

# LAWYER SPEECH IN THE REGULATORY STATE

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[C]riticism of their colleagues by public employees should be considered one of the most highly valued of speech activities . . .<sup>1</sup>

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[T]he speech of a lawyer[] . . . is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished.<sup>2</sup>

## INTRODUCTION

The expansion of the modern regulatory state demands a corresponding safeguard to ensure that officials act in the public's interest and advance democratic values.<sup>3</sup> Preserving space for free-flowing speech about corruption, illegal behavior, and other wrongdoing within the government agency workplace is an important way to protect the public, promote democracy, and preserve institutional legitimacy. While it is true that "[t]he tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present,"<sup>4</sup> the value of speech directed to curb the abuse of power is especially high in our modern era of massive government bureaucracy<sup>5</sup> accompanied by the rise

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1. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521, 634.

2. *Garcetti v. Ceballos*, 547 U.S. 410, 446 (2006) (Breyer, J. dissenting).

3. Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 *HARV. L. REV.* 1170, 1181 (2002). Whereas the public interest is typically meant to "connote a single, transcendent outcome that would best serve community welfare without reference to democratically expressed preferences," the notion of democratic values "connotes those aspects of agency decisionmaking that promote the agency's legitimacy in a democratic system of government." *Id.* "These democratic values include conformity with established law, public participation, and sensitivity to discernible public preferences," among other things. *Id.*

4. Blasi, *supra* note 1, at 529 (citations omitted) (referencing philosophers and theorists such as Aristotle, Montesquieu, Madison, Mill, Cooke, Locke, and Popper).

5. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *HARV. L. REV.* 421, 421–22 (1987) ("The post-New Deal increase in presidential power, and the creation of a massive bureaucracy concentrated in the executive branch, have augmented factional power and self-interested representation, often leading to regulation that fails to

of the “national surveillance state.”<sup>6</sup> This is because, while courts may “set the constitutional contours” of the regulatory state, it is administrative agencies that determine the functional day-to-day application.<sup>7</sup> Indeed, “[i]n many areas, the constitutional law enunciated in formal [agency] opinions and memoranda . . . is sometimes at least as important as any decision of Article III courts.”<sup>8</sup>

One obvious source of a check on government power in the regulatory state is government employee speech. Under current First Amendment jurisprudence, however, minimal protection exists for this sort of speech. This is true even for government lawyers and judges,<sup>9</sup> despite the unique professional obligations required of those licensed to practice law or hold judicial office.

The minimal protection for the speech of lawyers employed by the regulatory state is surprising given the special duties placed on members of the legal profession, which demand greater accountability as officers of the court and conservators of the rule of law than what is expected of most government employees. These obligations are even higher for members of the legal profession working in government office than for private attorneys, because government lawyers and judges “cannot be partisan advocates for any single position. Quite the opposite, [they] must pay heed to a range of parties and interests when undertaking any action.”<sup>10</sup> This treatment of lawyer speech is also surprising because lawyers employed by the regulatory state increasingly function as whistleblowers,<sup>11</sup>

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serve the interests of the public at large.”). From 2009 to 2012, Sunstein was Administrator of the White House Office of Information and Regulatory Affairs for the Obama Administration. See *Cass R. Sunstein*, HARV. L. SCH., <http://hls.harvard.edu/faculty/directory/10871/Sunstein> (last visited Mar. 27, 2016) [<https://perma.cc/H3H7-UYJ6>].

6. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489–90 (2006).

7. Alan B. Morrison, *What If . . . Buckley Were Overturned?*, 16 CONST. COMMENT. 347, 347 (1999).

8. Balkin & Levinson, *supra* note 6, at 498. According to Professors Balkin and Levinson, “The most obvious example over the past five years is the [Office of Legal Counsel within the Department of Justice’s] enunciation of the broad scope of presidential power in foreign affairs, leading, in one notorious example, to a crabbed and narrow reading of what constitutes ‘torture’ banned by domestic law and international treaties” which “also offered . . . highly disturbing views about the essentially unconstrained powers that the President enjoys under Article II.” *Id.* at 498–99.

9. It is notable that the two U.S. Supreme Court decisions most damaging to First Amendment protection for government employee speech involve lawyers. See *Connick v. Myers*, 461 U.S. 138 (1983) (holding that the First Amendment rights of an assistant district attorney discharged for circulation of a questionnaire regarding office conditions to coworkers were not violated); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that the First Amendment rights of a prosecutor who experienced retaliation after reporting investigatory misconduct were not violated).

10. Note, *supra* note 3, at 1181.

11. See, e.g., Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245 (2009) (discussing concerns present when public and private sector attorneys are not protected for whistleblowing).

gatekeepers,<sup>12</sup> and compliance officers.<sup>13</sup> Many also serve in quasi-judicial roles within various administrative agencies.<sup>14</sup>

As the regulatory state continues to grow,<sup>15</sup> the public is in greater need of affordable, well-organized governmental accountability. One solution might be to offer greater First Amendment protection to all government employees acting in a whistleblowing, gatekeeping, or compliance capacity. This expansion, however, surely would come at the cost of efficiency and control of the workplace for the government acting as an employer to manage day-to-day office functions.<sup>16</sup> Another solution is to offer greater protection to some, but not all, government employees. The latter is explored here—strong protection for government lawyer speech when engaged in assessment of the workplace. This speech has been described as “speech about ‘the manner in which government is operated[,] the protection of which was a central purpose of the First Amendment.’”<sup>17</sup> To be clear, in this Article I am concerned about a very specific sort of speech by lawyers: what I will call workplace assessment—namely, the speech that serves as a check on government abuse by “information providing,”

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12. See, e.g., Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 595–603, 608 (2005) (detailing several developments and trends, such as: “a shift in the regulatory center of gravity toward Washington with a corresponding shift from judicial to legislative and administrative regulation; [and a] greater emphasis on regulation that makes lawyers gatekeepers in order to protect public or third-party, rather than client, interests”); see also David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1164 (1993) (citing Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986)) (identifying the lawyer’s role in preventing client misconduct by employing the “gatekeeper strategy” in which “the lawyer can refuse to participate in the disputed transaction or otherwise withhold support in a manner that makes it more difficult for the client to accomplish its illicit purpose”).

13. See, e.g., Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71 (2014).

14. See, e.g., Terence G. Ison, *Administrative Law—The Operational Realities*, 22 CAN. J. ADMIN. L. & PRAC. 315 (2009).

15. See, e.g., John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1184 (1995) (citations omitted) (observing that “[i]n the last thirty years, we also have witnessed a spectacular growth of the federal regulatory state” and listing examples of “a vast range of social legislation establishing new responsibilities, rights, and remedies to protect the environment, public health, and occupational safety”). Expanded protection under the First Amendment has paralleled the growth of the regulatory state, though not in the contexts of government employee or government lawyer speech. See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1730 (1991) (“Not only did the post-New Deal government possess unprecedented interventionist powers, but it consolidated these powers within relatively unaccountable administrative agencies. Faced with the task of reconstituting the Founding commitment to liberty in response to these challenges, the Court invigorated the Bill of Rights’ non-economic guarantees of personal freedom—most energetically, the speech and press clauses of the First Amendment.”).

16. See *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006); *Connick v. Myers*, 461 U.S. 138, 149–54 (1983).

17. *Connick*, 461 U.S. at 156 (Brennan, J., dissenting) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

“watchdogging,” or “whistleblowing.”<sup>18</sup> As Randy Kozel explains in defining these terms:

When an employee keeps the public abreast of office operations and issues, she is performing an *information-providing* function. When the information she is providing pertains to potential inefficiencies in the employer’s office, she is performing a *watchdogging* function. And when the topics of her speech are not inefficiencies but illegalities, she is performing a *whistleblowing* function.<sup>19</sup>

Professional and occupational speech, and especially lawyer speech, historically has received scant attention from First Amendment theorists.<sup>20</sup> Recently, however, a handful of scholars have turned their attention to this topic, perhaps in part due to the controversial nature of *Garcetti v. Ceballos*,<sup>21</sup> as well as increased focus on occupational licensing<sup>22</sup> and publicity surrounding government lawyers as whistleblowers.<sup>23</sup> The attention may also be a function of a recent spate of decisions among lower courts involving the level of scrutiny to be applied when a government employee’s speech is restricted.<sup>24</sup> Or it could be due simply to the expanding number of government lawyers. As the regulatory state has grown at all levels in local, state, and federal government, so has the number of government attorneys—126,450 employed in the United States in 2014 according to the Bureau of Labor Statistics, or 21 percent of all

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18. See Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1038 (2005).

19. *Id.*

20. See, e.g., W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 305 (2001) (“One of the most important unanswered questions in legal ethics is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys acting in their official capacity.”). This is especially true regarding scholarship about the ethical obligations of government lawyers. See Allan C. Hutchinson, *‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers*, 46 OSGOODE HALL L.J. 105, 106 (2008) (“[L]ittle energy has been directed towards defining and defending the role and duties of government lawyers. Not only do the various official codes of professional conduct remain almost silent . . . there is also a paucity of academic literature and professional commentary . . .”).

21. 547 U.S. 410 (2006); see, e.g., Jeffrey W. Stempel, *The Worst Supreme Court Case Ever? Identifying, Assessing, and Exploring Low Moments of the High Court*, 12 NEV. L.J. 516, 523 (2012) (“My own pick for ‘worst’ case is *Garcetti v. Ceballos*, in which the Court denied a retaliatory discharge claim based on the purported First Amendment rights of a government employee . . .”).

22. See, e.g., Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 165 (2015) (critiquing the D.C. Circuit’s recent decision striking a licensing requirement for tour guides on First Amendment grounds and observing that “[u]ntil very recently, it was well accepted that purely economic regulations are subject to rational basis review”).

23. See, e.g., Jesselyn Radack, *When Whistle-Blowers Suffer*, L.A. TIMES (Apr. 27, 2010), <http://articles.latimes.com/2010/apr/27/opinion/la-oe-radack-20100427> [https://perma.cc/P2M9-WXYK]; see also Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221 (2015).

24. See, e.g., Julian W. Kleinbrodt, *Pro-Whistleblower Reform in the Post-Garcetti Era*, 112 MICH. L. REV. 111, 115 (2013) (“*Garcetti* has produced general confusion in the lower courts.” (citations omitted)).

lawyers.<sup>25</sup> This is an increase from 105,130 government attorneys a decade ago (20 percent of all lawyers)<sup>26</sup> and only 38,062 half a century ago (14.2 percent of all lawyers).<sup>27</sup>

In my earlier work, I articulated a First Amendment theory supporting strong protection for attorney advice and advocacy.<sup>28</sup> In my view, a lawyer's speech as advisor and advocate not only holds First Amendment value for the client and for the public, but also for the functioning of American democracy.<sup>29</sup> This is supported both by foundational values undergirding the First Amendment as well as Supreme Court doctrine.<sup>30</sup> In this Article, I build upon that analysis to posit that lawyers for the regulatory state ought not to be treated as government employees for purposes of the First Amendment when engaged in speech about workplace conditions related to curbing abuse of power, corruption, or other illegality. While my position runs counter to the existing precedent of closely divided Supreme Court decisions, it finds support in a historical and philosophical understanding of free speech principles.

The workplace assessment speech I am contemplating here goes to the heart of First Amendment values. Consider, for example, the "checking value" of lawyer speech for the regulatory state.<sup>31</sup> Lawyers often will be in the best position to act as a check on government abuse of power in light of the responsibilities placed upon the legal profession to maintain our democratic form of government.<sup>32</sup> As such, this Article suggests that the

25. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2014 (2014), <http://www.bls.gov/oes/current/oes231011.htm> [<https://perma.cc/4AVT-FXZ3>]. This figure includes 52,550 local government lawyers, 39,790 state government lawyers, and 34,220 federal executive branch lawyers. *Id.* The total number of lawyers for 2014 according to the Bureau of Labor Statistics was 603,310. *Id.*

26. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2004 (2004), <http://www.bls.gov/oes/2004/may/oes231011.htm> [<https://perma.cc/SP73-3HX7>]. This figure includes 48,760 local government lawyers, 32,100 state government lawyers, and 24,270 federal executive branch lawyers. *Id.* According to the Bureau of Labor Statistics, the total number of lawyers for 2004 was 521,130. *Id.*

27. AM. BAR FOUND., THE 1971 LAWYER STATISTICAL REPORT 12 (Bette H. Sikes et al. eds., 1972) (statistics from 1963). The total number of lawyers in 1963 was 269,069, according to the report. *Id.* at 5.

28. See generally Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2012).

29. *Id.*

30. See *id.* at 675–77 (discussing philosophical foundations for protecting attorney advice under the First Amendment); *id.* at 664–72 (discussing doctrinal foundations for protecting attorney advice under the First Amendment, including *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *NAACP v. Button*, 371 U.S. 415 (1963)).

31. See Blasi, *supra* note 1, at 521.

32. See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (“[L]awyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” (quoting *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383 (1963))); MODEL RULES OF PROF'L CONDUCT pmbl. ¶¶ 10–11 (AM. BAR ASS'N 2014) (“The legal profession is largely self-governing. . . . [It] is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement.”). As such, “[s]elf-regulation also helps maintain the legal profession's independence from government domination.” *Id.* This is critical because “[a]n independent

speech of lawyers for the regulatory state warrants heightened protection when it is serving this checking-value function.

The Article proceeds as follows. Part I critiques two highly controversial split decisions from the Supreme Court ascribing minimal First Amendment protection to government lawyer speech—*Connick v. Meyers*<sup>33</sup> and *Garcetti v. Ceballos*.<sup>34</sup> While I certainly am not the first to question the outcomes of *Connick* and *Garcetti* (indeed, some call *Garcetti* one of the worst Supreme Court opinions ever),<sup>35</sup> the significance of workplace assessment speech by lawyers in the context of the regulatory state largely has escaped the attention of commentators and courts.<sup>36</sup> This Article helps fill that void.

Part II then turns to an explanation of why lawyers are different from other government employees. Here, I explore three justifications for heightened protection. First, government lawyers' speech, because of their special training and education, can serve important political functions, including acting as a check against government misconduct. Second, the speech of lawyers is subject to special professional duties not typically placed on government employees. Third, similar to judges, lawyers serving the regulatory state must act beyond the interests that guide a private practice attorney, taking into account the agency's role within the overall government structure as well as the public's interest.

The conclusion proposes a framework to be applied to the workplace assessment speech of government lawyers when acting as a check on the power of the regulatory state. By applying this framework, rather than what the Court did in *Connick* and *Garcetti*, in the future, members of the legal profession faced with concerns about governmental abuse of power will be permitted to exercise professional judgment to report wrongdoing—and be protected when they do so. Protecting government lawyers' workplace assessment speech can serve as a critical check against abuse of power by officials and help legitimize the role of the regulatory state in American democracy.

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legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." *Id.*

33. 461 U.S. 138 (1983).

34. 547 U.S. 410 (2006).

35. See Stempel, *supra* note 21, at 523.

36. A Lexis search for sources addressing the First Amendment protection for government employee speech resulted in over 1000 articles, compared to only a dozen or so articles focusing specifically on the speech of lawyers and judges as whistleblowing government employees in the wake of *Connick* and *Garcetti*. This search was conducted on July 2, 2015, and the results are on file with the author. Perhaps this is due to a systemic inattention to members of the legal profession as employees of the regulatory state—it has been observed that "[g]overnment lawyers are the orphans of legal ethics." Hutchinson, *supra* note 20, at 106.

I. THE EVOLUTION OF FIRST AMENDMENT PROTECTION FOR  
WORKPLACE ASSESSMENT SPEECH BY GOVERNMENT EMPLOYEES

Congress shall make no law . . . abridging the freedom of  
speech . . . .<sup>37</sup>

The First Amendment protects the freedom of expression without regard to content or viewpoint, even if it is unpleasant, disruptive, vulgar, offensive, or insulting. This protection, however, is not absolute, and the government may limit speech in a number of ways, whether as the sovereign, a regulator of professions and industries, or an employer.<sup>38</sup> For example, in its capacity as a sovereign, the government may establish time, place, and manner restrictions.<sup>39</sup> The government can restrict unprotected speech<sup>40</sup> and decide what viewpoints may be expressed in its own speech.<sup>41</sup> Reasonable, content-based restrictions can be placed on which speech is permissible on government property that is not fully open to the public.<sup>42</sup> The government often restricts speech as the regulator of professions and industries, for example as the regulator of lawyers,<sup>43</sup> judges,<sup>44</sup> prison administrators,<sup>45</sup> radio/television stations,<sup>46</sup> and the military.<sup>47</sup>

37. U.S. CONST. amend. I.

38. *See infra* notes 39–49.

39. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (“[G]overnment has no power to restrict such activity because of its message. Our cases make equally clear, however, that reasonable ‘time, place[,] and manner’ regulations may be necessary to further significant governmental interests, and are permitted.” (citations omitted)).

40. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” (citations omitted)).

41. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”).

42. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (“Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum . . . is not dedicated to general debate or the free exchange of ideas.”).

43. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”).

44. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015) (“States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. [The Court] must decide whether the First Amendment permits such restrictions on speech. [The Court] hold[s] that it does.”).

45. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 86 (1987) (“The Court rejected the inmates’ First Amendment challenge to the ban . . . noting that judgments regarding prison security ‘are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters.’” (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974))).

46. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969) (“[T]he Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.”).

Relevant to this Article, the government may also regulate the speech of its employees, including government lawyers.<sup>48</sup> Government employee speech historically received no First Amendment protection. Justice Holmes is famous for his line that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>49</sup> In other words, government employees had to accept their employment “on the terms which [were] offered” to them.<sup>50</sup>

The Warren Court’s focus on individual rights,<sup>51</sup> however, led to greater protection for government employee speech in *Pickering v. Board of Education*.<sup>52</sup> The case involved a public school teacher fired for publishing a letter to the editor critical of tax policy proposed by the Board of Education.<sup>53</sup> This is an example of the government employee as an information provider and a watchdog.<sup>54</sup> The Court found that government employees do not sacrifice all free speech rights as a condition of their employment; rather, there must be “a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>55</sup> Using this balancing test, the Court held that the teacher’s speech was protected because it related to a matter of public concern and did not interfere with the efficient operation of the school.<sup>56</sup> The Court later extended *Pickering* protection to a government employee speaking privately to a supervisor.<sup>57</sup> Even when the Court extends less protection, it recognizes that “[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”<sup>58</sup>

Subsequent decisions, however, weakened *Pickering*’s protection and, interestingly, repeatedly involved workplace assessment speech by a

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47. See, e.g., *Parker v. Levy*, 417 U.S. 733, 756 (1974) (“For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.”).

48. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (“[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”).

49. See, e.g., *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (1892) (upholding an ordinance banning police officers from political fundraising).

50. *Id.* at 518.

51. See, e.g., William F. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205 (1970).

52. 391 U.S. 563 (1968).

53. *Id.* at 564–65.

54. Kozel, *supra* note 18, at 1038 (“Teachers are, as a class, the members of a 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.” (quoting *Pickering*, 391 U.S. at 572)).

55. *Id.* at 1015 (quoting *Pickering*, 391 U.S. at 568).

56. *Pickering*, 391 U.S. at 572.

57. See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

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

government lawyer.<sup>59</sup> *Connick*, decided in 1983, involved a lawyer working in the Orleans Parish District Attorney's Office,<sup>60</sup> and *Garcetti*, decided in 2006, involved a lawyer working in the Los Angeles County District Attorney's office.<sup>61</sup> As this Article goes to print, we sit at the decade anniversary of *Garcetti*. This marks an important moment to reflect upon the decision's consequences for the government lawyer's role and duties engaging in workplace assessment in a regulatory state, particularly given that the opinion is perhaps the most disparaged free speech case ever rendered by the Court. A brief overview of both cases lays out the critical tensions involved when the government, as an employer, seeks to manage the workplace by silencing speech on government abuse.

#### A. *Connick v. Myers*

In *Connick v. Myers*, an assistant district attorney's employment was terminated based on her circulation of a questionnaire addressing workplace concerns.<sup>62</sup> Sheila Myers argued that this violated her First Amendment rights.<sup>63</sup> The Supreme Court held 5-4 that it did not.<sup>64</sup> The Court reached this result by adopting a "public concern" threshold test to be satisfied before applying a *Pickering* analysis.<sup>65</sup> Immediately prior to Myers's termination, she had distributed a "questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."<sup>66</sup> Her supervisor, District Attorney Harry Connick, soon informed her that "she was being terminated because of her refusal to accept the transfer . . . [and] that her distribution of the questionnaire was considered an act of insubordination."<sup>67</sup>

Although she won her wrongful termination claim in the lower court, the Supreme Court overturned that result because the majority did not view the questionnaire as sufficiently addressing matters of public concern.<sup>68</sup> The one exception, according to Justice White writing for the majority, was the question about whether employees felt pressured to work in a political campaign.<sup>69</sup> But after evaluating the context surrounding Myers's writing and distribution of the questionnaire, the majority determined that the rest of the questions were "mere extensions of Myers'[s] dispute over her transfer to another section of the criminal court."<sup>70</sup>

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59. *See infra* Part I.A–B.

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

61. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

62. *Connick*, 461 U.S. 138.

63. *Id.* at 141.

64. *Id.* at 139.

65. *Id.* at 142.

66. *Id.* at 141.

67. *Id.*

68. *Id.* at 154.

69. *Id.* at 149.

70. *Id.* at 148.

The majority failed to recognize, as Justice Brennan observed in writing for the dissent, that “[t]he First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy.”<sup>71</sup> For Justice Brennan, and Justices Blackmun, Marshall, and Stevens joining his opinion, the proper application of a public concern test would cover the very matters at issue in Myers’s questionnaire. This would include issues “that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital governmental agency, discharges his responsibilities.”<sup>72</sup>

With the benefit of hindsight, we see that Justice Brennan was prescient in his observations about the value of the speech at issue in *Connick*. The Orleans Parish District Attorney’s Office, as it turns out, permitted for decades a workplace culture that led to significant prosecutorial misconduct, in some instances causing the wrongful incarceration of innocent individuals for many years.<sup>73</sup> As a *New York Times* article published nearly thirty years later documented:

For the third time in 16 years and the second time in two, the Orleans Parish district attorney’s office must explain itself before the United States Supreme Court.

Each of the cases involves charges of prosecutorial misconduct, and in particular the failure to turn over crucial evidence to the defense, a constitutional violation that defense lawyers, former prosecutors and four Supreme Court justices have said was at least at one time “pervasive” in the district attorney’s office here. In the case last year, one of the key issues was not whether the misconduct took place, but how widespread it was. . . . Justice John Paul Stevens called the office’s violations “blatant and repeated.”<sup>74</sup>

Admittedly, Myers’s questionnaire did not directly address this particular misconduct; but her workplace assessment speech—asking questions about the pressures faced by employees, the working performance of personnel, office morale, and the benefit of an internal employee grievance

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71. *Id.* at 160 (Brennan, J., dissenting).

72. *Id.* at 163.

73. See, e.g., David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J.F. 203, 207–08 (2011) (describing the wrongful conviction of John Thompson, who spent fourteen years on death row because the Orleans Parish District Attorney’s Office withheld exculpatory evidence (citation omitted)). Keenan et al. also note that Harry Connick, as the District Attorney of Orleans Parish, “offered no formal training to its prosecutors regarding [exculpatory] evidence.” *Id.* at 207. Connick

stopped reading legal opinions after he came to office in 1974 and was therefore unaware of important Supreme Court rulings . . . . Shortly after Connick’s retirement, “a survey of assistant district attorneys in the Office revealed that more than half felt they had not received the training they needed to do their jobs.”

*Id.* at 207–08.

74. Campbell Robertson & Adam Liptak, *Louisiana Prosecutors’ Methods Raise Scrutiny Again*, N.Y. TIMES, Nov. 3, 2011, at A19.

committee—might very well have uncovered concerns about the misconduct resulting in multiple wrongful convictions as well as other information that is a matter of public concern.<sup>75</sup> Myers’s information providing and watchdogging was intended to uncover a workplace culture that we now know, sadly all too well, led to substantial government abuse.

### B. *Garcetti v. Ceballos*

Two decades after *Connick*, the Court again addressed the scope of First Amendment protection for government employees by taking up another case involving an attorney, this time at the Los Angeles District Attorney’s Office. *Garcetti v. Ceballos*, again a 5-4 decision, came on the heels of “one of the worst police scandals in U.S. history, involving corruption and widespread abuses by an anti-gang unit of the LA Police Department . . . .”<sup>76</sup> Eventually, this led “to the overturning of more than 100 convictions, the departure of more than a dozen officers, [and] the payment of \$70 million to victims . . . .”<sup>77</sup> Richard Ceballos, a calendar attorney in the district attorney’s office, wrote a memorandum raising concerns about a case that involved possible police misconduct, specifically the use of an affidavit with “serious misrepresentations” to secure a search warrant.<sup>78</sup> The memo led to a contentious meeting with his superiors,<sup>79</sup> and he was subpoenaed by the defense.<sup>80</sup> Ceballos alleged that his superiors retaliated against him by denying a promotion, among other things, for the memo he wrote, violating his First Amendment right to freedom of speech.<sup>81</sup>

The majority opinion, authored by Justice Kennedy, focused not on whether the speech was a matter of public concern (because it unquestionably was) but rather on whether the speech was made in furtherance of official employee duties.<sup>82</sup> According to the majority, “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>83</sup> This is true “even if his judgment in this case was sound and appropriately expressed.”<sup>84</sup> Thus, the majority concluded that Ceballos’s speech was not protected, even while simultaneously recognizing that “[e]xposing governmental inefficiency and misconduct is a matter of considerable significance . . . .”<sup>85</sup> In other words, before applying *Pickering*, the Court first requires that an employee speak as a citizen on a

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75. See generally *Connick*, 461 U.S. 138.

76. Brief for Respondent at 1, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473).

77. *Id.* at 2.

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

79. *Id.*

80. *Id.*

81. *Id.* at 415.

82. See *id.* at 413–26.

83. *Id.* at 421.

84. *Id.* at 432 (Souter, J., dissenting).

85. *Id.* at 425 (majority opinion).

matter of public concern—if the employee is not speaking as a private individual, then “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.”<sup>86</sup> This characterization ignores a fundamental aspect of the role of a lawyer, where professional obligations require a fidelity to the democratic process and rule of law, a point to which I return to below in Part II.

Justice Souter, writing in dissent, characterized the First Amendment value of Ceballos’s speech differently. He explained that the “private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation” of “its chosen policy and objectives.”<sup>87</sup> According to Justice Souter, Ceballos should have been able to claim First Amendment protection when “speaking out against a rogue law enforcement officer, [regardless of whether] his job requires him to express a judgment about the officer’s performance.”<sup>88</sup> The majority’s view, by contrast, seriously compromises any effort to encourage whistleblowing.

Justice Souter also recognized the special obligations of lawyers which further inform the First Amendment value of workplace assessment speech: “Some public employees are hired to ‘promote a particular policy’ by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.”<sup>89</sup> Souter would have applied *Legal Services Corp. v. Velazquez*<sup>90</sup> to protect the whistleblowing activity in *Garcetti*.<sup>91</sup> In *Velazquez*, in a 5-4 decision also authored by Justice Kennedy, the Court struck down a federal restriction preventing attorneys for the Legal Services Corporation (LSC) from challenging the validity of a state or federal statute.<sup>92</sup> Under the challenged restriction, the LSC attorneys were required to cease representation immediately if a question about a statute’s validity arose.<sup>93</sup> Justice Kennedy’s opinion expressed the concern that, if the legislative restriction was validated by the Court, “there would be lingering doubt whether the truncated representation had resulted in . . . full advice to the client . . . .”<sup>94</sup> As a consequence, both “[t]he courts and the public would” be left “to question the adequacy and fairness of professional representations . . . .”<sup>95</sup> Recognizing the importance of “an informed, independent bar,”<sup>96</sup> he further noted that “[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws

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86. *Id.* at 418.

87. *Id.* at 428 (Souter, J., dissenting).

88. *Id.* at 431.

89. *Id.* at 437 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001)).

90. 531 U.S. 533 (2001).

91. See *Garcetti*, 547 U.S. at 437.

92. *Velazquez*, 531 U.S. at 536–37 (“[T]he restriction . . . prohibits legal representation funded by recipients of [Legal Services Corporation’s] moneys if the representation involves an effort to amend or otherwise challenge existing welfare law.”).

93. *Id.* at 544–45.

94. *Id.* at 546.

95. *Id.*

96. *Id.* at 545.

from legitimate judicial challenge”<sup>97</sup> brought by members of the legal profession. Similarly, the outcome of *Garcetti* (as well as *Connick*) insulates the government from legitimate challenges brought by members of the legal profession. Under *Velazquez*, government lawyer speech in this context ought to be protected.

## II. WHY LAWYER SPEECH, AND GOVERNMENT LAWYER SPEECH, IS NOT GOVERNMENT EMPLOYEE SPEECH

Numerous commentators have critiqued the legacy of *Connick* and *Garcetti*, calling for reform.<sup>98</sup> For example, as one scholar has observed, the outcomes of these cases undermine our democracy “by allowing government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters’ views and facilitate their ability to hold the government politically accountable for its choices.”<sup>99</sup> Others have argued that “the Court should have retained the *Pickering-Connick* balancing inquiry and not limited the scope of the First Amendment” in *Garcetti*<sup>100</sup> and that the opinion “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.”<sup>101</sup>

A few scholars have endeavored to justify the *Connick* and *Garcetti* decisions. For example, Robert Post would separate speech furthering the government’s “managerial” authority, which it draws upon in “administering its own institutions,” from the government’s “governance” authority, which it demands in order to “govern the general public.”<sup>102</sup> This distinction is significant, according to Post, because it explains why “[m]anagerial authority is controlled by [F]irst [A]mendment rules different

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97. *Id.* at 548; see also *Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) (“Laws punishing speech which protests the lawfulness or morality of the government’s own policy are the essence of the tyrannical power the First Amendment guards against.”).

98. See, e.g., Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2D 335, 341 (2006) (“Many fewer whistleblowers are likely to come forward without constitutional protection.”); Stempel, *supra* note 21; Mark Strasser, *Whistleblowing, Public Employees, and the First Amendment*, 60 CLEV. ST. L. REV. 975, 976 (2013) (“As far as the Constitution is concerned, an individual who fulfills her professional duties by exposing corruption or threats to public health and safety may permissibly be fired. If our recent history teaches us anything, it is that such an understanding of constitutional protections cannot help but undermine the public good.”).

99. Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009).

100. See, e.g., Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 563 (2008).

101. Chemerinsky, *supra* note 98, at 340.

102. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775 (1987). For another perspective justifying the outcome of *Garcetti*, see Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 33 (2008) (rejecting “the scholarly consensus on *Garcetti*,” and observing that “although the Court’s opinion is admittedly undertheorized, its holding is consistent with fundamental principles of First Amendment law”).

from those which control the exercise of the authority used by the state when it acts to govern the general public.”<sup>103</sup> As a consequence, he asserts in a case like *Connick*, “[m]anagerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon.”<sup>104</sup>

My point here is narrower than these commentators, in part because of my belief that lawyer speech at times warrants higher protection under the First Amendment than that of others when the speech serves an advisory, advocacy, or assessment function.<sup>105</sup> This view is grounded upon the premise that “a strong and forceful legal profession is a vital resource in holding governments to democratic account and guaranteeing that all citizens are empowered by vigorous representation in their dealings with governing bodies and other powerful elites.”<sup>106</sup> Consequently, it is critical to view the protection of lawyer speech as the equivalent of protecting professional independence, thus facilitating lawyers’ ability to “act as a bulwark between state oppression and citizens’ freedom.”<sup>107</sup>

As a pragmatic matter, I also recognize the administrative tensions involved if all government employee workplace assessment speech were protected fully under the First Amendment. Given this reality, I do not join the chorus of critics who would extend the First Amendment to all employees.<sup>108</sup> Instead, I contend that the speech of lawyers in this context deserves heightened protection for at least three reasons. First, government lawyers and judges are uniquely poised to serve as a check against agency misconduct given their education and training. Second, the speech of lawyers and judges is subject to special duties placed on members of the legal profession—duties which, at times, by their nature demand that they speak out against abuses of power. Third, much like judges, government lawyers must function in a less partisan manner than their private counterparts, which makes them better prepared to engage in a reasoned, balanced inquiry in workplace assessment speech. Each of these reasons is addressed in turn below.

#### A. *The Checking Value of Lawyer Speech*

The speech of government lawyers can serve as a check against government misconduct, what Vincent Blasi calls the “checking value.”<sup>109</sup>

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103. Post, *supra* note 102, at 1775.

104. Robert Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

105. See Knake, *supra* note 28, at 682.

106. Hutchinson, *supra* note 20, at 109.

107. *Id.*

108. See, e.g., discussion *supra* notes 98–101 and accompanying text; see also Joshua D. Herman, *The Limits on Disciplining Public Employee Speech*, 103 ILL. B.J. 24, 26 (2015) (“*Garcetti*’s potential for quieting whistleblowers led the Illinois legislature to amend the Whistleblower Act and Illinois False Claims Act by providing protection for public employees who are no longer protected by the First Amendment.”); Howard L. Zwickel, *In Support of an Implied State Constitutional Free Speech Tort in Public Employment Retaliation Cases*, 78 ALB. L. REV. 33 (2015).

109. Blasi, *supra* note 1.

As Blasi explains: “The central premise of the checking value is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people.”<sup>110</sup> Blasi situates his idea of the checking value in an understanding of the “moral quality of official power”<sup>111</sup>:

First, because the investiture of public power represents a form of moral approval, public servants are probably more likely than those who wield private power to lose their humility and acquire an inflated sense of self-importance, often a critical first step on the road to misconduct. Second, since public officials have been “chosen” by the people, either directly by election or indirectly via a chain of appointments anchored by an election, the public is probably less inherently skeptical of officials than of powerful private figures. . . . Third, when trust is shown to have been abused, the cost to the society is greater if important expectations have been defeated.<sup>112</sup>

He argues that, on balance, “systematic scrutiny and exposure of the activities of public officials will produce more good in the form of prevention or containment of official misbehavior.”<sup>113</sup> Even if some “diminution in the efficiency of the public service or weakening of the trust that ultimately holds any political society together” might occur,<sup>114</sup> this compromise, for Blasi, is a worthy and preferred tradeoff.

Lawyers are particularly well suited to serve the checking function against governmental abuse given their education and training.<sup>115</sup> For example, members of the legal profession can “serve as an important check on such unleashed power by informally restraining and channeling [a regulatory body’s] political will. By training, [government] lawyers understand the importance of neutral principles, of fair processes, and of rational arguments . . . .”<sup>116</sup> Similarly, government lawyers “perform the same function that Alexis de Tocqueville observed that they play in American society as a whole, that of restraining ill-considered democracy.”<sup>117</sup> For example, while lawyers working for Congress “work to execute the will of Congress, [they] also act to temper that will, to ensure that it results from judgment as much as from passion.”<sup>118</sup> Government

110. *Id.* at 538.

111. *Id.* at 540.

112. *Id.*

113. *Id.* at 552.

114. *Id.*

115. For example, Blasi has observed that because “recourse to the courts is one way that victims of official misconduct may put a halt to improper government practices, a proponent of the checking value should look favorably on the contention that the First Amendment protects communication designed to ‘stir up’ litigation” with “the government or its officials.” *Id.* at 647. Blasi would not extend this position, however, to other cases holding that the First Amendment “includes the right to advise people on how they can secure effective legal representation.” *Id.* at 646 (citations omitted).

116. John C. Yoo, *Lawyers in Congress*, 61 L. & CONTEMP. PROBS. 1, 19 (1998).

117. *Id.*

118. *Id.*

lawyers also “are a uniquely valuable source of information about the workings of public agencies.”<sup>119</sup> Of course this may be true of any government employee, but providing higher protection at least to government lawyer speech advances “a societal interest in self-governance [that] does outweigh governmental efficiency” without over burdening the government’s managerial functions.<sup>120</sup> This check on power is particularly important in light of the ever-expanding (and arguably unconstitutional<sup>121</sup>) regulatory state.

Relatedly, members of the legal profession are uniquely trained to “be the conduit for . . . promulgation” of the rule of law.<sup>122</sup> The complexity of law, which is increasing under the expanding regulatory state, demands lawyers to “make it accessible to those for whom it is relevant.”<sup>123</sup> This is because “lawyers are often better positioned than nonlawyers to realize the unfairness or unreasonableness of a law.”<sup>124</sup> The most “effective representation within and operation of the system” comes from lawyers as “sophisticated, experienced agents who know their way around the rule-systems and the courts.”<sup>125</sup> The education and training that prepares lawyers to navigate complex legal issues similarly makes them the preferred segment of government employees to engage in protected workplace assessment speech. Moreover, it has been said that lawyers establish social order and the “normative vision” for American democracy.<sup>126</sup> As such, they hold “a right to participate in the creation and maintenance of the state’s *nomos* that is denied to other persons in the society.”<sup>127</sup> Indeed, “the state’s *nomos* is . . . dependent on the profession.”<sup>128</sup>

*B. The Professional Obligations of Lawyers  
As Officers of the Court and Conservators of Democracy*

Lawyers, as members of the legal profession, have enhanced responsibilities because they are officers of the court and conservators of democracy. These obligations not only justify protecting lawyer speech over other employees but also ameliorate concerns about such protection

119. Kermit Roosevelt, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1253 (1997).

120. *Id.*

121. See, e.g., ROBERT H. BORK, *THE TEMPING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990) (asserting that the modern regulatory state is unconstitutional, although also refraining from invalidating it).

122. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1547 (1995).

123. *Id.* at 1547–48.

124. David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 259 (1996).

125. See Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 448 (2010).

126. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1410 (1992).

127. *Id.*

128. *Id.*

overly burdening the government's interest in efficient administration of its work. As Justice Breyer explained, dissenting in *Garcetti*:

[T]he speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. . . . The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.<sup>129</sup>

For example, the Preamble to the American Bar Association Model Rules of Professional Conduct explains that “[t]he legal profession is largely self-governing. . . . [I]t is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement.”<sup>130</sup> As such, “[s]elf-regulation also helps maintain the legal profession's independence from government domination.”<sup>131</sup> This is critical because “[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”<sup>132</sup> Lawyers in their professional capacity are simultaneously commanded to be “a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>133</sup> These duties obligate lawyers to speak in certain instances beyond the scope of their employment requirements. For example, Model Rule 1.13 contains a reporting requirement that is triggered when a lawyer knows of certain illegal behavior by an officer or employee of an organizational client, and Model Rule 3.3 demands disclosure of directly adverse legal authority.<sup>134</sup>

These elements make the speech of lawyers working for the regulatory state different than the speech of other employees. When lawyers speak in their employment capacity, they may or may not be speaking on behalf of

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129. *Garcetti v. Ceballos*, 547 U.S. 410, 446–47 (2006) (Breyer, J., dissenting) (citations omitted).

130. MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 10 (AM. BAR ASS'N 2014).

131. *Id.* ¶ 11.

132. *Id.*

133. *Id.* ¶ 1.

134. *See id.* ¶ 1.13(b) (“If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.”); *id.* ¶ 3.3(a)(2) (“A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

their employer—the government—but they are always speaking on behalf of the legal profession.

*C. The Heightened Professional Obligations  
of Government Lawyers*

Government lawyers, similar to judges, must function in a less partisan manner than their counterparts in private law practice, which better prepares them to conduct a reasoned, balanced inquiry when engaging in workplace assessment speech. Two approaches, generally speaking, help explain the professional obligations ascribed to a lawyer employed by the regulatory state: “the agency loyalty approach” and “the public interest approach.”<sup>135</sup> The agency loyalty approach “sharply limits the realm in which the lawyer may permissibly attempt to exert influence over the client.”<sup>136</sup> Under this view, “the government lawyer’s client is the agency that employs the lawyer, and the lawyer owes the traditional duties of loyalty, zeal, and confidentiality to the agency just as the lawyer would to a private client.”<sup>137</sup> By contrast, the public interest approach “makes serving the public interest the government lawyer’s primary duty and consequently values the interests of the lawyer’s agency only to the extent that those interests coincide with the public interest.”<sup>138</sup> The formulation of these approaches, of course, is not perfect, and a number of scholars and commentators have endeavored to critique and supplement them.<sup>139</sup> Certainly under the public interest

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135. Note, *supra* note 3, at 1173, 1176.

136. *Id.* at 1173.

137. *Id.*

138. *Id.* For further discussion of approaches addressing elements of the public interest, see Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 279–80 (2000) (observing that the duty of government lawyers to “seek justice” in criminal cases” is “well established” and “seems generally applicable to government lawyers in civil litigation as well”—a duty which may “imply specific professional obligations designed to make it more likely that, where the government is a party, the outcome of the litigation is just and the process is fair”); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988) (“The basic maxim of the approach I propose is this: [t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”).

139. See, e.g., Hutchinson, *supra* note 20, at 105 (critiquing the loyalty and public interest approaches and articulating “a more appropriate model for thinking about [government lawyers’] professional responsibilities and ethical privileges”); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 565–69 (1986) (arguing that the public interest model runs counter to representative democracy); Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2040 (2012) (introducing “a parity-based theory of employee speech founded on the presumption that government employees should be treated similarly to other citizens absent a meaningful ground of distinction beyond the bare fact of employment” which “emphasizes the need to confront two vital issues that have been neglected in the Supreme Court’s case law: the relevance of institutional mission, and the evidentiary value of expression”); Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 2011 UTAH L. REV. 1563, 1583–84 (offering a “compliance theory” to understand the role of government lawyers, which is a “behavioral-studies approach [that] addresses the nature of individual compliance and provides a framework for discussing how and why attorneys follow the rules”). See generally William

approach, and arguably even under the agency loyalty approach, courts recognize that government lawyers have heightened obligations as compared to lawyers engaged in private practice. As the Seventh Circuit Court of Appeals recognized, where members of the private bar “are appropriately concerned first and foremost with protecting their clients—even those engaged in wrongdoing—from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest.”<sup>140</sup> This duty stems from the concept of “the public trust” owed by a government lawyer, because the government overall “is responsible to the people in our democracy with its representative form of government. . . . [T]he lawyer’s employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.”<sup>141</sup> Consequently, a government lawyer has an obligation to expose wrongdoing within government.<sup>142</sup>

Some commentators have described government lawyers as being held to “the highest standard” possible as they are “admonished to ‘put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department.’”<sup>143</sup> This is true for several reasons. First, “government lawyers cannot be partisan advocates for any single position. Quite the opposite, government lawyers must pay heed to a range of parties and interests when undertaking any action.”<sup>144</sup> Second, “the government

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H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (rejecting the premise of the binary client-lawyer relationship in an adversary system); W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333 (2009).

140. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002) (citing *In re Lindsey*, 158 F.3d 1263, 1273 (1998); MODEL RULES OF PROF'L CONDUCT ¶ 1.13 cmt. (AM. BAR ASS'N 2014)) (“[G]overnment lawyers may have higher duty to rectify wrongful official acts despite general rule of confidentiality.”).

141. *Lindsey*, 158 F.3d at 1273.

142. *Id.*

143. Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311, 313 (2003) (quoting Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 n.3 (1999)); see also *United States v. Pavloyianis*, 996 F.2d 1467, 1475 (2d Cir. 1993) (“[W]e normally ascribe a higher standard of professional and ethical responsibility [to government attorneys.]”); *Freeport-McMoran Oil & Gas Co. v. Fed. Energy Regulatory Comm’n*, 962 F.2d 45, 46 (D.C. Cir. 1992) (rejecting the “remarkable assertion at oral argument that government attorneys ought not be held to higher standards than attorneys for private litigants”); *United States v. Krebs*, 788 F.2d 1166, 1176 (6th Cir. 1986) (“United States Attorneys are ‘held to a higher standard of behavior’ than other attorneys.” (quoting *United States v. Young*, 470 U.S. 1, 25 (1985))). Some commentators, however, disagree. See, e.g., Michael C. Duff, *Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace*, 30 BERKELEY J. EMP. & LAB. L. 133, 157 n.123 (2009) (citing Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1116 (1995)) (“[G]overnment attorneys owe no ethical duty to a broader public interest. . . . [Further,] attempts by an attorney to impose such a duty on an agency, assuming it could be identified, would create separation of powers issues by exalting privately held ethical opinions over the opinions of agency heads, who, unlike career attorneys, are accountable to the democratically elected executive.”).

144. Note, *supra* note 3, at 1181.

lawyer's primary goal should always be reconciliation—or at least accommodation—of as many interests as possible, rather than vindication of any single interest.”<sup>145</sup> As a consequence, neither “the agency’s policy position” nor “abstract notions of the public good . . . can demand the lawyer’s unqualified allegiance.”<sup>146</sup> Third, government lawyers have special responsibilities to serve the public good and to uphold the administration of justice.<sup>147</sup> This “is an uncontroversial proposition in mainstream American legal thought” which “finds expression in numerous historical sources, including both primary sources such as judicial opinions and statutes, and secondary sources.”<sup>148</sup> Relatedly, government lawyers must “take an oath, separate from their bar oath, to uphold the United States Constitution and the laws of this nation,” and their “compensation comes not from a client whose interests they are sworn to protect from the power of the state, but from the state itself and the public fisc.”<sup>149</sup> As the Supreme Court observed in *Polk County v. Dodson*,<sup>150</sup> a government lawyer “is not amenable to administrative direction in the same sense as other employees of the State.”<sup>151</sup> Rather, a government lawyer “works under canons of professional responsibility that mandate his exercise of independent judgment.”<sup>152</sup> As such, a government “lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior.”<sup>153</sup>

#### CONCLUSION

The unusual role lawyer speech plays, both as the embodiment of law and as the fulfillment of professional obligations, sets it apart from that of other government employees. Government lawyer speech serving a checking value function ought to receive heightened protection, whether the speech is information providing, watchdogging, or whistleblowing, so long as the speech does not run counter to professional ethics obligations. Consider the Supreme Court’s recent revisiting of *Pickering*, *Connick*, and *Garcetti* in a 2014 decision. In *Lane v. Franks*,<sup>154</sup> the Court held that the

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145. *Id.*

146. *Id.* at 1181–82.

147. See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000) (“[G]overnment lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities.”); Hutchinson, *supra* note 20, at 114 (“The significant difference between private lawyers and government lawyers is that the latter have a much greater obligation to consider the public interest in their decisions and dealings with others than the former.”).

148. Berenson, *supra* note 147, at 789.

149. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002).

150. 454 U.S. 312 (1981).

151. *Id.* at 321 (observing the professional independence required of public defenders, which similarly would be required of all lawyers for the regulatory state).

152. *Id.*

153. *Id.*

154. 134 S. Ct. 2369 (2014).

First Amendment protects the speech of a government employee testifying under oath about crimes witnessed in the course of employment:

Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.<sup>155</sup>

The lower court had rejected Lane’s First Amendment argument, giving what Justice Sotomayor (authoring the unanimous opinion) called “short shrift to the nature of sworn judicial statements” and “ignor[ing] the obligation borne by all witnesses testifying under oath.”<sup>156</sup> In reconciling the opinion with *Garcetti*, Justice Sotomayor explained that the “critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>157</sup>

The logic of *Lane* supports a framework where government lawyers’ speech is protected under the First Amendment in the same way as citizens speaking on a matter of public concern, though admittedly not explicitly in the Court’s opinion. Justice Sotomayor emphasized that the Court’s “precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”<sup>158</sup> Indeed, she observed that the “importance of public employee speech is especially evident in the context of this case: a public corruption scandal.”<sup>159</sup> Notably, the speech at issue in both *Connick* and *Garcetti* could be said to address the same sort of public corruption scandals, though the speakers were not under oath to testify. Yet both, as lawyers, were under similar obligations as officers of the court and members of the legal profession.

Even if government lawyer speech is protected as contemplated by this Article, under *Pickering*, a second question must be addressed: “whether the government had ‘an adequate justification for treating the employee differently from any other member of the public’ based on the government’s needs as an employer.”<sup>160</sup> On the one hand, “government employers often have legitimate ‘interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public,’ including ‘promot[ing] efficiency and integrity in the discharge of official duties,’ and ‘maintain[ing] proper discipline in public service.’”<sup>161</sup> On the other hand, “a stronger showing [of government interests] may be necessary if the employee’s speech more substantially involve[s] matters of public

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155. *Id.* at 2378.

156. *Id.* at 2378–79 (citation omitted).

157. *Id.* at 2379.

158. *Id.*

159. *Id.* at 2380.

160. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

161. *Id.* at 2381 (alterations in original) (quoting *Connick v. Myers*, 461 U.S. 138, 150–51 (1982)).

concern.”<sup>162</sup> In *Lane*, relevant to the Court was the fact that the government could not demonstrate an “interest that tips the balance in their favor. There was no evidence, for example, that Lane’s testimony . . . was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.”<sup>163</sup> A similar analysis follows in the case of government lawyers, grounded in professional duties. Perhaps somewhat paradoxically, the speech of lawyers is constrained exceptionally by professional ethics rules in order to effectuate legal advice and advocacy,<sup>164</sup> while at the same time requiring speech in certain circumstances. Thus, to apply the so-called second prong of *Pickering*, a court should ask “whether the government had ‘an adequate justification for treating the employee differently from any other member of the public’”<sup>165</sup> based upon professional conduct rules.

Given the steadily increasing presence of the regulatory state in our democratic government, the justifications for protecting lawyer speech based upon its checking value are especially robust in the context of workplace assessment when the lawyer is carrying out professional obligations. By applying this framework rather than what the Court did in *Connick* and *Garcetti*, members of the legal profession faced with concerns about governmental abuse of power would be permitted to exercise their professional judgment in deciding whether to engage in information providing, watchdogging, or whistleblowing functions. Protecting the workplace assessment speech of government lawyers, who are subject to greater professional obligations and duties than other government employees, can serve as a desirable check against abuse of power by officials and at the same time help legitimize the role of the regulatory state in American democracy.

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162. *Id.* (alterations in original).

163. *Id.*

164. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT ¶ 3.4(e) (AM. BAR ASS’N 2014) (“A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . .”); *id.* ¶ 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”); *id.* ¶ 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted . . . .”); *id.* ¶ 1.4(a)(3) (“A lawyer shall . . . keep the client reasonably informed about the status of the matter . . . .”); *id.* ¶ 3.6(a) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”); *id.* ¶ 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”).

165. *Lane*, 134 S. Ct. at 2380 (quoting *Garcetti*, 547 U.S. at 418).