PROTECTING PUBLIC KNOWLEDGE PRODUCERS

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(from the Knight Institute's Lies, Free Speech, and the Law symposium[**])

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Introduction

In 2020, the U.S. Agency for Global Media (USAGM) was sued by several of its employees. USAGM oversees U.S.-funded international broadcasting outlets, including the Voice of America (VOA).[1] The plaintiffs, five USAGM senior managers and VOA's program director,[2] alleged that USAGM CEO Michael Pack, who was appointed by President Trump in 2020, "[had] sought to interfere in the newsrooms of the USAGM networks, in violation of their eighty-year practice . . . of journalistic autonomy." Plaintiffs accused Pack of "seek[ing] to quash . . . coverage that is insufficiently supportive of President Trump," as well as "any coverage, unless unfavorable, of President Trump's political opponents."[3] These actions, the plaintiffs charged, ran afoul not only of statutory commands but of the First Amendment.[4] USAGM responded that VOA and the other networks speak on behalf of the government and lack any First Amendment rights in so doing.[5] In taking the actions that he did, Pack was simply "exercis[ing] his [own] authority to 'direct and supervise' and to 'assess the quality, effectiveness, and professional integrity of' USAGM" reporting.[6]

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[1] Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 341–42 (D.D.C. 2020).

[2] *Id.* at 342.

[3] *Id.* at 342.

[4] *Id.* at 342–43.

[5] Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 27–32, *USAGM*, 502 F. Supp. 3d (D.D.C. 2020) (No. 1:20-cv-02885-BAH).

[6] *Id.* at 51.

The First Amendment arguments in this case, *Turner v. USAGM*, reflect a broader tension in the case law concerning the government's role as "knowledge producer"—that is, its role in producing or conveying information or otherwise fostering knowledge. From the plaintiffs' perspective, the government ties itself to a mast when it purports to produce journalism. That mast is comprised of the norms of professional journalism, including a strict separation between an operation's business or political commitments and its journalistic endeavors.[7] This argument is consistent with several strands of Supreme Court case law. For example, the Court repeatedly has held that, although government is not required to subsidize private speech or create speech forums, once it does so, it may not impose restrictions that are based on viewpoint or that are incompatible with the very nature of the speech subsidized or forum created.[8] The defendants, on the other hand, invoked aspects of free speech doctrine that emphasize the government's broad discretion to control the speech that it produces. This includes the *Garcetti* rule—stemming from the 2006 Supreme Court case of *Garcetti v. Ceballos*—whereby government employees generally are unprotected by the First Amendment for their work product speech, meaning speech that they produce as part of their job duties.[9] *Garcetti* itself arguably is in tension with the Court's acknowledgment elsewhere to the effect 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."[10]

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[7] *See* Reply Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction at 21–23, *USAGM*, 502 F. Supp. 3d (No. 20-cv-02885-BAH). *Cf.* Brief of the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Plaintiffs' Motion for a Preliminary Injunction at 7, *USAGM*, 502 F. Supp. 3d (No. 20-cv-02885-BAH) (explaining that the government "would never be able to credibly commit to producing professional journalism" if the First Amendment did not enforce its promises to "tie itself to the mast" of journalistic independence).

[8] *See, e.g.,* Legal Services Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001); Rosenberger v. Rector, 515 U.S. 819, 829 (1995). *Cf.* United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 201, 203–05 (2003) (plurality opinion) (concluding that libraries could be required to use internet blocking filters as a condition of federal funding but doing so only after determining that such blocking is consistent with "the role of libraries in our society").

[9] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[10] Lane v. Franks, 573 U.S. 228, 240 (2014). *See also* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 301–02, 311–12 (2015).

Similar First Amendment questions are raised by battles currently raging over state legislative proposals to curtail discussions of race and racism in another site of knowledge production: public colleges and universities. The laws' opponents argue that they are antithetical to the very nature of higher education. They suggest that states tie themselves to the mast of academic freedom norms—including rules of faculty and intradisciplinary governance on matters of scholarship and pedagogy—when they create colleges and universities.[11] The laws' proponents, on the other hand, emphasize the "public" in public education, suggesting that schools effectively belong to the public, are funded partly by their tax dollars, and that members of the public, through their representatives, must have a say in what is taught and studied at the schools.[12]

These First Amendment controversies are layered on top of major cultural and political tensions. This is unsurprising, as public knowledge institutions often are sites of cultural contestation. If one reviews the public debates alongside the legal arguments about these matters, one can find illuminating overlaps between the two. For example, public outcries against the press and against "critical race theory" are often framed as fights against indoctrination by elites.[13] From this perspective, it is not journalism or higher education that is under siege. Rather, it is ordinary folk who are seeking simply to right the balance and to reclaim neutrality in public spaces. These arguments parallel legal arguments to the effect that government employees, or persons carrying out government-subsidized functions, have no constitutional right to speak freely while carrying out their government-supported roles. Their words effectively belong to the people.

The shared populist core of the arguments for broad political control of public knowledge institutions betrays the arguments' fundamental failings. First, the notion that political might should govern knowledge production runs counter to the very idea of discipline-based knowledge and expertise; it would strip knowledge production of its meaning and value. Worse still, it would mislead consumers of any "knowledge" so produced, because the knowledge would purport to stem from

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[11] *See, e.g.*, Am. Ass'n Colls. and Univs. & Pen Am., *Statement by the American Association of Colleges and Universities (AAC&U) and PEN America Regarding Recent Legislative Restrictions on Teaching and Learning*, PEN AM. (June 8, 2022), https://pen.org/wp-content/uploads/2022/06/Statement-by-AACU-and-PEN-2.pdf [https://perma.cc/7GW2-XFWR].

[12] *See infra* text accompanying notes 153-57.

[13] *See infra* Subpart III.B, Section III.C.1.

disciplinary best practices and expertise. Such deception poisons the speech marketplace and is antithetical to core First Amendment values. Second, the conceit that political controls protect against indoctrination and support neutrality is belied by the nature of the power that proponents of political control seek: the power to bar or require certain speech content in public schools and in other public knowledge institutions.

In this essay, I explore the nature and value of government's knowledge producers in our constitutional order and the legal, cultural, and political threats that they face. In Part I, I explain that public knowledge producers are an essential part of a democratic society, and that their worth depends partly on their having some insulation from political pressure. In Part II, I use the example of international broadcasting, with an emphasis on the *USAGM* case to argue that such insulation is called for not only as a matter of good policy but as a matter of First Amendment theory. I acknowledge, however, that First Amendment doctrine is more mixed; one can find support for this position, as well as contrary indicia in judicial precedent. I also make the case for more robust doctrinal support to insulate public knowledge producers going forward. In Part III, I explore the broader legal, political, and social contexts. With respect to law, I observe that legislation plays at least as crucial a role in protecting knowledge producers as does the First Amendment. Yet such legislation increasingly is under threat by the Supreme Court's growing allegiance to unitary executive theory. I also explore parallels between judicial reasoning in some of the First Amendment case law, unitary executive theory, and cultural and political movements against knowledge producers. Finally, I apply some of my earlier analyses to one last set of examples: ongoing legal and political controversies concerning the topic of race in public higher education.

I. THE NATURE AND VALUE OF PUBLIC KNOWLEDGE PRODUCERS . . . AND THEIR INDEPENDENCE

In a time of epistemic crisis and creeping authoritarianism, it is only fitting that some scholars have turned their attention to the institutional forces that produce knowledge. In a sprawling history of the historical relationship between democracy and truth, for example, Sophia Rosenfeld cites the democratic importance of "mediating and educational institutions," or "knowledge-producing institutions."[14]

[14] SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY loc. 1751–59 (2019) (ebook).

Vicki Jackson, in recent work, compares "knowledge institutions" across constitutional democracies.[15] She deems such institutions "fundamental to the success of constitutional democracy."[16] Jackson offers a helpful definition of knowledge institutions: "ongoing entit[ies,]" either public or private, "whose principal purpose is knowledge production or dissemination . . . according to disciplinary norms."[17]

I adopt the term "public knowledge producers" in this essay. My definition overlaps in large part with Jackson's, but my focus is narrower in one respect and broader in others. It is narrower in the sense that I focus solely on government-supported actors. To be sure, private institutions are an essential part of any ecosystem of democratic knowledge.[18] My emphasis, however, is on the special opportunities and challenges presented by public knowledge producers, including the unique constitutional questions that they raise. I use the term "public" to refer to individuals and entities who are funded in whole or in part by the government. This includes government agencies and employees, as well as entities and individuals who operate at least partly through government subsidies or contracts. To be clear, this criterion is not sufficient to distinguish public from private actors for all purposes. In the context of this essay, however, the definition is fitting for two reasons. First, I stress the value of government's subsidizing the production of knowledge. Any amount of public support furthers that value, even if more support is preferable to less. Second, the problems that I tackle in this essay arise when the government leverages such support—whether in the form of employment, subsidies, or otherwise—to restrict the speech of a subsidized entity or person. The concerns that I address thus are implicated whenever the government imposes restrictions

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[15] Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 CAN. J. COMPAR. & CONTEMP. L. 156 (2021).

[16] *Id.* at 166. Indeed, Jackson's article appears in an issue of the Can. J. Compar. & Contemp. L. that is devoted, fittingly, to the topic of "Democratic Decay: Challenges for Constitutionalism and the Rule of Law" (see Symposium & Articles, *Democratic Decay: Challenges for Constitutionalism and the Rule of Law*, 7 CAN. J. COMPAR. & CONTEMP. L. 1-452 (2021), https://www.cjccl.ca/wp-content/uploads/2021/05/CJCCL-V7-2021-full.pdf [https://perma.cc/ZXD4-CJUM]).

[17] Jackson, *supra* note 15, at 166.

[18] *See id.* at 206 (observing that different types of knowledge institutions together "constitute a knowledge ecosystem within which voters, representatives, and policymakers act"). *Cf.* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 11–12 (2013) (defining "a First Amendment institution" as "one whose contributions to public discourse play a fundamental role in our system of free speech" (citation omitted)).

on speech as a condition of its largesse, in whatever amount and form that largesse takes.

Within the confines of public entities and individuals, however, my definition extends somewhat further than Jackson's. First, I use the term "producers" rather than "institutions" to make clear that knowledge creators can include individuals within their larger institutions, as well as the institutions themselves. Indeed, as *US-AGM* and *Garcetti* both illustrate, some difficult constitutional and policy questions pit the speech of individuals within institutions against the institutions themselves, with the latter represented by supervisors or others atop the institutional hierarchy. Furthermore, even entities that do not themselves constitute knowledge institutions might assign one or more individuals to play a knowledge-producing role. For example, internal watchdogs—most notably inspectors general—are quintessential knowledge producers. The essence of their jobs is to gather and report information in service of accountability.[19]

Second, and this may be a small quibble as a practical matter, I would not limit the definition of knowledge producers to those "whose *principal* purpose is knowledge production or dissemination."[20] Rather, I would take a somewhat more liberal view, asking whether the individual or entity's tasks, in the ordinary course of their job, include "knowledge production or dissemination . . . according to disciplinary norms."[21] The value of discipline-based knowledge production is no less significant in cases where that production constitutes an ordinary, if not a principal part of one's job responsibilities. To the contrary, it is essential to incorporate knowledge production throughout public institutions and roles, rather than cordoning it off as a specialized project.[22] More importantly, politicization efforts can target discrete knowledge-production tasks—for example, political appointees

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[19] *See* PAUL C. LIGHT, MONITORING GOVERNMENT: THE INSPECTOR GENERAL AND THE SEARCH FOR ACCOUNTABILITY 16–17 (1993).

[20] Jackson, *supra* note 15, at 166 (emphasis added).

[21] *Id.* at 166.

[22] *Cf.* MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 227 (2021) (suggesting that the Freedom of Information Act, 5 U.S.C. § 552, is too often the only option for persons who need information from agencies and that, rather than shoehorning most informational needs into the Freedom of Information Act, "[e]ach agency needs to begin to see information delivery as part of its core mission").

might retaliate against a public employee for expertise-based reporting that is a regular but nonprincipal part of their job—just as they can target entire knowledge institutions or knowledge-based jobs.

Public knowledge producers include government scientists, economists, inspectors general, as well as public universities and their faculty members.[23] As Jackson and others have concluded, such organizations and actors are essential to a well-functioning democratic society. They are necessary, in part, for the same reasons that knowledge producers on the whole are democratically crucial. For one thing, they help to build and maintain a "shared epistemic foundation"[24] on which officials can base public policy decisions and citizens can meaningfully judge those decisions.[25] They also foster the critical thinking skills that empower citizens to evaluate information, to assess candidates and policy questions, and to "resist manipulations by those in high office" and elsewhere.[26] It is no surprise that autocracies seek to destroy the independence of knowledge producers, if not eliminate their roles entirely.[27]

Public knowledge producers also add value that stems specifically from their public status, although that value is contingent on their having some insulation from political pressures. First, their location within government agencies helps to keep government itself honest and accountable. For example, career scientists and economists with civil service protections can produce reports based on expertise and disciplinary best practices. Such reports can present a challenge to political actors who wish to misrepresent factual information or expert consensus. Other

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[23] *Cf.* Jackson, *supra* note 15, at 166–91 (detailing a similar list of knowledge institutions).

[24] Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 153 (2018).

[25] *See, e.g.,* Jackson, *supra* note 15, at 198–200, 203–06; Huq & Ginsburg, *supra* note 24, at 130–35, 153–57.

[26] Jackson, *supra* note 15, at 204. *See also, e.g.,* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 17 (Lawbook Exchange 2000) (1948) (referencing "the enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends"); Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 472 (2019) (recognizing that "justified true belief" is an important free speech value that can help us to see that "the main benefits of the search for truth"—a search much vaunted in free speech theory and case law—"are the values that it inculcates, not the destination it reaches").

[27] *See, e.g.,* Huq & Ginsburg, *supra* note 24, at 128–35.

knowledge producers, such as inspectors general, can suss out government lies and misdeeds more directly.

Public knowledge producers—including disciplinary experts found in public universities and in agencies—also fill informational and educational gaps that the market alone cannot be relied on to fill. They can provide services that are central to democracy but that are insufficiently profitable for private actors to provide consistently on their own. Relatedly, public funding liberates knowledge producers from market demands that might otherwise compromise the integrity of their research and educational programs.

Publicly supported journalism illustrates the importance of "public options"[28] to supplement private knowledge production. Although the United States provides far less financial support per capita for public journalism than do other democracies,[29] it has provided some support—mostly in the form of postal subsidies for newspapers and magazines—since the nation's founding.[30] In the 20th century, it created the Corporation for Public Broadcasting, which to this day provides partial funding for Public Broadcasting Service (PBS) and National Public Radio.[31]

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[28] *See* VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM? CONFRONTING THE MISINFORMATION SOCIETY 136 (2020) (using the term "the public option" in this context); Alexander Sammon, *A Public Option Might Be Journalism's Last Hope*, AM. PROSPECT (Aug. 16, 2019), https://prospect.org/culture/public-option-might-journalism-s-last-best-hope/ [https://perma.cc/DH7C-FYAQ] (same).

[29] *See* Timothy Neff & Victor Pickard, *Raising the Bar for Journalism*, MEDIA INEQ. & CHANGE CTR., https://www.asc.upenn.edu/sites/default/files/2021-06/MIC_Infographic_Authors.pdf [https://perma.cc/DNW7-78RN] (last visited Nov. 17, 2022); Victor Pickard & Timothy Neff, *Op-ed: Strengthen Our Democracy by Funding Public Media*, COLUM. JOURNALISM REV. (June 2, 2021) https://www.cjr.org/opinion/public-funding-media-democracy.php [https://perma.cc/W3VU-DSEK] [hereinafter Pickard & Neff, *Op-ed: Strengthen Our Democracy*]; Catherine Buni, *4 Ways to Fund—and Save—Local Journalism*, NIEMAN REPS. (May 7, 2020) https://niemanreports.org/articles/4-ways-to-fund-and-save-journalism/ [https://perma.cc/TE9P-AB5M].

[30] *See, e.g.,* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 5–6, 42–43 (2021); Pickard & Neff, *Op-ed: Strengthen Our Democracy*, *supra* note 29; GEOFFREY COWAN & DAVID WESTPHAL, PUBLIC POLICY AND FUNDING THE NEWS 8–11 (2010).

[31] *See, e.g.,* Glenn J. McLoughlin & Lena A. Gomez, CONG. RSCH. SERV., RS22168, THE CORPORATION FOR PUBLIC BROADCASTING: FEDERAL FUNDING AND ISSUES 1–2 (updated July 3, 2017); MINOW, *supra* note 30, at 50–51, 141–42; *History Timeline*, CORP. FOR PUB. BROAD., https://www.cpb.org/aboutcpb/history-timeline [https://perma.cc/TZ48-9MP5] (last visited Nov. 17, 2022).

Public opinion surveys reflect the relatively high esteem in which viewers and listeners hold public news organizations. For example, respondents in an annual survey have rated PBS "the most trustworthy institution among nationally known organizations for [18] consecutive years."[32] This trust stems partly from perceptions of PBS' political independence. Another survey conducted in 2021 found that "the political leanings of PBS viewers span the spectrum from extremely liberal to extremely conservative."[33]A majority of that survey's 1,500 respondents "rank[ed] PBS as neutral when asked about 'bias in news.'"[34]

Apart from the substantive value of a public news option, such an option is increasingly necessary to ensure that all Americans can access fact-based, professional news services, particularly local news and resource-intensive investigative reporting. The current economic landscape for news media is very bleak. More than a decade ago, researchers at University of Southern California's Annenberg School for Communication and Journalism concluded that "the financial model for news is facing the greatest crisis in decades."[35] The situation has only worsened since then. Last year, Victor Pickard and Timothy Neff observed that "[t]he newspaper industry . . . has seen its number of employees reduced by well over fifty percent in the last two decades. As newspapers downsize or close altogether, news deserts are spreading rapidly across the country, and hundreds of communities no longer have any local media coverage whatsoever."[36] Nor, they add, will the market right the problem. "As newspapers' advertising revenue continues to shrink, local news is

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[32] KNIGHT FOUND., *Part I. Fifty Years Later, the Continuing Case for the Information Commons, in* PUBLIC MEDIA AT 50: WHAT'S NEXT FOR THE INFORMATION COMMONS (2014), https://knightfoundation.org/public-media-white-paper-2017-levin/ [https://perma.cc/D2GH-QUS2] (reporting the results from the 2017 survey); *see also* PBS Publicity, *About PBS*, PBS (Feb. 2, 2021), https://www.pbs.org/about/about-pbs/blogs/news/pbs-and-member-stations-voted-most-trusted-institution-for-18-consecutive-years/ [https://perma.cc/N9LV-WD8B] (reporting the results from the 2021 survey).

[33] Christopher Ali et al., *PBS Could Help Rebuild Trust in US Media*, COLUM. JOURNALISM REV. (Mar. 9, 2021), https://www.cjr.org/tow_center/pbs-could-help-rebuild-trust-in-us-media.php [https://perma.cc/6MGV-78N7].

[34] *Id.*

[35] COWAN & WESTPHAL, *supra* note 30, at 1. *See also id.* at 5–6.

[36] Pickard & Neff, *Op-ed: Strengthen Our Democracy*, *supra* note 29.

no longer commercially viable in many markets and communities. In the meantime, hedge funds and other parasitic buyers continue to devour and dismantle what's left of the local media landscape." [37]

Confronting this crisis calls for a variety of initiatives, including philanthropy and indirect government support as in subsidies and tax incentives. Public journalism, too, is a crucial part of any such efforts. The U.S. provides far less financial support for public reporting than do many other democratic nations. Although the U.S. has the world's largest gross domestic product (GDP), it is 25th out of 27 countries examined by Pickard and Neff in percentage of GDP spent on public media.[38] In contrast, "[t]he world's strongest democracies, such as Norway, Sweden, and Finland, also have the best-funded public media."[39] The U.S. funding model for public broadcasting is also an unstable one that leaves news producers vulnerable to political pressure. When PBS was first created, for example, the Carnegie Commission on Educational Television proposed funding it through taxes on television set sales.[40] Instead, the U.S. chose to fund, and continues to fund, PBS through direct congressional appropriations.[41]

Despite these limitations, public news broadcasting has been remarkably successful, as suggested by the surveys cited above. We need more of it, and it is overdue for changes in its funding model and its delivery systems. With respect to the latter, for example, a more robust print and internet presence seems essential.[42] But public journalism itself is a crucial democratic presence, more so today than ever.

Apart from funding, the key concern cited by public media critics is the risk of state capture, or undue influence by political or partisan interests.[43] Though this

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[37] *Id.*

[38] Neff & Pickard, *supra* note 29.

[39] Julie Sloane, *MIC Infographic: Raising the Bar for Journalism*, ANNENBERG SCH. FOR COMMC'N AT THE UNIV. OF PA. (June 3, 2021), https://www.asc.upenn.edu/news-events/news/mic-infographic-raising-bar-journalism [https://perma.cc/3L4K-FZD9]. *See also id.* In assessing relative democratic strength, Neff & Pickard referenced THE ECONOMIST INTEL. UNIT, DEMOCRACY INDEX 2019 (2019), https://www.eiu.com/topic/democracy-index/ [https://perma.cc/V7M8-MATG].

[40] PICKARD, *supra* note 28, at 147.

[41] *Id.* at 147–48.

[42] *See, e.g.,* KNIGHT FOUND., *supra* note 32.

[43] *See* Victor Pickard, *American Journalism is Dying. Its Survival Requires Public Funds*, THE GUARDIAN (Feb. 20, 2020), https://www.theguardian.com/commentisfree/2020/feb/19/american-

concern is a legitimate one, the answer is not to give up on the very idea of public media. As we have seen, even under current conditions, public media is widely viewed as less ideologically skewed than other news sources. Rather, we must maintain—and, where lacking, build—a public media infrastructure that enables its journalists to operate within the confines of disciplinary norms and professional journalistic judgments, rather than political pressure. This is achieved partly through policy decisions, such as funding sources and legislative and regulatory directives. The governing constitutional framework, too, is no small matter.

In Part II, I explore the First Amendment principles and doctrine that ought to govern publicly supported journalism. Using the recent *USAGM* case as a jumping-off point, I explain that government programs that purport to deliver services associated with a communicative discipline—journalism, in this case—should be understood to bind themselves to the mast of that discipline's norms as a matter of First Amendment law. I situate this conclusion within existing case law. Specifically, I observe that important strains of precedent already take this view, but that they are in tension with other, more restrictive areas of judicial doctrine.

II. PUBLIC KNOWLEDGE PRODUCTION AND THE FIRST AMENDMENT: THE EXAMPLE OF *USAGM*

A. Background: International Broadcasting and the Firewall

The United States' longstanding involvement in international broadcasting presents an illuminating twist on the concept and value of public media. The oldest and best known of the U.S. international broadcasting ventures is VOA, which was created in 1942 to broadcast to Europe throughout World War II.[44] VOA continued to broadcast after the war and today reaches an estimated weekly audience of roughly 300 million people around the globe through digital, television, and radio content.[45] The U.S. also broadened its international broadcasting offerings after

journalism-press-publishing-mcclatchy [https://perma.cc/8S44-4Z4P] (citing and refuting this common criticism).

[44] MATTHEW C. WEED, CONG. RSCH. SERV., R46968, U.S. AGENCY FOR GLOBAL MEDIA: BACKGROUND, GOVERNANCE, AND ISSUES FOR CONGRESS 2 (Nov. 17, 2021).

[45] *Mission and Values*, VOA, https://www.insidevoa.com/p/5831.html#:~:text=Voice%20of%20America%20(VOA)%20is,more%20than%20311%20million%20people [https://perma.cc/24LW-58VH] (last visited Feb. 26, 2022). *See also VOA Around the World*, VOA (Nov. 13, 2017, 4.00 PM), https://www.voanews.com/a/voa-around-the-world/4113370.html [https://perma.cc/PW5X-RXBR] (using a map to show the areas of VOA coverage around the globe).

World War II. Today, it boasts two federal broadcasting networks—VOA and the Office of Cuba Broadcasting.[46] It also started three networks—Radio Free Europe, Radio Free Asia, and the Middle East Broadcasting Networks—that are formally headed by nonprofit corporations but that the U.S. supports through grants.[47]

These media ventures reflect two core goals: advancing U.S. foreign policy interests and transmitting independent journalism that adheres to the highest professional standards. The latter commitment is epitomized by VOA's first transmission in 1942: "'The news may be good or bad; we shall tell you the truth.'"[48] It has also been expressed through various statutory directives over the years. For example, the current statutory framework governing the networks requires both the secretary of state and the CEO of USAGM to "respect the professional independence and integrity of [USAGM], its broadcasting services, and the grantees of [USAGM]."[49] It also demands that U.S. international broadcasting "be conducted in accordance with the highest professional standards of broadcast journalism."[50] The former commitment—advancing U.S. foreign policy interests—is spelled out in a statutory directive to the effect that U.S. international broadcasting "shall . . . be consistent with the broad foreign policy objectives of the United States."[51]

It is a delicate task, undoubtedly, to strike a balance between advancing journalistic professionalism and independence and guarding U.S. foreign policy interests. But doing so is both possible and worthwhile. Through the statutory provisions governing USAGM and the networks, the U.S. has evinced the view that its foreign policy interests intrinsically are served by exporting journalism that foreign

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[46] WEED, *supra* note 44, at 3, 6.

[47] *Id.* at 2–6.

[48] Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 341 (D.D.C. 2020) (quoting Voice of America, *VOA's First Broadcasts: "The News May Be Good or Bad, We Shall Tell You the Truth*," YOUTUBE, at 0:35–0:39 (Mar. 9, 2012), https://youtu.be/-k3bkvDDfgU [https://perma.cc/NFU3-CSST]).

[49] 22 U.S.C. § 6204(b).

[50] 22 U.S.C. § 6202(a)(5).

[51] 22 U.S.C. § 6202(a)(1).

audiences can trust on the basis of its independence and commitment to journalistic best practices.[52] At the same time, the relevant statutes impose some content directives beyond "professional independence and integrity" and the "highest professional standards of broadcast journalism."[53] They require, for example, that VOA news "be accurate, objective, and comprehensive," and "present a balanced and comprehensive projection of significant American thought and institutions."[54] Furthermore, U.S. international broadcasting should provide "a variety of opinions and voices from within particular nations and regions prevented by censorship or repression from speaking to their fellow countrymen."[55] Trickier than these fairly open-ended directives, which in themselves are compatible with professional journalistic standards, is the matter of who shall enforce these standards and how shall they do so—how, in particular, USAGM shall reconcile the directives of journalistic professionalism and independence with its CEO's statutory authority to "direct and supervise all broadcasting activities"; "assess the quality, effectiveness, and professional integrity of, all such activities within the context of the broad foreign policy objectives of the United States"; and ensure that U.S. international broadcasting adheres to the requisite "standards and principles," including the criteria, such as professionalism and objectivity, cited above. [56]

The most obvious means by which to reconcile these various directives and authorities is by building a firewall between the networks' day-to-day journalistic operations and USAGM management, as well as other upper-level executive branch personnel, including the presidentially appointed Broadcasting Advisory Board.[57] Such a firewall itself parallels the separation practiced in private journalistic enterprises between day-to-day editorial decision-making and commercial and institu-

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[52] *See, e.g., supra* notes 49-50 and accompanying text. *See also* 22 U.S.C. § 6202(b)(1) (requiring the inclusion of "news which is consistently reliable and authoritative, objective, and comprehensive"); 22 U.S.C. § 6202(c) ("[t]o be effective, the Voice of America must win the attention and respect of listeners"); 22 U.S.C. § 6202(c)(1) ("VOA will serve as a consistently reliable and authoritative source of news.").

[53] *See supra* notes 50-52 and accompanying text.

[54] 22 U.S.C. §§ 6202(c)(1), 6202(c)(2).

[55] 22 U.S.C. § 6202(b)(7).

[56] 22 U.S.C. § 6204(a)(1).

[57] 22 U.S.C. § 6205 ("Establishment of the International Broadcasting Advisory Board").

tional considerations. VOA Director Amanda Bennett, one of the plaintiffs in *US-AGM*, signed a declaration to this effect based on her decades of experience as a journalist. Referencing her previous places of employment, she wrote:

> The Wall Street Journal, The Oregonian, The Lexington Herald-Leader, The Philadelphia Inquirer, and Bloomberg News all had a strong system in place—a *de facto* firewall—to protect the independence and integrity of their journalists. At each of these institutions, though the word "firewall" is not always used, this separation prevented the business side of the network, which has a directed interest in maximizing profits, from interfering with editors and reporters, who were responsible for producing journalism.[58]

B. Free Speech and the Anti-Distortion Principle

Striking this balance is not solely a question of statutory interpretation and policy judgment. It has a constitutional dimension as well. Specifically, one can draw an anti-distortion principle from existing First Amendment case law and from the normative commitments associated with free speech. Such a principle constrains the government from restricting speech in a manner that would distort the nature of a communicative good that it purports to provide. In other words, government must tie itself to the mast of the disciplinary norms of institutions that it purports to establish or to subsidize.[59]

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[58] Declaration of Amanda Bennett in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 3–4, ¶ 10, Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333 (D.D.C. 2020).

[59] I first explored this anti-distortion principle in Kitrosser, *supra* note 10, although I have discussed government manipulation of information more broadly elsewhere. *See, e.g.*, HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015). My observations about anti-distortion build on important work by others, including, e.g., Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 DUKE L. J. 1, 27–31 (2009) (explaining that free speech concerns are raised when government's role in crafting the speech of employees or subsidy recipients is obscured); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental,* 83 N.Y.U. L. REV. 605, 665–71 (2008) (making a similar point) [hereinafter Corbin, *Mixed Speech*]; Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1397–1401, 1450, 1460–61, 1487, 1491 (2001) (same). *Cf.* Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 232 (Aug. 30, 2021) (identifying the problem of "First Amendment capture," whereby "contested speech [is] categorized as government speech, giving the government the ability to eliminate competing viewpoints entirely").

There are two core justifications for the anti-distortion principle, one negative and one positive. The negative justification involves avoiding the harm caused when the government commits to deliver a type of communicative good that is associated with expertise and disciplinary norms—in this case, journalism that is explicitly billed, by statute, as independent and adhering to the "highest professional standards"[60]—but undermines such expertise or norms in a way that skews the good's communicative output.[61] Such distortion runs counter to some of the most significant concerns underlying constitutional free speech protections. This includes the notion that free speech is a prerequisite of democratic government, enabling the public to exchange ideas and information.[62] It also includes a healthy distrust of government's capacity and motivation to abuse censorial powers to skew information and debate in its favor.[63] Although these concerns relate most naturally to communications geared toward domestic audiences—for instance, to public broadcasting that airs predominantly in the United States—they apply to U.S. operations geared toward foreign audiences as well. As a practical matter, it is simply not realistic in this age of digital media and global interconnectedness to proceed as though U.S. audiences will not consume media created by the U.S. government for foreign audiences. Even if such airtight division were plausible, the effects of distortion on the speakers—those hired, ostensibly, to conduct journalism and then used as propaganda vessels—would remain a serious concern.[64]

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[60] *See supra* notes 49-50 and accompanying text.

[61] As described in Kitrosser, *supra* note 10, at 325, information distortion is "the phenomenon whereby government purports to provide or subsidize information of a type that is defined by reference to professional or social norms, while manipulating the information in a manner antithetical to those norms."

[62] *See, e.g.,* MEIKLEJOHN, *supra* note 26 (developing a democracy-based theory of free speech); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 67 (Jamie Kalven ed., 1988) (arguing that in a landmark libel case, the Supreme Court "almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official"). *Cf.* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521 (1977) (detailing the value of free speech as a check on government misconduct).

[63] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 33–34, 44–46, 86, 162–63 (1982) (demonstrating that all major free speech theories share a core distrust of government, and that this should be a central concern of a free speech doctrine).

[64] Undoubtedly, deciding to air stories internationally sometimes raises different foreign policy or national security considerations than deciding to air the same stories domestically. However, the final, case-by-case weighing of interests must be left to the career editors and reporters.

There is also a positive justification for the anti-distortion principle, one based on its affirmative furthering of First Amendment interests. By protecting the integrity of public knowledge production, the principle helps to support the existence of a shared epistemic foundation. Much more than a core of shared facts, such a foundation includes lessons, if only by example, in building knowledge and thinking critically about the information that one receives.[65] Indeed, some scholars, ranging from Alexander Meiklejohn in the mid-20th century to Martha Minow in more recent days, have argued that the First Amendment can be construed to impose affirmative obligations on government to maintain institutions that foster public knowledge.[66] Although I take no position here on the constitutional imperative of public knowledge production, I agree that such production at minimum is essential from a policy perspective. Such production fills gaps that the market leaves open and adds unique value by virtue of its noncommercial nature. Much of this value is lost, however, if public knowledge production is readily subject to political manipulation. Indeed, politically skewed communications that are presented in the guise of independent, discipline-based knowledge do not simply fail to capture the advantages of public knowledge production; they affirmatively cause harm.

C. First Amendment Doctrine: Anti-Distortion and Competing Forces

There is considerable support for the anti-distortion principle in existing First Amendment case law. However, the doctrine also contains substantial counterforces. In this section, I use the *USAGM* case as a jumping-off point to explore this tension in two closely related areas of First Amendment law: that involving public programs and subsidies, and that involving government employees. In both realms, I explain, the judicial precedent most consistent with the anti-distortion principle gets things largely correct. That precedent includes the district court's decision in *USAGM*, which was not appealed in light of the change in administrations that followed it.

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[65] *Cf.* Blocher, *supra* note 26, at 444 (stressing the importance of the "individual habits of mind and social practices that support the acquisition and belief of truths").

[66] *See* MINOW, *supra* note 30, at 59–60, 94–100; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 260–61 (1961).

1. On *Garcetti's* reach, the government speech doctrine, and the anti-distortion principle

After finding that at least one plaintiff had standing,[67] and that the plaintiffs' First Amendment claims were not preempted by the Civil Service Reform Act (CSRA),[68] Chief Judge Beryl A. Howell addressed the applicability of the 2006 case of *Garcetti v. Ceballos*. Howell held that *Garcetti*—which deemed public employees categorically unprotected for speech that constitutes work product—does not apply to "the core editorial or journalistic functions of government-employed journalists."[69] Howell analogized journalism to academic research and teaching, which the *Garcetti* Court itself had suggested might fall beyond *Garcetti*'s reach. Writing for the Court in *Garcetti*, Justice Kennedy had acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[70] In the years since *Garcetti*, "at least two circuits have found that *Garcetti* does not apply to the teaching and writing activities, undertaken 'pursuant to their official duties,' of faculty members at public universities."[71] Judge Howell cited these developments with approval, noting "the special status of teachers and academics in the First Amendment tradition."[72] Turning to journalism, she observed that "[f]reedom of the press holds an equally exalted place in the First Amendment firmament."[73] It follows, she concluded, that "*Garcetti* does not apply to the core editorial or journalistic functions of government-employed journalists."[74]

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[67] Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 357–61 (D.D.C. 2020).

[68] *Id.* at 365–72.

[69] *Id.* at 375.

[70] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006). In making this point, he referenced Justice Souter's concern, expressed in his dissent in *Garcetti*, that the majority opinion might jeopardize academic freedom, as public university faculty "necessarily speak and write 'pursuant to official duties.'" *Id.* at 438 (Souter, J., dissenting); *see also id.* at 425 (referencing Justice Souter's dissent).

[71] Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 375 (D.D.C. 2020) (citing Demers v. Austin, 746 F.3d 402, 411 (9th Cir. Wash. 2014); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011)).

[72] *USAGM*, 502 F. Supp. 3d at 374.

[73] *Id.* at 375.

[74] *Id.* at 376.

An approach like Judge Howell's—one that takes seriously the *Garcetti* Court's suggestion that academic research and teaching might retain some First Amendment coverage and extends this carve-out to analogous activities—can help to preserve the integrity of public knowledge production. Going forward, however, courts should place such carve-outs on firmer footing by relying explicitly on the anti-distortion principle. They should make clear, in other words, that public academics' speech retains some protection because the alternative—unfettered state control of such speech—is incompatible with the very nature of the academic enterprise. The same can be said of unfettered state control of speech produced by publicly funded journalists or by other public knowledge producers. The problem, in short, is not solely the infringement on a highly valued type of speech, such as academic writing or journalism. The problem is the government's purporting to fund the production of such speech while distorting central features of that production.

To glean an anti-distortion principle from precedent, one can begin within the public employee speech cases themselves. Since its 1968 decision in *Pickering v. Board of Education*[75]—the first in the line of modern public employee speech precedents—the Court has stressed that the First Amendment covers public employee speech not only because such speech is valued by the speaker but because of its social significance.[76] In the 2004 case of *San Diego v. Roe*, for example, the Court acknowledged that "[u]nderlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."[77] More recently, in *Lane v. Franks*, the Court rejected the argument that speech about one's work is necessarily work product that falls within the *Garcetti* rule.[78] Writing for the *Lane* Court, Justice Sotomayor explained that "speech by public employees on subject matter related to their employment holds special value precisely because those employers gain knowledge of matters of public concern through their employment."[79] Implicit in

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[75] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[76] *Id.* at 572 (observing that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions").

[77] San Diego v. Roe, 543 U.S. 77, 82 (2004).

[78] Lane v. Franks, 573 U.S. 228, 239–41 (2014).

[79] *Id.* at 240.

this "special value" rationale are notions of both access and expertise. Public employees bring something special to the speech marketplace partly because they are privy to information about the government that the average citizen cannot access on their own. Equally important is their professional expertise, including their ability to make sense of and convey the information to which they have special access. For such expertise to add value, however, it must remain undistorted by political or other extrinsic pressures and reflect the speaker's best professional judgment.

Concerns about distortion shape the doctrine more overtly in several cases involving government programs, subsidies, and public forums. Among these precedents is the 2001 case of *Legal Services v. Velazquez*, which involved a federal statutory restriction on the use of congressionally appropriated Legal Services Corporation (LSC) funds.[80] The restriction prohibited attorneys, in the course of LSC-funded representation, from challenging the constitutionality of state or federal welfare laws or the consistency of state welfare laws with federal statutes.[81] LSC attorneys were free to argue that agents had interpreted or applied welfare statutes incorrectly. They were forbidden, however, from challenging the legality of the statutes themselves.[82] The Supreme Court held that the law violated the First Amendment. Its fundamental failing, said the Court, was that it attempted to "use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning."[83] Specifically, Congress had sought to fund activities within the legal system under conditions that distorted the role of LSC lawyers. This disadvantaged clients and courts, who depend on attorneys to "present all the reasonable and well-grounded arguments necessary" in a case.[84] To make matters worse, the statutory restriction shielded the government from zealous advocacy

[80] Congress established the LSC in 1974 to fund local organizations by providing "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." Legal Services Corp. v. Velazquez, 531 U.S. 533, 536 (2001).

[81] *Id.* at 536–37.

[82] The LSC interpreted the restriction to mean that "[e]ven in cases where constitutional or statutory challenges became apparent after representation was well under way . . . its attorneys must withdraw." *Id.* at 539.

[83] *Id.* at 543.

[84] *Id.* at 544.

against itself. "We must be vigilant," the Court admonished, "when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[85]

In several other cases involving government funding or property, the Court similarly observed that the government may not impose conditions on an expressive medium that it funds or creates where those conditions would distort the nature of the medium.[86] In the context of limited public forums, for example, the Court has explained that once the government opens such a forum, "[it] must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint."[87]

To be sure, there are significant counterforces in the case law as well. The most important one is government speech doctrine. This is the notion that, "[w]hen government [itself] speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[88] Thus, if a court finds that a government-funded position or program is a vehicle for government messaging, the government is free to shape the resulting expression however it wishes.[89] Were government speech doctrine limited to cases involving expression that is transparently conveyed as a scripted message from the government, it would not be problematic. Indeed, such expression might even further government accountability. As Justice Alito suggests, for example, in the 2015 case of *Walker v. Sons of Confederate Veterans*, "it is the democratic electoral process," rather than the First Amendment, "that first and foremost provides a check on government speech."[90] However, democratic checks cannot be counted on when the government's impact on speech is not transparent.

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[85] *Id.* at 548.

[86] *Id.* at 542–44 (citing several such cases and noting that "[w]here the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations"). *See also* HORWITZ, *supra* note 18, at 18 (observing that the Supreme Court's "decisions are inevitably influenced by the function and purpose of the institutions that come before them").

[87] Rosenberger v. Rector, 515 U.S. 819, 829 (1995) (citations omitted).

[88] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

[89] *Id.* at 207–09.

[90] *Id.* at 207.

This is a growing concern, as the Court has decided several cases in which it characterized as government speech expression that the government played a nontransparent role in shaping.[91]

The distorting effect of an expansive government speech doctrine is especially worrisome when speech is presented to readers and listeners as the product of expertise. Such a scenario is epitomized by *Rust v. Sullivan*, the 1991 case that was the first in the line of expansive government speech cases.[92] In *Rust*, the Court upheld federal regulations barring family planning clinics from mentioning abortion in the course of providing federally subsidized counseling.[93] *Rust* strikes me as incorrect from an anti-distortion perspective. Although the program that the Court upheld purported to subsidize health care, it conditioned that subsidy in a manner that distorted the expressive relationship between patient and health care provider. As Robert Post put it, the role of a physician requires the exercise of "independent professional judgment." Patients, in turn, "expect and rely upon that judgment."[94]

Although one can draw distinctions between *Rust* and *Velazquez*—indeed, the Supreme Court did just that in *Velazquez* and has distinguished the two cases from one another elsewhere[95]—I do not see much material difference between the two with respect to distortion. I raise this point only to stress, again, that these two

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[91] *See, e.g.*, *id.* (holding that the state engaged in speech when it issued specialty license plates designed by private groups and that, therefore, the state could reject proposed designs without any First Amendment limits); Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (holding that the city engaged in speech by accepting privately donated monuments for a public park and that, therefore, the city could reject donations without First Amendment constraint). *See also, e.g.*, Corbin, *Mixed Speech*, *supra* note 59, at 611–16, 639–40, 663–71 (discussing the government speech doctrine and arguing that it takes an overly broad view of what constitutes government speech); Norton, *supra* note 59, at 25–32 (same).

[92] Rust v. Sullivan, 500 U.S. 173 (1991). Although Rust did not explicitly frame its reasoning in terms of "government speech," that was the nub of its analysis, and the Supreme Court would, in later cases, make that framing overt. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (explaining this trajectory).

[93] *Rust*, 500 U.S. at 173, 191.

[94] Robert C. Post, *Subsidized Speech*, 106 YALE L. J. 151, 172–74 (1996).

[95] *Velazquez*, 531 U.S. at 542–43 (the legal advice and advocacy at issue "cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*"). *See also, e.g.,* United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 201, 213 (2003) (plurality opinion) (distinguishing *Rust*, 500 U.S. from *Velazquez*, 531 U.S.).

threads of case law—*Garcetti* and the government speech cases on the one hand, and those aspects of employment, subsidy, and public forum cases that protect subsidized speech from distortion—are in tension with one another. For those concerned about distortion, then, the task at hand is to limit the reach of the former and to broaden the latter's scope.

This brings us back to *Garcetti*. *Garcetti*'s rationale echoed the government speech doctrine in part, with the Court stating that restrictions on work product speech "simply reflect[] the exercise of employer control over what the employer itself has commissioned or created."[96] The problem with this rationale is its overbreadth. Certainly, some government employees are hired to convey messages crafted by the government. But as noted earlier, and as others have pointed out in response to *Garcetti,* much public employment does not entail such a role. To the contrary, many government employees are hired to engage in knowledge production in the ordinary course of their jobs. Treating knowledge production as scripted government speech is a recipe for distortion. Worse still, it invites distortion that insulates the government from speech that might criticize it. Such criticism might be direct—for example, it could take the form of an inspector general's damning findings. Or it might be indirect—say, a scientific report that casts doubt on the premises underlying a president's policy goals.

Yet *Garcetti* also contains the seeds of its own containment through the anti-distortion principle. First, *Garcetti* explicitly embraced the reasoning of the *Pickering* line of cases to the effect that public employee speech has special, expertise-driven value.[97] Indeed, in the Supreme Court's first major public employee speech case following *Garcetti*—the 2014 case of *Lane v. Franks*—the Court rejected the argument that speech about one's public employment is necessarily work product speech that is not covered by the First Amendment. Writing for the *Lane* Court, Justice Sotomayor observed that "our 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."[98] Second, *Garcetti* floats the possibility of a special exception for academic speech. Although Justice Kennedy's

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[96] Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

[97] *Id.* at 419–20.

[98] Lane v. Franks, 573 U.S. 228, 240 (2014).

opinion does not elaborate much on this idea, it logically rests, as we have seen, at least partly on anti-distortion concerns. For reasons already explored, the same concerns support a broader exception to *Garcetti*'s reach.

2. Balancing harms and considering who decides

In addition to the government speech rationale, the *Garcetti* Court also relied on the notion of ordinary managerial discretion.[99] That is, the idea that supervisors require leeway to evaluate the quality of employees' work product. I refer to this as ordinary managerial discretion to distinguish it from the government speech rationale. The latter assumes a supervisorial prerogative to dictate employees' speech content. The former is considerably less aggressive, envisioning a managerial right not to script employees' work product speech but to evaluate its quality.

Ordinary managerial discretion is entirely appropriate,[100] and I know of no serious objections to *Garcetti* that say otherwise. The dissenters in *Garcetti* themselves took the position that any managerial concerns can be addressed under the "*Connick-Pickering* balance test" that courts ordinarily apply to review public employees' free speech claims.[101] Under that test, courts ask whether the speech at issue involves a matter of public concern.[102] If it does not, then there is no First Amendment protection. If it does involve a matter of public concern, then courts balance employees' free speech interests against the "interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[103]

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[99] *See* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 635 (2012) (explaining that *Garcetti* "gestured" at two rationales based on the government's need for managerial control—the government speech rationale and what I describe here as ordinary managerial discretion).

[100] *See id.* at 635–36. *See also, e.g.,* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 46–49 (2008) (defending *Garcetti* on the basis that the government must be able to manage employees and evaluate their job performance).

[101] *Garcetti*, 547 U.S. 410, 428–35 (2006) (Souter, J., dissenting) (advocating for the balancing test, though suggesting that it can be applied with somewhat more bite in the context of work product speech); *id.* at 446–47 (Breyer, J., dissenting) (advocating for the balancing test in some, but not all, work product speech cases).

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

[103] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

As I detailed in earlier work, I urge courts to take a somewhat different approach to assess ordinary managerial discretion arguments. Specifically, "[j]udicial review in the work product context can and should be designed not to second-guess supervisor assessments of work product quality, but to smoke out retaliation against work product speech *for reasons other than quality*."[104] Under this approach, for example, "a government scientist's superior would be free to discipline her for sloppy research methods or poorly written reports." On the other hand, it would not "constitute a work quality-based decision were a government scientist's supervisors to discipline her for reaching scientific conclusions in tension with an administration's policy agenda."[105] Courts are well equipped to manage such inquiries. They "have considerable experience conducting inquiries designed to smoke out illegitimate decision-making bases and to distinguish them from permissible rationales."[106]

Improper political interference may take the form not only of individual disciplinary decisions but of broader policies and structures. This brings us back to *USAGM*. The plaintiffs' First Amendment claims stemmed from a series of actions, including some directed at individuals. They all centered, however, on an alleged structural failing—specifically, defendants' breach of the firewall between the networks' day-to-day journalistic operations and upper-level management.[107] One firewall-breach claim, for example, entailed "defendants' requests to participate in news coverage meetings and efforts to directly oversee journalists' assignments."[108]

I raise this aspect of *USAGM* to highlight two points. First, because the firewall-breach claims concerned "'generally applicable' policies and practices," Judge Howell applied a somewhat heightened version of the *Connick-Pickering* test, asking "whether the restrictions defendants have allegedly imposed on [plaintiffs']

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[104] Kitrosser, *supra* note 10, at 336.

[105] *Id.*

[106] *Id.* at 337–38.

[107] Amended Complaint at ¶ 174, Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 375 (D.D.C. 2020) (No. 1:20-cv-02885-BAH); *USAGM*, 502 F. Supp. 3d at 372.

[108] *USAGM*, 502 F. Supp. 3d at 381.

speech are no more restrictive than 'reasonably necessary to protect' various government interests."[109] This higher scrutiny level originated in the 1995 Supreme Court case of *United States v. National Treasury Employees Union* (*NTEU*).[110] The *NTEU* Court suggested that the "widespread impact" of the challenged statutory provision gave "rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech," a general restriction can "chill[] potential speech before it happens."[111] It makes good sense to apply this somewhat tougher and more forward-looking approach to general policies and practices for the reasons described by the *NTEU* Court. Indeed, one can see the wider perspective to which such scrutiny lends itself in Judge Howell's observation that defendants' efforts created a chilling effect. As she put it, "[i]n response to the knowledge that defendants are monitoring VOA and network coverage and reaching out to individual journalists directly with questions about coverage, journalists and editors have already refrained from engaging in certain speech and are likely to continue doing so."[112]

Second, the firewall breaches illustrate how decision-makers' identities themselves can evidence improper political interference. In the case of *USAGM*, there is no single, correct resolution to each of the myriad coverage, editing, and other journalistic decisions that must be made on a day-to-day basis. Yet political distortion was evidenced by high-level management's intrusion into the daily processes through which those decisions are made.

III. Broader Legal, Political, and Social Contexts

A. Legislative Protections for Knowledge Production, and the Threat Posed by Unitary Executive Theory

Though necessary, First Amendment protections alone do not suffice to safeguard public knowledge production. Legislation that fosters expertise-driven public knowledge production and shields it from undue political influence is essential as well. Indeed, the merit-based civil service itself is a creation of the political branches. As Jon Michaels writes, the 1883 Pendleton Act "marked a sharp turn

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[109] *Id.* at 378 (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 474 (1995) (as quoted in Weaver v. U.S. Info. Agency, 87 F.3d at 1429, 1439 (D.C. Cir. 1996)).

[110] *NTEU*, 513 U.S. 454.

[111] *Id.* at 468.

[112] *USAGM*, 502 F. Supp. 3d at 381.

away from premodern public employment, sweeping away the longstanding spoils system."[113] In the many years since its passage, subsequent "Congresses and presidents [have] extend[ed] coverage to more and more federal employees and [have] thicken[ed] the protections enjoyed by all civil servants."[114] For example, civil service laws today protect federal employees who blow the whistle on certain workplace problems including lawbreaking, gross mismanagement, and abuses of authority.[115]

Civil service protections are especially crucial in the face of judicial precedent narrowing the scope of the First Amendment's safeguards. In addition to substantive limits, the Supreme Court for decades has barred federal employees from bringing damages actions against their employers for infringing their First Amendment rights.[116] In the 1983 case of *Bush v. Lucas*, the Court held that the CSRA—which today includes the amendments of the Whistleblower Protection Act and the Whistleblower Protection Enhancement Act, among other statutes—is the exclusive vehicle for federal employees to complain of First Amendment violations by their employers.[117] Given this precedent, Judge Howell deemed it a close question whether the CSRA precluded the *USAGM* plaintiffs' First Amendment claims.[118] Howell allowed the claims to proceed, however, because they alleged general changes in plaintiffs' working environment, rather than targeted acts of retaliation like those covered by CSRA.[119]

Federal knowledge producers' statutory safeguards—including civil service laws—themselves are increasingly at risk of judicial invalidation. One of the most significant threats is the Supreme Court's widening embrace of unitary executive

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[113] JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 71 (2017).

[114] *Id.* at 71.

[115] JASON ZUCKERMAN & ERIC BACHMAN, THE WHISTLEBLOWER PROTECTION ACT: EMPOWERING FEDERAL EMPLOYEES TO ROOT OUT WASTE, FRAUD AND ABUSE 2–3 (2017).

[116] *See* Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government Whistleblowers*, 94 NOTRE DAME L. REV. 1699, 1706–08 (2019).

[117] *Id.* at 1706–08 (citing Bush v. Lucas, 462 U.S. 367 (1983)).

[118] Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 370 (D.D.C. 2020) ; *see also id.* at 362–66.

[119] *Id.* at 366–69.

theory. As I have detailed elsewhere, unity is a "decades-long project of the conservative legal movement" that "posits that the President must control all discretionary activity within the executive branch."[120] Taken to its logical conclusion, unity could obliterate tenure protections for knowledge producers and for those charged to safeguard their independence. Such threats currently loom over civil servants, inspectors general, and members of the Office of Special Counsel and the Merit Systems Protection Board. The latter two groups are tasked with reviewing federal employees' CSRA complaints.[121]

Although an extensive discussion of unity is beyond this essay's scope, four brief points are in order. First, unitary executive theorists—including justices who embrace unity—rely partly on arguments from accountability. For example, writing for a majority of the Court in the 2020 case of *Seila Law LLC v. Consumer Financial Protection*, Chief Justice Roberts touted the unique political accountability of the presidential office: "Only the President (along with the Vice President) is elected by the entire Nation."[122] Roberts cautioned, however, that the people cannot hold the president to account for that which he cannot control.[123] Accountability thus is undermined by checks on presidential power in the administrative state, including "for cause" removal restrictions.[124]

Second, this pro-unity argument relies on a thin, formalistic vision of accountability. As a result, it overlooks unity's capacity to undermine meaningful accountability by enabling the president and his allies to manipulate the information by which the public can judge them. As I have put it elsewhere:

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[120] Heidi Kitrosser, *A Government That Benefits from Expertise: Unitary Executive Theory and the Government's Knowledge Producers*, 72 SYRACUSE L. REV. 1473, 1473–74 (2022) (citing Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 376–82 (2020) (discussing unity's lineage as a political project); Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENVER L. REV. 197 (2011) (same); Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 313–19 (2010) (same); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158, 1166 (1992) (describing unity); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1995) (same).

[121] *See* ZUCKERMAN & BACHMAN, *supra* note 115, at 14–16.

[122] Seila L. LLC v. Consumer Fin. Prot. Bureau, 923 F.3d 680, 2203 (2020).

[123] *See id.* at 2203.

[124] *See id.* at 2203.

> [E]xecutive branch accountability has both formal and substantive components. Formally, the people and the other branches must have mechanisms to respond to executive branch successes and failures alike. Substantively, the public and the other branches must have the means to discover such misdeeds in the first place. Unity is partly responsive to formal accountability, concentrating power in one nationally elected and highly visible figure who is subject to one re-election opportunity and to the possibility of impeachment. Yet a categorical unity directive can gravely damage accountability's substantive aspects. It can do so by enhancing the President's ability, directly or through subordinates, to shield or manipulate the very information against which the public and the other branches may judge his actions.[125]

A key means through which unity can undermine accountability is by undermining knowledge producers' independence from partisan political pressures.

Third, there is a striking parallel between the accountability-based arguments of unitary executive theorists and those made to advance broad applications of government speech doctrine. Recall, for example, Justice Alito's assurance that "the democratic electoral process . . . first and foremost provides a check on government speech."[126] As we have seen, however, democratic checks do not work where the government's impact on speech is not transparent. In the case of speech that purportedly stems from expertise, nontransparent government pressure can have a distorting effect that undermines accountability.

Fourth and finally, although the Supreme Court has increasingly embraced unitary executive theory over the past few years, it can and should refrain from extending this line of precedent further. Given the many flaws in unity's underlying reasoning[127]—including but not limited to the accountability-related problems just referenced—the Court would be well advised to exercise restraint going forward. At minimum, the Court should defer to legislative choices to protect public knowledge producers. As I detail in another recent paper, it is possible for the Court to do so within the confines of existing precedent.[128]

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[125] Kitrosser, *supra* note 120, at 1485 (citations omitted).

[126] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015). 2245.

[127] There is a large and still-growing literature chronicling the deep flaws in unity's textual, historical, and functional justifications. I cite several of those works in Kitrosser, *supra* note 120, pt. II.

[128] *See generally,* Kitrosser, *supra* note 120.

B. Cultural and Political Hostility to Knowledge Production, and Parallels in Legal Reasoning

A certain populist sensibility underlies the Supreme Court's accountability-based justifications in both the unitary executive theory and government speech contexts. Each justification is premised, first, on the assumption that control by elected officials—whether of public employees or of publicly funded speech—ultimately equals control by the people.[129] Second, each treats popular will as the appropriate determinant of the speech output in question, including public knowledge production.

The implications of these premises, particularly the second, is starkly illustrated by a 1988 memorandum opinion by the Justice Department's Office of Legal Counsel (OLC). The opinion took the position that Congress could not constitutionally require the director of the Centers for Disease Control and Prevention to mail "AIDS information flyers" to the public "without necessary clearance" by the president.[130] OLC deemed its conclusion to follow from the unitary structure of the executive branch, which itself stemmed partly from the founders' desire to ensure politically accountable governance.[131] OLC explained that the "highly scientific" nature of the information in question had no bearing on its analysis. Rather, it stressed, the "President's supervisory authority encompasses *all* of the activities of his executive branch subordinates, whether those activities be technical or non-technical in nature."[132] Similar consequences follow when *Garcetti* and government speech doctrine are applied to permit control by elected officials of public knowledge production.

The notion that "the people" have a right to determine the content of publicly subsidized speech, including that which purports to reflect disciplinary expertise,

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[129] This premise oversimplifies matters at best. This is particularly so in the context of unitary executive theory, where proponents extol the uniquely responsive nature of the nationally elected president despite the fact that the president is subject to a single reelection opportunity during his or her presidency, and despite the decisive role played by the electoral college in a third of this century's presidential elections.

[130] Charles J. Cooper & Douglas W. Kmiec, Statute Limiting the President's Auth. to Supervise the Dir. of the Ctr. for Disease Control in the Distrib. of an AIDS Pamphlet, 12 Op. O.L.C. 47 (1988).

[131] *Id.* at 48–52, 56–57.

[132] *Id.* at 57. This "necessarily follows," the opinion continues, "from the fact that the Constitution vests '[t]he entire executive Power,' without subject matter limitation, in the President." *Id.*

plays an influential role in American culture and politics as well as in the law. One contemporary manifestation of this view can be seen in right-wing attacks on the so-called "deep state," which generally refers to career bureaucrats in nonpartisan, expertise-driven roles.[133] It is no coincidence that the same politicians who frequently invoke the deep state also use the term "fake news" to describe reported information that reflects poorly on them or their political allies. In wielding these terms, politicians convey the notion that "truth" is a product of power and loyalty. From this perspective, public knowledge production is among the spoils of political power. There is little if any place, in this view, for publicly supported speech that reflects disciplinary expertise, shielded from partisan politics.

Suspicion of expertise is nothing new in American life,[134] nor is it invariably a negative force. To the extent that American law and culture reflect epistemic humility—including the notions that even the loftiest are fallible, that leaders must be kept in check by the people, and that individuals should recognize the limits of their own perspectives—that is largely a good thing, in my view.[135] Trouble follows, however, when epistemic humility shades into epistemic relativism, or the idea that "any idea or claim is just as good as any other."[136] Epistemic relativism, in turn,

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[133] *See, e.g.,* STEPHEN SKOWRONEK ET AL., PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 3–5, 27–28 (2021) (describing such attacks); Evan Osnos, *Trump vs. the "Deep State,"* THE NEW YORKER, May 21, 2018, at 56 (same); Jon D. Michaels, *Trump and the "Deep State": The Government Strikes Back*, FOREIGN AFFS., Sept./Oct. 2017, at 52.

[134] *See generally, e.g.,* RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1962); ROSENFELD, *supra* note 14.

[135] Billings Learned Hand delivered a particularly eloquent expression of epistemic humility during his speech, *The Spirit of Liberty* (May 21, 1944). In it, he asked: "What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right." Fittingly, Hand delivered his remarks to a crowd of 1.5 million people in Central Park, including 150,000 newly naturalized citizens, on a holiday called "I am an American Day." Billings Learned Hand, *The Spirit of Liberty*, DIGITAL HISTORY, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199 [https://perma.cc/9D49-YE9Q] (last visited Nov. 18, 2022).

[136] Jackson, *supra* note 15, at 216.

lends itself to the notion that truth is always up for grabs, the mere spoils of political conquest.[137]

C. A Final Example: The Critical Race Theory Bogeyman

1. Cultural and political aspects of the controversy

In political discourse, epistemic relativism often takes the form of complaints to the effect that experts—or "elites" more broadly—are attempting to indoctrinate others. Those making the complaints sometimes pair them with calls to regulate the speech of the offending elites. There is tension between these positions, of course—that is, between championing free speech and advocating using the power of the state to control speech content. Yet they are consistent in two respects. First, each is compatible with the notion that there is no objective reality that matters; there is only power. From that perspective, and as elaborated in the previous section, truth is rightfully determined by those with political power. Second, each position makes sense as part of an appeal to populism—that is, as a piece of a larger narrative that pits elite experts against "real Americans." Historically, populist appeals against academic elites and other disciplinary experts have had a right-wing bent in the United States.[138] This is reflected in much political discourse today, including in assertions of an anti-Trump deep state and in rampant, false claims of a fraudulent 2020 presidential election that could not possibly have been won by anyone other than Donald Trump, the true voice of the people.[139]

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[137] *Cf.* ROSENFELD, *supra* note 14, at loc. 128 ("what counts as truth is now shaped to a substantial degree by group loyalty and partisanship—or what David Roberts, writing in VOX, calls 'tribal epistemology'" (citation omitted)).

[138] *See, e.g.,* HOFSTADTER, *supra* note 134, at 12–15, 39–42, 131–36; ROSENFELD, *supra* note 14, at loc. 1625–34.

[139] *See, e.g.,* Brad Brooks et al., *Why Republican Voters Say There's "No Way in Hell" Trump Lost*, REUTERS (Nov. 20, 2020), https://www.investing.com/news/politics/why-republican-voters-say-theres-no-way-in-hell-trump-lost-2352700 [https://perma.cc/X22C-TYHK]; Federico Finchelstein, *Donald Trump Has Blurred the Line Between Populism and Fascism in a Dangerous Way*, WASH. POST (July 9, 2021), https://www.washingtonpost.com/outlook/2021/07/09/donald-trump-has-blurred-line-between-populism-fascism-dangerous-way/ [https://perma.cc/5VPU-WXHK]; Uri Friedman, *What is a Populist? And Is Donald Trump One?*, THE ATLANTIC (Feb. 27, 2017), https://www.theatlantic.com/international/archive/2017/02/what-is-populist-trump/516525/ [https://perma.cc/PFA3-YMND].

Perhaps the most consistent target of right-wing populist outcries in the United States is public higher education. The stated concerns typically include some variation on the theme that universities are hotbeds of left-wing radicalism that seek to brainwash their students. These worries are often framed as fears that universities are trampling free speech through "political correctness" or "cancel culture." Though couched as anti-authoritarian in nature, these concerns often take the form of calls for the state to control or retaliate against curricular choices, faculty hiring, or pedagogical practices at state universities.

This phenomenon is far from new. As I wrote in 2017:

> For much of the past century, universities have been among the major targets in culture wars between so-called liberal elites and conservatives invoking populist rhetoric.[140] . . . Teachers and administrations have been accused in multiple forums over the years—from the congressional hearings of the 1950s[141] to the online watchdog groups of today[142]—of threatening free speech and free thought by indoctrinating students. Yet such concerns themselves can lead to actions—from the loyalty oath requirements of the mid-twentieth century[143] to present-day state legislative responses

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[140] *See, e.g.,* NEIL GROSS, WHY ARE PROFESSORS LIBERAL AND WHY DO CONSERVATIVES CARE? 15–16, 223–24, 230–34, 282–85, 292, 296 (2013); ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 222, 249 (2015).

[141] *See, e.g.*, GROSS, *supra* note 140, at 25 ("Historian Ellen Schrecker estimates that 'almost 20 percent of the witnesses called before congressional and state investigating committees [during the McCarthy era] were college teachers or graduate students'").

[142] *See, e.g.,* CAMPUS WATCH, http://www.campus-watch.org/incident.php [https://perma.cc/D9BP-PA8J] (last visited Apr. 3, 2017) (inviting reports about Middle Eastern studies classes and scholarship from "students and faculty on North American campuses"); *Mission*, CAMPUS REFORM, http://www.campusreform.org/about [https://perma.cc/S5GR-Q7ZF] (last visited Apr. 3, 2017) (calling itself a "watchdog to the nation's higher education system" that "exposes bias and abuse on . . . college campuses"). Today's efforts were preceded by William F. Buckley's mid-1950s call to National Review readers to "send him 'evidence of such nature as will clarify the question whether teachers are engaged in indoctrinating their students.'" Buckley promised that the National Review "would 'act as a repository'" (cited in GROSS, *supra* note 140, at 223).

[143] *See, e.g.,* Keyishian v. Bd. Regents, 385 U.S. 589, 591–93 (1967) (describing anti-communist pledges and loyalty oaths that State Univ. N.Y. faculty members were required to take as conditions of employment); THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S 10 (Robert Cohen & Reginald E. Zelnik eds., 2002) (referring to "an anti-[c]ommunist loyalty oath that in 1949 and the early 1950s drove away prominent faculty members and inhibited student activism" at the University of California).

to campus protests[144]—that threaten academic freedom.[145]

In our current moment, calls to regulate higher education in the name of freedom have become a near-constant drumbeat. Particularly ubiquitous is a growing furor over "critical race theory." CRT, which arose in American law schools in the 1970s and 1980s to examine systemic racism in American law and society, is taught predominantly in elective law school and graduate school courses.[146] It had been relatively obscure until conservative activists, by their own admission, began a deliberate campaign to energize prospective voters by convincing them that CRT is being taught pervasively in grade school as well as in colleges and universities, and that it indoctrinates students into a divisive, far-left ideology.[147] CRT's antagonists depict its content and prevalence in ways that range from incoherent to false; nonetheless, their efforts have borne fruit. Legislation and other official actions targeting CRT—or taking aim at other topics that activists have conflated with CRT (hereinafter "educational gag orders")—have been enacted or proposed in multiple states. Although most of these measures initially were directed at K-12 public education, they increasingly target public higher education as well.[148] According to the American Association of University Professors (AAUP), eight states passed educational

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[144] *See* Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2053–54 (2017) (see text accompanying nn.326–27).

[145] *Id.* at 1996–97 (citations in original).

[146] Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/VP8B-T57C].

[147] *See, e.g.,* Melanie Zanona, *"Lean Into the Culture War": House Conservatives Push Fight Against Critical Race Theory*, POLITICO (June 24, 2021), https://www.politico.com/news/2021/06/24/culture-war-critical-race-theory-496087 [https://perma.cc/NJ6K-PYKM]; Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/22LA-6VLQ]; Catie Edmondson, *McConnell Attacks Antiracism Education as "Divisive Nonsense,"* N.Y. TIMES, May 1, 2021, at A16.

[148] *See* Jeremy C. Young & Jonathan Friedman, *In Higher Education, New Educational Gag Orders Would Exert Unprecedented Control Over College Teaching*, PEN AM. (Feb. 1, 2022), https://pen.org/in-higher-education-new-educational-gag-orders/ [https://perma.cc/6DQB-DC9S]; *Legislative Interference in Teaching About Race*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/issues/teaching-about-race/faqs-bills-restricting-teaching-history [https://perma.cc/HKY6-AEKC] (last visited June 21, 2022) [hereinafter AAUP].

gag order laws in 2021, with two targeting higher education. As of June 2022, AAUP reports that it has identified "over 120 educational gag orders in state legislatures, including 47 that explicitly target higher education."[149]

A few examples help to illustrate the scope of the various bills. Oklahoma Senate Bill 1141 would bar any "institution within the Oklahoma State System of Higher Education" from requiring, either as a general education requirement or as a "core requirement for a degree program," enrollment "in a course . . . that addresses any form of gender, sexual, or racial diversity, equality, or inclusion curriculum."[150] South Carolina House Bill (HB) 4605, applicable to public and private colleges alike that receive any state funding or tax benefits, would bar schools from "subject[ing] individuals to, or require completion of instruction, presentations, [or] . . . discussions" affirming or promoting particular concepts, including the existence of "unconscious or implicit bias" or the desirability of affirmative action, even where the "instruction, presentation [or discussion] . . . is part of a lesson, assigned or suggested materials made available in any format or setting."[151]

Several bills fixate on The New York Times' 1619 Project. As PEN America summarized in February 2022:

> Alaska's HB 228 and Oklahoma's HB 2988 would ban the use of the 1619 Project as a college classroom assignment; New York's A[ssembly]B[ill] 8253 would ban it as a required assignment, even when paired with competing perspectives; Iowa's H[ouse]File] 222 would ban the 1619 Project "or any similarly developed curriculum." Missouri's HB 1634 would ban seven different curricula, including the 1619 Project, the Southern Poverty Law Center's Learning for Justice Curriculum, and the Zinn Education Project. Students training to be teachers would not be able to examine or discuss these curricula in a college classroom setting.[152]

A striking aspect of educational gag order campaigns and related public discourse is how much they reflect right-wing populism and the notion that political power, rather than expertise or a search for truth, should determine the content of public education. As Nate Hochman put it in the Manhattan Institute's City Journal, "[w]hat one teaches and does not teach in [the public school] setting is an un-

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[149] AAUP, *supra* note 148.

[150] S.B. 1141, 58th Leg., 2d Sess. (Okla. 2022).

[151] H.B. 4605, 124th Gen. Assemb., Reg. Sess. (S.C. 2021–2022).

[152] Young & Friedman, *supra* note 148.

avoidably political decision, using public funds to favor certain concepts and theories at the necessary exclusion of others."[153] Christopher Rufo, the person most directly responsible for igniting the nationwide anti-CRT frenzy,[154] took Hochman's point still further: He deemed it "totalitarian" to apply First Amendment protections to anti-CRT bills.[155] Writing in City Journal, Rufo explained that those who see anti-CRT campaigns as matters of free speech "fail to understand the basic premise of our constitutional rights."[156] He went on:

> The First Amendment protects the right of individuals to speak freely . . . the government itself . . . does not have a First Amendment right as such. This is the proper context for evaluating critical race theory, which is an almost entirely government-created and government-sponsored ideology, developed in public and publicly-subsidized universities, formulated into policy by public bureaucracies, and transmitted to children in the public school system. The critical race theorists and their enablers . . . want the right to enshrine their personal ideology as official state dogma. They prioritize the "freedom of the state" over the "freedom of the individual"—the prelude, whether deliberate or accidental, to any totalitarian system.[157]

The rhetoric of the anti-CRT movement also relies on a populist division between the people—those (presumably white) students whom activists imagine will feel guilt or offense at learning of structural racism and its role in America's past and present—and all others, including those whose experiences and ancestral histories might be illuminated by challenged materials and teachings.[158] For example, several of the educational gag order bills, as well as the Trump executive order on

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[153] Nate Hochman, *Critical Race Theory and Academic Freedom*, CITY J. (June 17, 2021), https://www.city-journal.org/critical-race-theory-and-academic-freedom [https://perma.cc/769R-KQEY].

[154] *See* Wallace-Wells, *supra* note 147.

[155] Christopher F. Rufo, *Critical Race Fragility*, CITY J. (Mar. 2, 2021), https://www.city-journal.org/the-left-wont-debate-critical-race-theory [https://perma.cc/728W-2U54].

[156] *Id.*

[157] *Id.*

[158] For discussions of populism's features, including a rhetorical division of "the people" from all others, see, e.g., Friedman, *supra* note 139; ROSENFELD, *supra* note 14, at loc. 1323–33.

which many of them are based, target teachings and materials that might cause students to feel guilt or discomfort.[159] Similarly, a common refrain in anti-CRT rhetoric is that offending lessons or materials are oppressive, even discriminatory against white students.[160] From these accusations, it is a short leap to the notion—also trumpeted by anti-CRT activists—that educational gag orders do not infringe on freedom. To the contrary, they positively advance it.[161]

2. First Amendment implications

The First Amendment principles and doctrinal tools explored in Part II map on to anti-CRT controversies in a few ways. First, where educational gag order laws target publicly funded higher education, *Velasquez* and the limited public forum

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[159] *See, e.g.,* Valerie Strauss, *Preparing Citizens to Stick Their Heads in the Sand*, WASH. POST (Feb. 1, 2022), https://www.washingtonpost.com/education/2022/02/01/race-curriculum-students-consequences/ [https://perma.cc/7XAH-NG3F] (explaining the central role played by "discomfort" in a number of educational gag order bills); Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021), https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/ [https://perma.cc/L6VF-HLKR] (citing legislative provisions focused on "guilt" or divisiveness); Cade Spencer, *Classroom Gag Orders: Protecting Tender Feelings or Denying Realities?*, FREE SPEECH PROJECT, https://freespeechproject.georgetown.edu/classroom-gag-orders-protecting-tender-feelings-or-denying-realities/ [https://perma.cc/W5MR-RS74] (last visited, June 23, 2022) (describing the relationship between the Trump executive order and state legislation, and citing examples of legislative provisions that target material causing feelings of "discomfort" or "guilt").

[160] *See, e.g.,* Kiara Alfonseca, *Critical Race Theory Thrust into Spotlight by Misinformation*, ABC NEWS (Feb. 7, 2022), https://abcnews.go.com/US/critical-race-theory-thrust-spotlight-misinformation/story?id=82443791 [https://perma.cc/RC6H-8C2V]; Mark McCormick, *Does CRT Make White Students Feel Bad? Try Being a Black Student*, KAN. REFLECTOR (Jan. 10, 2022), https://kansasreflector.com/2022/01/10/does-crt-make-white-students-feel-bad-try-being-a-black-student/ [https://perma.cc/592K-K7G5]; Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/HK7F-WCHU]; Memorandum from Jim Banks, Chairman, Republican Study Comm., to Republican Study Comm. members (June 24, 2021) (https://www.politico.com/f/?id=0000017a-3f65-d283-a3fb-bf6f99470000 [https://perma.cc/AU7Z-K8K9]).

[161] *See, e.g.,* Alfonseca, *supra* note 160; Reginald C. Oh, *An Academic Theory Has Become the 21st Century's Willie Horton*, WASH. MONTHLY (June 25, 2021), https://washingtonmonthly.com/2021/06/25/an-academic-theory-has-become-the-21st-centurys-willy-horton/ [https://perma.cc/5GAK-BFS8]; JONATHAN BUTCHER & MIKE GONZALEZ, BACKGROUNDER NO. 3567, CRITICAL RACE THEORY, THE NEW INTOLERANCE, AND ITS GRIP ON AMERICA (Dec. 7, 2020).

cases provide the right starting point. That is, such laws ought not to pass muster where they are viewpoint-based or would distort the nature of higher education. When the government funds higher education, it implicitly claims to support an enterprise that is largely self-governed by disciplinary experts on matters of academic merit, pedagogical method, and curriculum.[162] When elected officials supplant such decision-making through legislative mandates—for example, by prohibiting "'concepts related to . . . racial diversity, equality, or inclusion'" in the classroom[163] or micromanaging how professors may teach the concept of slavery[164]—they distort the very nature of academic pursuits. Specifically, they seek to use the university—and public expectations that its scholarly and curricular output will reflect disciplinary expertise—to launder political messaging.

A more complicated situation arises where restrictions on teaching or research come not from legislatures but from university administrations—say, in the form of professional consequences for poorly received pedagogy or scholarship. This scenario pits the academic freedom of professorial knowledge producers against the academic freedom of their knowledge producer institutions. Yet here, too, the doctrinal tools explored in Part II point us toward a solution. They call for a limited type of judicial review—one "designed not to second-guess supervisor assessments of work product quality, but to smoke out retaliation against work product speech *for reasons other than quality*."[165] This is similar to the approach advocated by Paul Horwitz, who suggests that courts should defer to universities' disciplinary decisions, so long as they are "'genuinely academic decision[s].'"[166] Drawing on due process case law involving public universities, Horwitz explains that "an academic decision is a professionally arrived at academic judgment that can only be judicially

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[162] For important discussions of discipline-based self-governance within academic institutions and the institutions' relationships to the First Amendment, see, e.g., HORWITZ, *supra* note 18, at 107–43; ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

[163] *See* Young & Friedman, *supra* note 148 (citing S.B. 1141, 2022 Leg., 58th Sess. (Okla. 2022)).

[164] *Id.* (citing several relevant bills).

[165] Kitrosser, *supra* note 10, at 336.

[166] HORWITZ, *supra* note 18, at 116.

overridden if the university has engaged in such a 'substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'"[167]

This analysis brings us full circle, back to our initial look at *Garcetti* and the potential academic exception that it raises. As I observed in that discussion, *Garcetti*'s academic exception holds promise, but it would be more principled, and potentially more robust, if it were framed as part of a broader anti-distortion rule. There is also a second reason why an anti-distortion rule is a more satisfying approach than an exception based on academic freedom alone. Specifically, an exception grounded in the nature of academic freedom could be invoked as readily to defend as to protest *Garcetti*'s application to professorial speech. Academic freedom, the argument would go, demands special deference not to individual professors but to academic institutions and their decision-making. An anti-distortion approach, on the other hand, alerts us to the dangers of political manipulation posed to professorial and institutional speech alike. It also lends itself to the doctrinal approach outlined above, one that protects institutional autonomy for legitimate academic decision-making, while remaining on guard against judgments that are mere pretexts for distortion.

Conclusion

These are dangerous times. According to polls, more than half of the members of one of our two major political parties continue to believe that the last presidential election—an election uniformly hailed as free, fair, and secure by election security experts—was fraudulent and that President Biden is not the rightful president.[168] The ongoing COVID pandemic, too, has revealed the susceptibility of so many Americans to scientific misinformation and disinformation. Conspiracy theories

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[167] *Id.* (citing Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)). Horwitz framed this approach partly as a response to Frederick Schauer's argument that courts should ask only whether a decision or other action was truly "the conduct" of a university (or other relevant institution). Horwitz, *supra* note 18, at 115 (citing Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256, 1274 (2005). "It is not enough," Horwitz concluded, "to simply say that a university has acted; we must decide whether it is *distinctly* the action of a university." Horwitz, *supra* note 18, at 115.

[168] *See, e.g.*, Philip Bump, *Nearly 700 Days Later, Most Republicans Still Believe Trump's Big Lie*, Wash. Post (Sept. 28, 2022), https://www.washingtonpost.com/politics/2022/09/28/nearly-700-days-later-most-republicans-still-believe-trumps-big-lie/ [https://perma.cc/5MNC-42WL].

abound regarding public schools as well, ranging from lies about tragic school shootings to fearmongering about curricular choices and library books.

Public knowledge production can serve as a crucial counterweight against such phenomena, supporting a shared epistemic base and fostering the critical thinking skills necessary to interpret, challenge, and build on that base. Yet public knowledge production itself is under siege by some of the same cultural and political forces that support misinformation and disinformation. In this push and pull of events, First Amendment law plays an important but complicated role. Aspects of the law bolster the politicization of public knowledge production. But there are important countertendencies in the doctrine as well, parts of the case law that evince an understanding of and protectiveness toward public knowledge production. These salutary pieces of our legal tradition are among the tools that we must draw upon as we strive to shore up public knowledge production and to forge a path out of the epistemic crisis that envelops us today.