IN THE NAME OF ACCOUNTABILITY

HEIDI KITROSSER*

TABLE OF CONTENTS

* William W. Gurley Professor, Northwestern University – Pritzker School of Law. I am very grateful to Erin Miller for inviting me to participate in the symposium for which I wrote this article, to Christina Koningisor for her wonderful turn as discussant for this piece, and to the student editors of the *Southern California Law Review* for their terrific work in organizing the symposium and editing this piece. I owe many thanks as well to Ronnell Anderson Jones and her colloquium students at the University of Utah Law School and to the faculty at the University of North Carolina Law School for inviting me to present this paper and for their thoughtful questions and comments.

INTRODUCTION

The Supreme Court has increasingly embraced legal doctrines that empower elected officials to hide politically inconvenient information and ideas from the American people. Two lines of precedent illuminate this phenomenon and its reach across seemingly disparate areas of the case law. The first is a development in First Amendment law known as government speech doctrine and the closely related rule that public employees receive no First Amendment protection for their work product speech—that is, for anything that they write or say while doing their jobs. This precedent puts at risk the ability of public employees or publicly subsidized experts—ranging from auditors hired to ferret out agency misconduct to scientists commissioned to study and report on changing climate patterns—to convey truthful information and competent, good faith analyses consistent with disciplinary and professional norms. The second line of precedent is the aspect of separation of powers law known as unitary executive theory ("UE theory," "UE," or "unity"). UE proponents argue that the president must fully control all discretionary executive activity in the United States, at minimum through an unfettered removal power. This jeopardizes the independence of federal actors who are charged with research and reporting on matters ranging from public corruption to public health.

The two doctrines not only have similar impacts on information and analysis in the United States, but also share a common rationale: political accountability. Proponents of government speech doctrine emphasize that the people can respond to government speech at the ballot box, rewarding elected officials for speech that they like or punishing them when they dislike what they hear. As for UE theory, supporters emphasize that the president is the only elected official in the federal executive branch. Indeed, they describe the president as more politically accountable than anyone else holding elected office in the United States, as the president alone is subject to nationwide election. It is crucial, they argue, that the president alone exercises discretionary executive power so that the people know whom to blame or reward electorally for the use of such power. Similarly, they brush away concerns about presidential abuses by stressing the ability of the people to punish transgressions at the ballot box.

The judiciary is far from alone in crafting and buttressing these schools of thought. To the contrary, UE theory was shaped and heavily promoted by the modern conservative legal movement well before the Roberts Court embraced it. Indeed, even as the Supreme Court rejected UE theory in the 1988 case of *Morrison v. Olson*, the Justice Department under Attorney General Meese relied on it internally and championed it externally along with the then-nascent Federalist Society. Today, with the support of the

Supreme Court, and with Donald Trump retaking the presidency and characterizing career experts across government as parts of a rogue "deep state," UE theory and its accountability rationale have more influence than ever.

Although, to my knowledge, no similarly probing intellectual history has been done with respect to government speech doctrine, the doctrine aligns intuitively with classic complaints about how Americans' tax dollars are spent, including on public education, public broadcasting, and other forms of knowledge production. Such gripes are not intrinsically partisan, but they can be marshalled in a partisan fashion when framed as appeals to stop "wrongheaded" or "offensive" views from being supported by public funds. Over the past several years, we have indeed seen campaigns, in both legal and political realms, for elected officials to control the communicative output of a range of government programs. These campaigns often characterize civil servants as parts of a leftist deep state, echoing the rhetoric of unitary executive theorists. Their targets include elementary school teachers, college professors, and librarians whom they deem "woke" and indoctrinating. The major thread of argument in these political and legal attacks has been accountability—specifically, the notion that the electorate, through elected representatives, should get the final word on the content of publicly funded knowledge production. Framed in legal terms, the argument is that all such output is the government's own speech.

Yet even as accountability serves as a rallying cry for proponents of UE theory and government speech doctrine, there is a profound tension between that call to arms and the negative impacts of both government speech doctrine and UE theory on the information ecosystem. This tension stems from two very different visions of accountability. Government speech and unitary executive arguments each focus on a thin vision of accountability, one that I have elsewhere called "formal accountability." Formal accountability requires only that there exist some means, mainly the ballot box, by which the public can accept or reject officials.[1]

A more robust vision of accountability—one that I label "substantive accountability"—recognizes that accountability "is a 'they,' not an 'it.' "[2] Indeed, the casting of a single vote for an official—even assuming the opportunity to vote for or against them again some number of years later—is too blunt an instrument to constitute considered approval of all manner of decision whether big or small, technical or non-technical, anticipated or

1. Those officials include the president, in the case of unitary executive theory, and the officials behind any given instance of government expression in the case of government speech doctrine.

2. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It"*: *Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

unanticipated. Rather, holding officials accountable entails countless acts over time, ranging from legislative oversight to internal and external whistleblowing to fearless investigative journalism. All of these acts—including, but not limited to, voting—require the gathering and exchange of information and ideas. In the longer-term, they require a knowledge ecosystem that reliably produces such communications and supports a citizenry capable of assessing them. If one's goal is substantive accountability, then government speech doctrine and UE theory are woefully inadequate to achieve it. To the contrary, they profoundly undermine it, especially when they are interpreted broadly.

Given the growing importance of UE theory and government speech doctrine in both legal and political realms, it is more important now than ever to understand how they undermine, rather than protect, meaningful, substantive accountability. Viewing these two schools of thought together also helps us to see how doctrines across seemingly disparate areas of the law can interact with and buttress one another and be harnessed by partisan interests.

In Part I of this Article, I summarize the respective accountability-based cases for UE theory and government speech doctrine. I explain that each rationale is premised on a simplistic, formal vision of accountability. In contrast, I argue that substantive accountability, which is antithetical to UE theory and to broad interpretations of government speech doctrine, is more faithful to constitutional principles and more desirable as a practical matter. In Part II, I elaborate on and illustrate the points made in Part I by drawing from the major Supreme Court cases on UE theory and government speech doctrine. In Part III, I present several examples of how UE theory and government speech doctrine have been wielded in the courts and the political branches to undermine substantive accountability. In Part IV, I consider where the case law leaves openings to impose limits on each doctrine to preserve substantive accountability.

I. SUBSTANTIVE ACCOUNTABILITY AND THE CONSTITUTION

Proponents of UE theory and government speech doctrine assume a very simplistic vision of government accountability. In the case of UE theory, they suggest that because the president is the only elected member of the executive branch, he alone can be accountable to the people in executing the law.[3] Thus, UE proponents bolster their textual and historical

3. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 97–99 (1994); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 998–99, 1012–15 (1993). *See*

arguments—which I and others have discussed elsewhere[4] and which I address briefly in Part II—by suggesting that accountability is a core reason why text and history dictate a unitary executive,[5] and that accountability independently demands a unitary executive.[6] Proponents elaborate further on presidential accountability by comparing the president not only to unelected bureaucrats, but also to members of Congress. Although the latter are elected, the argument goes, the president alone is subject to election by the entire nation through the Electoral College. He is also uniquely visible in culture and society.[7]

In the case of government speech doctrine, the Supreme Court and other proponents have treated accountability—again, in the form of elections—as a safety net that enables the people to register disapproval of unpopular government speech. They also suggest that government speech itself bolsters accountability, both in the sense that the government can give the people what they want through speech and that it can seek to persuade them through speech.

A number of scholars have critiqued the Court's treatment of accountability in both UE theory and government speech doctrine cases. With respect to UE theory, critics observe that it massively oversimplifies how accountability is achieved as a practical matter. Indeed, it seems naïve

also Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1747–48 nn.28–32 (2009) (summarizing accountability-based unity arguments and their sources) [hereinafter Kitrosser, *The Accountable Executive*].

4. *See, e.g.*, Heidi Kitrosser, *"A Government That Benefits from Expertise": Unitary Executive Theory & the Government's Knowledge Producers*, 72 SYRACUSE L. REV. 1473, 1482–83 (2022) [hereinafter, Kitrosser, "*A Government That Benefits from Expertise"*] (citing Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 152 (2022); DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER 28–31 (2021); Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2086–87, 2097–2102 (2021); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 187–88, 228–29 (2021); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1334 (2020); Jed Handelsman Shugerman, *The Imaginary Unitary Executive*, LAWFARE (July 6, 2020, 8:54 AM), https://www.lawfareblog.com/imaginary-unitary-executive [https://web.archive.org/web/20230909021003/https://www.lawfaremedia.org/article/imaginary-unitary-executive]; Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 23–24 (2018); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 328–30, 352–60 (2016); HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 155–57 (2015) [hereinafter KITROSSER, RECLAIMING ACCOUNTABILITY]).

5. *See, e.g.*, Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 506 (2016) [hereinafter Kitrosser, *Interpretive Modesty*] (citing Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 783; Calabresi, *supra* note 3, at 42–45). *See also* Kitrosser, *The Accountable Executive*, *supra* note 3, at 1747 nn. 25–26 and accompanying text.

6. *See* sources cited *supra* note 3.

7. *See* Kitrosser, *The Accountable Executive*, *supra* note 3, at 1747–48 nn.30–32 and accompanying text.

to believe that a single vote for president held once every four years can bear the accountability load for virtually all executive branch activity. Even if we put aside the Electoral College—on account of which the popular vote winner lost the presidency twice in the last quarter of a century—and the fact that voters across the country are not a monolith, the assumption that a presidential election result constitutes a referendum on every discretionary decision of the executive branch, including the most obscure and technical ones, is heroic.[8]

Furthermore, to the extent that constitutional accountability is about the electoral relationship between the people and elected officials, those officials include members of Congress as well as the president.[9] As Blake Emerson writes, unity proponents "do not grapple with the competing democratic authority of Congress to structure the Executive Branch."[10] To the contrary, unity is invoked to invalidate legislation passed by both houses of Congress—and, it is no small matter, signed by the president[11]—that seek to create some independence from unfettered presidential control in the administrative state.

Many if not most of the statutory innovations targeted by unity proponents themselves are designed to foster accountability—for instance, by shielding internal investigations from direct partisan control. This is not to say that administrative independence always enhances accountability. The point, rather, is that devising structures to maximize accountability, let alone to do so while preserving other goals and values, calls for legislative innovation and flexibility rather than categorical rules. As Justice Kagan put it, dissenting in 2020 in *Seila Law v. Consumer Financial Protection Bureau*, "[d]iverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward

8. *See, e.g.*, Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–202 (1995). *See also* Kitrosser, *The Accountable Executive*, *supra* note 3, at 1748–50 (citing Shane's argument as well as related criticisms by other scholars of the accountability-based argument for unity).

9. *See infra* note 13 and accompanying text. *See also, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1785 (1996); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007, 1017–20 (1997); Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, 5 ISSUES IN LEGAL SCHOLARSHIP 1, 12–15, 35–38 (2005). *See also* Kitrosser, *The Accountable Executive*, *supra* note 3, at 1748–49 nn. 34–36 (citing Flaherty, Farina, and Mashaw, among others).

10. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 376 (2022). *See also* Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1484–85 (citing Emerson's observation).

11. The only exception, of course, being a rare case involving a presidential veto and a supermajority override of that veto by each house of Congress.

tight presidential control of agencies. . . . At other times, the arguments favor greater independence from presidential involvement."[12]

Justice Kagan's point dovetails nicely with another major scholarly critique of UE theory's formalistic accountability. That is, formal accountability is consistent neither with the ordinary meaning of accountability nor with the conception of it embodied in the Constitution's structure. Elsewhere, I have summarized some of the major literature on these points as follows:

> [Unity's] vision of accountability is inconsistent with the far more complex [scheme] envisioned by the Constitution, [which] creates a web of accountability shared by multiple legislators representing multiple constituencies and by the presidency alike. Furthermore, constitutional accountability mechanisms are not directed solely toward vindicating majority policy preferences . . . but also toward guarding against abuse, incompetence, and majoritarian tyranny. In the context of the administrative state . . . constitutional accountability values demand not only multiple avenues for political accountability, but also intra-bureaucratic accountability mechanisms characterized by "complex chains of authority and expertise."[13]

I have built on these insights in my own work by focusing on the role that transparency plays in fostering meaningful, or substantive, accountability.[14] Even if our only goal were electoral responsiveness, that goal cannot be realized without popular access to information about government and an electorate capable of assessing it. Unfettered presidential control of the administrative state enables presidents to frustrate these ends by stifling or manipulating politically inconvenient information ranging from misconduct investigations to economic or scientific analyses that might cast doubt on administration priorities. The problem is yet more apparent when one considers the array of accountability mechanisms beyond the

12. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 282 (2020) (Kagan, J., dissenting).

13. KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 4, at 163. *See also id.* at 258, 259 nn.66–68 (first citing Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83, 2119–22, 2134–35 (2005); then citing Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 552–59, 564–65 (1998); Flaherty, *supra* note 9, at 1785; Shane, *supra* note 8, at 197–209; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1989)). For more recent discussions of the accountability-promoting effect of internal executive branch checking mechanisms, including restraints on political control of the administrative state, see, e.g., JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 63–65, 155–56, 170–71, 176–77 (2017); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 71–72, 79–81 (2017).

14. *See generally* KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 4; Kitrosser, *"A Government That Benefits from Expertise," supra* note 4; Kitrosser, *The Accountable Executive*, *supra* note 3.

franchise, all of which require a reliable flow of information and analyses.

As for government speech doctrine, a key critique of the accountability rationale is that it assumes a level of authorship transparency that is not necessarily present in state-created or state-disseminated speech. As Helen Norton writes, "government speech is most valuable and least dangerous when members of the public can identify the government as its source. If, on the other hand, the expression's government source is obscured . . . then political accountability provides no meaningful safeguard."[15] Although the Supreme Court has said that it might weigh public perception among other factors to determine whether speech is private or public,[16] the Court has developed no "reliable method" to gauge it.[17] To make matters worse, the other factors that the Court considers—such as the extent of government control over speech—can themselves undermine accountability if they are not accompanied by authorship transparency.[18]

A closely related problem can occur, even where there is no doubt that the speech at issue is produced or disseminated by the government, if that speech is falsely presented as a product of expertise or evidence-based fact-finding rather than political pressure. As with UE theory, the problem is politicized knowledge production. Elsewhere, I have referred to this phenomenon as "distortion."[19]

Distortion occurs when the government—whether through employment or subsidies—sponsors the creation or dissemination of speech but imposes conditions that distort the nature of the speech or its production.[20] In the context of government speech doctrine, the conditions would typically be imposed on the receipt of subsidies or on continued employment. In the unitary executive context, the means of enforcing conditions can vary and

15. Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 20, 27 (2009).

16. *See* Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 35–36 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 471 (2009), Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 212–14 (2015), and Matal v. Tam, 137 S. Ct. 1744, 1760 (2017)). *See also* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589–90 (2022) (describing its distinction between government speech and private speech as "not mechanical," but noting that it has, in past cases, considered factors including "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.").

17. Hemel & Larrimore, *supra* note 16, at 36–37.

18. *See Shurtleff*, 142 S. Ct. at 1590 (listing the factors that the Court has considered in the past). *See also* Hemel & Larrimore, *supra* note 16, at 58 ("[T]he emphasis on selectivity in several of the Court's cases leads to the counterintuitive result that Free Speech Clause scrutiny is relaxed when government exerts *greater* control over the flow of ideas.").

19. *See, e.g.*, Heidi Kitrosser, *Distorting the Press*, KNIGHT FIRST AMEND. INST. (July 16, 2024), https://knightcolumbia.org/content/distorting-the-press [https://perma.cc/AUZ7-CQA7].

20. *Id.*

will depend partly on how aggressively UE theory is interpreted. At minimum, enforcement can entail actual or threatened removal from office. Recently, I illustrated the phenomenon of distortion as follows:

> Take the example of a climate scientist who works for NASA and contributes to publicly issued reports and testimony that purport to detail scientific findings. Presumably, it is no secret that the scientist works for a government agency and is paid with public funds. Yet an accountability concern remains insofar as the public can be expected to assume that the scientist's contributions to public reporting are based on professional judgment and scientific best practices. Were those contributions instead shaped by political directives, the public would effectively be duped through distortion that cloaks political messaging in the vestments of science.[21]

Distortion can have both near-term and very far-reaching impacts on substantive accountability. To be sure, the line between short- and long-term consequences is a fuzzy one. For example, suppose that political appointees pressured civil servant scientists in an agency to bury or skew research findings that cast doubt on the feasibility of a presidential initiative. In the short run, such intimidation might prevent the public from hearing the unvarnished views of scientists on an electorally salient matter. In the longer run, the pressure campaign—particularly if it were not an isolated incident—might drive highly qualified scientists from the affected agency and deter others from serving in the first place. Such churn, along with the atmosphere that precipitated it, could impact public access to good-faith products of scientific expertise. Still more perniciously, it might undermine the capacity of the public to distinguish expertise from unfounded assertion.

Nonetheless, rough distinctions can be drawn between actions that undermine accountability in the near term and those that do so over time. Indeed, the preceding example suggests an intuitive place to draw a line: between acts or policies designed to keep discrete pieces of information or analysis from reaching the public, and those designed to politicize public knowledge-producing institutions from the inside. This distinction loosely parallels one made by political scientist Terry Moe between two techniques through which presidents wield control over the administrative state: centralization, whereby presidents institutionalize top-down White House control over agencies, and politicization, whereby presidents seek to shape

21. Heidi Kitrosser, *The Government Speech Doctrine Goes to School*, KNIGHT FIRST AMEND. INST. (Oct. 11, 2024), https://knightcolumbia.org/content/the-government-speech-doctrine-goes-to-school [https://perma.cc/4Q85-2KKU] [hereinafter Kitrosser, *The Government Speech Doctrine Goes to School*].

agencies through appointment and removal powers so that they are politically in tune with the White House in the first place.[22]

In pointing to both short- and long-term impacts to accountability, I mean to highlight the depth of the threat that government speech doctrine and UE theory pose to substantive accountability. From a short-term perspective, even if a knowledge institution were to remain fundamentally unchanged by political interference, the partisan manipulation of discrete pieces of data or expert analyses can distort the very picture of reality against which the electorate votes. In the longer run, the impact is yet more serious and harder to reverse, as politicization permeates state-funded enterprises purportedly devoted to disciplinary and professional expertise.

II. MAJOR JUDICIAL PRECEDENT (AND A GLIMPSE AT EXECUTIVE BRANCH PRECEDENT)

A. GOVERNMENT SPEECH DOCTRINE

In this Section, I review the major Supreme Court cases on government speech doctrine, emphasizing their relationships to accountability. The Court has developed the doctrine over the past few decades. Its premise is largely uncontroversial: "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[23] For example, as Justice Rehnquist wrote in 1991's *Rust v. Sullivan*, "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[24] Similarly, Justice Breyer, writing for the majority in *Shurtleff v. Boston* in 2022, posited that "Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans."[25]

Despite the commonsense idea at the doctrine's core—and the intuitive appeal of examples like those invoked by Rehnquist and Breyer—the doctrine's scope is heavily contested. Two categories of cases raise especially tough questions. The first entails restrictions that fall on speech that can plausibly be characterized as private, rather than governmental speech. For example, the Supreme Court held in *Walker v. Texas Division,*

22. *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985).

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

24. Rust v. Sullivan, 500 U.S. 173, 194 (1991).

25. Shurtleff v. City of Boston, 142 S. Ct. 1538, 1589 (2022).

Sons of Confederate Veterans that specialty license plates in Texas, even those designed by private groups to reflect private hobbies and interests, constitute government speech.[26] Dissenting on behalf of himself and three other justices, Justice Alito lamented the Court's "capacious understanding of government speech" that "threatens private speech that government finds displeasing."[27] Sounding a similar alarm, Mary-Rose Papandrea wrote that *Walker* put "the Court's growing deference to government institutional actors . . . on steroids, allowing the government to disfavor private speech in the name of protecting its image."[28]

The second category, and the one on which I focus in this essay, arises when government purports to subsidize speech that reflects evidence-based reasoning or that otherwise is governed by professional or disciplinary norms, but conditions its support on terms that would distort the nature of the undertaking. Distortion would occur, for example, if the government were to hire investigators to probe alleged wrongdoing or climate scientists to undertake research and report their findings while pressuring them to bury politically unwelcome results.

Distortion undermines free speech values in the same way that it undermines accountability: in the short term, it uses subsidized speakers to launder political messaging and present it as professional or disciplinary expertise; in the long run, it degrades the public's capacity to consume and process information necessary to oversee their government.

The distorting potential of government speech doctrine is as old as the doctrine itself. Indeed, commentators most often trace the doctrine's origins to *Rust v. Sullivan*, a case that itself raises the specter of distortion. In *Rust*, the Supreme Court upheld federal regulations barring family planning clinics from mentioning abortion in the course of providing federally subsidized counseling.[29] Although the *Rust* Court did not invoke the concept of government speech explicitly,[30] the Supreme Court described *Rust* in these terms just a few years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*.[31] The *Rosenberger* Court characterized *Rust* as grounded in the notion that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[32]

26. *Walker*, 576 U.S. at 204–05, 214–15; *id.* at 221–22, 225–26 (Alito, J., dissenting).

27. *Id.* at 221–22 (Alito, J., dissenting).

28. Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1197 (2016).

29. *Rust*, 500 U.S. at 191.

30. *Id.* at 196 (characterizing the regulations as simply setting boundaries on the scope of a government-funded program).

31. Rosenberger v. Rector & Visitors of U. of Va., 515 U.S. 819, 833 (1995).

32. *Id. See also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (explaining that "*Rust* did not place explicit reliance" on the government speech rationale, but that, "when interpreting the

Rust's critics have argued that the challenged conditions forced medical providers to choose between funding and professional and ethical norms; in short, that the conditions distorted the funded healthcare.[33]

Fifteen years after *Rust*, the Supreme Court decided the government speech case that is most conducive to distortion: *Garcetti v. Ceballos*.[34] *Garcetti* established that public employees receive no First Amendment protection against termination or other job-related penalties for speech that they convey while doing their jobs. *Garcetti* relies at least partly on a government speech rationale, characterizing public employee work product speech as speech that "the employer itself has commissioned or created."[35] The assumption that government employees invariably convey a government-crafted message when they speak runs headlong into distortion concerns in the many cases in which employees are hired to provide professional judgment and expertise.

The Supreme Court regularly parries concerns about abuses of the doctrine by invoking political accountability. In *Shurtleff v. City of Boston*, for example, the Court reiterated its view that "[t]he Constitution . . . relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks."[36] In *Walker*, the Court similarly argued that "the democratic electoral process . . . provides a check on government speech," and added that such speech itself is an expression of voters' wishes: "members of the public . . . influence the choices of a government that, through words and deeds, will reflect its electoral mandate."[37]

The *Garcetti* Court also suggested that electoral accountability will yield legislation to protect public employee speech that is in the public interest. Writing for the *Garcetti* majority, Justice Kennedy cited the existence of a "powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."[38] This reasoning is similar to that invoked by the Court

holding in later cases . . . we have explained *Rust* on this understanding").

33. *See, e.g.*, Heidi Kitrosser, *Politics, Knowledge, and Government Speech*, *in* ELGAR COMPANION TO FREE EXPRESSION (Alan Chen & Ashutosh Bhagwat eds.) (forthcoming 2025) (citing Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 174 (1996); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 667 (2008)).

34. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006).

35. *Id.* at 422. Indeed, to support this point, the *Garcetti* Court cites *Rosenberger*'s description of *Rust*'s holding. *Id.* (citing *Rosenberger*, 515 U.S. at 833). *See also, e.g.*, Norton, *supra* note 15, at 20 (critiquing *Garcetti* as an outgrowth of an overly expansive government speech doctrine).

36. Shurtleff v. City of Boston, 142 S. Ct. 1538, 1589 (2022).

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

38. *Garcetti*, 547 U.S. at 425. *See also* Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government*

in 1983's *Bush v. Lucas*.[39] The *Lucas* Court held that most First Amendment damages claims brought by federal employees against their employers are precluded by federal statutory civil service protection laws,[40] even as the Court "assumed, arguendo, that the [statutory] remedies . . . were not 'as effective as an individual damages remedy.' "[41] The Court reasoned that Congress has ample incentive to protect public employee speech, particularly whistleblowing, given Congress's "special interest in informing itself about the efficiency and morale of the Executive Branch."[42]

B. UNITARY EXECUTIVE THEORY

At first blush, UE theory has little in common with government speech doctrine; the former is an argument about government structure—specifically, the separation of powers—and pertains only to the federal government. Unity's core assertion is that the president must control all discretionary activity in the federal executive branch, at minimum by having the power to remove anyone whose job entails such activity. The theory is grounded partly in interpretations of Article II's text and history.

Yet UE theory shares important features with government speech doctrine. Most importantly, unity threatens substantive accountability even as its proponents justify it largely by reference to formal accountability. As with government speech doctrine, distortion is the main means by which UE theory can undermine substantive accountability.

A 1988 memorandum opinion by the Justice Department's Office of Legal Counsel ("OLC") illustrates how UE theory can enable political control of ostensibly non-political, even highly technical, communications.[43] In that memo, the OLC took the position that Congress could not constitutionally require the Director of the Centers for Disease Control ("CDC") to mail "AIDS information fliers" to the public "without necessary clearance" by the president.[44] "It matters not at all," the OLC asserted, "that

Whistleblowers, 94 NOTRE DAME L. REV. 1699, 1708–10 (2019) [hereinafter Kitrosser, *Judicial Buck-Passing*] (criticizing this statement by the *Garcetti* Court for, among other reasons, overstating the depth and breadth of statutory whistleblower protections).

39. Bush v. Lucas, 462 U.S. 367, 387 (1983).

40. *Id.* at 368.

41. Kitrosser, *Judicial Buck-Passing*, *supra* note 38, at 1706 (quoting *Lucas*, 462 U.S. at 372).

42. *Lucas*, 462 U.S. at 389.

43. This discussion of the OLC memo, including citations, is taken from Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1488.

44. Charles J. Cooper, *Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, *in* OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE: CONSISTING OF SELECTED MEMORANDUM OPINIONS ADVISING THE PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL AND OTHER OFFICERS OF THE FEDERAL GOVERNMENT IN RELATION TO THEIR OFFICIAL DUTIES 47, 47

the information in the AIDS fliers may be highly scientific in nature. 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."[45] The OLC further stressed the categorical nature of the president's authority by quoting a 1982 OLC opinion to the effect that the president's "ultimate control over subordinate officials . . . includes the right to supervise and review [their] work . . . *including reports issued* either *to the public* or to Congress."[46]

As we have seen, unity's proponents deem it essential to preserve accountability,[47] despite its negative effects on substantive accountability. Recall the major features of the accountability-based argument for unity. First, proponents observe that the president is the only elected member of the federal executive branch and contrast him with unelected bureaucrats.[48] They also deem him more politically accountable than members of Congress, given his high visibility and the fact that he alone is subject to election by the entire nation through the Electoral College.[49] As such, it is only when the president "controls all law execution in the United States [that] the national electorate has a clear object of blame or reward for such activity."[50]

The accountability rationale for unity is not extolled only by sympathetic scholars and executive branch lawyers. It has also been central to unity-friendly judicial precedent since the 1926 case of *Myers v. United States*.[51] In *Myers*, the Court invalidated legislation that required the president to obtain Senate approval before removing a postmaster whom the president had appointed with the Senate's advice and consent.[52] Fittingly, the Court's opinion was written by Chief Justice Taft, the only Justice in history to have previously served as U.S. President.[53] Much of Taft's

(1988).

45. *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.*

46. *Id.* (emphasis omitted).

47. *See, e.g.*, Calabresi, *supra* note 3, at 35–37, 45, 59, 65–66; Lessig & Sunstein, *supra* note 3, 97–99; Prakash, *supra* note 3, 998–99, 1012–15. *See also* Kitrosser, *The Accountable Executive*, *supra* note 3, 1747–48 nn.28–32 and accompanying text (summarizing accountability-based unity arguments and their sources).

48. *See, e.g.*, Kitrosser, *The Accountable Executive*, *supra* note 3, at 1747 (citing Lessig & Sunstein, *supra* note 3, at 97–99).

49. *See, e.g.*, Kitrosser, *The Accountable Executive*, *supra* note 3, at 1748 (citing Calabresi, *supra* note 3, at 58–70; Prakash, *supra* note 3, at 993, 1012–15).

50. Kitrosser, *The Accountable Executive*, *supra* note 3, at 1747 (citing Calabresi, *supra* note 3, 35–37, 59, 65–66).

51. The summary of *Myers* that follows, including citations, is drawn largely from a more detailed summary in Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1476–78.

52. Myers v. United States, 272 U.S. 52, 176 (1926).

53. *See* Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. SUP. CT. HIST. 167, 167 (2020) (noting that "Taft is the only person ever

analysis centered on the so-called "Decision of 1789,"[54] a lengthy debate in the First Congress on the president's power to remove officers.[55] Taft characterized the Decision partly as a referendum on the accountability rationale. Quoting James Madison in the 1789 Debate, Taft wrote:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved: the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.[56]

Taft also stressed the relative depth of presidential accountability: "the President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide."[57]

More than seven decades would pass before unity arguments would again be received so enthusiastically by the Supreme Court. In the interim, the Court decided a series of cases in which it upheld statutory restrictions on removal, distinguishing each from the provision reviewed in *Myers* and thus effectively narrowing *Myers*' reach.[58] In *Humphrey's Executor v. United States*, decided just nine years after *Myers*, the Court deemed *Myers*' holding limited to "purely executive officers."[59] In two 1980s cases—*Bowsher v. Synar*[60] and *Morrison v. Olsen*[61]—the Court characterized *Myers* as a directive against Congress reserving the removal power for itself; *Myers* did not categorically bar other limits, such as for-cause requirements, on the president's power to remove even purely executive officers.[62] Chief Justice Rehnquist, writing for the *Morrison* Court, explained that the validity of a removal restriction turns on a flexible, functional question: whether the

to have served as both president of the United States and as chief justice of the Supreme Court," and that this "unique confluence of roles is evident in *Myers*").

54. *See Myers*, 272 U.S. at 176.

55. *See id.* at 146.

56. *Id.* at 131.

57. *Id.* at 123.

58. Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1478–79 (citing generally Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), Bowsher v. Synar, 478 U.S. 714 (1986); Morrison v. Olson, 487 U.S. 654 (1988)).

59. *Humphrey's Ex'r*, 295 U.S. at 631–32. *See also* Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1479 n. 34 ("More pointedly, Justice Sutherland specified that any aspects of Justice Taft's lengthy exposition in *Myers* going beyond that core point are mere dicta. Sutherland also declared that '[i]n so far as' any statements in Justice Taft's opinion in *Myers* 'are out of harmony' with those expressed in *Humphrey's Executor*, the former 'are disapproved.' ") (citing *Humphrey's Ex'r*, 295 U.S. at 626).

60. *Bowsher*, 478 U.S. at 724–25.

61. *Morrison*, 487 U.S. at 686–90 (1988).

62. Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1479 (citing *Morrison*, 487 U.S. at 686, 689).

restriction is "of such a nature that [it impedes] the President's ability to perform his constitutional duty."[63]

As the lone dissenter in *Morrison*, Justice Scalia penned an opinion that has since become a classic in the UE theory canon and that presaged the Roberts Court's warm embrace of unity.[64] Among other things, Scalia invoked accountability.[65] The president, he observed, "is directly dependent on the people." Indeed, the Constitution's founders touted the relative accountability of a single president as opposed to a multi-member body: "since there is only *one* President . . . [t]he people know whom to blame" when something goes awry.[66] In the case of prosecutors, an unfettered presidential removal power ensures that "when crimes are not investigated and prosecuted fairly . . . the President pays the cost in political damage to his administration."[67]

Beginning in 2010, the Roberts Court retreated from the functional approach that the Supreme Court had embraced for most of the twentieth century.[68] As of now, the Court has not explicitly overruled *Humphreys Executor*, *Bowsher*, or *Morrison*. It has, however, reframed them, suggesting that they stand only for discrete "exceptions to the President's unrestricted removal power."[69] Accordingly, the Roberts Court has struck down several statutes imposing limits on this power, including a law that permitted the president to remove the director of the Consumer Financial Protection Bureau only for "inefficiency, neglect of duty, or malfeasance in office."[70]

Like the Taft Court, the Roberts Court identifies accountability as a central reason why the Constitution demands a unitary executive. Indeed, in every case in which it has rejected presidential removal restrictions, the

63. *Morrison*, 478 U.S. at 691 (cited in Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1479).

64. *See* Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1480 (citing Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 380 (2020); Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 209–10 (2011)).

65. Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1479–80 (citing *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting)).

66. *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting).

67. *Id.* at 728–29.

68. *See* Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1480 ("Since 2010, when Chief Justice Roberts wrote for the majority in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (*PCAOB*), the Roberts Court has distanced itself from the deference exhibited in *Humphrey's Executor* and *Morrison*.") (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010)).

69. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204–06, 228–30 (2020). *See also* Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1481–82 (discussing this line of reasoning in both *Seila* and *PCAOB*).

70. *Seila*, 591 U.S. at 206–07.

Roberts Court has followed Taft's lead by quoting James Madison's 1789 statement that "the lowest officers, the middle grade, and the highest," ought to depend "on the President, and the President on the community."[71]

To be sure, unity's proponents do not rely solely on accountability; they also invoke arguments from constitutional history and text. Elsewhere, I have recounted and built on some of the major rejoinders to these text and history-based arguments.[72] Although my focus in this Essay is on accountability, it is worth noting that unity's text and history-based arguments—and their failings—are themselves intertwined with unity's enervated vision of accountability. This is true, for example, of unity proponents' over-reading of founding-era arguments linking constitutional and statutory provisions to accountability. Proponents tend to leap from highly case-specific founding era arguments to a broad, acontextual constitutional unity directive, a move enabled by their fixation on formal, rather than substantive accountability.[73] This phenomenon is illustrated by unity proponents' use of the founding era decision not to append an advisory council to the president. As I explained in a previous article:

> [U]nity proponents cite founding fears that the President would hide behind his council, blaming it for his own poor decisions and thus defeating accountability. From this, unity proponents leap to the conclusion that the founders wanted the President to fully control all discretionary executive decisions and executive officers. Yet this conclusion massively oversimplifies the nature of the council debate. Council opponents focused on features specific to the proposed council, including its small size and its ability to collude with the President in relative secrecy. Notably, they also feared that the President and his council would seek to appoint executive branch officers who "possess[ed] the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure." At minimum, the council debate, centering as it did on the specific features of the proposed council, simply did not address whether the executive branch must in all respects be unitary. If anything, the accountability-related concerns articulated in the debate suggest that the founders feared full presidential control over executive branch decision making and officers. Unfettered control could,

71. 1 ANNALS OF CONG. 518 (1789) (Joseph Gales ed., 1834) (J. Madison) (quoted in *Seila*, 591 U.S. at 223–25; Collins v. Yellen, 594 U.S. 220, 251–52 (2021); *Free Enter. Fund*, 561 U.S. at 498); *see also* Myers v. United States, 272 U.S. 52, 171 (1926) (quoting Taft's use of same quote in *Myers*); Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1482 n.66 and accompanying text.

72. *See, e.g.*, Kitrosser, *"A Government That Benefits from Expertise," supra* note 4, at 1482–83; Kitrosser, *Interpretive Modesty*, *supra* note 5, at 507–10.

73. *See, e.g.*, Kitrosser, *Interpretive Modesty*, *supra* note 5, at 512.

among other things, foster secretive collusions between the President and those in his thrall.[74]

III. CONTEMPORARY THREATS TO SUBSTANTIVE ACCOUNTABILITY

In Part III, I present three sets of examples that span the period from the post-Watergate years to the earliest days of the second Trump Administration. In Section III.A, I look at the development of UE theory in the Department of Justice ("DOJ") during the late 1970s and 1980s and its use by the Department to resist post-Watergate ethics and oversight measures. I observe that Donald Trump has picked up this mantle in more recent years, including through his resistance to oversight by Inspectors General. In Section III.B, I look at the impact of both unity and government speech doctrine on the civil service more broadly. In Section III.B.1, I discuss the relationship between the federal civil service and UE theory. I focus especially on "Schedule F," newly reinstated through executive order on the first day of the second Trump Administration and aimed at replacing vast swaths of the civil service with political appointees. In Section III.B.2, I summarize two key reasons, including *Garcetti*'s impact, for the enervated state of first amendment protections for federal civil servants. In Section III.B.3, I cite several examples—including a recent spate of state laws regulating the classroom speech of public school teachers and professors—of government speech doctrine's effect on state and local employees.

A. UNITARY EXECUTIVE THEORY AND FEDERAL INVESTIGATIONS

Investigations that could implicate the president or his allies are classic locations for dispute over the constitutionality and wisdom of restrictions on the president's ability to fire personnel or interfere with their work. *Morrison v. Olson* itself involved a challenge to the independent counsel provisions of the 1978 Ethics in Government Act. Enacted in the wake of Watergate, the Act was an effort to confront public corruption, in part by creating an independent counsel ("IC") with some degree of distance from presidential control. The Act's IC provisions were responsive to fears that presidents would, as Richard Nixon had done, interfere with Justice Department investigations in which they could be implicated. Olson challenged these provisions partly on the basis that the IC was incompatible with a unitary executive because the IC did not serve at the president's pleasure. Instead, the IC could be terminated only by the Attorney General ("AG"), who herself

74. Kitrosser, *Interpretive Modesty*, *supra* note 5, at 512 (citing KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 4, at 146, 152–55; THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

is subject to at-will dismissal by the president. The AG could fire the IC "only for good cause, physical or mental disability . . . or any other condition that substantially impairs [the IC's] performance of . . . [their] duties."[75]

The majority and dissenting opinions in *Morrison* reflected two very different ideas about unity and accountability. To the majority, written by Justice Rehnquist, the judicial mission was limited and functional: its role was not "to define rigid categories"[76] but to ensure that legislation does not "interfere impermissibly with [the president's] constitutional obligation to ensure the faithful execution of the laws."[77] Among the factors that Rehnquist cited to explain why the removal restriction passed this practical assessment, it "was essential, in the view of Congress, to establish the necessary independence of the office," an office that could be tasked with investigating the president or close advisors.[78] To Justice Scalia, the lone dissenter, the president possessed all the executive power—a conclusion that he reached by interpreting Article II's opening words, "[t]he executive Power shall be vested in a President of the United States," to mean "*all of* the executive power"—and such power necessarily entails complete and indefeasible removal authority.[79] As for the risk that the president might abuse this power, Justice Scalia answered that "the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect."[80] Justice Scalia's vision of accountability was so narrow that he treated the IC provisions, enacted by elected members of Congress and subject to presidential veto, as constitutionally intolerable because they might subject the president and their advisers to popular scrutiny. The provisions, Scalia said, "weaken[] the Presidency by reducing the zeal of his staff" and "enfeeble[] him more directly in his constant confrontations with Congress, by eroding his public support."[81]

Although functionalism—and substantive accountability—prevailed over formalism in *Morrison*, Justice Scalia's views would eventually receive a much warmer reception in the Roberts Court. Within the executive branch, unitary executive theorists did not need to wait nearly so long to see their ideas put into practice. The Justice Department in the Reagan Administration

75. Ethics in Government Act, 28 U.S.C. § 596(a)(1) (1978).
76. Morrison v. Olson, 487 U.S. 654, 689 (1988).
77. *Id.* at 693.
78. *Id.*
79. *Id.* at 705 (Scalia, J., dissenting).
80. *Id.* at 728.
81. *Id.* at 713.

was deeply entwined with the conservative legal movement,[82] and both the Department and the broader movement made the advancement of UE theory a priority.[83] Conservative legal elites viewed unity as one means of reigning in the perceived liberalism of the administrative state, and were also drawn to it because Republicans at the time had better electoral chances with the presidency than in either house of Congress.[84]

Much of the pro-unity activity in the Reagan-era Justice Department was directed against post-Watergate legislation that imposed oversight measures on executive branch lawyers. Recounting these efforts, Deborah Pearlstein writes:

> [T]he first sustained campaigns to apply unitary executive theory to the day-to-day workings of government began within the Department of Justice, and some of the most important battles focused on just [the] claim . . . that an appropriate understanding of the executive power required recognizing constitutional limits on the ability of Congress and the federal courts to engage in professional oversight of Justice Department lawyers. On some occasions quite visibly, on others largely in secret, movement lawyers deployed unitary executive arguments to challenge or block three of the major tools that post-Watergate reformers had pursued to ensure government attorneys would worry more about being held accountable for their misconduct: (1) strengthened rules of professional ethics; (2) an Office of Professional Responsibility inside the Department of Justice to investigate ethics complaints against government attorneys; and (3) independent inspectors general to investigate allegations that government officials were responsible for waste, fraud, or abuse.[85]

Unity proponents also made their cases—for UE theory generally and against independent oversight of federal officials in particular—to the practicing bar, to legal academics, and to law students.[86] These efforts

82. *See* Deborah Pearlstein, *The Democracy Effects of Legal Polarization: Movement Lawyering at the Dawn of the Unitary Executive*, 2 J. AM. CONST. HIST. 357, 365–67, 378 (2024); Sitaraman, *supra* note 64, at 377–78; Hollis-Brusky, *supra* note 64, at 202–03, 214–15; Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 62–63, 66, 69–75, 79–80 (2009).

83. *See* Pearlstein, *supra* note 82, at 366–67, 378; Sitaraman, *supra* note 64, at 377–80; Hollis-Brusky, *supra* note 64, at 205–06, 212–13.

84. *See* Pearlstein, *supra* note 82, at 362 (citing Jack Goldsmith, *The Accountable Presidency*, THE NEW REPUBLIC, (Jan. 31, 2010), https://newrepublic.com/article/72810/the-accountable-presidency [https://perma.cc/H2SA-3SLW] (quoting Jeffrey Hart, *The Presidency: Shifting Conservative Perspectives?*, 26 NAT'L REV. 1351, 1353, 1355 (1974))); *see also* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 44–46 (2007); *see generally* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991).

85. Pearlstein, *supra* note 82, at 370.

86. *See id.*, at 365–67, 378; Hollis-Brusky, *supra* note 64, at 205–06, 212–13 Sitaraman, *supra*

contributed to unity's eventual reversal of fortune in the courts. They also helped to shift the norms of acceptable conduct among government officials, both because they "weakened internal ethics checks" and created a permission structure for ethical breaches.[87] Indeed, the repeated refrain that oversight legislation weakens the president and affronts voters lends itself to arguments that even highly credible and serious misconduct allegations are mere "partisan attack[s]."[88]

Although UE theory has a decided partisan valence historically, its allure as a means to push back against oversight has not been lost on Democrats when they occupy the oval office. Although the DOJ Inspector General—against which movement lawyers fought—was not established until 1988,[89] the initial Inspectors General Act was enacted in 1978, and then-President Jimmy Carter's OLC objected to two aspects of the law as inconsistent with unitary presidential control of subordinates.[90] John Harmon, Carter's Acting Assistant AG for the OLC, objected in a memorandum to the Act's removal provision, which gave the president at-will removal power over Inspectors General ("IGs") but required them to notify both Houses of Congress of their reasons for removal. Citing *Myers*, Harmon called this an "improper restriction on the President's exclusive power to remove Presidentially appointed executive officers."[91] Harmon also objected to the IG's statutory "obligation to keep Congress fully and currently informed" and the related "requirement that [the IG] provide any additional information or documents requested by Congress . . . without executive branch clearance or approval."[92] In Harmon's view, these informing rules interfere with the president's "general administrative control over those executing the laws," which "includes the right to coordinate and supervise all replies and comments from the executive branch to Congress."[93]

Finally, and unsurprisingly, Donald Trump has been especially brazen in resisting accountability measures and in invoking unity to do so. Examples to this effect include his dismissals of Inspectors General during his first administration and in the first week of his second administration. During his first administration, Trump notoriously fired several Inspectors General who

note 64, at 377–80; Teles, *supra* note 82, at 62–63, 66, 69–75, 79–80.

87. *Id.* at 359, 370.

88. *Id.* at 359.

89. *Id.* at 377–78.

90. *See generally* John M. Harmon, Assistant Att'y Gen., Off. Legal Couns., Memorandum Opinion for the Attorney General: Inspector General Legislation (Feb. 21, 1977).

91. *Id.* at 18.

92. *Id.* at 17.

93. *Id.*

investigated controversies ranging from the administration's handling of the Covid-19 pandemic to the call between Trump and the Ukrainian president that led to Trump's first impeachment.[94] Trump made clear his view that UE theory empowered him to take such actions.[95] As of this writing, less than one week into Trump's second administration, he has already fired more than a dozen Inspectors General in the course of a single Friday evening. The firings eschewed the applicable statutory requirement that Congress receive thirty days' notice of any removal including a "substantive rationale" with "detailed and case-specific reasons" for removal.[96]

B. BROADER ATTACKS ON THE CIVIL SERVICE: UE THEORY AND GOVERNMENT SPEECH DOCTRINE AT WORK

1. Unitary Executive Theory

UE theory also threatens the federal civil service on the whole, including disciplinary experts such as scientists, economists, and public health researchers. Unity can undermine their ability to disseminate competent, good-faith information and analyses that an administration finds politically inconvenient. Such impacts have both short-term and long-term aspects. In the short term, presidents and their political subordinates may invoke unity to block or manipulate certain communications. In the longer run, they may nip such communications in the bud more seamlessly by thinning out the merit-based civil service in favor of a largely political workforce.

94. *See, e.g.*, Bob Bauer & Jack Goldsmith, *Inspector General Reform on the Table*, LAWFARE (Oct. 5, 2021, 3:23 PM), https://www.lawfareblog.com/inspector-general-reform-table [https://perma.cc/9KCR-PQ79]; Melissa Quinn, *The Internal Watchdogs Trump Has Fired or Replaced*, CBS NEWS (May 19, 2020, 11:43 AM), https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list [https://perma.cc/4Y4U-TZ89]; Michael C. Dorf, *Inspector General Firings Highlight the Danger of the Unitary Executive Theory*, DORF ON L. (May 18, 2020), www.dorfonlaw.org/2020/05/inspector-general-firings-highlight.html [https://perma.cc/KAY3-QNBL].

95. Steven D. Schwinn, *Trump's Tears Against Inspectors General Tell Us It's Time to Abandon the Unitary Executive Theory*, JURIST (Apr. 13, 2020, 6:03 PM), https://www.jurist.org/commentary/2020/04/steven-schwinn-trumps-tears [https://perma.cc/6YVP-HXCD].

96. *See* David Nakamura, Lisa Rein & Matt Viser, *Trump Defends Ousting at Least 15 Independent Inspectors General in Late-Night Purge*, WASH. POST (Jan. 25, 2025), https://www.washingtonpost.com/politics/2025/01/24/trump-fire-inspectors-general-federal-agencies [https://web.archive.org/web/20250225161555/https://www.washingtonpost.com/politics/2025/01/24/trump-fire-inspectors-general-federal-agencies]; Megan Messerly, Josh Gerstein, Kyle Cheney & Nahal Toosi, *Trump Fires Independent Inspectors General in Friday Night Purge*, POLITICO (Jan. 25, 2025, 9:20 PM), https://www.politico.com/news/2025/01/25/donald-trump-inspectors-general-firing-00200611 [https://web.archive.org/web/20250127090247/https://www.politico.com/news/2025/01/25/donald-trump-inspectors-general-firing-00200611].

As for short-term impacts, there are two major categories of valuable civil service communications at risk. The first is whistleblowing regarding wrongdoing in federal agencies. Currently, civil service laws protect federal employees who blow the whistle on bad acts including illegality, waste, and abuse.[97] These protections would be compromised should an administration assert, and even more so should courts agree, that such legislation cannot constitutionally prevent the president from removing, at will, anyone who exercises discretionary executive power. As I elaborate in Part IV, it is by no means a foregone conclusion that courts would allow presidents to bypass civil service protections on unitary executive grounds. It is possible, however, that courts would indeed extend the logic of the Roberts Court removal cases so far. Courts might also draw to the same effect on the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission* in which the Court expanded the definition of "officers" who constitutionally cannot be part of the civil service.[98]

UE theory can also be invoked to stifle civil servants who seek to convey information or analysis in the ordinary course of doing their jobs. Recall, for example, the OLC's 1988 opinion to the effect that Congress may not require executive branch personnel to distribute even highly technical information without a chance for presidential intervention.[99] Furthermore, to the extent that some such speech falls within the terms of federal whistleblower protection laws,[100] it is vulnerable to the same unity-based threats as that faced by federal whistleblowers more broadly.

Unity can enable much more than the blocking of isolated pieces of information and analysis. It can have a deep, long-range impact by thinning out the ranks of the civil service, enabling the president to fill and potentially fire large swaths of the federal workforce previously designated as nonpartisan merit hires. As noted, it is by no means inevitable that courts would sign off on such sweeping changes. Existing case law does, however, open the door to such a possibility, and at minimum, it can embolden presidents to test the boundaries of precedent by trying to initiate such action.

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

98. Lucia v. SEC, 585 U.S. 237, 237–38 (2018).

99. *See supra* text accompanying notes 44–46. Although the CDC Directorship is not a civil service position, see Barry Sullivan, *Lessons of the Plague Years*, 54 LOYOLA U. CHI. L.J. 15, 59 (2022) (noting that the CDC director is a political appointee). The same rationale can be applied to civil servants whose duties include generating or disseminating information or who testify before Congress.

100. For example, a government auditor or investigator might make a report in the course of doing their job that also constitutes whistleblowing under the Act. Or scientists or public health experts may discover, in the course of doing job-related research, events that constitute "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8) (listing statutorily protected whistleblower disclosures, including "a substantial and specific danger to public health or safety").

Donald Trump seems determined to push the limits of a president's power to politicize the federal workforce. On the first day of his new administration, January 20, 2025, he issued an executive order ("EO") reinstating the so-called "Schedule F" order that he had issued in the waning days of his first administration.[101] The EO authorizes the transition of potentially tens of thousands of career positions throughout the federal workforce into political appointments.[102] In its purpose section and even its title, the EO projects confidence that it is permitted, even demanded, by unity and accountability.[103] The EO is entitled "Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce," and it asserts that the president has "sole and exclusive authority over the executive branch." It adds that any power held by federal employees "is delegated by the President," and that employees "must be accountable to the President, who is the only member of the executive branch, other than the Vice President, elected and directly accountable to the American people."[104] Fittingly, the idea behind Schedule F during Trump's first administration originated in a memorandum suggesting that Trump "[e]xplore the 'Constitutional Option' for firing federal employees,"[105] and that civil service protections might be unconstitutional.[106]

There is also an obvious kinship between the EO's reliance on the notion of presidential accountability and Trump's longstanding rhetoric about the abuses of the so-called "deep state."[107] As Donald Moynihan

101. The new class of political appointments is referred to as "policy / career" appointments, whereas Trump's earlier EO called them "Schedule F" appointments. *See* Exec. Order No. 14,171 § 3(a), 90 Fed. Reg. 8625 (Jan. 20, 2025). *See also, e.g.*, Nick Bednar, *President Trump and the Civil Service: Day 1*, LAWFARE (Jan. 23, 2025, 1:32 PM), https://www.lawfaremedia.org/article/president-trump-and-the-civil-service--day-1 [https://perma.cc/U4QJ-RZWA]; Drew Friedman, *Trump Revives Executive Order Aiming to Strip Some Federal Employees of Civil Service Protections*, FED. NEWS NETWORK (Jan. 21, 2025, 6:59 PM), https://federalnewsnetwork.com/workforce/2025/01/trump-revives-executive-order-aiming-to-strip-some-federal-employees-of-civil-service-protections [https://perma.cc/Q7VM-DDB3].

102. *See, e.g.*, Friedman, *supra* note 101. The EO expansively defines the jobs that qualify as "policy/career" appointments that can be removed from the civil service. Exec. Order No. 14,171 § 2–3 (incorporating definition from Schedule F with some amendments); Exec. Order 13,957 85 Fed. Reg. 67631 § 5(c) (Oct. 21, 2020) (incorporated into new EO). *See also, e.g.*, Bednar, *supra* note 101.

103. *See, e.g.*, Bednar, *supra* note 101 ("The executive order reinstating Schedule F begins by echoing unitary executive theory.").

104. Exec. Order No. 14,171 § 1.

105. Donald P. Moynihan, *Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174, 175 (2021) (citing a 2017 Memorandum from James Sherk to White House Domestic Policy Council).

106. *Id.*

107. *See, e.g.*, *id*. at 175; James Oliphant & Steve Holland, *How Trump Plans to Cement Control of Government by Dismantling the 'Deep State,'* REUTERS (Jan. 18, 2025, 4:56 PM), https://www.reuters.com/world/us/how-trump-plans-cement-control-government-by-dismantling-deep-state-2025-01-18 [https://perma.cc/N8B5-MHKJ]; Jeannie Suk Gersen, *How Much of the Government Can Donald Trump Dismantle?*, NEW YORKER (Jan. 16, 2025), https://www.newyorker.com/news/the-lede/how-much-of-the-government-can-donald-trump-dismantle [https://perma.cc/TCX5-QP8W].

writes, "Trump was not just antagonistic toward the career public service: this hostility was central to his political identity. He had openly campaigned against the 'deep state.' "[108] The EO's own language frames it as a reaction to "numerous and well-documented cases of career Federal employees resisting and undermining the policies and directives of their executive leadership," and as a "restor[ation of] accountability to the career civil service."[109]

2. Federal Employees and the First Amendment

Federal civil service laws are especially crucial to protect accountability-enhancing speech because federal employees lack robust First Amendment protections. On the rare occasions that an employee's free speech lawsuit proceeds to the merits, it confronts the *Garcetti* hurdle. Should a court conclude that the employee's speech either occurred outside of the course of their employment or warrants an exception from *Garcetti*, the employee still must overcome a balancing test that defers substantially to employers' rationales.[110]

As noted earlier, the reason why federal employees are rarely able to invoke the First Amendment to sue their employers directly is because the Supreme Court held in 1983's *Bush v. Lucas*[111] that the federal civil service laws preclude such suits.[112] The *Lucas* Court expressed confidence that Congress would protect whistleblowers.[113] It did not, apparently, anticipate a future in which whistleblower protection laws might themselves be overtaken by aggressive interpretations of UE theory. Even on their own terms, such laws have not reliably served as the "powerful network" that the *Garcetti* Court assured would protect whistleblowers in lieu of robust first amendment protections.[114] For example, at the time that the Court decided *Garcetti*, federal whistleblower protection law contained the same hole that

108. Moynihan, *supra* note 105, at 175.

109. Exec. Order No. 14,171 § 1.

110. *Turner v. U.S. Agency for Global Media* is a rare example of a First Amendment case in which a federal employee prevailed on the merits. *See* Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333 (D.D.C. 2020). Judge Howell found that the federal civil service laws did not preclude those aspects of the complaint that challenged structural changes to the agency as opposed to individual employee disciplinary actions. *Id.* at 364–70. Judge Howell also found that the type of employment at issue—journalism—fit within an exception to *Garcetti*. *Id.* at 374–75. Finally, because the structural changes at issue imposed ex ante limits on a wide swath of communications rather than targeted, post hoc discipline, Judge Howell applied a standard more deferential than the balancing test ordinarily applied in employee speech cases. *Id.* at 377.

111. Bush v. Lucas, 462 U.S. 367, 389–90 (1983).

112. *Id.* at 368.

113. See *id.* at 387; *supra* note 42 and accompanying text.

114. *See* Kitrosser, *Judicial Buck-Passing*, *supra* note 38, at 1700 and accompanying text.

Garcetti created in constitutional coverage—namely, it did not encompass speech made as part of one's job.[115]

3. The First Amendment and State and Local Employees

Although state and local employees can invoke their First Amendment rights directly, those rights have been narrowed considerably by courts, particularly through the government speech doctrine and *Garcetti*. Furthermore, as we have seen, the notion underlying a broad government speech doctrine—that public employee speech is rightly, even necessarily subject to political control—also has substantial political currency. That political appeal—coupled with legislators and executive officers feeling emboldened by the state of the case law—have helped give rise to a number of restrictive policies, ranging from sweeping public employee gag rules to legislation micro-managing the classroom speech of public school teachers. In this Section, I discuss three examples of such measures: post-hoc discipline for employee speech, prior restraints on employee communications with the media, and laws targeting public school educators in particular.

First, *Garcetti* and some lower court interpretations of it negatively impact substantive accountability by opening the door to retaliation for two categories of speech: employee reports of wrongdoing and employee communications on matters of public interest in the course of doing their jobs. The latter requires little explanation, as *Garcetti* explicitly permits discipline for speech that constitutes work product, however truthfully and competently performed. The former also follows plainly from *Garcetti* to the extent that catching and reporting on internal wrongdoing is a part of one's job. Furthermore, although lower court interpretations of *Garcetti* are not monolithic, some define job duty speech broadly enough to capture a good deal of such whistleblowing. For example, some courts treat the fact that an employee reported wrongdoing through their "chain of command," or through some other avenue that lacks a "civilian analogue," as evidence that the report fell within their job duties.[116] Some courts accord the same meaning to the fact that an employee's speech is directed toward resolving problems that interfere with their duties.[117] Furthermore, despite contrary

115. *See id.* at 1709–10.

116. *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 320–23 (2016) (and cases cited therein) [hereinafter Kitrosser, *Special Value of Public Employee Speech*]; Frank D. LoMonte, *Putting the 'Public' Back into Public Employment: A Roadmap for Challenging Prior Restraints that Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1, 23–24 (2019) (and cases cited therein).

117. *See* Kitrosser, *Special Value of Public Employee Speech*, *supra* note 116, at 317–19 (and cases cited therein).

language in a 2014 Supreme Court case,[118] some lower courts have treated the fact that an employee learned about information on the job as a factor that weighs against First Amendment coverage should they face discipline for communicating it.[119]

Second, although there is a sound basis to conclude that *Garcetti* does not license agencies to impose sweeping prior restraints on employee speech,[120] and some courts indeed have struck down such policies,[121] there remain scores of federal, state, and local directives that bar employees across multiple agencies from speaking to reporters without authorization. A 2019 report by the Brechner Center for Freedom of Information at the University of Florida found "dozens of examples of policies that either forbid government employees from speaking to journalists at all, or require that they obtain a supervisor's permission before doing so."[122] Such policies persist in part because "*Garcetti* fueled a mindset among government managers and their counsel that the courts would view restrictions on employee speech deferentially."[123] The political currency of the notion underlying *Garcetti* and government speech doctrine more broadly—that agency employees can be made to speak in one voice, dictated by political leadership—plays an important role as well.

Third, over the past several years, public school teachers—college and university professors as well as K–12 instructors—have faced a host of state laws barring them from conveying certain ideas about race or gender in the classroom.[124] State and public school board defendants have leaned heavily on the government speech doctrine to justify the laws. To defend its restrictions on the instructional speech of public college professors, for example, the state of Florida asserted that the First Amendment "categorically does not apply" because such communications constitute

118. Lane v. Franks, 573 U.S. 228, 240 (2014) ("[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue itself is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.").

119. *See* Kitrosser, *Special Value of Public Employee Speech*, *supra* note 116, at 315–17 (and cases cited therein).

120. *See, e.g.*, LoMonte, *supra* note 116, at 13–19, 25–32 (explaining that prior restraints on employee speech are properly analyzed under *United States v. NTEU* (1995) rather than *Garcetti* and that most cannot survive review under *NTEU*); UNIV. OF FLA. BRECHNER CTR. FOR FREEDOM OF INFO., PROTECTING SOURCES AND WHISTLEBLOWERS: THE FIRST AMENDMENT AND PUBLIC EMPLOYEES' RIGHT TO SPEAK TO THE MEDIA 4–9 (2019).

121. LoMonte, *supra* note 116, at 29–32; BRECHNER CTR., *supra* note 120, at 5–9.

122. BRECHNER CTR., *supra* note 120, at 3. *See also id.* at 7–8, 10–12; LoMonte, *supra* note 116, at 36 (citing Brechner Center's research).

123. LoMonte, *supra* note 116, at 26–27.

124. *See* Kitrosser, *The Government Speech Doctrine Goes to School*, *supra* note 21 (citing and discussing these laws).

"heartland government speech."[125] Defendants have also invoked accountability to bolster their government speech arguments. In the Florida litigation, for example, the state argued that anyone displeased with the restrictions on professorial speech could seek recourse "[at] the ballot box."[126] The laws' proponents similarly invoke political accountability in their appeals to the public. For example, Nate Hochman, writing in the Manhattan Institute's City Journal, characterized critics as "suggest[ing] that public educators should be insulated from accountability and democratic oversight."[127] Judicial responses to lawsuits challenging such restrictions have been mixed thus far. In cases involving college and university professors, courts have sided with plaintiffs, identifying an academic freedom exception to *Garcetti* that I discuss further in Part IV.[128] Courts have been less favorable to plaintiffs in the K–12 educational setting, concluding that primary and secondary school teachers are subject to *Garcetti*'s rule.[129] In the latter cases, however, plaintiffs have had some success in arguing that the laws are too vague to pass constitutional muster.[130]

IV. SOME KERNELS OF HOPE

Although both UE theory and government speech doctrine have made substantial strides in the courts and the political branches, they are not invulnerable to limiting principles. Indeed, courts already have imposed or laid the groundwork for some boundaries on each doctrine's reach. These aspects of precedent can, and should, be built on with substantive accountability among the lodestars in the process. I have explored these points in more detail elsewhere,[131] and highlight a few aspects here.

Turning first to UE theory, there are a few respects in which the current case law leaves the door open for some substantive accountability-based limits. For example, the Supreme Court has not, as of yet, weighed in on the

125. Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 10, 15, Pernell v. Fla. Bd. of Governors, No. 22-cv-00304 (N.D. Fla. Sept. 22, 2022), 2023 WL 18357418.

126. *Id.* at 10.

127. Nate Hochman, *Critical Race Theory and Academic Freedom*, CITY J. (June 17, 2021), https://www.city-journal.org/article/critical-race-theory-and-academic-freedom [https://perma.cc/TRV9-B6DG].

128. *See, e.g.*, Kitrosser, *The Government Speech Doctrine Goes to School*, *supra* note 21, at IV.A.2.

129. *See, e.g.*, *id.* at IV.B.2.

130. *See, e.g.*, *id.* at IV.D.

131. With respect to unitary executive theory, see Kitrosser, *"A Government That Benefits From Expertise," supra* note 4, at Part III. With respect to government speech doctrine, see, e.g., Kitrosser, *Distorting the Press*, *supra* note 19, and Kitrosser, *The Government Speech Doctrine Goes to School*, *supra* note 21.

constitutionality of civil service protections. Indeed, Chief Justice John Roberts, writing for the Court in a 2010 case, noted that "[n]othing in [its] opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[132] Roberts observed that many civil servants "would not qualify as 'Officers of the United States' who 'exercise significant authority pursuant to the laws of the United States;' " accordingly, they may not "be subject to the same sort of [presidential] control."[133] In a future case, the Court could decide the question that it has left open and affirm the constitutionality validity of civil service tenure protections. To its reasoning about the limited scope of civil servants' roles, the Court might add one about the work that they do perform. Namely, much of it entails the production of knowledge that reflects expertise and evidence-based analysis—for example, generating scientific reports or undertaking audits or inspections. Such work creates much of the factual backdrop against which the public and other branches can judge elected officials. By guarding against political interference with knowledge production, civil service protections support substantive accountability.

Similar substantive-accountability based arguments can be made regarding other questions that the Supreme Court has not, to date, decided. This includes the constitutionality of the limited removal restrictions that currently apply to IGs and of the still more ambitious proposals to provide IGs with for-cause protection from removal.[134]

As for government speech doctrine, the case law contains the seeds of an important limiting principle that I call the anti-distortion doctrine. It amounts to a wariness of conditions on state-sponsored knowledge production that would distort the nature of the sponsored programs or their communicative outputs. Perhaps the most overt use of the principle occurs in the 2001 case of *Legal Services v. Velazquez*.[135] The *Velazquez* Court invalidated a law restricting the types of arguments that congressionally

132. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 (2010). Presumably, the *PCAOB* Court singled out independent agencies, rather than executive agencies, because the for-cause protections enjoyed by independent agency heads ensure that civil servants in such agencies will be separated from presidential control by at least two for-cause layers. This matters because the *PCAOB* Court invalidated a scheme that separated the heads of the Public Company Accountability Oversight Board from unfettered presidential removal through two layers of "for cause" removal—one between the President and the commissioners of the Securities and Exchange Commission ("SEC"), and one between the SEC commissioners and the PCAOB board members. *Id.* at 484, 486–87.

133. *Id.* at 506 (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

134. *See* Kitrosser, *"A Government That Benefits From Expertise*," *supra* note 4, at 1493–94 (explaining that there remains some opening in judicial precedent to justify such protections).

135. *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

funded legal services attorneys could make in litigation.[136] The Court observed that Congress had funded the attorneys not to transmit government speech but rather to represent private clients.[137] Having done so, Congress could not limit the stock of arguments from which the attorneys could draw to advise and to advocate for their clients. Such a limit, said the Court, "distorts the legal system by altering the traditional role of the attorneys" as zealous advocates for their clients.[138] Among the problems with such distortion is that it "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."[139]

Garcetti itself contains some anti-distortion reasoning. The *Garcetti* Court left open the possibility of an exception for the expressive work of public school academics to the general rule that work product speech is unprotected. The *Garcetti* Court 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."[140] An academic freedom exception is necessarily grounded in an anti-distortion principle, specifically in the notion that the state may not create or fund an institution of a type ordinarily characterized by academic freedom but then curtail that freedom.

CONCLUSION

The doctrines explored here undermine substantive accountability in the name of accountability. Those attempting to limit the reach of UE theory and government speech doctrine, whether in the courts, the political branches, or the realm of public debate, must understand that their appeal lies partly in their proponents' insistence that the doctrines do not undercut accountability but in fact protect accountability. Highlighting the errors of that claim and the danger that the doctrines pose is one small but necessary step in any efforts to staunch their forward march.

136. *Id*. at 537–39.
137. *Id.* at 541–43, 547–48.
138. *Id.* at 544.
139. *Id.* at 545.
140. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).