative and then, to illustrate the character of emerging doctrine, applies this framework to institutions of higher education and the concept of academic freedom—an issue noted but set aside in *Garcetti*. Part III argues that the emerging First Amendment law of managerial prerogative permits public universities to regulate academic speech in a manner that is consistent with scholarly norms as a means of achieving legitimate institutional objectives.

I. MANAGERIAL PREROGATIVE IN *GARCETTI V. CEBALLOS*

Garcetti is the most explicit recognition to date of the concept of managerial prerogative in First Amendment jurisprudence. This part begins with an examination of the opinion, and then explores the concept of managerial prerogative embraced by the opinion and its implications for future litigation.

A. *The Decision*

1. Facts

Ceballos was a Deputy District Attorney with supervisory responsibilities—a "calendar deputy"—in the Los Angeles County District Attorney's Pomona office.[9]

In February 2000, a defense attorney telephoned Ceballos to alert him to a motion the attorney had filed attacking a search warrant on the ground that the affidavit of a deputy sheriff that had been used to obtain the warrant contained misrepresentations of fact.[10] Under the Fourth Amendment, if a warrant application contains intentional or reckless misrepresentations of fact that are material to the existence of probable cause, the warrant is invalid and evidence obtained pursuant to the warrant should be

9. *Id.* at 413.
10. *Id.* at 413–14.

suppressed.[11] After visiting the location described in the affidavit, Ceballos concluded that it inaccurately characterized as "a long driveway what Ceballos thought should have been referred to as a separate roadway" and that the affiant's claim that tire tracks had led from a stripped-down truck to the premises covered by the warrant could not be true because "the roadway's composition in some places made it difficult or impossible to leave visible tire tracks."[12] Ceballos wrote two memoranda to his supervisor recommending dismissal of the case.[13] After a "heated" meeting with sheriff's personnel, Ceballos's supervisor decided to proceed with the case.[14] At the ensuing suppression hearing, "Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant."[15] Ceballos subsequently lost his supervisory position and was denied a promotion.[16] He then brought suit alleging that he had been subjected to impermissible retaliation for the exercise of his First Amendment rights.[17]

2. The Court's Holding

There was a good deal of substance to Ceballos's claim. As we have seen, under then-prevailing doctrine, a public employee could claim First Amendment protection for speech at the workplace under a balancing test that assessed the employee's interests in commenting upon matters of public concern in light of the public employer's interests in promoting the efficiency of the public services that it performs.[18] To be sure, First Amendment protection was unavailable when a public employee's speech "cannot be fairly considered as relating to any matter of political, social, or other concern to the community,"[19] but as the Ninth Circuit rather sensibly concluded when it reversed a grant of summary judgment against Ceballos, allegations of police perjury implicate matters of substantial public

11. *See* United States v. Leon, 468 U.S. 897, 914–16 & n.12 (1984); Franks v. Delaware, 438 U.S. 154, 164–72 (1978).

12. *Garcetti*, 547 U.S. at 414. Ceballos thought that the characterization of the roadway in the affidavit was significant because it abutted a number of other residences and therefore Ceballos thought that the warrant application misleadingly suggested that the tire tracks could only have come from the premises that the warrant application sought authorization to search. Deposition of Richard Ceballos 32–33, *Garcetti*, 547 U.S. 410 (No. CV 00-11106), 2005 WL 1620385.

13. *Garcetti*, 547 U.S. at 414.

14. *Id.*

15. *Id.* at 414–15

16. *Id.* at 415.

17. *Id.*

18. *See supra* note 7 and accompanying text.

19. Connick v. Myers, 461 U.S. 138, 146 (1983); *accord, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 82–83 (2004) (per curiam); Rankin v. McPherson, 483 U.S. 378, 384–85 (1987).

concern.[20] Moreover, the public concern test does not exempt speech communicated privately to superiors at the workplace from First Amendment protection. The Court was quite clear on this point in *Givhan v. Western Line Consolidated School District*,[21] a case involving a private conversation between a public school teacher and her principal in which the teacher criticized the school's policies as racially discriminatory: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[22] And, until *Garcetti*, it had been settled that when "speech does involve a matter of public concern, the government bears the burden of justifying its adverse employment action."[23]

Reversing the Ninth Circuit, Justice Kennedy's opinion of the Court said next to nothing about the public concern test. Strikingly, the opinion offers no answer to the principal dissent's claim that allegations of police perjury implicate matters of public concern even when made pursuant to a law enforcement official's duties,[24] nor does it answer the related claim that the need to balance the employee's interest in speaking against the employer's interest in workplace efficiency "hardly disappears when an employee speaks on matters his job requires him to address."[25] Instead, the Court wrote that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy."[26] The Court explained that Ceballos was engaged in the type of speech over which an employer is entitled to exercise unfettered control:

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to

20. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006).

21. 439 U.S. 410 (1979).

22. *Id.* at 415–16. The Court subsequently reaffirmed this holding in *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983), and went on to hold that an item on a questionnaire circulated to the staff of a local prosecutor's office asking whether they felt pressured to work on political campaigns satisfied the public concern test, even though the questionnaire was circulated only to other Assistant District Attorneys within the office. *See id.* at 141, 149. To similar effect is *Rankin v. McPherson*, 483 U.S. 378 (1987), in which the Court held that the comment of a clerical employee of a local constable's office to a coworker during a private conversation at work, upon hearing of an attempt on President Reagan's life, that "if they go for him again, I hope they get him," *id.* at 381 (footnote omitted), was protected by the First Amendment, *see id.* at 384–92.

23. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995)*; accord Rankin*, 483 U.S. at 388.

24. Garcetti v. Ceballos, 547 U.S. 410, 430–32 (2006) (Souter, J., dissenting).

25. *Id.* at 430.

26. *Id.* at 421.

> promote a particular policy of its own it is entitled to say what it wishes").[27]

Although the Court never explained how an employer's entitlement to control speech that it has commissioned can be reconciled with the First Amendment's commitment to unfettered public discussion and debate, the Court repeatedly returned to this concept. For example: "When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance."[28] Again: "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."[29]

Accordingly, managerial prerogative was critical to the outcome in *Garcetti*. The Court did not abandon the public concern test in terms, but the question whether the employee's speech was an effort to raise a matter of public concern was no longer performing any analytical work. Instead, the Court's view was that when speech is undertaken to serve management's purposes, management necessarily enjoys the prerogative to evaluate that speech in order to determine whether it really serves management's purposes and, if not, to take whatever remedial action it deems warranted.[30]

Responding to the majority's approach, Justice Souter's dissent acknowledged that the government is entitled to control the message that its agents convey on its behalf, but added, "There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county

27. *Id.* at 421–22 (alteration in original).

28. *Id.* at 422.

29. *Id.* at 422–23.

30. In dissent in *Garcetti*, Justice Souter argued that a public employee can speak both as a citizen on a matter of public concern and as an employee, relying primarily on *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), and *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176–77 (1976), in which the Court had held that the First Amendment protected a teacher's right to speak at a public meeting of a board of education on pending labor negotiations. *See* 547 U.S. at 429–30 (Souter, J., dissenting). Others have echoed this criticism. *See, e.g.*, Chemerinsky, *supra* note 3, at 340–41; Estlund, *Work and Citizenship*, *supra* note 3, at 142–49; Rhodes, *supra* note 3, at 1189. While I have some difficulty with the notion that an attorney subject to a fiduciary obligation to his client is speaking as a citizen on a matter of public concern, even if one accepts the criticism, it highlights that *Garcetti* is not an application of the public concern test, but rather is based on a conception of managerial prerogative. This same point explains how the holdings in *Garcetti* and *Givhan* can be reconciled. In the latter case, the employee's expression of her views on school policy was not part of her duties, and hence no managerial prerogative over the manner in which employees perform their duties was implicated. *See supra* text accompanying note 21.

government's prosecutorial power by acting honestly, competently, and constitutionally."[31] The Court never responded to Justice Souter's attack; this is one of the ways in which the Court's opinion will strike many readers as undertheorized. In fact, Justice Souter's characterization of Ceballos's job was quite inaccurate, and in that inaccuracy lays the essence of the innovation in First Amendment law that *Garcetti* has worked.

B. *The Managerial Prerogative to Assess Subordinates' Speech*

1. The Character of Duty-Related Speech

It should be evident that a prosecutor is hired to speak on behalf of the government, at least in many aspects of prosecutorial duties. The most obvious example is when the prosecutor speaks as an advocate in the courtroom. Even the dissenters in *Garcetti* made no argument that when the prosecutor litigates for the government, he has some cognizable First Amendment interest in speaking his own mind that must be balanced against the office's interest in ensuring that its staff comport with office policies and positions. To the contrary, as suggested by the Court's citation to the *Rosenberger* case set out above, it is settled that when the government hires personnel to speak for it, the government is entitled to regulate the content and even the viewpoint reflected in such speech.[32] Thus, for example, a prosecutor who acts on his personal view and opposes incarcerating drug offenders during sentencing hearings when applicable office policy requires a request for incarceration could find no refuge in the First Amendment. Advocacy in the courtroom, however, is not the only context in which a prosecutor is expected to engage in speech that an employer must necessarily control and evaluate—certainly I recall being expected to say and write a good deal outside of my courtroom advocacy responsibilities during my years as a prosecutor. Consider, for example, the very context at issue in *Garcetti*—a prosecutor's recommendation about the merits of a pending case.

In my days as a prosecutor, I recall that line attorneys frequently voiced doubts about the strength of cases. Sometimes a prosecutor's doubts were well-founded, sometimes they stemmed from an inordinate fear of losing, and sometimes they were borne of a desire to avoid work. It was the job of management to fairly assess a line attorney's doubts about the merits of a case, rather than taking them at face value. Indeed, in order to avoid such difficult judgments about the merits of a case, a manager might even choose to take the position that it is the job of his staff to advocate, not adjudicate,

31. *Garcetti*, 547 U.S. at 437 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting). Paul Secunda has echoed this point. *See* Secunda, *supra* note 3, at 1811–13.

32. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540–43 (2001); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

and direct the staff to present every factual dispute to the appropriate trier of fact for resolution. Although I never served in an office that took this approach, it may well describe the position of senior management in *Garcetti*. The decision to adopt such a policy, in turn, involves an exercise of a constitutionally legitimate managerial prerogative—while the Constitution guarantees an accused a fair trial and a right of access to all exculpatory evidence, it does not guarantee an accused a right to a prosecutor who is willing to drop charges because of a possibility of defeat at hearing or trial.[33]

Thus, if senior management in the Los Angeles County District Attorney's office did not want to hear from prosecutors who are unwilling to trust trial judges to make the right ruling on a motion to suppress, its position might be unwise, improvident, or may even violate some state-law rule of professional ethics, but it violated no principle of constitutional law. The Constitution protects the innocent by guaranteeing them a fair trial, not a sympathetic ear in the prosecutor's office; indeed, the Court has unequivocally held that the Constitution requires no "judicial oversight or review of the decision to prosecute."[34] The Constitution accordingly reflects the view that after a fair hearing, an independent judicial determination is all that is necessary to protect a defendant's rights—an accused has no additional entitlement to an advocate inside of the prosecutor's office who will protect the accused's rights on the off chance that a judge will not.

As it happens, Ceballos's view of the validity of the search warrant in the underlying criminal case that gave rise to the *Garcetti* litigation was wrong—the trial court ultimately ruled that the warrant was valid. It is surely more than a little difficult to understand why the First Amendment should protect a prosecutor's assessment of the merits of a case from supervisory review—especially when that assessment proves erroneous. Still, the preceding discussion should make plain that the character of managerial prerogative does not turn on the soundness of Ceballos's judgment. It was the prerogative of Ceballos's supervisors, not Ceballos, to run the District Attorney's office, and among the constitutionally

33. *Cf.* United States v. Williams, 504 U.S. 36, 51–55 (1992) (prosecutors are under no constitutional obligation to present exculpatory evidence to a grand jury considering charges against a suspect). The right to a fair trial, and the subsidiary right to disclosure of exculpatory evidence to ensure a fair trial, are discussed in Part I.B.4. below.

34. Gerstein v. Pugh, 420 U.S. 103, 119 (1975)*; accord, e.g.*, Albright v. Oliver, 510 U.S. 266, 282–83 (1994) (Kennedy, J., concurring in the judgment); Costello v. United States, 350 U.S. 359, 362–64 (1956). The only pertinent qualification is that the U.S. Constitution guarantees an arrestee a right to a judicial determination of probable cause to support pretrial detention. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991). This determination, however, need not be the product of an adversarial hearing. *See Gerstein*, 420 U.S. at 116–25. Accordingly, the requirement of a postarrest judicial determination reinforces the point that the Constitution guarantees an accused only a right to a judicial determination of probable cause, and not any particular consideration from prosecutors.

permissible options open to management was the prerogative to insist that all disputes of fact be resolved by a judge. It was the District Attorney who had been elected to run the office, and he was therefore entitled to exercise his own judgment about whether his subordinates were performing their duties—including their speech-related duties—to his satisfaction. It was Ceballos's job, in turn, to perform his duties—including duty-related speech—to the satisfaction of the District Attorney. In other words, public employees who are hired to speak (and write) are not hired to say just anything, but are hired to speak (and write) in the fashion desired by their superiors.[35] To the extent that the District Attorney abuses this prerogative to run the office in the manner he finds optimal, in a republican system of government, it is the electorate that is entitled to correct that abuse, not Ceballos, and not the courts.

Although the need to evaluate the character of subordinates' job-related speech may be especially evident for prosecutors, it is far from unique to that context. For example, a candidate might gain public office on a pledge to make the office's staff more courteous and helpful to the public at large. Justice O'Connor once opined, "[S]urely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."[36] She added, "when an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech."[37] After all, if the First Amendment abolished hierarchy in public offices, then officeholders could never be held politically accountable for the acts of their subordinates; political accountability for the performance of public institutions would itself be seriously compromised.

Once hierarchy is recognized as consistent with constitutional principles, however, it should become plain that an elected official's prerogative to control the office he holds includes a prerogative to control employee speech for which the employer is to bear political accountability. And, as Justice O'Connor's example demonstrates, the prerogative to control employee speech is ubiquitous in public employment; it is hardly confined to those employees who, like Ceballos, are required to exercise professional

35. This point exposes the flaw in Terry Smith's claim that Ceballos could not have "expected to be subject to discipline for exposing potential mendacity by a deputy sheriff." Smith, *supra* note 3, at 575. To the contrary, prosecutors are acutely aware that if they make erroneous allegations of misconduct against others in the law enforcement community—or recommend abandoning what turns out to be a meritorious case—they will be held accountable. No prosecutor's office could function effectively without imposing some system of accountability in such circumstances.

36. Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion).

37. *Id.* at 672. Elizabeth Dale has made an analogous point, analogizing the approach taken in *Garcetti* to the concept of retained managerial rights in labor law. *See* Elizabeth Dale, *Employee Speech and Managerial Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175, 212–17 (2008).

judgment. Thus, in *Garcetti*, the Court properly recognized that when an employee's duties require the employee to speak, the employer does not violate the First Amendment by evaluating whether the speech comports with the employer's own views about how the employee should be performing speech-related duties. After all, if the elected officeholder is to be politically accountable for the manner in which the office discharges its duties, the officeholder must have the prerogative to control the manner in which those duties are discharged, including speech-related duties. Precisely because the District Attorney is politically accountable for the manner in which his office conducts prosecutions, for example, he is properly expected to control the manner in which his subordinates develop those recommendations. This point explains *Garcetti*'s reference to the government's power to control speech that it has created;[38] it is the availability of political accountability that justifies this prerogative. As the Court has explained, "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[39]

Given the reality of hierarchy in the workplace, Robert Post has argued that the First Amendment has little proper application to public employment, "where an image of dialogue among autonomous self-governing citizens would be patently out of place."[40] One can fairly debate, however, whether the promotion of a self-governing citizenry is the only relevant value in this context. Stanley Ingber, for example, has argued that sound management theory teaches that employees, by airing their views and even their grievances, can make an important contribution to the effective administration of the workplace.[41] Regardless of how one might resolve this debate, however, there is no serious argument to be made that the First Amendment requires public employers to abolish hierarchy. Whether they should listen to their subordinates' views or not, public managers must ultimately decide what positions their offices will take—and if Professor Ingber is correct that sound administration requires management to value the views of subordinates, management can hardly be indifferent to the need

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

39. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

40. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991); *accord, e.g.*, Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 406–22 (2002); Robert Post, *Sexual Harassment and the First Amendment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 382, 388–94 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004).

41. *See* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 60–73 (1990). For a similar argument, see Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 106–10 (1995).

to evaluate the speech of subordinates in order to determine whether it is contributing to the achievement of workplace objectives. Even for a manager who accepts Professor Ingber's view of the world, there is ample reason to be concerned about subordinates who provide what the manager comes to regard as suboptimal advice about workplace issues.[42] A manager who will be held politically accountable for suboptimal performance by subordinates cannot afford to look the other way.

Accordingly, even on Professor Ingber's account, management should take action against those whose duties include speech when it regards that duty-related speech as unacceptable. Supervisors cannot monitor everything that subordinates do; once they lose confidence in a subordinate, because of that subordinate's speech or for any other reason, remedial action is warranted, as the Court recognized in *Garcetti*.[43] The rationale for permitting remedial action, in turn, is more than consequentialist; it too is driven by First Amendment principle. A primary rationale for First Amendment protection is that it enables the people to hold government officials accountable for the conduct of their offices, and to decide whether to place new officials in charge of those offices at the next election.[44] And, as we have seen, if public policymakers could not remove subordinates whom they regard as unwilling or unable to execute their duties as those policymakers wish—including duties that involve speech—then they cannot be fairly held politically accountable for the performance of their offices, and they cannot obtain full and effective control over the performance of public offices even after enjoying electoral success. Preserving the process of political control and accountability over public offices is surely at the core of our Constitution, and it is precisely this value that is served by recognizing managerial prerogative in the public sector.[45] Conversely, if supervisors ignore the advice of their subordinates and, as Professor Ingber argues, the performance of the workplace therefore suffers, supervisors will

42. For a particularly helpful discussion of efficiency norms in the workplace, see McGowan, *supra* note 40, at 411–24.

43. Garcetti v. Ceballos, 547 U.S. 410, 422–23 (2006).

44. For classic judicial statements of this position, see, for example, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–71 (1964), and Stromberg v. California, 283 U.S. 359, 369 (1931). For classic scholarly statements along these same lines, see, for example, JOHN HART ELY, DEMOCRACY AND DISTRUST 105–16 (1980); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 1–27 (Lawbook Exchange 2000) (1948); and Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 526–65.

45. Cynthia Estlund, although a critic of *Garcetti*, makes the point quite nicely:

> In a sense, democracy itself depends on public officials being empowered to direct and evaluate how employees perform their jobs. It is all well and good for voters to elect officials and express policy preferences, but those democratic processes do not amount to much unless those elected and appointed officials can implement those policies. And most policies can only be implemented through the words and actions of public employees. In the simplest and starkest terms, that is why the workplace cannot and should not be run like a public square.

Estlund, *Free Speech Rights that Work at Work*, *supra* note 3, at 1472.

eventually be held politically accountable for that decline in performance. After all, cover-ups of official misconduct have become a staple of political scandal in recent years. Public officials that fail to consider internal allegations of malfeasance run considerable political risks.

2. The Categorical Nature of Managerial Prerogative over Workplace Speech

To the preceding discussion, one might respond that the need to evaluate and control the speech of subordinates does not require that public employers receive a categorical exemption from First Amendment attack. One could retain a balancing test in which the employee's interests in speaking would be weighed against the employer's interest in controlling duty-related speech in the workplace, as Justice Souter argued in his *Garcetti* dissent.[46] A rule that preserves judicial review over a public employer's assessment of the quality of an employee's speech, however, requires the employer to act not only on the basis of its own assessment of the manner in which the employee has discharged his speech-related duties, but also on the basis of its prediction of how a judge or jury might assess that same speech and weigh it against the employee's liberty interests. The uncertainty inherent in such litigation would inevitably have a chilling effect on employees and supervisors alike. Moreover, it is unclear at best that the process of political accountability will be less effective than judicial oversight in monitoring the performance of public institutions. If Professor Ingber is correct about the value of encouraging internal criticism in the workplace, then the mechanisms of political accountability will reward public employers who encourage internal dissent.

A more fundamental problem with balancing, however, is that there is nothing to balance. An employee called upon to speak as part of his duties—by evaluating the prosecutive merits of cases or otherwise—is not exercising a "liberty" interest. Instead, the employee's duty-related speech, as we have seen, is *supposed* to be performed in a manner consistent with management's wishes. At least when it is pursuing constitutionally legitimate policies, a public employer is entitled to insist that the employee perform official duties—including speech-related duties—in a fashion consistent with the wishes of the responsible politically accountable officials.[47]

46. *Garcetti*, 547 U.S. at 434–36 (Souter, J., dissenting). One could go further and adopt a "just cause" requirement that would give courts the authority to insist that an adequate managerial justification supported discipline against an employee on the basis of duty-related speech. For a proposal along these lines, see Estlund, *supra* note 41, at 124–39; Estlund, *Free Speech Rights That Work at Work*, *supra* note 3, at 1477–87; Estlund, *Work and Citizenship*, *supra* note 3, at 155–68.

47. Scott Moss has argued that judicial deference in the workplace speech cases is rooted in the view that public employees waive significant First Amendment rights by accepting public employment and that courts fear that public employee free speech cases

Consider Cynthia Estlund's critique of *Garcetti*'s categorical approach to workplace speech. She argues that *Garcetti* improperly ignored the First Amendment interests of public employees in their duty-related writing and speech: "Many employees may find that part of their job is to speak up, disclose information, [and] express critical judgments. They inevitably bring their civic and moral selves to that job."[48] Elected officials, however, also bring their "civic and moral selves" to their jobs, and they have no obligation to fight a guerilla war with their own staffs about the manner in which the staff discharges its duties. Precisely because it is elected officials and not their staffs who are politically accountable, public employers are entitled to insist that their employees leave their "civic and moral selves" at home, and conduct their duties—including their speech-related duties—as management prefers. After all, the electoral process determines whose sensibilities will inform the discharge of official duties, and not some sort of chancellor's veto supposedly held by individual public employees. A prosecutor whose "civic and moral self" is hostile to the incumbent officeholder's view on incarceration, for example, at best will waste a lot of supervisory time pressing objections to office policies, and, at worst, will exercise discretion in ways that undermine office policy.[49]

present unacceptable risks of judicial error, and then criticizes these justifications for deference as wanting. *See* Moss, *supra* note 3, at 1649–52, 1654–68. The argument advanced above, however, rests on neither waiver nor risk of error, but instead on a conception of managerial entitlement subject to political accountability. *Garcetti* itself rejects any notion of waiver, *see* 547 U.S. at 417, and the Court's concern about the risk of error, to the extent it can be found in this line of cases, seems part of its conception of managerial prerogative. For example, on the question of whether partisan political loyalty is a permissible criterion for a particular position, the Court has placed the burden on the employer to justify the use of this criterion and afforded no discernable deference to the employer's views. *See* Branti v. Finkel, 445 U.S. 507, 518–20 (1980). There is no obvious reason why the Court would view the risk of error to be lower on this question than on the question of whether a public employee's speech has adversely affected the workplace. Instead, the Court has afforded deference when speech is undertaken as part of an employee's assigned duties and is therefore within the scope of managerial prerogative, yet refused to defer when some other managerial justification for the restriction at issue is as yet unproven.

48. Estlund, *Work and Citizenship*, *supra* note 3, at 153.

49. Ironically, although the scholarly reaction to *Garcetti* has been hostile, *see supra* notes 3–4 and accompanying text, recent scholarship has also been harshly critical of prosecutorial discretion and advocated reforms that will reduce horizontal inequities among defendants created through the exercise of prosecutorial discretion. For a sampling of the extensive literature on point, see WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 13.2(d) (3d ed. 2007); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 297–306 (2001); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136–51 (1998); Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 640–59 (2005); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1530–34 (2000). Indeed, the attack on prosecutorial discretion is nothing new; for decades scholars have argued against lodging expansive discretion with individual prosecutors. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY

What is more, even if Professor Estlund is correct that public employees' "civic and moral selves" properly inform the discharge of their duties, her view would provide no real protection for dissenters within the ranks of the public workforce without radically altering the authority of politically accountable officials over their own offices. Long before *Garcetti*, the patronage cases, while limiting the ability of management to insist on partisan political loyalty, cautioned that political affiliation is properly a criterion for public employment when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[50] Thus, to the extent that an employee's personal views properly shape the performance of her duties, then employers are entitled to refuse to hire, or even dismiss, those whose views undermine office efficiency—by wasting supervisors' time pressing objections that management will inevitably reject.

In other words, if public employees' "civic and moral selves" properly bear on the performance of their duties, management is entitled to hire only those whose civic and moral conceptions mirror its own, at least if it wishes to avoid the friction and inefficiency of constantly having to monitor, and frequently having to overrule, employees whose personal views lead them to discharge their responsibilities inconsistently with the wishes of management. And, to the extent that one wishes to circumscribe managerial authority to discharge employees on the basis of views that have a bearing on the performance of their duties, then elected officials—and the voters to whom they answer—would lose a significant measure of control over the functioning of public offices.[51] That result is surely at odds with the vision of political accountability that, as we have seen, ordinarily informs First Amendment jurisprudence.

JUSTICE: A PRELIMINARY INQUIRY 188–214 (1969); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1545–73 (1981).

50. *Branti*, 445 U.S. at 518; *accord* Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 675 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 714, 718–19 (1996); Rutan v. Republican Party of Ill., 497 U.S. 62, 64, 71 n.5 (1990).

51. Consider, for example, Professor Estlund's proposal:

> Employees whose jobs require the exercise and expression of judgment and discretion on matters of public concern should be deemed to enjoy a reasonable expectation that they will not be penalized for expressing that judgment and discretion in a responsible manner. That reasonable expectation should be implied into the employment contract as a matter of First Amendment policy, and should be protected against deprivation without due process of law: an administrative hearing on whether the employee was indeed subject to reprisals for speech on matters of public concern that was part of the conscientious performance of the job.

Estlund, *Work and Citizenship*, *supra* note 3, at 156. On this view, what constitutes "responsible" or "conscientious" performance of speech-related duties would no longer be determined by politically accountable officials, but presumably by some sort of independent administrative adjudicative official, subject to what may be searching review by a judge or jury.

To be sure, a concept of First Amendment managerial prerogative seems to offer no remedy for managerial overreaching. There are, for example, plenty of objections to a managerial philosophy that insists that prosecutors press every case to hearing or trial regardless of subordinates' doubts about the strength of the evidence or the integrity of the investigators. But this risk of managerial overreaching compromises no First Amendment value precisely because it poses no threat to the process of political accountability that, as we have seen, is at the heart of the First Amendment. Prosecutors who press cases to trial on questionable evidence will see conviction rates go down, and lower conviction rates have consequences in the next election. Under a system of republican government, it is the voters who properly assess the performance of incumbent management, not the courts. The categorical rule of *Garcetti* does not entitle management to overreach. Instead, it leaves judgments about the soundness of managerial philosophy—on the management of employee speech as with all other matters within the scope of managerial prerogative—to the political process.

Thus, *Garcetti* rejects a vision of the public workplace in which employees are entitled to pit their own values against those of politically accountable management, with the judiciary ensuring mandatory arbitration of disputes. Viewed in that light, the holding in *Garcetti* looks less remarkable; acceptance of Ceballos's position, in contrast, would have radically insulated public employees from effective political control. It is therefore small wonder, in my view, that the Court rejected what it characterized as "a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[52] And, given the availability of political accountability, surely the burden rests on those who advocate judicial oversight of managerial prerogative to establish that the judiciary is likely to do a better job of managing public employees than their own politically accountable managers.

3. The Rule Against Content Regulation and Public Employee Speech

One can object to *Garcetti*'s conception of a managerial prerogative as antithetical to the longstanding hostility to content and viewpoint regulation reflected in settled First Amendment doctrine.[53] Indeed, government regulation of the content or viewpoint of speech has long been thought to mandate strict judicial scrutiny because of the risk that content regulation will cast government in the role of a censor of disfavored ideas or viewpoints.[54] Even prior to *Garcetti*, however, First Amendment doctrine

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

53. *See, e.g.*, Zack, *supra* note 3, at 912–15.

54. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–43 (1995); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1994); R.A.V. v. City

was coming to recognize that some institutions must be granted a prerogative to evaluate and control the content of what would otherwise be constitutionally protected speech if they are to achieve otherwise constitutionally legitimate objectives.

In *Arkansas Educational Television Commission v. Forbes*,[55] for example, the Court held that the general First Amendment prohibition against evaluating the content or viewpoint of speech should not be applied to a public broadcaster's programming decisions because the imposition of such a requirement would undermine the essential character of broadcasting by impairing editorial judgment and transferring some measure of editorial control to the judiciary.[56] Similarly, in *NEA v. Finley*,[57] the Court reasoned that decisions by a public agency about whether to fund particular art projects necessarily involve assessment of the merit of each applicant's art and accordingly held that the First Amendment did not prohibit an assessment of the merit of competing proposals.[58] Thus, the Court began

of St. Paul, 505 U.S. 377, 382 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991); Rust v. Sullivan, 500 U.S. 173, 192–94 (1991).

55. 523 U.S. 666 (1998).

56. *Id.* at 673–75. For example, the Court wrote,

> As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint based. To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. "That editors—newspaper or broadcast—can and do abuse this power is beyond doubt," but "[c]alculated risks of abuse are taken in order to preserve higher values." Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

Id. at 673–74 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124, 125 (1973)) (citations omitted and alteration in original).

57. 524 U.S. 569 (1998).

58. *Id.* at 583–86. In particular, the Court wrote,

> Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose artistically excellent projects. The agency may decide to fund particular projects for a wide variety of reasons, such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form. As the dissent below noted, it would be impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected

turning away from strict scrutiny for content and viewpoint regulation in the managerial context long before *Garcetti*.

Precedent aside, the rationale for the rule against content discrimination has limited applicability to the workplace. As the Court has observed, "[t]he rationale of the general prohibition . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[59] This concern has limited application to public employment. Because managerial prerogative is limited to the workplace, it is unlikely to drive disfavored viewpoints from the general marketplace of ideas—a point that the Court made quite explicitly in the Term following *Garcetti*. In *Davenport v. Washington Education Ass'n*,[60] as it considered a First Amendment attack on a state statute that required public employee unions to obtain nonmembers' authorization before using their mandatory union fees for election-related purposes,[61] the Court observed that "the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator."[62] The Court then upheld the statute, reasoning that "no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."[63] Similarly, an employer's requirement that duty-related speech serve managerial objectives is unlikely to drive disfavored views from the marketplace of ideas—it merely keeps them out of the workplace, at least until the next election, when those ideas may well carry the day.

> expression. The "very assumption" of the NEA is that grants will be awarded according to the "artistic worth of competing applicants," and absolute neutrality is simply "inconceivable."

Id. at 585 (quoting Advocates for the Arts v. Thomson, 532 F.2d 792, 795–96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976)) (citations and internal quotation marks omitted).

59. *R.A.V.*, 505 U.S. at 387 (quoting *Simon & Schuster*, 502 U.S. at 116).

60. 127 S. Ct. 2372 (2007).

61. Although the Court had previously held that objecting nonmembers have a First Amendment right to prevent any use of mandatory fees for purposes that are not germane to collective bargaining, those cases had not required that a union obtain affirmative consent from nonmembers before using mandatory fees for non-collective-bargaining purposes. *See id.* at 2376–77.

62. *Id.* at 2381. The metaphor of an unfettered marketplace of ideas as the mechanism by which the First Amendment protects the search for truth, originally formulated by Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting), has become commonplace in First Amendment jurisprudence. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003); Reno v. ACLU, 521 U.S. 844, 885 (1997); Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 464–65 (1995); Texas v. Johnson, 491 U.S. 397, 418 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–38 (1980).

63. *Davenport*, 127 S. Ct. at 2382.

Although the Court has justified the rule against content discrimination in terms of avoiding skew in the marketplace of ideas, some argue that the rule is justified instead as an effort to identify the kind of regulation of speech that is most likely to lack a sufficient justification.[64] On this account, as well, the process of political accountability is likely to work against overly restrictive regimes of workplace speech regulation without need of the heavy-handed First Amendment doctrine. Precisely because, as advocates of employee speech rights argue, employee work-related speech improves workplace efficiency by improving information flow to management,[65] it follows that overly restrictive regulatory regimes will undermine the efficiency of a public office, and will eventually create political vulnerabilities for officeholders.[66] Thus, the case for a First Amendment law of managerial prerogative, at least as First Amendment doctrine is currently structured, is strong, despite the general doctrinal hostility to regulation of speech on the basis of content or viewpoint.

4. Ceballos as a Whistleblower

The reader will note that I have yet to address the primary objection leveled at *Garcetti*—the claim that its holding will impoverish the marketplace of ideas by preventing those most likely to know of governmental misconduct from bringing what they know to an open marketplace of ideas.[67] Because whistleblowers advance the process of

64. For a sampling of the debate over whether First Amendment doctrine is properly directed at identifying regulations that are likely intended to burden disfavored ideas, or instead is aimed at identifying inadequately justified regulation of speech, compare, for example, Larry Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 931–54 (1993) (identifying censorial motive as the linchpin for First Amendment analysis); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–505 (1996) (same); and Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775–98 (2001) (same); with John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1152–65 (2005) (rejecting motive as dispositive); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 742–52 (2002) (same); and Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286–311 (2005) (same). The philosophical underpinning for both positions is helpfully summarized by Frederick Schauer, who argues that First Amendment protections are ultimately premised on skepticism about the competence of government to distinguish between speech that has net social utility and speech with net social disutility. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 73–86 (1982).

65. *See supra* note 41 and accompanying text.

66. As the Court has put it when explicating the justification for judicial deference to the political process, "'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted)).

67. *See supra* notes 3–4 and accompanying text.

political accountability at the core of the First Amendment, the constitutional argument for whistleblower protection is substantial.[68]

Yet, if whistleblowing is defined as bringing to light previously undisclosed government misconduct, *Garcetti* is not a whistleblowing case.[69] To be sure, Ceballos tried to do something that resembled whistleblowing—he concluded that his internal memoranda should be disclosed to the defense, and he had to be ordered to limit his disclosure only to portions of the memorandum describing his telephone conversation with a deputy sheriff who was likely to testify.[70] One might characterize this as disclosing governmental misconduct; indeed, the Due Process Clause forbids "the suppression by the prosecution of evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[71] This obligation is understood to impose a duty upon the prosecutor to learn of and disclose to the defense all exculpatory information known to law enforcement personnel involved in the investigation.[72] In *Garcetti*, however, there was never any question in the underlying criminal case of suppressing exculpatory evidence; Ceballos learned of the circumstantial evidence suggesting police perjury from the

68. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 570–81 (1970); Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N.U. L. REV. 17, 63–65 (1996); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 63–67 (1987); Kermit Roosevelt, Note, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1261–65 (1997).

69. The definition of "whistleblowing" utilized above tracks the Whistleblower Protection Act, which provides limited statutory protection to federal employees with respect to "any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 1213(a)(1) (2006).

70. *See* Deposition of Richard Ceballos, *supra* note 12, at 54–58.

71. Brady v. Maryland, 373 U.S. 83, 87 (1963).

72. *See, e.g.*, Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam); Strickler v. Greene, 527 U.S. 263, 280–81 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1995); *see also* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."); MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."). The analogous California rule that governed Ceballos provided that "[a] member [of the bar] shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce." CAL. R. PROF'L CONDUCT § 5-220 (2008). Justice Breyer, although skeptical of a general claim to First Amendment protection for duty-related speech, thought that this constitutional obligation of disclosure was decisive in *Garcetti*. *See* 547 U.S. at 446–49 (Breyer, J., dissenting).

defense counsel and his inspection of the area described in the warrant application, not as the result of any information in the exclusive possession of the District Attorney or Sheriff's office.[73] Ceballos's opinion about the affiant's veracity similarly was not exculpatory information; he had no special ability to evaluate the evidence. It may well be that Ceballos was unwilling to trust the trial judge to reach what he regarded as the correct result without the benefit of Ceballos' own views, but whatever one wants to call this course of conduct, it surely did not involve the disclosure of otherwise suppressed evidence of governmental misconduct into the realm of public discussion and debate.

Beyond all this, *Garcetti* addressed only Ceballos's communications to others within the District Attorney's office. Internal workplace speech, however, does not improve the public's understanding of the functions of government or otherwise enhance the effectiveness of the process of political accountability. Managerial receptiveness to internal complaints can improve the performance of public institutions, but as we have seen, the performance of public institutions is properly monitored by the political process, not the courts.

Thus, *Garcetti* was simply not a whistleblowing case. The holding in *Garcetti*, properly understood, does not alter the rule that affords First Amendment protection under a balancing test to a public employee who "seek[s] to bring to light actual or potential wrongdoing or breach of public trust."[74] For public employees who take their concerns to the public, *Garcetti* should pose no bar to First Amendment protection; managerial prerogatives with respect to such employees do not include an entitlement to evaluate their ability to assess allegations of misconduct (although the balancing test may still deny such employees protection).

There are, however, some governmental employees whose duties include ferreting out governmental misconduct, and they are categorically denied First Amendment protection under *Garcetti*, at least for intraoffice speech that is made pursuant to their investigative duties.[75] But again, these employees do not speak on their own behalf—they unearth misconduct in order to serve the purposes of their employers. It is therefore the prerogative of these employers to decide if the internal investigators that they have unleashed are serving their purposes. As we have seen, the concept of managerial prerogative attaches to duty-related speech undertaken to advance the purposes of a public employer. This concept

73. *See supra* text accompanying notes 10–12.

74. Connick v. Myers, 461 U.S. 138, 148 (1983). To date, the lower courts have read *Garcetti* to preserve protection for public employee allegations of misconduct when the employee's duties do not ordinarily include the investigation of misconduct. *See, e.g*, Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1332–33 (10th Cir. 2007); Freitag v. Ayers, 468 F.3d 528, 542–43, 545 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1918 (2007); Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006).

75. For an example, see Gonzalez v. City of Chicago, 239 F.3d 939, 941 (7th Cir. 2001).

should therefore also guide future litigation over whether speech should be considered duty-related within the meaning of *Garcetti*; speech that an employer would have legitimate reason to take into account when evaluating the quality of an employee's job performance is speech that falls within the scope of managerial prerogative.[76] *Garcetti* accordingly marks a turn away from a focus on public concern and toward a regime that endeavors to identify the scope of legitimate managerial prerogative.

No one should weep for the demise of the public concern or balancing tests, even from the standpoint of a whistleblower. These are deeply fact-dependent tests, requiring consideration of "the content, form, and context of a given statement, as revealed by the whole record."[77] Intensively fact-dependent tests, in turn, breed uncertainty in litigation. Indeed, the Court has twice divided 5-4 over the application of the public concern and balancing tests for public employee free speech claims,[78] and has acknowledged that "the boundaries of the public concern test are not well

76. In an effort to demonstrate that *Garcetti*'s rule is unsatisfactorily indeterminate, Charles W. "Rocky" Rhodes claims that he cannot tell whether *Garcetti* denies protection to a federal agent not assigned to investigate other agents and who nevertheless alleges criminal misconduct by an employee. *See* Rhodes, *supra* note 3, at 1194–97. Other critics have also argued that determining whether speech was made in the course of duties will pose many difficulties. *See, e.g.*, Ellis, *supra* note 3, at 202–08; Stafstrom, *supra* note 3, at 613–20; Suma, *supra* note 3, at 379–86. At least based on the holdings in the lower courts to date, however, the outcome in cases involving internal allegations of misconduct by law enforcement officials seems clear under *Garcetti*—law enforcement officials are expected, as part of their duties, to properly assess the merits of any evidence of criminal misconduct, whether by a colleague or otherwise. A public employer surely has the prerogative to terminate a law enforcement employee when it concludes that the employee has improperly evaluated evidence of misconduct. *See, e.g.*, Morales v. Jones, 494 F.3d 590, 597–98 (7th Cir. 2007) (police officer's allegation of misconduct by superior to District Attorney was unprotected under *Garcetti* because it was made as part of his duties, but subsequent deposition testimony in a related civil suit was not pursuant to duties); Green v. Bd. of County Comm'rs, 472 F.3d 794, 797–801 (10th Cir. 2007) (lab technician's complaints about drug testing program were unprotected); Spiegla v. Hull, 481 F.3d 961, 965–67 (7th Cir. 2007) (correctional officer responsible for institutional security lacked protection for complaint that superior deviated from institutional policy under *Garcetti*); Freitag v. Ayers, 468 F.3d 528, 545–46 (9th Cir. 2006) (prison guard's internal complaints about inmate harassment unprotected but external complaints to inspector general and legislator qualified for protection); Battle v. Bd. of Regents, 468 F.3d 755, 759–62 (11th Cir. 2006) (financial aid official's internal allegations of irregularities in financial aid program were unprotected). For helpful discussions of the manner in which *Garcetti* has been applied, see Ronald Kramer, Garcetti v. Ceballos*: The Battle over What It Means Has Just Begun*, 39 URB. LAW. 983 (2007); Christine Elzer, Note, *The "Official Duties" Puzzle: Lower Courts' Struggle with First Amendment Protection for Public Employees After* Garcetti v. Ceballos, 69 U. PITT. L. REV. 367, 375–86 (2007). In any event, whatever indeterminacy is left under *Garcetti* surely is less than a rule that would use a free-form balancing test for any statement involving a matter of "public concern."

77. *Connick*, 461 U.S. at 147–48 (footnote omitted); *accord* City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam); Rankin v. McPherson, 483 U.S. 378, 384–85 (1987).

78. *See Rankin*, 483 U.S. at 394–98 (Scalia, J., dissenting); *Connick*, 461 U.S. at 158–65 (Brennan, J., dissenting).

defined."[79] It should therefore come as no surprise that commentators have nearly universally attacked the Court's pre-*Garcetti* approach to public employee speech as providing uncertain protection that will, for just that reason, inevitably have an unacceptably chilling effect on the speech of public employees.[80] The public concern test's demise or, at a minimum, decreased importance in the wake of *Garcetti* should therefore not be mourned.

In this light, much of the criticism of *Garcetti* looks overheated. It is more than a little odd for *Garcetti*'s critics to campaign so vigorously for the right of public employees to engage in internal dissent that management is free to ignore, when the far more potent avenue for dissent—public pronouncements that can have real political consequences for inept or overreaching public managers—remains eligible for First Amendment protection. To be sure, there is some anomaly in a rule that protects Ceballos only when he goes outside of the chain of command and makes his complaints public, as Justice Stevens observed in his *Garcetti* dissent.[81] Indeed, for public statements not made pursuant to their duties—such as Ceballos's testimony—public employees can still claim the protection of the balancing test. Yet this anomaly, if anomaly it is, has its roots in First

79. *Roe*, 543 U.S. at 83. In *Garcetti*, the Court similarly described both the public concern and balancing tests: "To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of 'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.'" *Garcetti*, 547 U.S. at 418 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968) (ellipsis in original)).

80. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, AND MANAGEMENT 164–78 (1995); Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 50–75 (1988); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 28–51 (1990); Ingber, *supra* note 41, at 53–58; Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1018–27 (2005); Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 126–38 (1996); Massaro, *supra* note 68, at 25–37; Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 539–66 (1998); Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 29–31 (1999); Jeffrey A. Shooman, *The Speech of Public Employees Outside the Workplace: Towards a New Framework*, 36 SETON HALL. L. REV. 1341, 1360–67 (2006); Eugene Volokh, *Crime Facilitating Speech*, 57 STAN. L. REV. 1095, 1166–71 (2005); Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 957–69 (2001); Karin B. Hoppman, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 1012–19 (1997); Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1121–28 (1988); Roosevelt, *supra* note 68, at 1261–65.

81. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting). For a similar critique, see, for example, Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 994–95 (2007).

Amendment principle. When a public employee brings heretofore concealed misconduct into public view, he enables the process of political accountability to function. Such employees deserve First Amendment protection for just that reason. Public employees whose views remain hidden from public view, in contrast, contribute little to public discussion and debate. A government agency that encourages internal dissension and debate may provide more effective service to the public, and minimize the political risks that a whistleblower will disclose official misconduct with the attendant political consequences of such revelations, but as we have seen, ordinary processes of political accountability can be expected to operate against public employers that adopt suboptimal policies, whether relating to internal communications or any other aspect of their mission. Thus, when it comes to the intraoffice speech of public employees undertaken pursuant to their duties, the interest in ensuring that public officials remain politically accountable—the interest ordinarily thought to justify constitutional protection for whistleblowers—provides no support for limiting managerial prerogative with respect to duty-related speech.

A decade or so ago, when I was still litigating the public concern test rather than teaching it, I predicted its demise and replacement with an approach that would endeavor to delineate the scope of legitimate managerial prerogatives over employee speech.[82] At the risk of immodesty, I am happy to claim that *Garcetti* goes a considerable way toward vindicating my view. Even if the public concern test has not been expressly repudiated, after *Garcetti*, the question whether a public employee is speaking "'as a citizen . . . commenting upon matters of public concern,'"[83] will be decided not so much by "the content, form, and context of a given statement,"[84] as by the scope of managerial prerogative.

C. *The Future of First Amendment Workplace Litigation*

After *Garcetti*, it is settled that managerial prerogative includes an entitlement to control the speech of public employees whose duties require them to speak. The prerogative to control the speech that is required of public employees as part of their duties, however, does not exhaust the universe of employer prerogative. *Garcetti* defines managerial prerogative in terms of "the exercise of employer control over what the employer itself

82. *See* Rosenthal, *supra* note 80, at 567–73. Strangely, the most frequent recommendation of the other critics of the public concern test was that the Court should engage in balancing in all cases without need of a threshold determination that a public employee's speech raises a matter of public concern. *See, e.g.*, Allred, *supra* note 80, at 76–81; Estlund, *supra* note 80, at 52–54; Ma, *supra* note 80, at 138–47; Massaro, *supra* note 68, at 67–77. A test involving nothing but ad hoc balancing, however, would fail to obviate the chilling effect of a relatively indeterminate legal protection for public employees, as we have seen.

83. Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

84. *Id.* at 147–48.

has commissioned or created."[85] Speech that public employees undertake pursuant to their duties, however, is not the only example of public employee speech involving workplace arrangements that a public employer has "commissioned or created."

1. Insubordinate Speech

One obvious area of employer prerogative involves the promulgation and enforcement of office policy and directives. As we have seen, the First Amendment does not abolish hierarchy; a public employer accordingly need not rely on persuasion to implement office policy. The theory of political accountability at the heart of the First Amendment means that public employers must be able to implement their own policies through their control of the public workforce.[86] Thus, the prerogative to make and implement office policy necessarily includes the prerogative to take remedial measures against those who resist the policy, by speech or otherwise. And, as we have also seen, public employees have no protected liberty interest in pursuing their own notions about how the affairs of public offices should be conducted.[87] Thus, insubordinate speech implicates no First Amendment interest that can be balanced against the employer's interests.

In *Connick v. Myers*,[88] the Court made this very point as it held that a questionnaire concerning a recent reorganization of a prosecutor's office that a dissatisfied attorney, Sheila Myers, had circulated to her colleagues raised no issue of public concern because its "focus [was] not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."[89] Still, the approach taken in *Connick* does not quite capture the full scope of post-*Garcetti* managerial prerogative; had the questionnaire been modestly rephrased to suggest that the office was defaulting in its responsibilities to the public, the opinion suggests that it might have raised an issue of public concern.[90] *Garcetti*'s

85. *Garcetti*, 547 U.S. at 422.
86. *See supra* notes 37–45 and accompanying text.
87. *See supra* notes 47–49 and accompanying text.
88. 461 U.S. 138 (1983).
89. *Id.* at 148.
90. This follows from the Court's emphasis on the particular form of the questionnaire:

> We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court . . . . [W]e do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would

focus on the scope of managerial prerogatives, however, should make the precise words that Myers used immaterial. We have seen that public employees who are hired to pursue official objectives through, among other things, their speech, have no cognizable liberty interest in speech directed at undermining those objectives—everything that Myers said about how her office should be fighting crime involved speech concerning her professional responsibilities, and we know from *Garcetti* that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties [that] the employee might have enjoyed as a private citizen."[91] Whether insubordinate speech takes the form of a dispute over the effect of a new office policy on workplace morale or a claim that policy compromises public safety, it is inconsistent with management's prerogative to run the public office to which it has been entrusted without the need to persuade subordinates of the merits of each and every order. After *Garcetti*, First Amendment protection, at least when it comes to speech within the course of a public employee's duties, will no longer turn on whether the precise words used by a public employee seem to implicate an issue of public concern—at least when her point is that managerial directives should be opposed.

Admittedly, the managerial prerogative to set and enforce office policies has implications for whistleblowing. Public employers frequently impose obligations of confidentiality on their employees. The Court has quite brusquely rejected arguments that a public employee has a First Amendment right to disclose confidential information,[92] and has even held that an employee who is required to seek clearance before disclosing any employment-related information can be sanctioned for failing to seek clearance even if he discloses no classified or otherwise sensitive information, at least when the employee holds a position involving access to particularly sensitive information.[93] Although the opinions in the confidentiality cases have been criticized for their failure to explain how their holdings can be reconciled with the usual rule requiring that the government justify restrictions on speech under a balancing test when public employees speak on matters of public concern, [94] the concept of

> convey no information at all other than the fact that a single employee is upset with the status quo.

Id. For additional discussion of this point, see Rosenthal, *supra* note 80, at 555–56.

91. *Garcetti*, 547 U.S. at 421–22 (alterations in original).

92. *See* United States v. Aguilar, 515 U.S. 593, 605–06 (1995); Haig v. Agee, 453 U.S. 280, 308–10 (1981); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam).

93. *See Snepp*, 444 U.S. at 511–13.

94. *See, e.g.*, Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 700–04 (1984); Jonathan C. Medow, *The First Amendment and the Secrecy State:* Snepp v. United States, 130 U. PA. L. REV. 775, 814–19 (1982); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1770–71 & n.226 (1987); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103,

categorical managerial prerogative provides the missing rationale—managerial prerogative includes the power to set and enforce confidentiality policy. For example, enforcement of preclearance requirements reflects the managerial prerogative to avoid the risk of error that would exist if an employee were to make unilateral and unreviewed decisions about what information should be treated as confidential.[95] Thus, preclearance requirements serve the same interest in managerial control over the manner in which the office pursues constitutionally legitimate objectives that underlie the prerogative to evaluate and control employee speech recognized in *Garcetti*.

The implications of the view of managerial prerogative are not as alarming as they may seem at first blush. For one thing, First Amendment doctrine limits the scope of managerial prerogatives with respect to confidential information. We have seen that a true whistleblower can seek protection under the pre-*Garcetti* balancing test, at least if the employee has first sought preclearance when required.[96] An inadequately justified preclearance policy, moreover, can itself be challenged under the balancing test.[97] While the Court is likely to apply the balancing test in a fashion that is particularly deferential to the government in cases involving national security or other particularly compelling governmental interests supporting confidentiality,[98] the balancing test offers at least some protection for the true whistleblower.[99]

1144–48 (1987); Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1738, 1771–73 (1984); Diane F. Ortenlicher, Comment, Snepp v. United States*: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662, 685–94 (1981); Susan F. Sandler, Comment, *National Security Versus Free Speech: A Comparative Analysis of Publication Review Standards in the United States and Great Britain*, 15 BROOK. J. INT'L L. 711, 724–26 (1989).

95. *See, e.g.*, Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 341–42; Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 68–69 (1988).

96. *See, e.g.*, Anderson v. McCotter, 100 F.3d 723, 728–29 (10th Cir. 1996); O'Brien v. Town of Caledonia, 748 F.2d 403, 407–08 (7th Cir. 1984); McGehee v. Casey, 718 F.2d 1137, 1137 (D.C. Cir. 1983); Salge v. Edna Indep. Sch. Dist., 320 F. Supp. 2d 530, 539 (S.D. Tex. 2003), *aff'd*, 411 F.3d 178 (5th Cir. 2005); Shelton Police Union, Inc. v. Voccola, 125 F. Supp. 2d 604, 631–32 (D. Conn. 2001).

97. *See, e.g.*, Harman v. City of New York, 140 F.3d 111, 115 (2d Cir. 1998) (finding that the "City has not demonstrated any actual harm justifying . . . [the] broad restriction[s] on the ability of employees to comment on the workings of the city agencies").

98. *See, e.g.*, Dep't of Navy v. Egan, 484 U.S. 518, 528–29 (1988) (national security); CIA v. Sims, 471 U.S. 159, 174–77 (1985) (same); Andersen v. McCotter, 205 F.3d 1214, 1217–19 (10th Cir. 2000) (confidential patient information); Lytle v. City of Haysville, 138 F.3d 857, 866–68 (10th Cir. 1998) (confidential details of police investigation); Signore v. City of Montgomery, 354 F. Supp. 2d 1290, 1296–97 (M.D. Ala. 2005) (same), *aff'd mem.*, 136 F. App'x 336 (11th Cir. 2005) (per curiam); Garay v. County of Bexar, 810 S.W.2d 760, 765–66 (Tex. App. 1991) (confidential patient information); Lupo v. Bd. of Fire & Police Comm'rs, 402 N.E.2d 624, 626–27 (Ill. App. Ct. 1979) (same).

99. *See, e.g.*, Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 928–29; Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*,

What is more, whistleblowers whose speech is central to the process of political accountability—such as those who disclose serious government misconduct—are likely to engage the public's sympathies and for that reason acquire a measure of political protection from retaliation.[100] Conversely, even if there were relatively clear doctrine protecting whistleblowers from retaliation, it is certainly fair to question the proportion of public employees willing to gamble their careers on the outcome of a lawsuit, even if the odds of success are great. It is probably the case that no matter what First Amendment doctrine is in place, only those public employees with extraordinary ideological commitments are likely to act as whistleblowers.[101] The problems posed by limited First Amendment protection for whistleblowers, in short, are easily exaggerated.

2. Speech Outside the Workplace

One might think that the domain of managerial prerogative ends when a public employee leaves the workplace. Yet, one could also argue that management's prerogatives—within applicable contractual and statutory limitations—includes the right to control off-duty speech and expressive conduct that might reflect so poorly on an employee's fitness for duty as to implicate the managerial prerogative to purge the workforce of those whom

1 HARV. L. & POL'Y REV. 185, 188–97 (2007). Stephen Vladeck takes a different view, arguing that *Garcetti*'s categorical refusal to protect "speech that owes its existence to a public employee's professional responsibilities," 547 U.S. at 421, means that a whistleblower who learned of government misconduct only as a consequence of his duties lacks constitutional protection. *See* Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After* Garcetti, 57 AM. U. L. REV. 1531, 1540–42 (2008). While the passage highlighted by Professor Vladeck is ambiguous, elsewhere the Court acknowledged that among the reasons that public employees deserve some constitutional protection for speech related to their employment is that they are exposed to information of particular utility to assessing the performance of public institutions: "'Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.' The same is true of many other categories of public employees." *Garcetti*, 547 U.S. at 421 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968)). Thus, *Garcetti* did not turn on the fact that Ceballos learned about the alleged misconduct in the course of his duties. Instead, "[t]he controlling factor in Ceballos' case [wa]s that his expressions were made pursuant to his duties as a calendar deputy." *Id.* Accordingly, statements made outside of an employee's duties in an effort to expose government misconduct are not controlled by the holding in *Garcetti*.

100. The prevalence of statutory protection for whistleblowers, *see Garcetti*, 547 U.S. at 425; *id.* at 440–41 (Souter, J., dissenting), is some evidence of the political currency that whistleblowing possesses.

101. The available empirical evidence relating to the current statutory whistleblower protection, although limited, suggests that such legislation has had little success in inducing employees to disclose employer misconduct. *See, e.g.*, Estlund, *supra* note 41, at 119–24; Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 111–26 (2007).

it regards as unfit.[102] This point explains the otherwise deeply unsatisfying opinion in *City of San Diego v. Roe*.[103] In that case, a police officer was discharged after a supervisor discovered that he was selling sexually explicit videos on the Internet, including videos depicting the officer removing a police uniform and masturbating.[104] The Court held that the officer lacked protection under the threshold public concern test since "Roe's activities did nothing to inform the public about any aspect of the [police department]'s functioning or operation," adding that "[t]he speech in question was detrimental to the mission and functions of the employer."[105]

Even putting aside the possibility, overlooked by the Court, that Roe's video was a clumsy attempt to make a point about sexual hypocrisy in the law enforcement community,[106] the Court's reasoning conflates the public concern and balancing tests by making the question whether speech is detrimental to the employer's interests bear on the threshold public concern test.[107] Viewed through the lens of managerial prerogative as a threshold limitation on First Amendment protection for public employees, however, *Roe* makes a good deal more sense. Public employees who occupy a position of public trust can undermine that trust through off-duty conduct that raises sufficiently serious doubts about their integrity or judgment. A police officer whose off-duty activities reflect virulent racism, for example, could plausibly be thought to have undermined his ability to work effectively with the community as a whole.[108] In such circumstances,

102. Indeed, even critics of the public concern test who have proposed an approach that would deny protection to speech at the workplace while granting presumptive protection for employee speech elsewhere acknowledge that employers must still be permitted to regulate off-the-job speech that can harm working relationships. *See* Kozel, *supra* note 80, at 1044–51; Shooman, *supra* note 80, at 1367–70; Roosevelt, *supra* note 68, at 1265–67.

103. 543 U.S. 77 (2004) (per curiam).

104. *Id.* at 78–79.

105. *Id.* at 84.

106. One hesitates to defend Roe's video as having much in the way of redeeming value, but there was no finding that it was obscene or otherwise constitutionally unprotected based on its content alone, and one of the awkward aspects of the public concern test is that it puts the Court in the business of assessing the effectiveness of speech at making a point of political social import, an endeavor normally thought to be forbidden by the First Amendment itself. Until *City of San Diego v. Roe*, the Court had emphasized that "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 387 (1987). I have elsewhere developed this point at greater length. *See* Rosenthal, *supra* note 80, at 540–44.

107. For additional discussion of this confusion in *Roe*, see Estlund, *Work and Citizenship*, *supra* note 3, at 133–35; Shooman, *supra* note 80, at 1362–63.

108. Prior to *Roe*, these cases were resolved through an inquiry into whether the racist speech was disseminated in a manner that attempted to engage public concern and, if so, by application of the balancing test. *See, e.g.*, Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002) (upholding discipline against officer who circulated racist leaflet anonymously); Locurto v. Safir, 264 F.3d 154 (2d Cir. 2001) (upholding discipline against officer and firefighters who appeared in blackface on parade float parodying African Americans); Tindle v. Caudell, 56 F.3d 966 (8th Cir. 1995) (upholding discipline against officer who appeared in blackface at a private party); McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985) (upholding termination

managerial prerogative includes the right to control even off-duty speech that could undermine the employee's on-duty effectiveness.[109] If on-duty speech directed toward official objectives falls within the scope of managerial prerogative, then off-duty speech that compromises those same objectives should no less be subject to managerial control.

3. Coerced Ideological Loyalty

Given the broad scope of managerial prerogative advanced above, one might think that this conception could grant public employers virtually unlimited authority to suppress any employee speech that suggests disloyalty to a public employer. After all, in the private sector, managerial prerogative includes essentially unfettered power to regulate employee speech within applicable statutory and contractual parameters.[110] First Amendment doctrine, however, limits the prerogative of the public employer. Consider the patronage cases. They hold that the government may not endeavor to coerce partisan political loyalty by discriminating on the basis of partisan affiliation in public employment except for positions for which partisan political loyalty is an appropriate qualification for employment.[111] This line of cases understands the patronage system to undermine rather than preserve political accountability by converting the public workforce into an involuntary source of political support for incumbents—hence the process of preserving political accountability that ordinarily justifies managerial prerogative lends patronage practices no sanction.

Coerced partisan loyalty is not the only form of ideological discrimination forbidden by the First Amendment; the patronage cases themselves rely on an earlier line of cases condemning compulsory loyalty

of sheriff's clerical employee who publicly revealed that he was a recruiter for the Ku Klux Klan); City of Indianapolis v. Heath, 686 N.E.2d 940 (Ind. Ct. App. 1997) (upholding discipline of officer who made an anti-Semitic remark at a public meeting while off duty); Hawkins v. Dep't of Pub. Safety & Corr. Servs., 602 A.2d 712 (Md. 1992) (upholding termination of prison guard for off-duty anti-Semitic remark); Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112 (Mass. 2000) (upholding termination for joke told at political event); Vinci v. Neb. Dep't of Corr. Servs., 571 N.W.2d 53 (Neb. 1997) (upholding demotion of prison guard for off-duty racial slur).

109. For a similar view of *Roe* as turning on the extent to which the employer can reasonably fear that the employee's off-duty conduct can compromise public confidence, albeit without consideration of the impact of *Garcetti* or the role of managerial prerogative, 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, 129–30 (2006).

110. For a helpful account of the scope of managerial prerogative in the private sector, see Ingber, *supra* note 41, at 65–73.

111. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674–75 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 717–21 (1996); Rutan v. Republican Party of Ill., 497 U.S. 62, 73–79 (1990); Branti v. Finkel, 445 U.S. 507, 516–20 (1980).

oaths in public employment.[112] Similarly, in the public employee speech case recognized as seminal in *Garcetti*, *Pickering v. Board of Education*,[113] the Court held that a school board could not discipline a teacher employee for criticizing its effort to secure a tax increase,[114] a holding that is perhaps less an innovation than a particularized application of the deeply rooted First Amendment rule against any governmental effort to compel ideological conformity.[115] *Garcetti*, of course, took no issue with this line of cases; and under that line of cases, ideological disloyalty, without more, implicates no legitimate managerial prerogative.[116]

Thus, managerial assertions of a right to control employee speech must be directed toward managerial and not ideological objectives. As we have seen, the patronage cases permit consideration of an employee's ideological loyalty when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[117] The First Amendment accordingly makes ideology a permissible consideration on public employment only when there is a managerial justification for its consideration.[118] In those circumstances,

112. *See, e.g.*, *Bd. of County Comm'rs*, 518 U.S. at 674–75 (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Wieman v. Updegraff, 344 U.S. 183 (1952)); *O'Hare Truck Serv., Inc.*, 518 U.S. at 720–21 (relying on *Keyishian*); *Rutan*, 497 U.S. at 77 (discussing *Keyishian*, Elfbrandt v. Russell, 384 U.S. 11 (1966), and Torcaso v. Watkins, 367 U.S. 488 (1961)).

113. 391 U.S. 563 (1968).

114. *See id.* at 571–75*; see also* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979) (teacher could not constitutionally be fired for dismissing school's policies as discriminatory); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (teacher could not constitutionally be dismissed for disclosing memorandum imposing dress code); Perry v. Sindermann, 408 U.S. 593 (1972) (teacher could not constitutionally be fired for criticizing policies of the junior college system that employed him).

115. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–35 (1977); Wooley v. Maynard, 430 U.S. 705, 714–15 (1977), W. Va. State. Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943).

116. Indeed, *Garcetti* expressly endorsed the holding in *Pickering v. Board of Education*. Garcetti v. Ceballos, 547 U.S. 410, 417–18 (2006).

117. Branti v. Finkel, 445 U.S. 507, 518 (1980).

118. Thus, had Ceballos adduced evidence that other employees who displayed greater ideological loyalty to incumbent management and who had engaged in similar conduct had faced no retaliation, he would have been able to assert a cognizable First Amendment claim. *Cf.* Waters v. Churchill, 511 U.S. 661, 681–82 (1994) (plurality opinion) (evidence that management terminated employee only because of previous nondisruptive statements critical of management created genuine issue of fact); *id.* at 689–92 (Scalia, J., concurring in the judgment) (public employees may assert pretext as a basis to challenge discipline under the First Amendment). This qualification, however, elides the question of whether ideological loyalty is appropriately required of professional staff in a prosecutor's office. Most courts to consider the question have held that ideological loyalty can be required of prosecutors. *See, e.g.*, Fazio v. City of San Francisco, 125 F.3d 1328, 1334 (9th Cir. 1997); Gordon v. County of Rockland, 110 F.3d 886, 890–92 (2d Cir. 1997); Monks v. Marlinga, 923 F.2d 423, 426 (6th Cir. 1991) (per curiam); Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990); Clark v. Brown, 861 F.2d 66, 68 (4th Cir. 1988); Livas v. Petka, 711 F.2d 798 (7th Cir. 1983); Mummau v. Ranck, 687 F.2d 9 (3d Cir. 1982) (per curiam); Ness v. Marshall, 660 F.2d 517 (3d Cir. 1981). The possibility that the District Attorney might have been entitled

managerial prerogative is recognized as an incident of management's political accountability for its performance.

While *Garcetti* recognizes managerial authority, and the patronage cases limit it, there is a deeper commonality between these lines of authority. As we have seen, *Garcetti* enhances political accountability by preventing a diffusion of responsibility for the manner in which public officers discharge their duties. The patronage cases enhance political accountability as well, by ensuring that elected officials cannot use patronage resources as a means of garnering electoral support unearned by their records. Thus, it is the objective of political accountability that helps to define the scope and limits of managerial prerogative.

4. Other Constitutional Limitations on Managerial Prerogative

The constitutional prohibition on coerced ideological loyalty is not the only constitutional limitation on the managerial prerogative to regulate speech. As I note above, the Due Process Clause requires prosecutors to disclose exculpatory evidence.[119] The concept of managerial prerogative, while offering the strongest support for the holding in *Garcetti*, accordingly also argues against a reading of *Garcetti* that would deny prosecutors protection even when they speak pursuant to a constitutional obligation.[120] After all, the heart of *Garcetti*, as I argue above, is its view that managerial prerogative includes "the exercise of employer control over what the

to ideological loyalty from Ceballos suggests yet another problem with his First Amendment claim. As Justice O'Connor once observed, citing the discussion concerning the ability of a public employer to demand partisan loyalty of employees in positions for which partisan loyalty is appropriate in *Branti v. Finkel*, 445 U.S. 507 (1980), "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." *Waters*, 511 U.S. at 672 (plurality opinion).

119. *See supra* notes 71–73 and accompanying text.

120. On this point, *Garcetti* is ambiguous. After citing a number of legal and ethical constraints on public employers, including the constitutional obligation to disclose exculpatory evidence recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), *Garcetti* continues:

> These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.
>
> We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

Garcetti, 547 U.S. at 425–26. The first sentence set out above hints at some protection for employees, while the following paragraph inclines against protection. In any event, since the question whether the First Amendment permits discipline of a prosecutor for honoring his *Brady* obligation was not presented in *Garcetti*, it should not be regarded as containing an authoritative holding on that point.

employer itself has commissioned or created."[121] The Due Process Clause, however, limits employer control by compelling the production of exculpatory information of which the defense is otherwise unaware, and imposes an obligation of disclosure on prosecutors quite separate from any office policy or practice that an employer may have "commissioned or created." Thus, a conception of employer prerogative does not deny protection for an employee who is disciplined for honoring a constitutional obligation because an employer's desire to suppress such information is not within the scope of a public employer's constitutionally legitimate prerogatives.[122] Indeed, the centrality of the disclosure of exculpatory evidence to the proper functioning of the criminal justice system provides additional reason to doubt that any constitutional conception of managerial prerogative includes the power to suppress exculpatory evidence. A useful analogy is provided by the Court's decision to invalidate a prohibition on federally funded legal services organizations bringing litigation that challenges welfare laws on the ground that this distorted the proper role that lawyers play in protecting their clients' rights.[123] Suppressing exculpatory evidence in criminal proceedings does not inhibit the attorney-client relationship, but it does distort the ability of the criminal justice system to supply due process, and for this reason, it likely transgresses the constitutional boundaries of managerial prerogative. Nor does the theory of political accountability at the heart of the concept of managerial prerogative provide support for a prosecutor's effort to prevent his subordinates from disclosing exculpatory evidence. In light of the constitutional duty of disclosure, the Constitution denies a prosecutor the ability to suppress exculpatory evidence as a means of increasing conviction rates and therefore attracting political support. It follows that this form of managerial control over the prosecutorial function is constitutionally impermissible.

This is not to suggest, however, that the concept of managerial prerogative has nothing to say about the manner in which the obligation to disclose exculpatory evidence is discharged. Supervisors and subordinates will sometimes disagree about whether particular information must be disclosed. In *Waters v. Churchill*,[124] the Court held that when a public employer imposes discipline on an employee for her speech, it may act on the basis of its own factual determinations about what the employee had said as long as it conducts a reasonable investigation.[125] This approach—

121. *Id.* at 422.

122. For an argument in support of a similar constitutional limitation on managerial prerogative arising from the constitutional right of sexual privacy recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), see Secunda, *supra* note 109, at 119–27.

123. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–47 (2001).

124. 511 U.S. 661 (1994).

125. *Id.* at 675–78 (plurality opinion); *see also id.* at 687–92 (Scalia, J., concurring in the judgment) (employer's factual determination is conclusive unless pretextual). Although the plurality's analysis did not command a majority of the Court, its rationale is properly regarded as the holding of the Court because it states the narrowest ground articulated in

itself resting on a conception of managerial prerogative that came to fruition in *Garcetti*—suggests that a supervisor's decision that particular information need not be disclosed, if reasonable, should receive deference. And, as we have seen, the First Amendment does not protect insubordination. A policy requiring supervisory review prior to the disclosure of exculpatory evidence is not itself unconstitutional, and the violation of such a policy would accordingly infringe a legitimate managerial prerogative.[126]

* * *

Thus, the concept of managerial prerogative has important explanatory power in assessing the Supreme Court's public-employee free speech jurisprudence. That concept will provide critical guidance for post-*Garcetti* First Amendment litigation involving the rights of public employees. It remains to consider the implications of this conception of managerial prerogative for other areas of First Amendment law.

II. MANAGERIAL PREROGATIVE AND WORKPLACE HARASSMENT

Garcetti considers speech that is part of an employee's duties. This, however, is not the only type of speech in the workplace. Antiharassment law addresses workplace speech as well. The concept of managerial prerogative, moreover, has a good deal to say about the relationship between the First Amendment and antiharassment law.

A. *The First Amendment Attack on Antiharassment Law*

Title VII of the Civil Rights Act of 1964 makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[127] The Supreme Court has held that "sexual harassment so 'severe or pervasive' as to '"alter the conditions of [the victim's] employment and create an abusive working environment"' violates Title VII."[128] The same is true for harassment on the basis of other

support of the judgment. *Id.* at 685–86 (Souter, J., concurring). *See generally, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (discussing this rule).

126. Indeed, a policy requiring preclearance prior to disclosure of exculpatory evidence is much like the CIA preclearance policy that has already survived First Amendment attack. *See* Snepp v. United States, 444 U.S. 507, 511–13 (1980).

127. 42 U.S.C. § 2000e-(2)(a)(1) (2000).

128. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)) (alteration in original); *accord, e.g.*, Pa. State Police v. Suders, 542 U.S. 129, 146–47 (2004); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002); Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (per curiam); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

protected statuses, such as race.[129] Moreover, employers are always liable for harassment with tangible effects on the terms and conditions of employment, such as discriminatory harassment in "hiring, firing, promotion, compensation, and work assignment,"[130] and even absent such tangible results, employers are liable for supervisory harassment unless they demonstrate that they exercised reasonable care to prevent such harassment through the implementation of antiharassment policies or similar measures and that the employee unreasonably failed to take advantage of available preventative or corrective opportunities.[131] Employers are only liable for peer harassment upon proof of the employer's own negligence.[132]

When it comes to verbal harassment, the Court has stressed that not every offensive utterance is sufficient to alter the terms and conditions of employment in violation of Title VII.[133] Still, verbal harassment—even though it consists of "speech" ordinarily protected by the First Amendment—will sometimes be actionable. In *Harris v. Forklift Systems, Inc.*,[134] for example:

> The Magistrate found that, throughout Harris' time at Forklift, [Forklift's president Charles] Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris and other women's clothing.
>
> In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you

129. *See Nat'l R.R. Passenger Corp.*, 536 U.S. at 116 n.10.

130. *Faragher*, 524 U.S. at 790; *accord Suders*, 542 U.S. at 143–45; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753–54, 760–63 (1998).

131. *See, e.g.*, *Suders*, 542 U.S. at 145–46; *Faragher*, 524 U.S. at 801–08; *Burlington Indus., Inc.*, 524 U.S. at 763–65.

132. *See, e.g.*, *Faragher*, 524 U.S. at 799–800.

133. *See, e.g.*, *Nat'l R.R. Passenger Corp.*, 536 U.S. at 115–16; *Clark County Sch. Dist.*, 532 U.S. at 270–71; *Faragher*, 524 U.S. at 786–88; *Oncale*, 523 U.S. at 81; Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); *Meritor*, 477 U.S. at 67.

134. 510 U.S. 17, 19 (1993).

> do, promise the guy . . . some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.[135]

On these facts, the Court held the harassment actionable even though it had not caused Harris any physical or serious psychological injury.[136] In other words, purely verbal harassment is sometimes actionable under Title VII without proof of some tangible injury. There is a serious question whether the regime of antiharassment law is consistent with the First Amendment.

1. The Argument Based on Content

First Amendment doctrine has never treated speech as unprotected because others find it offensive or harassing. Indeed, laws proscribing offensive or annoying speech have been consistently invalidated.[137] Although the First Amendment is not thought to protect "fighting words," "true threats," or speech to "captive audiences," "fighting words" are limited to those likely to produce an immediate breach of the peace,[138] "true threats" are only those statements that express a serious intent to commit an act of unlawful violence,[139] and the "captive audience" concept generally has no application to persons outside of their home.[140] Thus, under current First Amendment doctrine, most forms of harassing workplace speech are unlikely to fall into any of the categories of unprotected expression that are defined by reference to the content of speech.[141]

135. *Id.* at 19 (citations omitted and second and third pairs of brackets in original).

136. *Id.* at 22–23.

137. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 132–33 (1974) (ordinance prohibiting use of "opprobrious language" toward a police officer); Gooding v. Wilson, 405 U.S. 518, 524–28 (1972) (statute prohibiting use of "opprobrious or abusive language, tending to cause a breach of the peace"); Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971) (ordinance prohibiting groups conducting themselves in a manner "annoying" to others).

138. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 409 (1989); Lewis v. City of New Orleans, 415 U.S. 130, 133–34 (1974); Gooding v. Wilson, 405 U.S. 518, 525 (1972); Cohen v. California, 403 U.S. 15, 20 (1971).

139. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359–60 (2003); Rankin v. McPherson, 483 U.S. 378, 386–87 (1987); Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam).

140. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–11 (1975); Spence v. Washington, 418 U.S. 405, 412 (1974); Cohen v. California, 403 U.S. 15, 21 (1971). One member of the Court once found this concept relevant as it upheld a prohibition on political advertising on public buses, *see* Lehman v. City of Shaker Heights, 418 U.S. 298, 305–08 (1974) (Douglas, J., concurring), but a four-Justice plurality found it relevant only to rejecting a claim that the bus should be treated as a public forum, *see id.* at 301–04 (plurality opinion), and the four dissenters rejected any reliance on the concept, *see id.* at 308–22 (Brennan, J., dissenting). The single vote in *Lehman v. City of Shaker Heights* is therefore not much of a peg to hang the captive-audience hat on when it comes to workplace harassment.

141. For additional explication of the difficulties in squaring antiharassment law with First Amendment doctrine, see, for example, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 510–31 (1991); Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment*

Moreover, even if harassing speech were considered unprotected, antiharassment laws can still be accused of impermissible discrimination against disfavored ideas, even within categories of unprotected speech. In *R.A.V. v. City of St. Paul*,[142] the Court held that an ordinance prohibiting "plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,"[143] and which had been construed by the Minnesota Supreme Court to reach only constitutionally unprotected fighting words,[144] nevertheless violated the First Amendment because it "impose[d] special prohibitions on those speakers who express views on disfavored subjects."[145] Since the invalidated ordinance's formulation seemingly tracks Title VII, there is reason to believe that Title VII, at least as applied to verbal harassment, constitutes impermissible viewpoint discrimination, as indeed a number of scholars have argued.[146]

To be sure, *R.A.V* offers antiharassment law some solace. After noting that the First Amendment tolerates "laws directed not against speech but against conduct," the Court added, "[t]hus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."[147] The Court concluded, "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[148] Still, this observation is of limited aid to a defense of antiharassment law; it is merely dictum, and it seems directed only to

Dog that Didn't Bark, 1994 SUP. CT. REV. 1, 12–20; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1010–35 (1993); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819–43 (1992).

142. 505 U.S. 377 (1992).

143. *Id.* at 380 (internal quotation marks omitted).

144. *Id.* at 380–81.

145. *Id.* at 391.

146. *See, e.g.*, DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 23–34 (2003); Browne, *supra* note 141, at 491–501; Gerard, *supra* note 141, at 1010–25; Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 801–08 (1995); Volokh, *supra* note 141, at 1826–32; Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 571–73 (1995). As one scholar put it,

> The important point is that *R.A.V.* forces governments to decide what they wish to control. If fighting words are a problem, ban them. And if, after having done so, the prohibition is selectively enforced to muzzle only the speaker of fighting words who hates white men, or Jews, or Korean-Americans, the doctrine of *R.A.V.* will operate to invalidate the prohibition . . . .

Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 183 (1992).

147. *R.A.V.*, 505 U.S. at 389 (citations omitted).

148. *Id.* at 390.

"fighting words" which, we have seen, probably do not encompass most types of actionable verbal harassment.[149]

Nevertheless, there is reason to believe that a course of harassment that violates Title VII lacks constitutional protection, even if it consists of verbal harassment that might be constitutionally protected in other contexts. As we have seen, Title VII is not a general antiharassment statute; it proscribes only harassment that is thought to alter the terms or conditions of employment.[150] Accordingly, actionable harassment necessarily amounts to an alteration in the character of the employment relationship; in other words, the plaintiff in a harassment case must prove that the employer effectively required an employee to submit to harassment on the basis of race (or other protected characteristic) that it would not have permitted had the victim been a nonminority employee. This type of contractual discrimination is a poor candidate for constitutional protection. In a long line of cases, the Court has held that discrimination in the terms and conditions of contracts or other forms of commercial activities is to be treated as unprotected conduct, not speech.[151] It is equally settled that the First Amendment offers no protection merely because a violation of an otherwise valid law thought to be directed at conduct involves, in whole or in part, words or other forms of speech.[152] As the Court has explained,

> "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.[153]

149. *See supra* notes 138–41 and accompanying text. For a more detailed argument that the *R.A.V.* dictum is of limited significance, see Volokh, *supra* note 141, at 1829–32.

150. *See supra* notes 127–36 and accompanying text.

151. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993); Hishon v. King & Spalding, 467 U.S. 69, 75 (1984); Runyon v. McCrary, 427 U.S. 160, 175–76 (1976); Norwood v. Harrison, 413 U.S. 455, 468–70 (1973); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388–89 (1973); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945). Conversely, the First Amendment is thought to protect the right to discriminate with respect to groups that associate for ideological and noncommercial reasons. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); *see also* David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001); Dale Carpenter, *Expressive Ass'n and Anti-Discrimination Law after* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1563–88 (2001).

152. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 62 (2006); Osborne v. Ohio, 495 U.S. 103, 110 (1990); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

153. *Rumsfeld*, 547 U.S. at 62 (citations omitted) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

Thus, the fact that discrimination in employment sometimes takes the form of speech erects no First Amendment barrier to regulation of such speech; rather, regulations aimed at nonspeech evils are thought to impose only incidental restrictions on speech.[154] Indeed, the lower courts that have considered the question have thus far universally held that evidence sufficient to satisfy Title VII standards also makes out conduct that is unprotected by the First Amendment.[155] This is also the ground on which most of its scholarly advocates defend antiharassment law against First Amendment attack.[156]

154. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 294–95 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566–67 (1991) (plurality opinion); Arcara v. Cloud Books, Inc., 478 U.S. 697, 702–04 (1986); United States v. Albertini, 472 U.S. 675, 688–89 (1985); Wayte v. United States, 470 U.S. 598, 610–11 (1985); United States v. O'Brien, 391 U.S. 367, 376–77 (1968). Moreover, precisely because the First Amendment permits the legislature to prohibit racial discrimination in employment, a prohibition on discriminatory speech that is part of a discriminatory act is considered equally permissible:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); *accord* Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2381 (2007); Virginia v. Black, 538 U.S. 343, 361–62 (2003).

155. *See, e.g.*, O'Rourke v. City of Providence, 235 F.3d 713, 735–36 (1st Cir. 2001); Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246–47 (10th Cir. 1999); Jarman v. City of Northlake, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 n.89 (D. Minn. 1993); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535–37 (M.D. Fla. 1991); United States v. Swan, 48 M.J. 551, 555–56 (N-M. Ct. Crim. App. 1998); Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 853–59 (Cal. 1999) (plurality opinion); *id.* at 868–75 (Werdegar, J., concurring); People v. Allen, 680 N.E.2d 795, 800 (Ill. App. Ct. 1997); Trayling v. Bd. of Fire & Police Comm'rs, 652 N.E.2d 386, 395 (Ill. App. Ct. 1995); Commonwealth v. Hendrickson, 724 A.2d 315, 318 (Pa. 1999); Sanchez v. State, 995 S.W.2d 677, 687–89 (Tex. Crim. App. 1999).

156. *See, e.g.*, Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 853–68 (1996); Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile-Environment Theory*, 1996 UTAH L. REV. 227, 252–62; Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 435–46 (1996); Fallon, *supra* note 141, at 42–51; Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67, 86–95 (2002); John H. Marks, *Title VII's Flight Beyond First Amendment Radar: A Yin-to-Yang Atttenuation of "Speech" Incident to Discriminatory "Abuse" in the Workplace*, 9 COLUM. J. GENDER & L. 1, 29–40 (1999); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL'Y & L. 127, 215–23 (1996); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 532–58 (1995); John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 967–77 (2007); Jessica M. Karner, Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 688–91 (1995).

Although one can surely question the integrity of the distinction between speech and conduct, at least in this context,[157] there remains a fairly apparent difference between advocating discriminatory employment practices and actually engaging in those practices. Employment practices that effectively alter the terms and conditions of employment surely seem to go into the eminently regulable realm of contractual relationships.[158] To be sure, drawing a distinction between speech and conduct may not be the most helpful way to make the point since it is possible to identify in virtually every effort at communication some component that one might regard as conduct. Eugene Volokh, for example, has argued that any regulation that is triggered by the expressive component of conduct should be treated as a presumptively invalid content-based speech restriction.[159] This observation, however, is of limited utility. Professor Volokh's view provides no means for separating permissible from impermissible regulation directed at the content of speech; yet it is clear that a great deal of content regulation is constitutionally unobjectionable. Citing fighting words and defamation as examples, the Court has observed,

> [I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.[160]

Thus, labeling a regulation as directed at the content of speech is not talismanic; a judgment remains necessary about the virtues and vices of the regulation at issue. And, in the particular context of employment, as the

157. *See, e.g.*, Peter Caldwell, *Hostile Environment Sexual Harassment and First Amendment Content Neutrality: Putting the Supreme Court on the Right Path*, 23 HOFSTRA LAB. & EMP. L.J. 373, 396–406 (2006); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 705–07 (1997); Fallon, *supra* note 141, at 14–16; Peirce, *supra* note 156, at 209–11; Karner, *supra* note 156, at 663–67.

158. This observation is related to the view, most forcefully pressed by Kent Greenawalt, that some types of words are not merely communicative, but effectively alter social or economic relationships, and under those circumstances can be regulated to the extent that they go beyond mere speech and become "situation-altering utterances." *See* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 6–7, 48–50 (1999). For a similar argument about harassing speech from another eminent scholar, see Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 357–60 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004). Even Eugene Volokh, a leading critic of the distinction between speech and conduct and the associated concept of a "situation-altering utterance," *see* Volokh, *supra* note 64, at 1311–16, 1334, refrains from arguing that speech that amounts to an alteration in contractual or other legal relationships qualifies for constitutional protection. *See id.* at 1334–35.

159. *See* Volokh, *supra* note 64, at 1286–311. On this basis, Professor Volokh also criticizes the speech/conduct distinction and the associated concept of a "situation-altering utterance." *See id.* at 1311–36.

160. New York v. Ferber, 458 U.S. 747, 763–64 (1982); *accord, e.g.*, Virginia v. Black, 538 U.S. 343, 358–59 (2003); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66–68 (1976) (plurality opinion).

R.A.V. dictum and the long line of cases upholding antidiscrimination laws against First Amendment attack suggest, it has long been settled that the government's compelling interest in promoting equal employment opportunities for women and minorities justifies a categorical prohibition on discriminatorily altering the terms and conditions of employment, whether that is accomplished through speech or otherwise.

But even if the argument that a Title VII violation should be treated as unprotected conduct persuades, it does not quite get antiharassment law out of the First Amendment woods, as we will now see.

2. The Argument Based on Overbreadth

The concept of "severe or pervasive" harassment expresses something less than mathematical precision, and that creates an additional First Amendment hurdle for antiharassment law. Insufficiently precise laws are thought to run afoul of the First Amendment because vagueness creates a risk that those potentially subject to the vague prohibition will be inhibited from engaging in constitutionally protected speech.[161] It is far from clear that antiharassment law can be squared with this doctrine.

The Supreme Court has acknowledged that it is often difficult to tell when individual acts of harassment, nonactionable in themselves, become sufficiently severe or pervasive to violate Title VII because "[s]uch claims are based on the cumulative effect of individual acts."[162] This imprecision gives employers an incentive to adopt prophylactic policies barring conduct that does not itself violate Title VII in order to minimize their exposure to liability. This incentive is enhanced by the Court's recognition of an affirmative defense based on antiharassment policies.[163] But, because it is difficult to tell when harassment becomes actionable, employers cannot tenably adopt a policy of "no Title VII violations"—that would give employees insufficient guidance in an area that can trouble even experts, and run the risk that an accumulation of incidents that do not individually violate the employer's policy will in the aggregate give rise to a

161. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 871–72 (1997); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574–76 (1987); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975); Lewis v. City of New Orleans, 415 U.S. 130, 133–34 (1974); Gooding v. Wilson, 405 U.S. 518, 520–21 (1972). This doctrine is analytically distinct from a claim that a statute is overbroad because it proscribes a substantial quantum of constitutionally protected conduct. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 118–20 (2003); *Ferber*, 458 U.S. at 769–73; Broadrick v. Oklahoma, 413 U.S. 601, 612–15 (1973). If one takes it as given that Title VII proscribes only unprotected conduct, then it is not overbroad in this sense.

162. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002). In contrast, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." *Id.* at 114.

163. *See supra* note 131 and accompanying text.

violation.[164] Accordingly, prophylactic antiharassment policies are commonplace, and for just this reason, critics argue that even if Title VII violations are themselves unprotected, the statute creates an impermissible chilling effect by inducing employers—public and private—to prohibit nonactionable and therefore constitutionally protected verbal harassment.[165] A number of lower courts have invalidated prophylactic antiharassment policies on this ground.[166] The scholarly advocates of antiharassment law, for their part, have been strikingly unable to answer the critics on this point.[167]

164. As one eminent scholar put it, "a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination." Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 907 (1996).

165. *See, e.g.*, Browne, *supra* note 141, at 501–10; Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563, 581–97 (2001) [hereinafter Browne, *Zero Tolerance*]; Gerard, *supra* note 141, at 1025–28; Robbins, *supra* note 146, at 808–11; Volokh, *supra* note 141, at 1811–14; Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 299, 304–11; Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 635–46 (1997). Largely for this reason, critics argue that the First Amendment precludes harassment liability only for the most egregious forms of individually targeted harassment. *See, e.g.*, TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL 121–62 (1998); Kingsley R. Browne, *The Silenced Workplace: Employer Censorship Under Title VII*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 399, 409–12; Estlund, *supra* note 157, at 741–59; Volokh, *supra* note 141, at 1863–68. For a judicial opinion taking this view, see Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430, 1438–42 (C.D. Cal. 1994).

166. *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 258–67 (3d Cir. 2002) (granting preliminary injunction); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 207–10 (3d Cir. 2001); Cohen v. San Bernadino Valley Coll., 92 F.3d 968, 971–72 (9th Cir. 1996); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–84 (6th Cir. 1995); UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1180–81 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852, 864–68 (E.D. Mich. 1989). Still other cases have found that ad hoc regulation of allegedly harassing speech creates similar problems. *See, e.g.*, Iota Chi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (holding that a university's punishment of participants in a sexist skit violated the First Amendment).

167. Typical is Suzanne Sangree's effort to address the problem by arguing that Title VII is no trap for the unwary because only employers who are culpable for harassment can be held liable. *See* Sangree, *supra* note 156, at 528–32. This is no answer to the claim that Title VII will inevitably cause employers to overregulate speech because of its imprecision. Deborah Epstein denies that employers are likely to adopt prophylactic antiharassment policies, *see* Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649, 658–65 (1997), but her response to the rather impressive empirical evidence adduced by the Title VII critics consists of a single telephone interview of an employer-consultant who appears to have a financial interest in the continued vitality of Title VII antiharassment doctrine, *see id.* at 664 & nn.85 & 87. In any event, the interview reflects a view at odds with the practical reality that the financial incentives of employers, especially in the private sector where there is no potential liability for violating the First Amendment, lie entirely in minimizing potentially actionable speech. Having formerly represented a public employer, and having attended more than a few sexual harassment training seminars from both sides of the rostrum, it is clear to me that the

The Supreme Court, for its part, is becoming engaged. In *Davis v. Monroe County Board of Education*,[168] a majority of the Court, without reaching any First Amendment issue, recognized a cause of action for damages under Title IX of the Civil Rights Act when a school district culpably fails to prevent the sexual harassment of a student,[169] but Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, warned that a public school's ability to enforce antiharassment rules "is . . . circumscribed by the First Amendment," and noted that "[a] number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment."[170] It is just a short step to the view of the critics that Title VII's analogous antiharassment rule impermissibly chills protected speech. Indeed, in the very next Term, dissenting from a denial of certiorari, Justice Thomas argued that antiharassment law impermissibly restrains protected speech in an employment discrimination case.[171] Thus, it appears that the First Amendment day of reckoning for antiharassment law is coming.[172]

message sent by these seminars is that managers and employees alike should err on the side of caution.

168. 526 U.S. 629 (1999).

169. *See id.* at 639–53. The advocates of antiharassment regulation in the schools argue that speech demeaning to racial or other minorities, or women, subordinates these traditionally disadvantaged groups and therefore discriminatorily limits their educational opportunities. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 111–21 (2004); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 372–86 (1991); Rhonda G. Hartman, *Revitalizing Group Defamation as a Remedy for Hate Speech on Campus*, 71 OR. L. REV. 855, 884–96 (1992); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 449–76; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2371–73 (1989); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 43 WASH. & LEE L. REV. 171, 198–211 (1990).

170. *Davis*, 526 U.S. at 667 (Kennedy, J., dissenting) (citations omitted). Later in the opinion, Justice Kennedy added, "At the college level, the majority's holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights." *Id.* at 682.

171. *See* Avis Rent-A-Car Sys., Inc. v. Aguilar, 529 U.S. 1138, 1140–42 (2000) (Thomas, J., dissenting from denial of certiorari).

172. Some advocates of antiharassment law had taken comfort in the fact that although Forklift mounted a First Amendment defense in *Harris v. Forklift Systems Inc.*, *see* Brief for Respondent at 31–33, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92-1168), the Court ruled for Teresa Harris without even mentioning the First Amendment defense. *See* Fallon, *supra* note 141, at 9–10; Schauer, *supra* note 158, at 356–57. This view fails to take the posture of the case into account. Harris was the petitioner, and her petition for certiorari presented only the question whether she was required to establish a serious psychological injury to make out a Title VII violation. *See* Brief for Petitioner at i, Harris v. Forklift Sys., Inc., 510 U.S. 17 (No. 92-1165). Under the Court's rules, it will not consider questions not fairly subsumed in the questions presented in petition for certiorari. *See* SUP. CT. R. 14.1(a). Although the Court may consider an argument advanced by a respondent in support of the judgment below that was not reached by the lower court or presented in the petition for certiorari, it frequently declines to reach questions not yet decided in the lower courts. *See, e.g.*, Gonzalez v. Duenas-Alvarez, 127 S. Ct. 815, 822–23 (2007); Engine Mfrs. Ass'n v. S.

B. *Managerial Prerogative and Workplace Harassment*

We have seen that under *Garcetti*, what an employee says within the course of his duties is subject to employer control; there is simply no First Amendment right to perform one's duties in a fashion that displeases one's employer, even when one's duties include speaking.[173] As the Court explained, "Restricting speech that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created."[174] This approach has significant implications for antiharassment law, which by its nature regulates relationships that an employer has created for its own purposes.

As we have seen, *Garcetti* ultimately rests on a notion that management has a right to control how public employees perform their jobs; and surely that includes how they treat each other. Just as a public employer can "prohibit its employees from being 'rude to customers,'"[175] it can insist that they not be rude to each other. Even if some harassing workplace speech might not occur in the course of an employee's duties and therefore does not fall within the literal scope of the holding in *Garcetti*, we have also seen that managerial prerogative is not so narrowly circumscribed—it extends to all conduct by the employee that is inconsistent with the employer's legitimate managerial objectives with respect to the functioning of the public institution at issue.[176] If the marketing of crude pornography away from the workplace at issue in *Roe* is unprotected because it compromises employer prerogatives, crude remarks at the workplace could hardly be entitled to greater protection.[177]

Coast Air Quality Mgmt. Dist., 541 U.S. 246, 258–69 (2004); West v. Gibson, 527 U.S. 212, 223 (1999); NCAA v. Smith, 525 U.S. 459, 469–70 (1999). Indeed, the Court "generally do[es] not address arguments that were not the basis for the decision below." Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996). Since the Court in *Harris* merely remanded the case to the lower courts for further proceedings, its disposition did not deprive Forklift of its First Amendment defense, and at least from the Court's point of view, there was no reason for it to consider that defense in the first instance. Justice Kennedy and Justice Thomas's subsequent opinions expressing support for a potential First Amendment defense to harassment claims make clear that those who joined the Court's opinion in *Harris* did not believe they were foreclosing potential First Amendment defenses to harassment liability.

173. *See supra* Part I.B.2.

174. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

175. Waters v. Churchill, 511 U.S. 661, 672–73 (1994) (plurality opinion).

176. *See supra* Part I.C.

177. See *supra* notes 104–05 and accompanying text. For similar reasons, antiharassment policies within public schools and universities should survive First Amendment attack, at least with respect to harassment occurring within class and other official settings. Just as a public employer can require its employees not to be rude to customers, or each other, surely a public university can enforce ordinary civility norms appropriate to the classroom.

1. The Argument Based on Content

As for the question whether an employer's prohibition on harassing speech at the workplace runs afoul of the rule against content or viewpoint discrimination, the *R.A.V.* dictum may be a sufficient answer to this charge.[178] An employer could also evade the problem by adopting a generally applicable civility code that does not identify discriminatory harassment for special treatment. Moreover, under such a policy, the employer could even choose to treat violations motivated by discriminatory animus as aggravated; the First Amendment is not thought to preclude sanctions based on discriminatory motive.[179] But even putting these possibilities aside, the concept of managerial prerogative is itself a sufficient answer to the charge of content or viewpoint discrimination.

As we have seen, in *Davenport*, the Court acknowledged that when the government is not enforcing generally applicable laws, the risk that content-based regulations will drive disfavored views from the market is decreased, and accordingly the rationale for heightened First Amendment scrutiny of such regulations is lacking.[180] Similarly, in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*,[181] the Court also sustained a form of viewpoint discrimination against First Amendment attack. Upholding a high school athletic association's antirecruiting rule against First Amendment attack, the Court wrote, "Just as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights," a public association "can similarly impose only those conditions on such speech that are necessary to managing an efficient and effective state-sponsored high school athletic league."[182] The Court upheld the rule based on the "common-sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics."[183] Notably, both cases permit not only content but even viewpoint discrimination in the managerial context—the regulations at issue put the views of unions and high schools who wish to compete for athletes at a special disadvantage.

178. *See supra* notes 147–60 and accompanying text.

179. *See* Wisconsin v. Mitchell, 508 U.S. 476, 484–88 (1993). For discussions of the use of motive as a means to save antiharassment policies from First Amendment attack, see David Schimmel, *Are "Hate Speech" Codes Unconstitutional? An Analysis of* R.A.V. v. City of St. Paul, 76 EDUC. REP. 653, 663–64 (1992); Catherine B. Johnson, Note, *Stopping Hate Without Stifling Speech: Re-Examining the Merits of Hate Speech Codes on University Campuses*, 27 FORDHAM URB. L.J. 1821, 1841–43 (2000).

180. *See supra* notes 60–63 and accompanying text.

181. 127 S. Ct. 2489 (2007).

182. *Id.* at 2495.

183. *Id.* at 2495–96. In its next sentence, the Court quoted *Garcetti* as it explained that the "rule discourages precisely the sort of conduct that might lead to those harms, any one of which would detract from a high school sports league's ability to operate 'efficiently and effectively.'" *Id.* at 2496 (quoting Garcetti v. Ceballos, 547 U.S. 410, 419 (2006)).

The question of antiharassment law's constitutionality was not at issue in either of these cases; but they importantly illustrate the implications of managerial prerogative for antiharassment law. *Davenport* makes fairly clear that a charge of viewpoint discrimination is likely to have little force when applied to antiharassment workplace rules. When an employer insists that its employees keep discriminatory speech out of the office, whether to improve morale and workplace harmony or merely to minimize the risk of liability, there is little chance of the suppression of disfavored ideas—employees remain free to vent their private views in the most appropriate venues for personal concern. *Tennessee Secondary School Athletic Ass'n*, in turn, suggests that a workplace rule that requires employees to adhere to commonly understood norms of civility ordinarily thought appropriate in the workplace, even if likely to fall disproportionately on identifiable viewpoints, is likely to be sustained without need of an elaborate empirical showing that it improves efficiency. These cases, in short, provide potent answers to the charge that antiharassment law tolerates impermissible content and viewpoint discrimination.

2. The Argument Based on Overbreadth

The overbreadth attack on antiharassment law remains to be considered. But again, the concept of managerial prerogative goes a long way toward answering this attack on antiharassment law.

Recall that Title VII, like other antidiscrimination laws, is considered a content-neutral regulation of conduct.[184] The Supreme Court tells us that to survive First Amendment attack, such laws "need not be the least restrictive or least intrusive means . . . . Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[185] This standard accordingly permits prophylactic regulation when reasonable.[186] While a wildly overbroad antiharassment policy could be invalidated for that reason, or on grounds of impermissible vagueness, policies that constitute a reasonable effort to prevent an accumulated series

184. *See supra* notes 147–60 and accompanying text.

185. Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)); *accord, e.g.*, Hill v. Colorado, 530 U.S. 703, 725–26 (2000); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 216–18 (1997); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477–78 (1989). This test is derived from *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The Court subsequently explained that the *O'Brien* test for incidental restrictions on speech is essentially the same as the test governing the regulation of the time, place, or manner of speech. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

186. *See, e.g.*, *Albertini*, 472 U.S. at 688–89; *Clark*, 468 U.S. at 296–97; Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652–53 (1981).

of incidents that could amount to an actionable hostile environment are far more defensible. Such policies are more defensible yet when coupled with a scienter or culpability requirement that forbids only verbal harassment that the speaker knows or should know will be perceived as abusive and without a business justification should readily pass muster. A scienter requirement is generally understood to cure problems of impermissible vagueness.[187] At a minimum, a policy with reasonable prophylactic scope and a scienter requirement therefore should survive First Amendment attack.[188]

In any event, the concept of managerial prerogative tolerates what might otherwise be considered unacceptable imprecision in regulation when regulation is consistent with ordinary workplace norms. As we have seen with Justice O'Connor's example of a workplace policy forbidding "employees from being 'rude to customers,'"[189] vagueness standards are more forgiving in the workplace. Employees surely can be expected to understand workplace norms as an incident of their employment. In *Roe*, for example, there was no specific rule against officer involvement in the manufacture or distribution of sexually explicit videos; Roe's discipline was based, among other things, on rules against "conduct unbecoming of an officer" and "immoral conduct."[190] Yet Roe did not even put forward a vagueness attack on these rules, which would in any event have been doomed by the Court's prior holding that sustained against a First Amendment vagueness attack a civil service rule that permitted termination "for such cause as will promote the efficiency of the service."[191]

This more forgiving view of imprecision when it comes to workplace regulation of speech follows from the character of managerial prerogative.

187. *See, e.g.*, Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525–26 (1994); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–503 (1982).

188. *Cf.* Cohen v. San Bernadino Valley Coll., 92 F.3d 968, 971–72 (9th Cir. 1996) (holding policy lacking culpability requirement impermissibly vague as applied to teacher's use of long-accepted pedagogical methods); UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1180–81 (E.D. Wis. 1991) (reasoning that an intent to demean listener would cure vagueness); Doe v. Univ. of Mich., 721 F. Supp. 852, 864–68 (E.D. Mich. 1989) (holding policy overbroad and vague because it had been applied to serious academic discussion and reached "threats" to "academic efforts" and "a stigmatizing or victimizing comment" without any culpability requirement); United States v. Swan, 48 M.J. 551, 555–56 (N-M. Ct. Crim. App. 1998) (defendant's culpable mental state defeated overbreadth and vagueness challenge); Sanchez v. State, 995 S.W.2d 677, 687–89 (Tex. Crim. App. 1999) (requirement of culpable mental state saved antiharassment statute from vagueness and overbreadth attack). There is a striking paucity of judicial decisions considering whether prophylactic policies can satisfy First Amendment tailoring standards. Although one opinion by then-Judge Alito rejects such an argument, the policy at issue was aimed at preventing many kinds of harassment that were not unlawful. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2000).

189. Waters v. Churchill, 511 U.S. 661, 672, 673 (1994) (plurality opinion).

190. City of San Diego v. Roe, 543 U.S. 77, 79 (2003) (per curiam).

191. *See* Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974) (plurality opinion) (internal quotation marks omitted); *id.* at 164 (Powell, J., concurring in the judgment).

As we have seen, the First Amendment rule against vagueness is thought to minimize the possibility of self-censorship caused by a fear of violating imprecise regulations.[192] This rationale has limited applicability to the workplace for at least two reasons. First, as we have also seen, regulation in the workplace raises little threat that disfavored views will be driven from the marketplace of ideas. Second, the fear of self-censorship itself has little application to the workplace. The workplace, after all, is supposed to be full of what one could regard as chilling effects—we have seen that at work; employees are expected to serve their employers' interests, rather than their own, even when speaking. It is therefore not unreasonable to expect employees to understand and conform to ordinary workplace norms of civility and professionalism.

3. Title VII and Private Employers.

The preceding discussion, as well as *Garcetti* itself, concerns a public employer's prerogatives. One could argue that Title VII, by placing governmental pressure on private employers to impose speech regulations, cannot be supported by managerial prerogative since it enlists potentially unwilling employers in a governmental effort to inhibit harassing speech.[193] Of course, to the extent that a private employer forbids its staff to violate Title VII, there is no constitutional objection; we have seen that Title VII violations are unlikely candidates for First Amendment protection.[194] But even to the extent that Title VII is thought to effectively compel employers to adopt prophylactic antiharassment policies, that would not render it invalid.

The objection based on the rules against content and viewpoint discrimination is easily answered. As we have seen, as recently as *Davenport*, the Court has emphasized that this rule is inapplicable to contexts in which regulation is unlikely to skew the general marketplace of ideas, such as regulations governing only the workplace.[195] Just as excluding harassing speech from the public workplace raises little threat of skewing the marketplace of ideas, the regulation of harassing speech at the private workplace is equally unlikely to have much effect on the general tenor of public discussion and debate. After all, even if private firms do overregulate, that will not drive what might be considered racist or sexist views from general public discussion and debate altogether; it will just keep such speech out of the workplace. When the threat of driving disfavored views from the marketplace of ideas is so low, there is little reason to invalidate an otherwise constitutional regulation of what is considered

192. *See supra* note 161 and accompanying text.

193. Writing before *Garcetti*, Kingsley Browne advanced just this argument. *See* Browne, *Zero Tolerance*, *supra* note 165, at 573, 576–78.

194. *See supra* notes 147–60 and accompanying text.

195. *See supra* Part II.B.1.

unprotected conduct merely because of the risk that it will produce undue self-censorship. Indeed, although *Davenport* upheld a regulation governing only public employees and their unions, the Court cautioned that for private sector employers, "[w]e do not suggest that the answer must be different," and added that it had in the past upheld regulations of labor-management relations "in a manner that is arguably content based."[196]

As for the problem of overbreadth, as we have also seen, Title VII is thought to regulate conduct rather than speech, and the First Amendment tolerates prophylactic regulation if reasonable in scope. This doctrine is fully applicable to government regulations that impose restrictions on private groups that must, in turn, impose them on their own members. For example, the government may compel the organizers of a protest to ensure that all protesters comply with a no-camping rule in public parks as a prophylactic means of protecting park resources,[197] and it can similarly prevent the members of religious groups from distributing literature on the grounds of a state fair as a prophylactic means of limiting pedestrian congestion.[198] Since private groups engaged in otherwise constitutionally protected activity can be compelled to require their members to adhere to prophylactic regulations of this character, it is difficult to understand how private firms cannot be compelled to impose similarly prophylactic antiharassment regulation on their members.[199]

Thus, the reality that Title VII will produce some prophylactic antiharassment regulation is itself no reason to invalidate antiharassment law on First Amendment grounds, although the potential for unreasonably overbroad regulation must still be considered. On that score, however, while private firms have an incentive to adopt prophylactic antiharassment policies to minimize the possibility that a series of otherwise nonactionable events do not eventually produce actionable harassment, they also have an incentive to avoid unnecessarily overbroad regulation of employee speech. Firms that squander resources by investigating and enforcing wildly overbroad prophylactic policies will for that reason place themselves at a competitive disadvantage. If by chance private firms do overregulate, that

196. Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2382 n.4 (2007). For example, the Court upheld the authority of the National Labor Relations Board to prohibit a private employer to make a threat of reprisal or a promise of a benefit during a unionization drive. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969).

197. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294–99 (1984).

198. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650–55 (1981).

199. Although the compelled speech doctrine forbids the government from compelling private firms to effectively adopt as their own speech with which they disagree, that doctrine does not apply when a firm is required to comply with prophylactic regulations that are fairly understood as requiring those subject to regulation to comply with a regulatory mandate rather than requiring the regulated entity to convey what listeners might reasonably understand as its own message. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61–65 (2006); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 653–57 (1994).

error cannot be laid at the government's door. Such overregulation, instead, would be an example of the exercise of managerial prerogative by the private firm itself—likely an imprudent exercise of managerial prerogative, given the competitive harm of overregulation, but an exercise of managerial prerogative nevertheless.

To be sure, there is always some risk that a legal rule that creates liability for speech will produce impermissible overregulation, but that threat does not mean that all such rules run afoul of the First Amendment. For example, the threat of self-censorship has persuaded the Court to prohibit liability for defamation absent fault, and presumed or punitive damages absent intentional falsehood or reckless disregard for the truth,[200] but when the speech at issue raises no issue of public concern, the Court has declined to grant it special First Amendment protection because the threat to robust public discussion and debate is necessarily limited.[201] The same point is applicable to potentially harassing speech at work. The incentive that Title VII creates for private employers to keep harassing speech out of the workplace creates, at most, a highly limited threat to the general marketplace of ideas.

Thus, the incentive that Title VII creates for private employers to adopt prophylactic regulation is not likely to lead to impermissibly overbroad regulation of speech. And, given the market incentive for private firms to avoid inefficient overregulation, Title VII seems a particularly unattractive context for the Court to hold that the risk of self-censorship requires the invalidation of antiharassment laws.[202]

III. THE EMERGING DOCTRINAL PARAMETERS OF MANAGERIAL PREROGATIVE AND ACADEMIC FREEDOM

By now, it should be plain that First Amendment doctrine is undergoing an important evolution when it comes to the management of speech within public institutions. While no case before *Garcetti* contained such a bold and categorical statement on the character of managerial prerogative, over the past quarter century, the power to control the content and even the viewpoint reflected in speech has been steadily recognized in a variety of contexts as an appropriate incident of managerial authority in governmental institutions. We now know, for example, that the government may prohibit a dissident labor union from access to its internal mail system while

200. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

201. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 774–75 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–61 (1985) (plurality opinion); *id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 773 (White, J., concurring in the judgment).

202. This same approach should also sustain student antiharassment laws such as Title IX against First Amendment attack. As we have seen, these regulations are also proper if limited to generally understood civility norms appropriate to the classroom context. *See supra* note 177.

granting access to the incumbent union,[203] bar nonprofit organizations thought to be involved in controversial social or political activities from a charitable drive aimed at public employees,[204] exclude fringe candidates from a debate televised on a public television station,[205] utilize "decency and respect for . . . diverse beliefs" as criteria when acting on applications for public funding of the arts,[206] and use a technological filter to screen out obscene and pornographic material from the materials provided through the Internet at public libraries.[207] These cases illustrate the scope of the emerging First Amendment law of managerial prerogative.

The discussion that opens Part III sketches out the doctrinal parameters of the concept of managerial prerogative in First Amendment jurisprudence. The concluding portion of Part III applies that framework to an issue expressly reserved for future decision in *Garcetti*—the interaction between managerial prerogative and the concept of academic freedom.

A. *A Doctrinal Framework for the Law of First Amendment Managerial Prerogative*

In recent years, a few scholars have advocated for reform of First Amendment doctrine within public institutions, while bemoaning the failure of existing doctrine to take account of institutional imperatives. Frederick Schauer, for example, has argued that First Amendment doctrine should be calibrated to the needs of particular public institutions,[208] and Professor Post has argued that the First Amendment doctrine ought to distinguish between the government acting in its regulatory and managerial capacities.[209] Even advocates of doctrinal reform have complained, however, about the difficulty of divining a new doctrine that would grant government institutions the power to regulate the content and even the viewpoint of speech without distorting the general marketplace of ideas.[210] After *Garcetti*, however, the contours of the new doctrine have begun to come into sharper focus. As we have seen, *Garcetti* offers managerial control over speech that the government has itself commissioned for its own purposes as the conceptual justification for recognizing governmental authority over the content of speech within a public institution. This is not quite the approach taken by Professors Schauer and Post, although it

203. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
204. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985).
205. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).
206. *See* NEA v. Finley, 524 U.S. 569, 569 (1998) (quoting 20 U.S.C. § 954(d)(1) (2000)).
207. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003).
208. *See, e.g.*, Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998); Frederick Schauer, *Toward an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).
209. *See, e.g.*, POST, *supra* note 80, at 234–65.
210. *See, e.g.*, Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1115–17 (1995).

contains important elements of their proposals along with an emphasis on affording public institutions the power to control institutional speech to the extent that such control facilitates the political accountability of those institutions.

1. The Threshold Inquiry

As we have seen, *Garcetti* and the other workplace speech cases are premised on a recognition that some public institutions cannot achieve otherwise constitutionally legitimate objectives—and therefore cannot be fairly held politically accountable for the manner in which they pursue such objectives—unless they are afforded the ability to control the speech of those within those institutions.[211] A focus on an institutional need to evaluate the content of speech, however, is not limited to the workplace speech cases. This point has become significant to a variety of First Amendment litigation involving the management of speech within public institutions.

Consider, for example, the forum cases, which treat governmental authority to regulate access to government property. The Court has held that when the government creates a forum for nongovernmental communication for a limited programmatic purpose, it may regulate the content of speech as long as the distinctions it draws are reasonable in light of the underlying purposes of the forum and not an effort to suppress disfavored viewpoints.[212] For instance, the Court has held that a public

211. This inquiry partakes of the distinction between managerial and public domains that Robert Post has offered:

> Public discourse must be distinguished from domains that I have elsewhere called "managerial." Within managerial domains, the state organizes its resources so as to achieve specified ends. The constitutional value of managerial domains is that of instrumental rationality, a value that conceptualizes persons as means to an end rather than as autonomous agents. Within managerial domains, therefore, ends may be imposed upon persons.
>
> Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon. Yet managerial domains are organized along lines that contradict the premises of democratic self-governance. For this reason, First Amendment doctrine within managerial domains differs fundamentally from First Amendment doctrine within public discourse. The state must be able to regulate speech within managerial domains so as to achieve explicit governmental objectives. Thus the state can regulate speech within public educational institutions so as to achieve the purposes of education; it can regulate speech within the judicial system so as to attain the ends of justice; it can regulate speech within the military so as to preserve the national defense; it can regulate the speech of government employees so as to promote "the efficiency of the public services [the government] performs through its employees"; and so forth.

Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) (quoting Connick v. Myers, 461 U.S. 138, 142 (1983)) (footnotes omitted).

212. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992); United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality opinion); Cornelius v. NAACP Legal

television station could permissibly exclude fringe candidates from a televised debate on the ground that limiting the debate to major candidates was a reasonable editorial judgment in a medium that necessarily requires editorial judgment to be exercised.[213] Thus, the imperatives associated with institutional objectives are thought to justify what would otherwise be considered impermissible discrimination against unpopular views or speakers. Similarly, when the government hires persons to speak on its behalf, it is well settled that the government may engage in content and even viewpoint regulation to ensure that its agents transmit the approved message.[214]

Questions of managerial prerogative also arise when the government must manage speech that is undertaken as part of its own programmatic objectives. We have seen that public employment is one such circumstance—a public employer must necessarily assess the quality of its employees' speech at the workplace, whether evaluating a prosecutorial recommendation or addressing a supervisor's alleged sexual harassment of a subordinate. *Garcetti* holds that this process of assessment is a managerial prerogative not subject to First Amendment attack, but in this *Garcetti* is not unique.[215] There are other circumstances in which the government must of necessity evaluate the quality of speech, and these cases implicate the concept of managerial prerogative no less than in *Garcetti*. Thus, when deciding what books and other materials it will carry, a public library must inevitably make judgments about the quality of the materials that it chooses to offer to the public.[216] When deciding which art

Def. & Educ. Fund, Inc., 473 U.S. 788, 807–13 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

213. *See Ark. Educ. Television Comm'n*, 523 U.S. at 678–83.

214. The general rule is that the government may engage in speech, or hire individuals to speak on its behalf, without violating the First Amendment as long as its speech is directed toward a legitimate governmental objective. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995); Rust v. Sullivan, 500 U.S. 173, 192–94 (1991). For a sampling of the impressive body of literature examining the First Amendment issues raised by speech of the government itself or those tasked to speak on its behalf, see, for example, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 158–207 (1983); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501–09 (2001); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 702–47 (1992); David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1659–83 (2006); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 26–52 (2000); Post, *supra* note 211, at 164–76; Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 560–73 (1996); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 605–22 (1980).

215. Perhaps the classic example of managerial prerogative is the military, where the Court has long recognized that the special needs of military discipline require recognition of a broad prerogative to manage speech. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 353–58 (1980); Parker v. Levy, 417 U.S. 733, 757–61 (1974).

216. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 204–06 (2003) (plurality opinion).

projects merit public subsidy, an arts program must evaluate the quality of the various applicants.[217] When deciding what content to offer to viewers, a public broadcaster must make essentially editorial judgments about the quality of broadcast material.[218] Moreover, as we have seen, when the government makes managerial judgments about the quality of speech, the government properly acts on the basis of standards far more imprecise than those required in general First Amendment jurisprudence.[219]

Thus, the threshold inquiry in the emerging law of managerial prerogative asks whether a public institution must manage or control the content of speech in order to achieve an otherwise constitutionally legitimate objective. If so, the general rule requiring strict scrutiny when the government regulates the content of speech is deemed inapplicable, and managerial prerogative will be recognized to ensure that the institution can fairly be held politically accountable for the manner in which its public duties are discharged. Locating the boundaries of managerial prerogative, in turn, requires an inquiry into the character of the content discrimination that is a proper incident to a public institution's mission.

2. The Propriety of Viewpoint Discrimination

As we have seen, the concept of managerial prerogative can justify both content and viewpoint discrimination. Still, the rule against viewpoint discrimination is not categorically inapplicable to public institutions. As we have seen, the patronage cases hold that ideological discrimination is forbidden in public employment except for positions in which ideological loyalty is "appropriate."[220]

The theory of political accountability at the root of the First Amendment law of managerial prerogative explains the emerging doctrine when it comes to viewpoint discrimination. Public institutions frequently will not require ideological loyalty from their staff in order to complete their missions—clerical employees expected to type and file need no ideological qualifications; and a public institution's political accountability is not compromised if it is permitted to inquire into only the clerical skills of its clerical staff, which can usually be readily monitored.[221] Sometimes,

217. *See* NEA v. Finley, 524 U.S. 569, 583–86 (1998).

218. *See Ark. Educ. Television Comm'n*, 523 U.S. at 673–75.

219. *See supra* notes 189–92 and accompanying text; *see also Finley*, 524 U.S. at 588–90.

220. *See supra* notes 50, 111 and accompanying text.

221. *Cf.* Rankin v. McPherson, 483 U.S. 378, 390–91 (1987) ("Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. We cannot believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency. At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee." (footnotes omitted)).

however, a public employee's ideology may well bear on and act as an appropriate proxy for performance. To return to the example of a prosecutor's office considered in Part I above, at least a measure of viewpoint discrimination is appropriate in that context; hiring prodefendant prosecutors would hardly be consistent with the prerogative of a District Attorney's office to take the most aggressive positions consistent with applicable law, and senior management cannot practicably monitor everything that line prosecutors do. Indeed, although the Supreme Court has yet to consider the question, the weight of authority in the lower courts is that the position of prosecutor is one for which ideological loyalty can be required.[222] And, as we have seen, when the government employs persons to speak for it, it may engage in viewpoint discrimination in order to ensure that the appropriate message is sent.[223] *Davenport* explains that when the government is not imposing generally applicable regulations, the rationale for a ban on viewpoint discrimination as an effort to ensure that disfavored views are not driven from the marketplace of ideas will often be absent,[224] and *Tennessee Secondary School Athletic Ass'n* adds that managerial prerogative should be assessed in light of the particular objectives of the governmental organization at issue.[225] Thus, the emerging First Amendment law of managerial prerogative requires an examination of the objectives of the institution at issue to assess whether the type of content or viewpoint discrimination at issue is a proper incident to institutional objectives or threatens to drive disfavored viewpoints from the marketplace of ideas.

3. Managerial Prerogative as a Shield Against External Interference

The First Amendment law of managerial prerogative, as we have seen, endeavors to permit institutions to manage speech as necessary in order to achieve otherwise constitutionally legitimate objectives. Intrusive judicial oversight, as we have also seen, can subvert the proper functioning of the marketplace of ideas by depriving public officials of managerial control and hence political accountability for the operation of public institutions. Judicial oversight, however, is not the only type of external interference with managerial prerogative that can undermine the proper functioning of a public institution within a broader marketplace of ideas.

When it comes to nongovernmental institutions that manage speech within the marketplace of ideas, the Court has long recognized that legislative interference with managerial prerogative offends the First Amendment. The Court invalidated a prohibition on editorializing by federally funded public broadcasters, for example, as distorting the proper

222. *See supra* note 118.
223. *See supra* note 214 and accompanying text.
224. *See supra* text accompanying notes 59–63.
225. *See supra* text accompanying notes 181–83.

role of broadcasters in the marketplace of ideas.[226] The same rule governs public institutions that must necessarily regulate speech in order to achieve an otherwise legitimate constitutional objective. As we have seen, the Court invalidated a prohibition on federally funded legal services organizations bringing litigation that challenged welfare laws on the ground that this distorted the proper role that lawyers play in protecting their clients' rights.[227] Thus, legislative interference with managerial prerogative runs afoul of the same principles that caution against judicial oversight of institutional management of speech.

4. Two Illustrations of the Emerging Doctrine

Governmental support for the arts illustrates the scope of First Amendment managerial prerogative, as well as the analytic confusion that results if the character of managerial prerogative is not clearly identified. In *Finley*,[228] the Court upheld a statutory requirement that the National Endowment for the Arts consider "decency and respect for the diverse beliefs and values of the American public" when awarding public funding while doubting the permissibility of an interpretation of these criteria that permitted viewpoint discrimination.[229] The Court's approach appears more than a bit contradictory. On the one hand, it is surely difficult to deny that the statutory criteria were a form of viewpoint discrimination—they plainly would work against art that attacks mainstream sensibilities.[230] On the other hand, it is far from clear that a rule against viewpoint discrimination is appropriate in arts funding, any more than it would be appropriate when the

226. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 381–401 (1984). The conceptual underpinning of this line of cases can be traced to *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in which the Court invalidated a statute granting political candidates a right to reply to editorials as an impermissible burden on editorializing, *see id.* at 254–57, and because it impermissibly interfered with editorial discretion:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258 (footnote omitted). For a more extended discussion of this doctrine and how it relates to public broadcasters, see Jonathan M. Phillips, Comment, *Freedom by Design: Objective Analysis and the Constitutional Status of Public Broadcasting*, 155 U. PA. L. REV. 991 (2007).

227. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–47 (2001).

228. NEA v. Finley, 524 U.S. 569, 576 (1998).

229. *See id.* at 576, 583–87.

230. This point was at the heart of the argument in the dissenting opinion. *See id.* at 604–11 (Souter, J., dissenting).

President picks his cabinet. At least in the view of many, it is difficult to separate ideology from the aesthetic merit of art, and a constitutional imperative that such programs ignore the sensibilities of most taxpayers and voters will ultimately make these programs politically untenable.[231] For my own part, I have a difficult time understanding how the First Amendment is advanced by a constitutional rule governing arts funding that requires public managers to follow a politically untenable course that must ultimately lead to the abolition of such programs, at least absent an empirical case, which the plaintiff in *Finley* did not attempt to make, that public funding threatens to effectively silence dissenting artistic viewpoints. But whether one agrees with *Finley* or not, there can be little doubt that managerial prerogative permits a government agency to consider the content of speech, and permits even the consideration of viewpoint to the extent that one agrees that viewpoint merges, at least on the margins, with artistic merit. The extent to which public arts funding should be exempt from the rule against viewpoint discrimination, in short, should turn on the extent to which viewpoint discrimination is thought to be a proper incident to the otherwise constitutionally legitimate objective of promoting excellence in the arts.

Contrast government arts funding with the management of a public library. At issue in *United States v. American Library Ass'n*[232] was the Children's Internet Protection Act (CIPA), legislation that required public libraries receiving federal funds or federally authorized discounted rates for Internet access to utilize filters that block pornographic material that are inappropriate for minors.[233] Although the case produced no majority opinion, there was general agreement on the appropriate doctrinal framework. Anticipating the conception of managerial prerogative articulated in *Garcetti*, eight Justices agreed that content discrimination at public libraries posed no particular problem because libraries properly make judgments about quality when building their collections.[234] There was similar agreement that the statute should be assessed to determine if it undermined the traditional function of public libraries, and no member of the Court was willing to characterize the function of libraries as promoting the study of some viewpoints at the expense of others.[235] Instead, the Court

231. For a defense of *Finley* that focuses on the sensibilities of taxpayers, see Lackland H. Bloom, Jr., NEA v. Finley*: A Decision in Search of a Rationale*, 77 WASH. U. L.Q. 1, 34–50 (1999).

232. 539 U.S. 194 (2003).

233. *See* 20 U.S.C. § 9134(f) (2006); 47 U.S.C. § 254(h)(6) (2006).

234. *See Am. Library Ass'n*, 539 U.S. at 204–06 (plurality opinion); *id.* at 216–20 (Breyer, J., concurring in the judgment); *id.* at 226 (Stevens, J., dissenting); *id.* at 235–36 (Souter, J., dissenting). The only member of the Court not to make this point in *United States v. American Library Ass'n* was Justice Kennedy, and he subsequently authored *Garcetti*.

235. *Id.* at 203–04, 207–08 (plurality opinion); *id.* at 214–15 (Kennedy, J., concurring in the judgment); *id.* at 216–18 (Breyer, J., concurring in the judgment); *id.* at 220–25 (Stevens, J., dissenting); *id.* at 235–42 (Souter, J., dissenting). This view of the library's function is

joined issue on the question of whether the statute distorted the proper function of libraries, with the majority concluding that the CIPA imposed such a modest burden on adult patrons: they needed only to request that the filter be disabled to view whatever they wished—that it should be viewed as a reasonable prophylactic effort to protect minors from inappropriate material,[236] while the dissenters argued that the statute improperly constrained the managerial discretion of libraries.[237]

Regardless of one's view on the correct result in *American Library Ass'n*, however, the decision helpfully illustrates the centrality to the emerging First Amendment law of managerial prerogative of an assessment of the extent to which a challenged regulation distorts or advances legitimate institutional objectives.[238] The decision reflects general agreement on the Court on two critical propositions: laws consistent with an otherwise legitimate institutional objective that necessarily requires the institution to distinguish between high- and low-quality speech are not subject to the rules against content or viewpoint discrimination; while laws that inhibit the ability of an institution to make such distinctions, at least when they are central to their own role in the marketplace of ideas, should be invalidated.

My purpose in reviewing the arts funding and library cases is not to rehash old litigation, but to illustrate both the utility and growing importance of managerial prerogative in First Amendment litigation. While the concept of managerial prerogative was absent in *Finley*, resulting in an opinion that lacked conceptual clarity, managerial prerogative importantly informed the decision in the library case, illustrating the growing importance of this concept in First Amendment doctrine. Yet, managerial prerogative is of greatest value if it can untangle conceptual difficulties in areas in which the law is not yet settled. That leads to the final institutional context that this Article examines—the public university.

also reflected in the earlier conclusion of four members of the Court that a public school may not remove books from school libraries for purely ideological reasons unrelated to sound pedagogy. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863–72 (1982) (plurality opinion).

236. *See Am. Library Ass'n*, 539 U.S. at 208–09 (plurality opinion); *id.* at 214–15 (Kennedy, J., concurring in the judgment); *id.* at 218–20 (Breyer, J., concurring in the judgment).

237. *See id.* at 225–30 (Stevens, J., dissenting); *id.* at 235–42 (Souter, J., dissenting).

238. The Children's Internet Protection Act (CIPA) presents an additional complication because its filtering requirement was imposed as a condition on the receipt of federal financial assistance. On the one hand, the plurality viewed this feature as bringing the CIPA within the protection of the cases on subsidized speech, *see id.* at 212 (plurality opinion); on the other hand, Justice Stevens argued that this feature meant that the plurality's reliance on the managerial prerogative of libraries to make judgments about quality was mistaken given that the statute functioned as a condition on funding rather than as a managerial decision, *see id.* at 226–28 (Stevens, J., dissenting).

B. *Managerial Prerogative in Higher Education*

Consider the management of public employee speech within the public university, where managerial prerogative seemingly collides with academic freedom.

1. Managerial Prerogative and Public Education

When it comes to primary and secondary education, there is plenty of evidence of the influence of managerial prerogative in First Amendment doctrine. Even as it recognized the right of junior and senior high school students to engage in a nondisruptive antiwar protest in *Tinker v. Des Moines Independent Community School District*,[239] the Court cautioned that schools can prevent protests under circumstances "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,"[240] a standard significantly more generous than the usual rule that protects potentially disruptive speech except when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[241] Since *Tinker*, the Court has held that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse,"[242] and on that basis upheld discipline against a student for a speech at a school assembly containing "pervasive sexual innuendo" that would have been protected outside of the school context;[243] and upheld a high school principal's excision from a school newspaper of articles about students' pregnancy and the impact of divorce because the principal's decision to prohibit publication was "reasonably related to legitimate pedagogical concerns."[244] These holdings surely demonstrate how the character of institutional objectives have come to shape the application of First Amendment rules that ordinarily view content discrimination as suspect.

239. 393 U.S. 503 (1969).

240. *Id.* at 514; *see also id.* at 513 ("If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.").

241. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *accord, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003); Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002); Texas v. Johnson, 491 U.S. 397, 409 (1989); NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 927–28 (1982); Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (per curiam).

242. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

243. *Id.* at 682–86.

244. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). To be sure, at some points, the opinion relied on the fact that the newspaper was sponsored by the school, *see id.* at 271–73, and therefore this decision is influenced to some extent by the government speech doctrine, *see supra* note 214 and accompanying text.

Most recently, in *Morse v. Frederick*,[245] the Court even tolerated a measure of viewpoint discrimination, holding that a high school may forbid speech at a school event that is reasonably construed to advocate use of illegal drugs in light of the pedagogical interest in discouraging drug use.[246] Even the dissenting opinion in that case acknowledged that "[g]iven that the relationship between schools and students 'is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults,' it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting."[247] This approach fits comfortably within the doctrinal parameters for a managerial prerogative outlined above—the mission of the public schools is to teach; they can therefore hardly be indifferent to advocacy that undermines their pedagogical objectives.[248] This prerogative to select and pursue pedagogical objectives reaches regulation of the speech of teachers no less

245. 127 S. Ct. 2618 (2007).

246. *Id.* at 2626–29. Even before *Morse v. Frederick*, courts had upheld restrictions on student speech that appeared to be viewpoint-based when supported by what they regarded as an adequate pedagogical justification. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–82 (9th Cir. 2006) (prohibition on displaying antigay message), *vacated as moot sub nom.*, 127 S. Ct. 1484 (2007); Scott v. Sch. Bd., 324 F.3d 1246, 1248–49 (11th Cir. 2003) (per curiam) (prohibition on displays of confederate flag); West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (same).

247. *Morse*, 127 S. Ct. at 2646 (Stevens, J., dissenting) (citation omitted) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)). Justice Stevens was willing to protect the speech at issue—a sign proclaiming "BONG HiTS 4 JESUS"—only because of its opacity, and seemingly embraced a norm of law-abidingness as a legitimate institutional objective: "[I]t is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy." *Id.* at 2646.

248. For a more extended discussion of the inevitability of viewpoint discrimination as an incident of the inculcation of values thought to be appropriate in primary and secondary education that in some respects anticipates *Morse*, see R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 206–13 (2007). In a similar vein, Emily Waldman argues that viewpoint discrimination is permissible to the extent that it involves speech that is reasonably attributable to the school because it occurs in a setting in which some measure of official endorsement or at least acquiescence to the viewpoint expressed could be reasonably implied. *See* Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 110–23 (2008). Prior to *Morse*, the more commonly expressed view in the academy condemned viewpoint discrimination in the public schools even while acknowledging, somewhat inconsistently, a legitimate role for values inculcation. *See, e.g.*, Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 824–42 (1995); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Values Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 64–71; Samuel P. Jordan, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555 (2003); Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 94–109 (2002); Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647 (2005). For a defense of *Morse* as properly deferring to institutional imperatives, see Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 870–77 (2008).

than students; the prerogative to insist on the chosen curriculum implies the correlative power to discipline teachers who deviate from that curriculum.[249] *Garcetti* confirms this conclusion by denying protection for the speech of public employees made pursuant to their duties.[250] After all, regulation of what teachers say to their classes (as well as much of what students say and write in school) "simply reflects the exercise of [managerial] control over what the [school] itself has commissioned or created."[251]

249. For surveys of pre-*Garcetti* case law reflecting this point, see W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 329–42 (1998); Waldman, *supra* note 248, at 75–87; Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 615–36 (1999).

250. The lower courts have read *Garcetti* in just this fashion. *See, e.g.*, Lee v. York County Sch. Dist., 484 F.3d 687, 694–700 (4th Cir. 2007); Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 671–73 (7th Cir. 2006)*; see also* Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 219–27 (2008) (summarizing decisions). For an elaboration on this aspect of *Garcetti*, see Waldman, *supra* note 248, at 102–08.

251. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006). In his concurring opinion in *Morse*, Justice Alito cautioned that he joined the opinion of the Court

> on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

127 S. Ct. at 2636 (Alito, J., concurring) (citation omitted). It is difficult to believe, however, that the Court's holding can remain so confined. Speech advocating the use of illegal drugs cannot plausibly be distinguished from speech advocating any other type of illegal activity that is potentially dangerous to minors. Perhaps more important, it is hard to believe that the cryptic prodrug message that can perhaps be teased out of Joseph Frederick's sign poses a greater threat to a school's pedagogical objectives than speech that straightforwardly urges students to neglect their studies. Indeed, as George Wright has recently argued, student speech that merely has the potential to distract others from their studies surely threatens legitimate pedagogical objectives. *See* R. George Wright, Tinker *and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 127–35 (2008). Whatever else his sign meant, Frederick was surely engaging in a form of juvenile clowning at a school event—and that alone might have triggered a legitimate managerial prerogative to avoid pointless distraction without need to turn Frederick into Timothy Leary (for the uninitiated, see Leary v. United States, 383 F.2d 851, 857 (5th Cir. 1967), *rev'd*, 395 U.S. 6 (1969)). Had the Court focused on the scope of managerial prerogative in the secondary school setting, it might have produced a more principled and persuasive opinion, while at the same time embracing Justice Alito's related statement that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'" at least if the mission were defined in a manner that "g[a]ve public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). An objective of producing ideological conformity, or even avoiding ideological distractions, when not anchored in broader pedagogical concerns, as we have seen, has always been treated as illegitimate, and *Tinker v. Des Moines Independent Community School District* applied that rule to the secondary school setting. Of course, one could also support the result in *Morse* through a different model—that of parental rather than

2. Managerial Prerogative and Academic Freedom

At first blush, higher education might seem like a poor candidate for inclusion in the First Amendment law of managerial prerogative. We generally think about higher education as a venue for uninhibited discussion and debate rather than one in which management is entitled to monitor and control the speech of institutional actors. First Amendment doctrine related to public colleges and universities seems to reflect just this point.

In *Healy v. James*,[252] for example, as it held that a public university had unconstitutionally denied recognition to a chapter of Students for a Democratic Society, the Court denied that "First Amendment protections should apply with less force on college campuses than in the community at large," adding that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[253] The Court has since held that mandatory student activity funds charged by public universities are subject to the First Amendment prohibition on compelled support for political or other ideological causes[254] and that public universities are equally subject to the public forum doctrine's rule against impermissible content discrimination,[255] confirming the applicability of the First Amendment to the public university.

There is, moreover, a substantial body of precedent recognizing a constitutional dimension to the concept of academic freedom, with the invocation of this concept in *Healy* providing only one example.[256] Thus, in *Garcetti*, the Court cautioned, "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."[257] Indeed, there is reason to be skeptical about *Garcetti*'s application to the

managerial prerogative. On this view, schools would no more be bound to respect First Amendment rights than parents. Indeed, Justice Thomas advocated such a model in *Morse*. *See* 127 S. Ct. at 2634–36 (Thomas, J., concurring). The Court, however, has rejected this approach since *Tinker*. *See id.* at 2637–38 (Alito, J., concurring).

252. 408 U.S. 169 (1972).

253. *Id.* at 180 (internal quotation marks omitted). The Court reiterated this point as it subsequently held that a public university had unconstitutionally expelled a student for distributing an allegedly indecent publication on campus. *See* Papish v. Bd. of Curators, 410 U.S. 667, 669–71 (1973) (per curiam).

254. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229–35 (2000).

255. *See* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 828–37 (1995); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981).

256. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (Powell, J.); *Healy*, 408 U.S. at 180; Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

257. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006). This qualification was offered in response to Justice Souter's expression of concern about the implications of the Court's holding for academic freedom. *See id.* at 438–39 (Souter, J., dissenting).

academy. Although scholarly speech and writing might seem within the scope of managerial prerogative as it was described in *Garcetti* because they are incidents of academic duties, as we have seen, *Garcetti* involved speech made by public employees acting as agents of the government. It is far from clear that scholarly work can be described in a similar fashion.[258]

The First Amendment concept of academic freedom, however, reflects the influence of managerial prerogative. The Court has invoked academic freedom when it has granted academics protection from forms of coerced ideological conformity, but in this line of cases, the coercion was imposed by external forces rather than by university leadership.[259] The Court has described this line of cases as "recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy."[260] This formulation, of course, leaves unclear whether the autonomy right is held by the institution rather than individual scholars. In the classic judicial explication of academic freedom as a First Amendment concept, Justice Frankfurter's opinion in *Sweezy v. New Hampshire*[261] speaks of academic freedom as an institutional rather than individual prerogative: "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be

258. *See, e.g.*, Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the* Pickering-Connick *Doctrine and the Public Higher Education Faculty After* Garcetti, 33 J.C. & U.L. 313, 350–59 (2007); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 823–29 (2007). For a similar argument for recognizing a broad swath of academic freedom prior to *Garcetti*, see Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1090–99 (2003).

259. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (invalidating statutory provisions barring "subversives" from university employment); Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating statute requiring teachers to disclose organizational affiliations); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (invalidating professor's conviction for refusal to answer Attorney General's questions about his lectures and political affiliations). In the context of primary and secondary education, the Court has similarly held that the First Amendment prohibits externally imposed regulation aimed at producing ideological conformity; for example, the Court has invalidated laws restricting the teaching of evolution. *See* Edwards v. Aguillard, 482 U.S. 578, 585–89 (1987); Epperson v. Arkansas, 393 U.S. 97, 104–08 (1968).

260. *Grutter*, 539 U.S. at 329; *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking [sic] by the academy itself." (citations omitted)).

261. 354 U.S. 234 (1957). This statement has since been invoked as seminal with some frequency. *See, e.g.*, Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 237–38 (2000) (Souter, J., concurring); *Ewing*, 474 U.S. at 226 n.12; Widmar v. Vincent, 454 U.S. 263, 276 (1981); *Bakke*, 438 U.S. at 312 (Powell, J.).

taught, and who may be admitted to study.'"[262] Notably, this account offers no rights to individual scholars or students to be free from institutional regulation.[263]

The influence of Justice Frankfurter's institutional approach to academic freedom in *Sweezy* is perhaps clearest in *Regents of the University of Michigan v. Ewing*.[264] In that case, the Court held that academic decisions are insulated from judicial review absent "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment,"[265] and cited the First Amendment's protection of academic freedom as supporting this narrow scope of review.[266] Moreover, since the Court had already held that the First Amendment grants individual scholars no entitlement to participate in university governance,[267] the upshot of *Ewing* is that the First Amendment conception of academic freedom is an institutional right, as opposed to some form of collective right of scholars that they exercise through some sort of entitlement to control university policy. Indeed, since *Healy*, the Court has retreated from its suggestion that the First Amendment requires that the university be an unregulated marketplace of ideas, suggesting considerable sway for the concept of managerial prerogative advanced above by cautioning that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.' . . . A university's mission is education, and decisions of this

262. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 12 (Albert van de Sandt Centlivres et al. eds., 1957)).

263. This is not to say that the public university itself holds First Amendment rights, at least against the government that has created it. There are a number of doctrinal objections to such a view. *See, e.g.*, Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 247–48 (6th Cir. 2006). *But cf.* Fagundes, *supra* note 214, at 1664–78 (developing a contrary argument offering some protection for governmental entities as First Amendment speakers). Instead, as noted above, the rule seems to be that individual academics have a right to be free from external interference with their academic work, but no right to be free from academic regulation by their institutional employer. This is, of course, the concept of managerial prerogative sketched in Part III.A above.

264. 474 U.S. 214 (1985).

265. *Id.* at 225.

266. *See id.* at 225–26. This principle of autonomy, it should be added, argues only for protection when there is some substantial interference with academic decision making. In cases in which the Court could discern no meaningful interference, claims of academic freedom have been rejected. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (upholding statute imposing duty of nondiscrimination on universities with respect to military recruiters); Univ. of Pa. v. EEOC, 493 U.S. 182 (1990) (enforcing subpoena for peer review materials in litigation alleging sex discrimination in tenure review).

267. "[T]his Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions . . . . Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting . . . there is no constitutional right to participate in academic governance . . . ." Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287–88 (1984).

Court have never denied a university's authority to impose reasonable regulations compatible with that mission . . . ." [268] Thus, the academic freedom line of cases reflects deference to managerial prerogatives.[269]

268. Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981) (citation omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). Moreover, in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, as it upheld the antirecruiting rule at issue in that case, the Court observed that "Brentwood made a voluntary decision to join TSSAA and to abide by its anti-recruiting rule," then noted, citing *Connick* and *Pickering*, that "[j]ust as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants," and from this concluded that "TSSAA can similarly impose only those conditions on such speech that are necessary to managing an efficient and effective state-sponsored high school athletic league." 127 S. Ct. 2489, 2495 (2007) (citations omitted). This approach, in addition to linking public employee and public school First Amendment cases, has plain application to the students and faculty at public universities, who voluntarily affiliate with their institutions in a way that primary and secondary students, who are required to attend school, do not. Indeed, even in *Healy v. James*, the Court cautioned that "[i]n the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. . . . Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." 408 U.S. 169, 189 (1972) (quoting *Tinker*, 393 U.S. at 513); *accord* Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 669–70 (1973) (per curiam). In any event, *Healy* and its progeny concern the First Amendment rights of students, rather than those of teachers.

269. This view is consistent with that of most scholarly observers, who have characterized the First Amendment doctrine of academic freedom in terms of institutional autonomy. *See, e.g.*, Blocher, *supra* note 248, at 877–82; William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 230–62 (1999); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 304–11, 323–27 (1989); Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 472–501 (2005); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1310–22 (1988); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919–26 (2006); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 79, 135–43. Even commentators who advocate an account of academic freedom that affords rights to the individual scholar acknowledge that existing doctrine provides only limited if any protection of this type. *See, e.g.*, Matthew Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 846–54 (1983); Lynch, *supra* note 258, at 1090–99; Julie H. Margetta, *Taking Academic Freedom Back to the Future: Refining the "Special Concern of the First Amendment,"* 7 LOY. J. PUB. INT. L. 1, 30–34 (2005); David M. Rabban, *A Functional Analysis of the "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 227, 280–300. The leading dissenter from this view argues that courts have overread Justice Frankfurter's *Sweezy v. New Hampshire* opinion, and denies that the Supreme Court has ever squarely held that the First Amendment protects institutional academic freedom. *See* Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007). This account, however, reads at least *Regents of the University of Michigan v. Ewing* quite grudgingly, and does not dispute that Justice Frankfurter's opinion in *Sweezy*, even if overread, has taken on quite a life of its own. Nevertheless, if it is right that the First Amendment, properly understood, offers no special protection for academic freedom, then this concept supplies no basis to limit the applicability of *Garcetti* to higher education.

Equally important, the public university fits comfortably within the ambit of the emerging First Amendment law of managerial prerogative. Under the doctrinal framework advanced above, the threshold inquiry is whether the public institution at issue must necessarily engage in the management of the writing and speech in order to achieve its legitimate societal objectives. On that score, the public university falls well within the scope of First Amendment managerial prerogative—institutions of higher education must necessarily evaluate the content and quality of speech in order to perform their function. Grading is the most obvious example, but the same is true when public universities decide what to teach, whom to hire, and whom to tenure.[270] The argument for management of speech, however, goes much deeper than that. The function of the university involves more than staffing decisions and the allocation of grades; the university is widely seen as an institution central to both the search for truth and the promotion of high-quality public discussion and debate through its cultivation of a faculty that insists on the highest standards of intellectual rigor by its adherence to scholarly norms.[271] Thus, when the government establishes a university, it is seeking to foster a very special type of writing and speech. The public university accordingly presents a context entirely consistent with *Garcetti*'s view that public managers will sometimes enjoy a prerogative to control speech that they have themselves created or commissioned.

3. The Scope of Managerial Prerogative in the Public University

As we have seen, the scope of managerial prerogative is ascertained by identifying the forms of content or viewpoint discrimination that are properly incident to the university's mission as a public institution. Many forms of content discrimination—for example, evaluating the work of students and faculty for its academic merit—are plainly central to the mission of the university. When faculty grade students or evaluate candidates for tenure or promotion, an evaluation of the candidates' writings and speech in order to assess their academic merit is inescapable.

270. As Justice Stevens has written,

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written.

Widmar, 454 U.S. at 278 (Stevens, J., concurring in the judgment).

271. For a more detailed argument along these lines, see Byrne, *supra* note 269, at 333–40. The same point can be made in economic terms; the university can be seen as reducing transaction costs in the marketplace of ideas by acting as a repository for particularly high-quality writing and speech. *See* Blocher, *supra* note 248, at 857. In their accounts of the function of higher education, university leaders have similarly stressed the role of higher education in improving the quality of deliberative democracy. *See, e.g.*, DEREK BOK, OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE 185–93 (2006); AMY GUTMANN, DEMOCRATIC EDUCATION 50–52, 172–75 (1987).

Universities must also manage speech to ensure that it is consistent with curricular objectives. Faculty must, for example, monitor students' written work and in-class comments to ensure they are relevant to curricular objectives, just as the university must monitor faculty to ensure that they hew to the prescribed curriculum. Even before *Garcetti*, courts had consistently upheld discipline against teachers for speech that would otherwise be protected, but that was inconsistent with prescribed curricular objectives or that lacked a pedagogical justification.[272] *Garcetti* confirms the soundness of this approach. And, as we have also seen, while the First Amendment may forbid external interference in a public university's assessment of student and faculty speech, it equally insulates such academic determinations against judicial review.[273]

Thus, a measure of content discrimination is undoubtedly within the scope of a public university's managerial prerogative. But what of viewpoint discrimination? As we have seen, the emerging law of managerial prerogative will sometimes tolerate viewpoint discrimination when it is unlikely to drive disfavored ideas from the general marketplace of ideas,[274] but higher education might seem to be a poor candidate for permitting viewpoint discrimination. After all, if disfavored viewpoints are banned from the university, they may indeed disappear from the marketplace of ideas altogether.[275] The opponents of university speech codes, for example, point out that they are viewpoint-based regulations of expression,[276] and add that the purpose of the relevant institution is properly

272. *See, e.g.*, Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 594–95 (6th Cir. 2005) (professor could be disciplined for refusing to provide students with additional information about grading policies); Vega v. Miller, 273 F.3d 460, 466–68 (2d Cir. 2001) (termination of professor for use of sexually explicit and vulgar language in classroom infringed no clearly protected right and was therefore protected by qualified immunity); Brown v. Armenti, 247 F.3d 69, 74–75 (3d Cir. 2001) (professor's refusal to change a grade unprotected); Bonnell v. Lorenzo, 241 F.3d 800, 818–21 (6th Cir. 2001) (professor's use of vulgarities in classroom unprotected); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491–92 (3d Cir. 1998) (professor's choice of curriculum and materials unprotected); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1191 (6th Cir. 1995) (coach's use of racial slur unprotected); Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) (professor's use of vulgarities in classroom unprotected); Lovelace v. Se. Mass. Univ., 793 F.2d 419, 425–26 (1st Cir. 1986) (per curiam) (professor's grading policy unprotected). Conversely, at least before *Garcetti*, use of vulgarities or other speech normally deemed unprotected in the educational setting was held to be protected when it occurred in a context in which a pedagogical justification was evident. *See* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 681–82 (6th Cir. 2001).

273. *See supra* notes 261–65 and accompanying text. Thus, as one court explicated the case law, "[j]udicial interference with a university's selection and retention of its faculty would be an interference with academic freedom." Weinstein v. Univ. of Ill., 811 F.2d 1091, 1097 n.4 (7th Cir. 1987).

274. *See supra* Part I.B.3.

275. *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834–37 (1995) (public university's exclusion of religious organizations from receiving proceeds of student activity fund amounted to impermissible viewpoint discrimination).

276. *See, e.g.*, BERNSTEIN, *supra* note 146, at 59–72 (discussing constitutional implications of university speech codes); Stephen Fleischer, *Campus Speech Codes: The*

understood to facilitate rather than inhibit the development of diverse viewpoints.[277]

Resolution of these questions, under the view of managerial prerogative advanced above, requires an identification of the forms of content or viewpoint discrimination that are properly part of a university's mission. And while the conception of a university as a viewpoint-neutral marketplace of ideas is perhaps attractive, it is far from clear that the First Amendment compels public universities to hew to such a model—or even that such a model is consistent with the character of scholarly speech that the university seeks to foster. After all, among other things, the university is a forum in which the search for truth and the quality of democratic deliberation is enhanced through an insistence on the highest standards of scholarship and argument. In such a forum, content regulation is appropriate, but a measure of viewpoint regulation is called for as well. A simple effort to produce ideological conformity advances no generally understood mission of the public university, and for that reason managerial prerogative grants universities no exception from the general rule embraced by the patronage cases. Nevertheless, while partisan political affiliation and any number of other ideological screens could not be regarded as appropriate criteria for decision making in a public university, any number of viewpoints lack credibility under the norms of the relevant academic discipline, and surely no one would expect the university to remain indifferent to students or faculty who pursue them.

Consider, for example, the view of those who advocate Holocaust denial in the face of voluminous historical evidence to the contrary.[278] Surely no one could doubt the propriety of a public university's refusal to hire a historian who pursued such dubious views, just as no university could be expected to refrain from discriminating against an applicant for a sociology department who proposed to use astrology as a means of studying social

Threat to Liberal Education, 27 J. MARSHALL L. REV. 709, 712–28 (1994) (applying First Amendment doctrine to speech codes); Robert A. Sedler, *The Unconstitutionality of Campus Bans of "Racist Speech": The View from Without and Within*, 53 U. PITT. L. REV. 631, 646–53 (1992) (discussing "the constitutionality of bans on racist speech on campus"); Jeanne M. Craddock, Comment, *Constitutional Law—"Words That Injure; Laws That Silence": Campus Hate Speech Codes and the Threat to American Education*, 22 FLA. ST. U. L. REV. 1047, 1060–89 (1995) (arguing that the First Amendment does prohibit content-based restrictions on speech in campus speech codes).

277. *See, e.g.*, Fleischer, *supra* note 276, at 739–47; Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1399–400 (1990). A closely related attack on speech codes makes the point that in the university context, counterspeech should be the appropriate response to the expression of noxious views. *See* Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1256–63 (1995).

278. For a description of the small but significant advocacy within the academy of Holocaust denial despite the contemporaneous efforts to document Nazi atrocities in the wake of World War II, see Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 37–52 (1997).

trends.[279] One might deny that this is viewpoint discrimination, and claim instead that such regulation is merely a form of content regulation—an insistence that scholarly work be supported by appropriate evidence. Yet, in the general marketplace of ideas, the government would surely be guilty of viewpoint discrimination by insisting that only views with ample evidentiary support enter the marketplace of ideas. Even in the context of the public university, discrimination against those who base their views on faith rather than evidence—religious adherents—has already been branded by the Supreme Court as viewpoint rather than content discrimination.[280] I see no basis for treating astrology—or Holocaust denial—any differently. For that matter, a history department might well choose not to hire adherents to the "great man" theory of history in an effort to enhance its reputation with regard to other, more academically respected approaches to history, yet this too involves discrimination against an identifiable viewpoint.[281] Yet, while a refusal to hire astrologers as sociologists, or Holocaust deniers, or "great man" advocates as historians, is properly characterized as viewpoint discrimination under current doctrine, it is surely a type of viewpoint discrimination that is a necessary part of the mission of the university—ensuring that the positions taken by scholars are supported by the type of evidence that is demanded by scholarly norms, so that scholarly work is appropriately rigorous and disciplined, just as the work of students undertaken as part of their studies is subject to intensive monitoring for quality.[282]

To be sure, First Amendment jurisprudence generally insists on counterspeech as the answer to meritless ideas, as the critics of speech codes note,[283] but surely it is not the function of the university to hire scholars that it thinks incompetent and hope that someone else rebuts their work; or to grant degrees to students that hew to discredited doctrines in the hope that someone can eventually persuade them otherwise.[284] If the public

279. For a more elaborate argument along these lines, from which I have borrowed the astrology example, see Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 155, 158–63.

280. *See Rosenberger*, 515 U.S. at 829–46.

281. For a discussion of changing views of the proper study of history, see, for example, Peter Burke, *Overture: The New History, Its Past and Future*, *in* NEW PERSPECTIVES ON HISTORICAL WRITING 1, 1–23 (Peter Burke ed., 1991).

282. For a lengthier explication of the role that viewpoint discrimination properly plays in the academy, see Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1033–44 (1993).

283. *See, e.g.*, Calleros, *supra* note 277, at 1256–63.

284. J. Peter Byrne has made the point eloquently:

> In society at large, freedom of speech insulates from penalty expression that is vulgar, pernicious, incomprehensible, and mad. . . . The justifications for this regime are various but persuasive. First Amendment doctrine recognizes the danger to a democratic political process if officials proscribe some subjects or modes of expression. . . .
>
> Yet can it be said that these familiar themes exhaust the value to democratic society of free expression? The First Amendment ought also to be aspirational.

university is to elevate the caliber of scholarly, public discussion and debate, it must have the power to regulate both the content and the viewpoint of speech consistent with scholarly norms. As we have seen, in the general marketplace of ideas, the government would surely be guilty of viewpoint discrimination by insisting that only views with ample evidentiary support enter the marketplace of ideas, but just as surely, the academy properly insists on scholarly norms as a means of exposing "more subjective, flabbier, and less coherent thinking."[285] Of course, when regulation is not based on scholarly norms but some other objective, then the argument for deference to the academy's effort to pursue its academic mission disappears.[286] But, as we have seen, First Amendment doctrine reflects this point by granting deference only when regulation is consistent with scholarly norms and not the product of external political interference.[287]

Accordingly, the First Amendment law of managerial prerogative tolerates regulation of speech within the university as long as that regulation represents a bona fide professional judgment of academic merit consistent with scholarly norms. It will now be helpful to apply what may seem like a relatively abstract formulation to a concrete case.

4. Managerial Prerogative and Faculty Speech: The Case of Ward Churchill

Although a managerial prerogative to assess the content and viewpoint of speech consistent with scholarly norms may seem uncontroversial when it

> Society ought to strive toward speech that is truthful, gracious, well-considered, and generous to opponents. It ought not settle for . . . speech that is ignorant, self-interested, manipulative, hateful, or vapid. . . .
>
> Preeminent among the systems of discourse within our diverse society, academic speech holds expression to high standards. For all the notorious faults of jargon and circumlocution associated with scholarship, academic speech provides our most important model of expression that is meaningful as well as free, coherent yet diverse, critical, and inspirational.

Byrne, *supra* note 269, at 260–61 (footnotes omitted).

285. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 419 (1991).

286. Paul Horwitz has argued that the existence of distinct institutional norms should ordinarily be seen as a prerequisite for special judicial deference to institutions under the First Amendment. *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1510–15 (2007). Whatever the merit of this view, however, it does not reflect the emerging law of First Amendment prerogative, which affords deference to institutions that lack such a distinctive normative structure, such as the public workplace, where managerial prerogative is justified as an incident of political accountability without need of an elaborate normative structure that governs institutional regulation of speech, as we have seen. Still, as the preceding discussion demonstrates, the existence of distinctive institutional norms is of considerable aid in identifying constitutionally legitimate institutional objectives as well as impermissible external interference with managerial prerogative.

287. *See supra* notes 259–64 and accompanying text.

comes to hiring and tenure decisions, what of other academic work? Consider, for example, Ward L. Churchill, the University of Colorado professor of ethnic studies who was fired after producing a notorious essay that seemingly characterized the terrorist attacks of September 11, 2001 as an understandable response to American foreign policy, although the university claimed that his termination was based on unrelated academic misconduct.[288] Presumably, the university's insistence that it had not discharged Churchill for the essay reflects conventional pre-*Garcetti* thinking that even poorly reasoned and inflammatory work, if addressing a matter of public concern, is eligible for constitutional protection.[289] Considering the view of managerial prerogative advanced here, however, things look quite different.

We have seen that at least when it comes to making hiring and promotional decisions, the First Amendment permits a public university to evaluate the content and even the viewpoint of scholarly writing and speech consistent with scholarly norms. Had Churchill included his September 11 essay in an application for tenure, there is little doubt that the First Amendment would have permitted a denial of tenure consistent with prevailing scholarly norms. At least to my eye, the essay as a whole is little more than a rant, and its most notorious passage, in which the civilian victims of the attack on the World Trade Center were likened to "little Eichmanns,"[290] is a non sequitur. It may well be that many participants in

288. *See* Dan Frosch, *Colorado Regents Vote to Fire a Controversial Professor*, N.Y. TIMES, July 25, 2007, at A11.

289. For the conventional view, see J. Michael McGuinness, *Public Employee Expression Law Under the Colorado and Federal Constitutions*, COLO. LAW., Apr. 2005, at 77.

290. This characterization appeared in the context of an argument that the victims of the attacks should not be considered "innocent" (to the extent that the argument made is comprehensible):

> There is simply no argument to be made that the Pentagon personnel killed on September 11 fill that bill. The building and those inside comprised military targets, pure and simple. As to those in the World Trade Center . . . Well, really. Let's get a grip here, shall we? True enough, they were civilians of a sort. But innocent? Gimme a break. They formed a technocratic corps at the very heart of America's global financial empire ? the "mighty engine of profit" to which the military dimension of U.S. policy has always been enslaved ? and they did so both willingly and knowingly. Recourse to "ignorance" ? a derivative, after all, of the word "ignore" ? counts as less than an excuse among this relatively well-educated elite. To the extent that any of them were unaware of the costs and consequences to others of what they were involved in ? and in many cases excelling at ? it was because of their absolute refusal to see. More likely, it was because they were too busy braying, incessantly and self-importantly, into their cell phones, arranging power lunches and stock transactions, each of which translated, conveniently out of sight, mind and smelling distance, into the starved and rotting flesh of infants. If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I'd really be interested in hearing about it.

Ward Churchill, *"Some People Push Back" On the Justice of Roosting Chickens*, http://www.politicalgateway.com/news/read.html?id=2739 (last visited Aug. 14, 2008).

corporate America cast a blind eye toward what may well be American depredations in the Third World, but this hardly merits the remotest comparison with an architect of the Nazi genocide.[291] The statement is an inflammatory, unthinking hyperbole; if there is an argument that those who planned the extermination of millions are morally equivalent to those who are insensitive to the impact of United States foreign and economic policies in the Third World, it is not made in Churchill's essay.

But perhaps the original essay can be forgiven as written in the heat of the moment. Yet, in a book that he later published, presumably after having had ample time to reflect on the fairness of his comparison of those who worked at the World Trade Center to those who directed the murder of millions, Churchill refused to back down:

> The storm of outraged exception taken by self-proclaimed progressives to this simple observation has been instructive, to say the least. The objections have been mostly transparent in their diversionary intent, seeking as they have to focus attention exclusively on janitors, firemen and food services workers rather than the much larger number of corporate managers, stock brokers, bond traders, finance and systems analysts, etc., among those killed.
>
> A few have complained of the "cold bloodedness" and the "insensitivity" embodied, not in the vocations pursued by the latter group, but in describing their attitudes/conduct as having been in any way analogous to Eichmann's. Left unstated, however, is the more accurate term we should employ in characterizing a representative 30-year-old foreign exchange trader who, in full knowledge that every cent of his lavish commissions derived from the starving flesh of defenseless Others, literally wallowed in self-indulgent excess, playing the big shot, priding himself on being a "sharp dresser" and the fact that "money spilled from his pockets . . . flowed like crazy . . . [spent] on the black BMW and those clothes—forgetting to pack ski clothes for a Lake Tahoe trip. Dropping $1,000.00 on new stuff," and so on. As a "cool guy" with a "warm heart"? A "good family man"? Just an "ordinary," "average" or "normal" fellow who "happened to strike it rich?" How then are we to describe Eichmann himself?[292]

One hardly knows where to begin. The fact that the foreign exchange trader considered himself unextraordinary surely does not merit any comparison with Adolf Eichmann—unless pretty much the entire world's population merits similar comparison. As for Churchill's claim that the trader acted "in full knowledge that every cent of his lavish commissions derived from the starving flesh of defenseless Others," Churchill's

291. For an account of Adolf Eichmann's role in the genocide, see DAVID CESARANI, EICHMANN: HIS LIFE AND CRIMES 36–199 (2004).

292. WARD CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY 19–20 (2003) (footnotes omitted) (ellipses and brackets in original).

supporting footnote cites only an obituary in the *New York Times*,[293] which itself says nothing of the trader's supposed awareness of the lamentable source of his income; it does not even identify the nature of the trader's work.[294] If there is an argument that foreign exchange trading inevitably produces starvation, it is not made by Churchill; and he surely makes no effort to explain why he is unable to discern any moral distinction between a foreign currency exchange trader who may be indifferent to the suffering that his profession supposedly creates and those who plan genocide. Although I profess no particular expertise in the field of ethnic studies, one certainly hopes that such work is not consistent with scholarly norms in the field.

To be sure, ordinary First Amendment doctrine tolerates a good deal of rhetorical hyperbole,[295] and protects statements that cannot reasonably be construed as factual assertions as opposed to opinions.[296] But these principles are found in cases considering generally applicable laws—they do not answer the question whether a university must disregard what it finds to be shoddy scholarship by one who seeks a scholarly position. It is hard to understand how the marketplace of ideas is harmed if academic institutions insist that those who seek admittance to institutions that adhere to uniquely high standards comply with norms of scholarship rather than indulge an appetite for vituperation. If bad scholarship were somehow protected from critical evaluation in the hiring and tenure process, public universities plainly could not fulfill their legitimate functions.[297] The authority to repudiate bad scholarship and those who create it is plainly within the scope of First Amendment managerial prerogative. The absence

293. *Id.* at 33 n.128.

294. *See* B. Drummond Ayres, Jr. et al., *An Old-Fashioned Man, A Pair of Loving Brothers, and a Jolly Snowboarder*, N.Y. TIMES, Dec. 9, 2001, § 1B, at 8.

295. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–56 (1988); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982); Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284–86 (1974).

296. *See* Milkovich v. Lorain Journal, Co., 497 U.S. 1, 18–22 (1990). Nevertheless, given Ward Churchill's apparently baseless but seemingly factual claim that some of the World Trade Center victims knew that "every cent of [their] lavish commissions [was] derived from the starving flesh of defenseless Others," *supra* note 292, it may well be that he is not entitled to the First Amendment protection afforded statements of opinion even without reference to managerial prerogative.

297. As Professor Byrne wrote, long before *Garcetti*,

> [T]he free exchange of ideas, the support of which is the central tenet of the First Amendment, is a more attractive ideal when it results in insight and elucidation rather than in manipulative persuasion of vituperative ranting. The development of a field of knowledge through reasoned debate and the progress of a student to a critical perspective are among the most appealing and fruitful forms of expressive activities. These goals are often missing in political or commercial speech. This may be the sense behind Justice Brennan's highly figurative declaration that the "classroom is peculiarly the 'marketplace of ideas.'"

Byrne, *supra* note 269, at 337 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). For a statement along similar lines, see Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006).

of any reasoned defense of Churchill's incendiary reference to Eichmann puts his essay in the realm of inflammatory cant, incapable of persuading, rather than measured and incisive advocacy of an unpopular position.

Of course, the Churchill essays were not part of an application for scholarly employment, promotion, or tenure. One could argue that Churchill wrote them as a citizen addressing a matter of public concern and therefore should receive First Amendment protection.[298] One could also argue, however, that university faculty are paid, among other things, to produce work of intellectual value for both the academy and the public at large, and, as a consequence, the university's enforcement of scholarly norms even with respect to post-tenure writings intended for a nonscholarly audience "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[299] To resolve this debate under the conception of employer prerogative advanced above, one must return to the role of content discrimination in defining the mission of a public university.

It is surely difficult to understand why the role of the university must be limited to promoting high-quality scholarship only in work that is included in a promotion or tenure application, with the university otherwise indifferent to the quality of the work that its scholars produce. The point of the promotion and tenure process becomes elusive if it is understood to permit scholars to abandon the standards to which they have been trained to adhere upon receiving tenure and instead produce work as debased, demagogic, and unreasoned as the worst of popular culture. After all, there seems little reason to inculcate norms of quality in the hiring, promotion, and tenure processes that academics are free to ignore once they have surmounted these processes.[300] In particular, a university could legitimately expect that its ethnic studies scholars will make some contribution toward elevating debate over America's interaction with the Third World, rather than resorting to the most inflammatory and misleading kind of rhetoric.

298. Some pre-*Garcetti* cases seem to take this view of the nonscholarly work of academics. *See, e.g.*, Levin v. Harleston, 966 F.2d 85, 87–89 (2d Cir. 1992).

299. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006). This is the reason that the extracurricular speech of students is likely subject to less extensive regulation than faculty speech. The mission of the university is not generally understood to include supervision of student speech not undertaken as part of the curriculum, although a full exploration of this issue lies beyond the scope of this Article.

300. To be sure, academics sometimes produce nonscholarly work wholly unrelated to their academic interests that can therefore be characterized as irrelevant to the university's managerial prerogative to control work that it has effectively commissioned. It may be that writing or speech bearing little relation to a scholar's academic pursuits, and which has no likelihood to undermine the scholar's effectiveness as a teacher, does not implicate legitimate managerial interests. For an argument along these lines, see Thomson, *supra* note 279, at 165–72. As we will see, however, this distinction is not reflected in authoritative statements embodying generally accepted scholarly norms.

That said, I have stressed that academic freedom protects scholars against political interference and insists that academic decisions be consistent with scholarly norms. Churchill's essays appear to have been intended for a popular audience, and therefore very likely should not be held to the same standards as work intended for an academic audience. Still, even the canonical accounts of academic freedom have never asserted that it includes protection for shoddy reasoning or unsupported accusations in a faculty member's nonscholarly writings.[301] For example, the 1915 American Association of University Professors statement on academic freedom, the foundational document of its type in the United States,[302] acknowledged that "in their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or exaggerated modes of expression."[303] It also acknowledged the academy's obligation "to purge its ranks of the incompetent and the unworthy, [and] to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship."[304] These norms have remained widely accepted in the academy.[305] Thus, although work directed at a general audience is properly judged by different standards than scholarly output, those who indulge in advocacy of crackpot ideas compromise the quality of public discussion in debate in a manner inconsistent with the norms of the academy. While the First Amendment forbids enforced ideological conformity, it offers no protection to those whose work is inconsistent with scholarly norms, as we have seen. And, if Churchill's work is consistent with scholarly norms, even for work directed at a popular audience, then we are all in trouble.

Although I suspect that few serious scholars have any sympathy with Churchill's essays, one could legitimately fear that the termination of those who voice unpopular views will have a chilling effect even on responsible scholars. As a doctrinal matter, however, the Court has never found this possibility in itself sufficient to impose on public universities a system of

301. *See, e.g.*, Finkin, *supra* note 269, at 822–29; Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499, 514–24 (2001); Horwitz, *supra* note 269, at 477–79.

302. *See, e.g.*, RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 468–506 (1955); Byrne, *supra* note 269, at 276–79; Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law, and Collective Action*, 16 CORNELL J.L. & PUB. POL'Y 263, 268–74 (2007); Metzger, *supra* note 269, at 1267–85.

303. AM. ASS'N OF UNIV. PROFESSORS, THE 1915 DECLARATION OF PRINCIPLES (1915), *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE 172 (Louis Joughin ed. 1967).

304. *Id.* at 170.

305. For a discussion of the development of professional norms with respect to scholars' speech outside of their academic roles since the 1915 statement, see Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609, 627–29, 634–37, 647–49 (2001).

tenure protection as a matter of constitutional imperative.[306] There is, moreover, reason to doubt the likelihood of this sort of chill. Tenure offers a variety of valuable protections to scholars.[307] A university that capriciously erodes these protections will accordingly find itself at a significant disadvantage in the market for scholarly talent. Moreover, evidence of political interference with academic decision making may add up to a compelling case for pretext, depriving a university of the institutional academic freedom defense to which it would otherwise be entitled.[308] Indeed, the conception of managerial prerogative advanced here could well ward off political interference with academic decision making precisely because such interference would provide the basis for judicial intervention.

The possibility of pretext, however, supplies no justification for granting scholars lifetime protection for any and all shoddy work. Surely a constitutional guarantee of protection for the incompetent is as real a threat to the mission of the university as any other. The concept of managerial prerogative, in turn, grants universities the control over speech that compromises legitimate institutional missions, such as a university's desire to elevate the level of public discussion and debate. After all, the threat to academic freedom comes from political pressure, not scholarly norms. The fact that bad scholarship may also reflect an unpopular political viewpoint—as in the Churchill essays—is surely no reason to insulate bad scholarship from the operation of scholarly norms.

CONCLUSION

As the adverse scholarly reaction to *Garcetti* demonstrates, the emergence of managerial prerogative in First Amendment law strikes many as alarming, since it seems to reduce the scope of First Amendment protections that those who work in public institutions enjoy.[309] Yet managerial prerogative also advances critical First Amendment objectives. Public institutions are properly assigned important societal objectives, and are properly held politically accountable when they fail to achieve those

306. To the contrary, the Court has been quite clear on this point: "[T]he interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest." Bd. of Regents v. Roth, 408 U.S. 564, 575 n.14 (1972).

307. For an account of the benefits afforded faculty by tenure, see Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 69–81 (2006).

308. To be fair, there is some evidence of political interference in Professor Churchill's case. *See* Cope, *supra* note 258, at 342–44. On the view advanced here that external interference with academic decision making does not fall within the scope of First Amendment managerial prerogative, a finding that political interference was a substantial motivating factor for Churchill's dismissal would require the university to bear the burden of proving that it would have dismissed Churchill even absent political pressure. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977).

309. *See supra* notes 3–5 and accompanying text.

objectives. The First Amendment's protection for speech and the press is thought to grant the public the information it needs to enforce political accountability, but political accountability is undermined if the mission of public institutions could be subverted by prodefense prosecutors, efficiency-sapping workplace harassers, or inept scholars, who could use the costs and risks of litigation as a means to blunt the ability of politically accountable public officials to bring them to heel.

When it comes to the regulation of speech outside of public institutions, we all compete in the marketplace of ideas, and First Amendment doctrine endeavors to keep the competition fair. But when it comes to the performance of public institutions, it is the marketplace of ideas that evaluates them. Permitting public institutions to act on their own assessments of the quality of speech within those institutions does not insulate institutional management from the marketplace of ideas—the next election holds them accountable for the manner in which they have managed the public institutions within their care. Those who fire prodefense prosecutors, or who discharge whistleblowers who have exposed serious misconduct, will necessarily confront the ordinary processes of political accountability that are themselves protected by the First Amendment. The last say on the exercise of managerial prerogative is had by the voters.

For those who aspire to a fully effective and accountable government, the emerging law of managerial prerogative, by insisting on both managerial control and managerial accountability, has considerable virtues. After all, the First Amendment law of managerial prerogative acts in a representation-reinforcing manner. It recognizes managerial authority in order to facilitate the process by which public institutions are held politically accountable for the manner in which they discharge their responsibilities—a process that would be undermined by intrusive judicial oversight that would diffuse accountability. Yet, as we have seen, it also circumscribes managerial authority when public employee speech is most likely to enhance accountability—as in the case of the true whistleblower who brings concealed governmental misconduct into public view, or in the case of the officeholder who seeks to coerce ideological loyalty from his employee-voters. For this reason, the emerging First Amendment law of managerial prerogative bears more than a little resemblance to representation-reinforcing theories of judicial review, such as the one famously championed by John Hart Ely.[310] In this sense, Professor Ely's work continues to shape constitutional law. Worse things could happen.

310. *See* ELY, *supra* note 44, at 73–104.