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# Whistleblowing Speech and the First Amendment

RONALD J. KROTOSZYNSKI, JR.\*

*Alexander Meiklejohn, the iconic First Amendment scholar who expounded the democratic self-government theory of the freedom of speech, posited that for democratic self-government to function, the voters themselves must possess the information necessary to hold the government accountable. Yet, the information necessary for the citizenry to render wise electoral verdicts not uncommonly belongs to the government itself, and government officials often prove highly reluctant to share information that reflects badly on them and their work. The lack of critically important information about the government's performance makes it difficult, if not impossible, for voters to hold government accountable on Election Day. To date, the federal courts have failed to recognize the crucial role that government employees often play in providing voters with the information necessary to make wise electoral decisions. The Connick/Pickering doctrine conveys only modest protection on government employees who engage in whistleblowing speech. Moreover, this doctrine fails to take into account directly the value and importance of whistleblowing speech to voters. This Article calls for the recognition of a new subcategory of government employee speech, whistleblowing speech, and proposes more rigorous First Amendment protection for such speech. Simply put, contemporary First Amendment theory and practice fails to provide sufficient protection to government employees who engage in whistleblowing speech that calls the body politic's attention to wrongdoing, corruption, and malfeasance within government agencies. If we want government employees to speak, rather than remain silent, stronger constitutional medicine than Connick/Pickering will be required.*

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\* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. The author wishes to thank the law faculties at the University of Texas School of Law, the University of Washington School of Law, the Ohio State University Moritz College of Law, the University of Alabama School of Law, the Lewis and Clark Law School, the Seattle University School of Law, and the University of Oregon School of Law, which all hosted faculty workshops associated with this Article and my larger book-length project, *The Disappearing First Amendment: On the Decline of Freedom of Speech and the Growing Problem of Inequality Among Speakers* (forthcoming Cambridge University Press 2019). A number of individual legal scholars provided very useful, and constructive, comments and suggestions on earlier iterations of this Article: David Anderson, Ash Bhagwat, Mark Brandon, Caroline Mala Corbin, Charlotte Garden, Lily Kahng, Margot Kaminski, Sandy Levinson, Lyrissa Lidsky, Gerry Moohr, Andy Morriss, Marty Redish, Joel Schumm, Gary Spitko, David Super, Mark Tushnet, Chris Walker, Chris Wells, and Tim Zick. The University of Alabama Law School Foundation provided generous financial support, in the form of summer research grants, which greatly facilitated my work on this scholarly endeavor. The usual disclaimer applies: Any and all errors and omissions are the sole responsibility of the author.

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#### INTRODUCTION

Democratic self-government relies on regular elections to ensure that government remains accountable and responsible to the body politic. However, for elections to serve as a means of securing government accountability, the voters must have access to relevant information about the successes—and failures—of those who currently hold office.<sup>1</sup> Without information, the electoral process cannot serve as an effective means of ensuring government accountability for both its actions and its failures to act.<sup>2</sup> This holds true as a general matter, but holds doubly true in a period when the

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1. *But see* Lyrrisa Barnett Lidsky, *Not a Free Press Court?*, 2012 B.Y.U. L. REV. 1819, 1830–34 (2012) (arguing that the Roberts Court appears “deeply suspicious of the claim that the media play a special constitutional role in our democracy,” bordering on outright “hostility,” and positing that the conservative majority “treats the differences between media and non-media corporations as nonexistent”).

2. For an excellent and comprehensive overview of the purposes and function of both the Free Press Clause and a free press in a democratic polity more generally, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983). Professor Anderson posits that, for the Framers, “[f]reedom of the press—not freedom of speech—was the primary concern.” *Id.* at 533; *see also* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1032–33, 1043, 1069–70 (2011) (noting “the common intuition that there does exist a press that performs a special role in our democracy and is deserving of constitutional status outside the shadow of the Speech Clause” and arguing that “[t]he Press Clause needs a distinct definition to truly fulfill its unique functions in our society and our democracy”). Of course, if one embraces the point of view that the mass media play an integral role in the process of democratic deliberation, it might necessarily follow that vesting such power in unregulated private hands constitutes a problematic public policy—as opposed to using government power to ensure access to the mass media. *See* JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA (1973); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). If the mass media are an essential component of the democratic process, like the political parties themselves, one could conceive of the press as having constitutional obligations, as do the political parties,

incumbent White House administration openly and brazenly embraces the concept of “alternative facts.”<sup>3</sup>

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when they undertake an essential role in the electoral process. See *Terry v. Adams*, 345 U.S. 461, 469–70 (1953). But cf. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254–58 (1974) (invalidating on First Amendment grounds a Florida law that required a newspaper to afford a candidate for public office a “right of reply” if a newspaper opposed the candidate’s election).

3. Jim Rutenberg, “*Alternative Facts*” and the Costs of Trump-Branded Reality, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/business/media/alternative-facts-trump-brand.html> [<https://perma.cc/UJE9-BSVL>] (discussing the Trump administration’s efforts to peddle to the press and body public so-called “alternative facts,” which are verifiably false, but self-serving, factual claims). The Trump administration’s routine flouting of government ethics rules presents another need for whistleblowing speech to ensure that high government offices are not used for personal pecuniary gain—perhaps at the expense of the national interest. See Eric Lipton, *White House Moves To Block Ethics Inquiry into Ex-Lobbyists on Payroll*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html> [<https://perma.cc/U8MC-VQ8X>]. Other examples of the potential abuse of power have come to light only because of internal leaks to the press. See, e.g., Sari Horwitz, Ashley Parker & Ed O’Keefe, *Trump Angrily Calls Russia Investigation a “Witch Hunt,” and Denies Charges of Collusion*, WASH. POST (May 18, 2017), [https://www.washingtonpost.com/world/national-security/deputy-attorney-general-rod-rosenstein-will-brief-the-full-senate-in-a-closed-session/2017/05/18/41de8548-3bd4-11e7-8854-21f359183e8c\\_story.html](https://www.washingtonpost.com/world/national-security/deputy-attorney-general-rod-rosenstein-will-brief-the-full-senate-in-a-closed-session/2017/05/18/41de8548-3bd4-11e7-8854-21f359183e8c_story.html) [<https://perma.cc/MW6A-5JAW>]; Devlin Barrett & Matt Zapotosky, *Russia Probe Reaches Current White House Official, People Familiar with the Case Say*, WASH. POST (May 19, 2017), [https://www.washingtonpost.com/world/national-security/russia-probe-reaches-current-white-house-official-people-familiar-with-the-case-say/2017/05/19/7685adba-3c99-11e7-9e48-c4f199710b69\\_story.html](https://www.washingtonpost.com/world/national-security/russia-probe-reaches-current-white-house-official-people-familiar-with-the-case-say/2017/05/19/7685adba-3c99-11e7-9e48-c4f199710b69_story.html) [<https://perma.cc/AY7H-BE23>]. The Trump administration consistently denies growing reports of both financial self-dealing with the Russian government and efforts to block or impede investigation of its political and financial ties to the Russian government; nevertheless, investigators seem to have established that senior leaders in the campaign were on the Russian government’s payroll. Mark Mazzetti & Matthew Rosenberg, *Michael Flynn Misled Pentagon About Russia Ties, Letter Says*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/politics/michael-flynn-fifth-amendment-russia-senate.html> [<https://perma.cc/JHG4-28LC>]. Even so, however, President Trump himself has admitted, after leaks from White House staffers to the national press corps, that he casually shared classified Israeli intelligence with senior Russian government officials at an Oval Office meeting. See Adam Goldman, Eric Schmitt & Peter Baker, *Israel Said To Be Source of Secret Intelligence Trump Gave to Russians*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/world/middleeast/israel-trump-classified-intelligence-russia.html> [<https://perma.cc/RHH4-8KFK>]. To be sure, all presidential administrations seek to suppress damaging information that calls into question the administration’s honesty, competence, and discretion. However, the scale of malfeasance, and possibly corruption, in the current White House may well rival that of the Grant administration, which arguably held the record on these fronts until now. See Michael A. Genovese, *Presidential Corruption: A Longitudinal Analysis*, in CORRUPTION IN AMERICAN POLITICS 135, 140–42 (Michael A. Genovese & Victoria A. Farrar-Myers eds., 2010) (noting that that the Grant administration was “victimized by widespread political corruption” that involved the highest levels of government, including the Vice President and several members of the cabinet, and positing that Grant’s political inexperience, poor personnel choices, lax management style, and tendency to place personal loyalty over competence were

Professor David Anderson observes that for James Madison and the other proponents of the Bill of Rights, “freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed.”<sup>4</sup> The press obviously plays a crucial role in facilitating the process of democratic deliberation and government accountability.<sup>5</sup> But the press can play this role only if journalists are able to obtain and disseminate accurate information about the government’s activities.<sup>6</sup>

Since time immemorial, however, government officers will race to claim responsibility for successes but are far more reticent to acknowledge—much less take responsibility for—government failures.<sup>7</sup> All of the relevant incentives run toward attempting to hide or cover up instances of corruption, malfeasance, or ineptitude. And, yet, democratic accountability requires that information that incumbent government officers would prefer to suppress be made available to the voters—who express a collective judgment on the success, or failure, of the incumbent officers on election day through their ballots.<sup>8</sup>

the root causes of it); SCOTT JOHN HAMMOND, ROBERT NORTH ROBERTS & VALERIE A. SULFARO, *CAMPAIGNING FOR PRESIDENT IN AMERICA: 1788–2016*, at 526–27 (2016) (observing that “Grant led what was far and away the most corrupt administration to date,” discussing various scandals that occurred on President Grant’s watch, notably including the infamous *Crédit Mobilier* scandal, and noting that “[b]ecause of the extensive corruption, a new term, ‘Grantism,’ was coined both to describe the condition of corruption that gripped the administration and to claim the location of its source directly in the president himself rather than in the Republican Party”). Although it is probably too early to draw any firm conclusions, an analogy between the Trump administration and the Grant administration with regard to their ethical standards may well prove to be apt. *See, e.g.*, Nicholas Confessore & Kenneth P. Vogel, *Trump Loyalist Mixes Businesses and Access at “Advisory” Firm*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/corey-lewandowski-trump.html> [<https://perma.cc/NSB8-8TAE>] (noting the existence of “ethical quandaries surrounding the Trump White House, where the president has given significant access and power to friends and loyalists who are not on the government payroll but work as lobbyists or retain significant outside business interests” and observing that “Mr. Trump’s ‘kitchen cabinet’ includes Washington lobbyists, a variety of so-called strategic advisers who provide advice on government policy making but are not registered as lobbyists, and a panoply of wealthy friends with extensive business interests before the [federal] government”).

4. Anderson, *supra* note 2, at 537.

5. Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2434–37 (2014).

6. *Id.* at 2446–47; *see* West, *supra* note 2, at 1032–33, 1041–47, 1069–70 (noting the need for press access to information in order to facilitate using the electoral process to secure government accountability).

7. *See* Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 454, 469 (2011) (observing that “systemic failures of governance are not particularly rare, which is a very good reason indeed to spend considerable time and energy thinking about issues associated with administrative competence” and positing that “all presidential administrations, regardless of political party, are prone to suppress bad news whenever possible”).

8. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–27, 36–38 (1948).

Government employees are obviously quite often in the best position to know about government engaging in questionable, if not entirely illegal or unconstitutional, activity. Edward Snowden's revelations about the existence of a massive domestic spying program set off a national debate about the relative importance of national security, and anti-terrorism efforts, versus informational privacy.<sup>9</sup> Because intelligence agencies invariably operate in largely non-transparent ways, only an insider—a whistleblower—could credibly confirm the existence of government domestic spying programs like PRISM.<sup>10</sup>

What's more, domestic surveillance programs could easily be used in ways that thwart or inhibit democratic accountability—for example, by using embarrassing personal information to discredit political opponents of the incumbent president.<sup>11</sup> Or by aiding or inhibiting the election of a sitting member of Congress—or even a presidential candidate—through selective data dumps.<sup>12</sup> Truly, information is power—particularly when the information is purloined from smart phones, email accounts, and web surfing habits.<sup>13</sup> Very few people would want to share with God

9. See Editorial, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2014), <https://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html> [https://perma.cc/9GSK-YRC5]; see also Siobhan Gorman, Carol E. Lee & Janet Hook, *Obama Proposes Surveillance-Policy Overhaul*, WALL ST. J. (Aug. 9, 2013), <https://www.wsj.com/articles/obama-to-unveil-new-plans-for-surveillance-transparency-1376063621> [https://perma.cc/B2MX-LGK6].

10. See Margaret Hu, *Taxonomy of the Snowden Disclosures*, 72 WASH. & LEE L. REV. 1679, 1686–93 (2015).

11. See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1952–58 (2013).

12. See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS (2017) (reporting on the Russian government's intentional and sustained activities to damage the presidential campaign of Hillary Rodham Clinton and to advance the electoral prospects of Donald Trump); see also Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html> [https://perma.cc/8NFJ-TTC5] (reporting on how the Russian government used sophisticated cyberattacks to damage Hillary Rodham Clinton's credibility and, in the process, enhanced Donald Trump's electoral chances); Michael D. Shear & David E. Sanger, *Putin Led a Complex Cyberattack Scheme To Aid Trump, Report Finds*, N.Y. TIMES (Jan. 6, 2017), <https://www.nytimes.com/2017/01/06/us/politics/donald-trump-wall-hack-russia.html> [https://perma.cc/S98M-WN74] (reporting on the U.S. intelligence community's conclusion that Russia's cyber hacking efforts were intended to advance Donald Trump's candidacy and injure the Clinton campaign's credibility with the electorate).

13. Joined Cases C-293/12 & 594/12, *Digital Rights Ireland Ltd. v. Minister for Commc'ns, Marine and Nat. Res.*, 2014 EUR-Lex CELEX LEXIS 238, ¶ 28 (Apr. 8, 2014), <http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0293&lang1=en&type=TXT&ancre=https://perma.cc/DJ5C-8VJB> (observing that “it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by the directive and, consequently, on their exercise of freedom of expression”); see also Opinion of Advocate General Cruz Villalón, *Joined Cases C-293/12 & 594/12, Digital Rights Ireland Ltd. v. Minister for Commc'ns, Marine and Nat. Res.*, 2013 EUR-Lex CELEX LEXIS 845, ¶ 52 (Dec. 12, 2013), <http://curia.europa.eu>

and country all of their most intimate communications and online activities.<sup>14</sup>

In sum, for elections to secure government accountability, the electorate must have the information required to reach sensible conclusions about what government is doing well and what government is doing poorly.<sup>15</sup> As Professor Alexander Meiklejohn stated the proposition, “[w]hen a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator.”<sup>16</sup> Instead, “[t]he voters must have it, all of them.”<sup>17</sup>

The question then becomes: How precisely will the electorate come to possess the information that it requires to make accurate determinations about the current government’s wisdom—or lack of it? It is easy enough to say, “Well, the mass media will report on the activities of the government.” But, this only kicks the can down the road a bit further—precisely how will the media come to possess the information necessary for voters to make wise electoral decisions?

Quite obviously, government employees will play a regular and important role in facilitating the ability of citizens to hold government accountable through the electoral process.<sup>18</sup> A government employee who possesses information relevant to government misconduct has a choice to make: She could release the information to the

/juris/celex.jsf?celex=62012CC0293&lang1=en&type=TXT&ancre= [http://perma.cc/DJ5C-8VJB] (observing that the European Union’s massive data collection and retention program gave rise to “the vague feeling of surveillance” and that such surveillance could be “capable of having a decisive influence on the exercise by European citizens of their freedom of expression and information” and, accordingly, produced an unacceptable chilling effect on the exercise of freedom of speech).

14. See Opinion of Advocate General Cruz Villalón, 2013 EUR-Lex CELEX LEXIS 845, ¶ 52; see also NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 105–07, 165, 179–80 (2015). Professor Richards observes that “[a]t one level, it would seem obvious that surveillance chills and deters free thought, reading, and communications,” but surveillance also leads people to “change their behavior toward the ordinary and the inoffensive” too. See Richards, *supra* note 11, at 106. In sum, “[w]hen we feel we are being watched, we act differently.” *Id.*

15. See MEIKLEJOHN, *supra* note 8, at 37 (“In the last resort, it is not our representatives who govern us. We govern ourselves, using them. And we do so in such ways as our own free judgment may decide.”).

16. *Id.* at 88.

17. *Id.*

18. See Julian W. Kleinbrodt, Note, *Pro-whistleblower Reform in the Post-Garcetti Era*, 112 MICH. L. REV. 111, 113 (2013) (arguing that “[w]histleblower speech is critically important because it helps ensure a well-functioning democracy” and observing that information provided by government employees can be crucial to securing accountability); Diane Norcross, Comment, *Separating the Employee From the Citizen: The Social Science Implications of Garcetti v. Ceballos*, 40 BALT. L. REV. 543, 570–72 (2011) (noting the value of whistleblowing speech to securing government accountability); Julie A. Wenell, Note, *Garcetti v. Ceballos: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623, 635–37 (2007) (noting the importance of government employees engaging in whistleblowing speech to securing reform and quoting a *Garcetti* brief for the proposition that “[n]either the public nor the government itself can hold officials accountable for abuse unless public employees can disclose government misconduct without fear of reprisals.”).

press, in order to facilitate reform and electoral accountability or, in the alternative, she could remain silent in order to protect a government office from public embarrassment. If we want government employees to facilitate accountability by sharing critical information about the government's activities with the body politic, we should consider carefully the incentives—and disincentives—that we provide for choosing speech over silence.<sup>19</sup> For example, if we wish to encourage strongly public disclosure about matters of public concern,<sup>20</sup> we would provide very robust legal protections against a government employer retaliating against a government employee who engages in whistleblowing activity.<sup>21</sup> Simply put, ambiguity in the scope

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19. See Louis Michael Seidman, *Powell's Choice: The Law and Morality of Speech, Silence, and Resignation by High Government Officials*, in *SPEECH AND SILENCE IN AMERICAN LAW* 48, 78–80 (Austin Sarat ed., 2010). Professor Seidman notes that *Garcetti* creates perverse incentives to ignore the chain of command and creates a doctrinal framework that “sharply favors those who are willing to make a clean break.” *Id.* at 80. This result obtains because “the [government] employer has no employment needs when the speaker is no longer a government employee.” *Id.* Accordingly, “the more an employee is willing to break with her patron, the greater her protection.” *Id.* This is undoubtedly true. Even so, however, most employees seek to retain, rather than shed, their current employment. *Cf. id.* at 79–81 (offering reasons and rationales that would incent a government employee to make a noisy exit).

20. The need for encouraging such disclosures should be self-evident. See, e.g., Emily Wax-Thibodeaux, *VA Removes Sharon Helman, Manager at Center of Phoenix Health-Care Scandal*, WASH. POST (Nov. 24, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/11/24/va-removes-sharon-helman-manager-at-center-of-phoenix-health-care-scandal> [<https://perma.cc/LP4S-RE7C>]. Employees who engage in whistleblowing activity, even using protected internal channels, and in theory under the protection of laws like the federal Whistle Blower Protection Act of 1989, Pub. L. 101–12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201–1222 (2016)), face a serious prospect of retaliation by their government employers. See Emily Wax-Thibodeaux, *Whistleblowers Say VA Has Not Changed*, WASH. POST, Apr. 30, 2015, at A19 [hereinafter Wax-Thibodeaux, *VA Has Not Changed*] (reporting on “widespread reports of retaliation against whistleblowers” within the Department of Veterans Affairs, including demotions followed by being “moved into windowless storage rooms, or basements,” for their work spaces); see also Emily Wax-Thibodeaux, *Isolated. Harassed. Their Personal Lives Investigated. That's Life as a VA Whistleblower, Employees Tell Congress*, WASH. POST (Apr. 14, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/04/14/isolated-harassed-their-personal-lives-investigated-thats-life-as-a-va-whistleblower-employees-tell-congress> [<https://perma.cc/U5HW-TZQK>] (reporting on various forms of targeted retaliation against VA whistleblowers, including having “their medical backgrounds scrutinized, and even their mental health and personal lives investigated” and observing that “those who retaliate against [VA whistleblowers] were rarely if ever punished”) [hereinafter Wax-Thibodeaux, *Isolated. Harassed.*].

21. We should also consider whether threatening whistleblowing government employees with treason or espionage charges is fundamentally consistent with our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *But cf.* Wax-Thibodeaux, *VA Has Not Changed*, *supra* note 20 (noting that “[t]he poor and punishing treatment of whistleblowers inside the Department of Veterans Affairs has been described as part of a ‘corrosive culture,’” but observing that more than a year after the Secretary of Veterans Affairs “vowed to change” this sorry situation, the promised reforms had not yet been implemented). Current First Amendment law routinely taxes the cost of



of such protection is a strong incentive for government employees to remain silent. A rational government employee will not disseminate information about wrongdoing within her department or agency if a not improbable consequence will be the loss of her employment.<sup>22</sup> Given the importance of accurate information about the government's activities to holding government accountable for its actions, the federal courts should deploy the First Amendment as a shield for whistleblowing speech.<sup>23</sup>

The First Amendment's protection of speech integral to the political process could logically encompass speech by government employees that relates to matters of public concern that relate specifically to the government office in which the employee works. Targeted protection for "whistleblowing speech" could be justified in normative terms because such speech is essential to the proper functioning of the political process. The Supreme Court, however, has not provided robust protection for government employees who engage in whistleblowing activities.<sup>24</sup> Nor has Congress enacted legislation that provides comprehensive and reliable protection to government

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speech activity against private citizens, even on facts where a meaningful and cognizable legal harm has unquestionably occurred. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458–61 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–56 (1988). Why should the government itself be immune from having to incur costs associated with the protection of freedom of expression? If the grieving family of a dead soldier, killed while on active duty, must submit to an outrageous and offensive targeted protest of their dead relative's funeral and burial services because we must "protect even hurtful speech on public issues to ensure that we do not stifle public debate," *Snyder*, 562 U.S. at 461, then, by parity of logic, the government should have to incur costs that it would rather avoid in order to facilitate the process of democratic deliberation. Unfortunately, however, contemporary First Amendment law does not routinely require government itself to shoulder the costs of speech when national security or military affairs are at stake. Collective social costs matter—but so do individual social costs. First Amendment theory and doctrine should reflect this basic fact; nevertheless, it currently does not.

22. Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency"*, 23 OHIO N.U. L. REV. 17, 25, 51–52, 63 (1996) (noting that both statutory and constitutional protections for government employees who engage in whistleblowing speech are weak and convey uncertain protection and, accordingly, "[t]he uncertainty in this area means that no government employee, regardless of the significance of the communication, can be ensured that her speech will be protected"); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 65 (1987) (observing that "the government office is *expected* to tolerate more 'deviance' and 'outspokenness' than the private office and many people already assume that it does so" and, in consequence, "[t]ermination from a government job therefore may send a profoundly and disproportionately negative message to other, potential employers" (emphasis in original)). As Professor Levinson explains, "whistleblowers will sometimes be penalized for their speech and speech will be chilled because employees will not know in advance whether their disclosures will be protected." Levinson, *supra*, at 20 n.6. And, as Professor Massaro has argued, "[t]he difficult truth is that an employee who is willing to say things that rankle an employer, however accurate, may also be hard to tolerate." Massaro, *supra*, at 64.

23. *See infra* notes 141–64 and accompanying text.

24. *See Kleinbrodt, supra* note 18, at 118–28 (discussing and critiquing the shortcomings and limitations associated with the contemporary *Connick/Pickering* doctrine in the context of whistleblowing government employee speech).

employees who disclose truthful, but embarrassing, information about significant failures in the operation of government programs.<sup>25</sup>

This Article proceeds in five parts. Part I examines the Supreme Court's initial efforts to protect government employees who speak out about matters of public concern under the *Connick/Pickering* doctrine.<sup>26</sup> Part II then contrasts the approach of the Rehnquist and Roberts Courts, which have declined to extend *Connick/Pickering*. Indeed, although the Rehnquist and Roberts Courts have never mustered a majority to overrule expressly *Connick* and *Pickering*, the Supreme Court's most recent decisions have narrowed significantly the First Amendment protections afforded to government employees' speech.

Part III considers the paradox of the near-absolute protection that the Supreme Court has afforded government employees to be free of a spoils system in which elected government officials condition government employment on partisan loyalty. To be clear, I do not suggest that the Supreme Court has erred in constitutionalizing civil service protections through First Amendment precedents that prohibit the use of a political patronage system for government employment (at least for non-confidential and non-policymaking positions). The point is more subtle: if the potential disruption of a government office is not a sufficient predicate for firing an employee based on her partisan identity, the same logic would suggest that government should be equally debarred from firing a government employee who speaks out on a matter of public concern.

Part IV proposes the creation of a new First Amendment speech category: namely, "whistleblowing" speech. The *Connick/Pickering* line of precedent does not adequately take into account the value of a government employee's speech to the process of democratic deliberation; whistleblowing speech conveys important benefits on the body politic that transcend the government employee's personal autonomy interests in speaking out on matters of public concern. Part V provides a brief summary and conclusion of the arguments set forth in this Article.

Government employees are often uniquely situated to provide voters with information essential to holding government accountable.<sup>27</sup> First Amendment doctrine, under the existing *Connick/Pickering* doctrine, fails to take this consideration into account.<sup>28</sup> To be sure, government employees should not be required to relinquish their right to speak more generally as citizens regarding matters of public concern as a consequence of working for a government employer. At the same time, however, whistleblowing speech, an important subset of government employee speech, clearly facilitates the process of holding government democratically accountable through the electoral process.

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25. See Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697, 1698–1701 (2015).

26. *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

27. Kleinbrodt, *supra* note 18, at 113–14; Wenell, *supra* note 18, at 636–37.

28. See *infra* notes 41–56 and accompanying text.

Just as political speech enjoys enhanced First Amendment protection vis á vis other kinds of speech, such as commercial speech<sup>29</sup> and sexually explicit speech,<sup>30</sup> so too, government employee speech that empowers voters to assess accurately government successes and failures should be specially and specifically protected because of its essential nexus with the process of democratic deliberation. In sum, although not all government employee speech is whistleblowing speech,<sup>31</sup> only government employee speakers can engage in whistleblowing speech because they are uniquely situated to provide the body politic with the information it must have to ensure government accountability through the democratic process and, accordingly, merits independent and enhanced First Amendment protection from more generic government employee speech.

#### I. THE WARREN AND BURGER COURTS' CONTINGENT PROTECTION OF GOVERNMENT EMPLOYEES AS CITIZEN-PARTICIPANTS IN THE PROCESS OF DEMOCRATIC SELF-GOVERNMENT

Government employees have never enjoyed strong First Amendment protection for their speech activity—whether on the job or off the clock.<sup>32</sup> Nothing even remotely close to a First Amendment privilege for whistleblowing speech has ever existed in the governing constitutional precedents. To be sure, the Warren Court did take some tepid steps toward affording government employees who speak out about matters of public concern some measure of First Amendment protection. In *Pickering*, decided in 1968, the Supreme Court held that government employers could not punish employees for exercising their First Amendment rights—at least when an employee speaks out on a matter of public concern.<sup>33</sup> The *Pickering* test, however, was never particularly robust—it involves a balancing exercise that considers the employee's interest in speaking out about a matter of public concern and

29. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). *But cf.* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (questioning the rationales offered to justify lower free speech protection for commercial speech over other kinds of speech).

30. See *Miller v. California*, 413 U.S. 15 (1973). *But cf.* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) (questioning the basic rationales offered to exclude nude images of children from any First Amendment protection and suggesting that this doctrinal approach places unjustifiable burdens on artistic freedom); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005) (questioning whether the government has any legitimate interest in regulating obscenity because it causes moral harms to those who peruse such materials).

31. Again, it bears noting that government employees speak out about a wide variety of matters of public concern, many—indeed most—examples of government employee speech do not involve whistleblowing activity. See *infra* notes 151–59 and accompanying text. When a government employee speaks out about a matter of public concern wholly unrelated to her government employment, and which does not facilitate the process of democratic accountability through elections, the speech would not constitute “whistleblowing speech.” See *id.*

32. See, e.g., *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (observing without irony that a city policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”).

33. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

then weighs this private interest against a government employer's interest in maintaining a well-functioning workplace.<sup>34</sup>

Marvin L. Pickering was a high school teacher in Will County, Illinois.<sup>35</sup> He published a letter to the editor of the local newspaper criticizing the local school board's handling of efforts to secure public approval of new school taxes.<sup>36</sup> Pickering's letter challenged some of the local school board's claims about existing school district expenses and its financial support for the district's athletic programs.<sup>37</sup> The school district promptly fired Pickering after the newspaper published his letter criticizing both their management of the district, particularly with respect to athletics programs, and the board's efforts to secure public approval of an increase in local school taxes through a public referendum.<sup>38</sup> The district did so because it concluded that, in the words of the governing state law, his continued employment would be "detrimental to the efficient operation and administration of the schools of the district."<sup>39</sup> The Illinois state courts upheld the school district's discharge of Pickering as an appropriate action to rein in an insubordinate school district employee.<sup>40</sup>

The Supreme Court of the United States granted review and reversed the Illinois Supreme Court.<sup>41</sup> Writing for the majority, Justice Thurgood Marshall explained that public school employees do not relinquish their ability to speak out as citizens regarding matters of public concern.<sup>42</sup> He observed that

[t]o the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to

34. Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 B.Y.U. L. REV. 2117, 2119 (2010) ("Under this framework, a public employee's speech is not entitled to any First Amendment protection unless it is determined, as a threshold matter, that the speech involves a matter of public concern, and, even if that requirement is satisfied, the speech is protected only if the value of the speech outweighs the government employer's interests in restricting or punishing it."); see *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (discussing the matter of public interest threshold requirement and balancing test for determining whether government employee speech about a matter of public interest enjoys First Amendment protection in light of the managerial imperatives of the government employer).

35. *Pickering*, 391 U.S. at 564–66.

36. *Id.* at 575–78 (appendix reprinting Mr. Pickering's letter to the editor).

37. *Id.*

38. *Id.* at 566–67.

39. *Id.* at 564–65 (internal quotations and citation omitted).

40. *Id.* at 565.

41. *See id.* at 565, 574–75.

42. *But cf. McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (observing that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"). *McAuliffe* equates the rights of public sector and private sector employees; accordingly, a government employee, just like an employee working for a private employer in an employment-at-will state, "takes the employment on the terms which are offered" and "[t]he servant cannot complain" about those conditions. *Id.* at 518. *Pickering* constitutes a clear break with *McAuliffe*'s assumption that government, as an employer, is no more obliged to respect constitutional constraints than is a private employer. *See Pickering*, 391 U.S. at 568, 571–73.

comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.<sup>43</sup>

On the other hand, however, Justice Marshall emphasized that “it cannot be gain-said that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>44</sup> Accordingly, “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>45</sup>

From its inception, the *Pickering* doctrine thus required federal courts to weigh the disruption associated with the continued employment of a whistleblower against the interest of the employee in exercising her First Amendment rights. At least arguably, an important third interest exists and should have been directly factored into the balance—namely, the value of the information that the government employee provides to the body politic. Plainly, the value of information provided by government employees about the operation of a government office varies—particularly with respect to the information’s potential relevance to the ability of voters to enforce democratic accountability at the next election.<sup>46</sup> Moreover, the value of information to voters will often correlate positively with the potential disruption that release of the information might cause to the government office about which it relates.<sup>47</sup> Explosive revelations of serious and ongoing wrongdoing will cause more workplace disruption than a complaint about the occasional misuse of a government-owned copier by certain coworkers.<sup>48</sup>

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43. *Pickering*, 391 U.S. at 568.

44. *Id.*; see also Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164–65, 178–80 (1996) (discussing the “managerial domain” of the government as an employer and steward of public resources and also the need to take legitimate managerial goals and objectives into consideration when determining the proper scope of First Amendment rights in the context of government-created environments, including government employment).

45. *Pickering*, 391 U.S. at 568.

46. See Levinson, *supra* note 22, at 25, 51–52. As Professor Levinson observes, To hold that a government employee’s speech can be proscribed no matter what the content of the speech and no matter what the specific employee/employer situation, is to cut off public debate on speech that lies at the core of the First Amendment—speech which is necessary to democratic self-government.

*Id.* at 51.

47. See generally Kleinbrodt, *supra* note 18, at 113–14 (noting that the value of information provided by a whistleblowing government employee might not be available through other means); Wenell, *supra* note 18, at 635–37 (noting that engaging in whistleblowing speech is likely to lead to retaliation if the information embarrasses a government employer). *But cf.* Massaro, *supra* note 22, at 40–42 (citing Alexander Meiklejohn and arguing that the value of information necessary to facilitate government accountability through the process of democratic self-government should, in most cases, overbear the cost associated with disruption allegedly caused by the whistleblowing speech).

48. See Wax-Thibodeaux, *Isolated. Harassed.*, *supra* note 20 (reporting on pervasive

In other words, revelations that do not seriously embarrass the head of a government agency are less likely to be deemed “disruptive” than revelations that lead to criminal investigations or demands for resignations of principal officers within the agency.<sup>49</sup> The *Pickering* test, however, focuses not on the value of the information to the community, but rather on the abstract interest of the employee in exercising her First Amendment rights as a citizen. I do not suggest that an employee’s interest in exercising her First Amendment rights should be deemed irrelevant to the analysis—but I would suggest that the importance of the information and the availability of the information (or lack of it) from other sources should also be considered in the decisional matrix used to determine if a government employer may constitutionally fire an employee who engages in whistleblowing activity.

To be sure, Justice Marshall did emphasize the importance and value of having government employees participate in the process of democratic deliberation.<sup>50</sup> In the context of a referendum of school district voters to approve or reject new taxes to support the school district, “free and open debate is vital to informed decision-making by the electorate.”<sup>51</sup> Moreover, “[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 operation of the schools should be spent” and “it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”<sup>52</sup> In this regard, one should bear in mind that Marvin Pickering was less a crusading whistleblower than an angry crank; his claims about the school district’s policies were poorly informed and, in fact, contained numerous factual inaccuracies.<sup>53</sup>

This aspect of the *Pickering* majority opinion *hints* at the relevance of information to the body politic as a relevant consideration in affording a government employee who engages in whistleblowing activity protection. However, the formal balancing test—which weighs a government employee’s autonomy interest in speaking out about a matter of public concern against the

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forms of retaliation visited on VA hospital employees who reported on shocking failures to meet the medical needs of injured veterans in places like Phoenix, Arizona). Despite assurances by the Secretary of Veterans Affairs that this systematic pattern of retaliation against whistleblowing employees would be stopped, it continued to occur—and on a widespread basis. *See id.*

49. *See generally* Seidman, *supra* note 19, at 56–61 (discussing the practical and political significance of resignations by government officers to the operation of government agencies and observing that resignations can both facilitate and also frustrate public accountability).

50. *Pickering*, 391 U.S. at 571–75.

51. *Id.* at 571–72.

52. *Id.* at 572.

53. *See id.* at 570–73. The *Pickering* Court extended the *New York Times Co. v. Sullivan* “actual malice” standard to government employee speech about a matter of public concern. *See id.* at 574–75; *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–85 (1964) (requiring a public official plaintiff to prove that a media defendant published false statements of fact with “actual malice,” meaning with actual knowledge of falsity or reckless indifference to the truth or falsity of a factual assertion of and concerning the plaintiff, and that this showing of actual malice must be supported with “clear and convincing evidence”).

disruptions that such action might cause going forward in a government workplace—does not take this factor into consideration at all.

Nevertheless, *Pickering* prevailed because on the facts at bar his speech related to a matter of public concern and did not cause significant workplace disruption.<sup>54</sup> Moreover, he prevailed even though his letter to the editor contained some factual errors. *Pickering* made the errors in good faith, the board could easily have corrected the public record, if it wished to do so, and *Pickering's* letter, the inaccuracies notwithstanding, plainly related to a matter of public concern. Critically, however, *Pickering's* authorship and subsequent publication of the critical letter did not “in any way either impede[] the teacher’s proper performance of his daily duties in the classroom or . . . interfere[] with the regular operation of the schools generally.”<sup>55</sup> On these facts, the Supreme Court “conclude[d] that the interest of the school administration in limiting teachers’ opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public.”<sup>56</sup>

Subsequent cases involving the free speech rights of government employees decided during the Warren and Burger Court eras generally followed *Pickering* and afforded a government employee who spoke out on a matter of public concern First Amendment protection, provided that the employee’s continued presence in the government workplace was not unduly disruptive.<sup>57</sup> To be sure, in *Connick v. Myers*,<sup>58</sup> the Burger Court narrowed *Pickering's* scope by requiring that the speech at issue relate to a matter of public, rather than private, concern and defining “public concern” in relatively narrow terms to exclude internal workplace management disputes.<sup>59</sup>

Sheila Myers, an assistant district attorney working in New Orleans, Louisiana, was unhappy with being reassigned within the district attorney’s office.<sup>60</sup> After learning of her reassignment, she circulated a questionnaire “concerning internal office affairs.”<sup>61</sup> Her survey asked employees about various office personnel policies, including transfers, morale, the lack of a formal grievance committee, confidence in office managers, and “whether employees felt pressured to work in political campaigns.”<sup>62</sup> She was promptly fired because the distribution of her survey allegedly caused a “mini-insurrection” within the district attorney’s

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54. *Pickering*, 391 U.S. at 571–75.

55. *Id.* at 572–73.

56. *Id.* at 573.

57. *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414–15 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

58. 461 U.S. 138 (1983).

59. *See id.* at 145–48. *But cf.* *Snyder v. Phelps*, 562 U.S. 443, 451–55 (2011) (defining a “matter of public concern” very broadly to encompass very bizarre claims linking the deaths of U.S. military personnel with God’s wrath over a permissive attitude toward sexual minorities in contemporary U.S. society).

60. *Connick*, 461 U.S. at 140.

61. *Id.*

62. *Id.* at 141; *see also id.* at 155–56 (reproducing, as an appendix, the entire office questionnaire that Myers prepared and circulated on October 7, 1980).

office.<sup>63</sup> After being discharged, Myers brought a federal lawsuit alleging a *Pickering* violation; she prevailed on this claim in the lower federal courts.<sup>64</sup> The Supreme Court granted review and reversed.<sup>65</sup>

The *Connick* Court found that most of the questions on the survey, save for Question 11 on whether office employees felt pressured to work on political campaigns, related to matters of private, rather than public, concern.<sup>66</sup> Writing for the majority, Justice Byron White explained that “*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”<sup>67</sup> This result obtained because “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”<sup>68</sup>

The *Connick* majority feared that reading *Pickering* more broadly would turn the First Amendment into a means of seeking routine federal court review of “ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation.”<sup>69</sup> Routine dismissals of government employees wholly unrelated to an employee’s speech about a matter of public concern “are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.”<sup>70</sup>

Justice White strongly argued that speech primarily related to internal employment disputes does not seriously implicate core First Amendment values.<sup>71</sup> He explained that

when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.<sup>72</sup>

Employee speech about a matter of public concern enjoys First Amendment protection, but speech related to a matter of private concern does not. *Connick* sets forth

63. *Id.*

64. *See id.* at 141–42.

65. *Id.* at 142, 154.

66. *Id.* at 149.

67. *Id.* at 146.

68. *Id.*

69. *Id.*

70. *Id.* at 146–47.

71. *See id.* at 147 (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.”).

72. *Id.*



an open-ended test for determining whether a government employee's speech relates to a matter of public or private concern and the relevant considerations include "the content, form, and context of a given statement, as revealed by the whole record."<sup>73</sup>

Even though the *Connick* Court read *Pickering* narrowly and confined its scope of protection to speech that implicates interests beyond the immediate workplace environment, *Connick* did not undercut *Pickering*'s protective force when a government employee's speech squarely related to a matter of public concern. And, the Burger Court was relatively generous in construing speech as relating to a matter of public concern—including, for example, a Mississippi county constable office clerk's declaration, while at work, following the unsuccessful assassination attempt on President Ronald Reagan's life, "If they go for him again, I hope they get him."<sup>74</sup> In fairness to Ms. Ardith McPherson, the office clerk who made the off-color remark, the record clearly established that, if considered in context, her comments plainly related to the Reagan administration's efforts to reduce or wholly eliminate various public assistance programs—rather than her personal support for John Hinckley, Jr.'s effort to murder President Reagan.<sup>75</sup>

It also bears noting that *Rankin v. McPherson*, decided in 1987, is technically a decision from the Rehnquist Court, rather than the Burger Court. However, *Rankin* fits more comfortably with the Warren and Burger Court precedents that permitted government employees to invoke the First Amendment to contest allegedly retaliatory discharges from government employment.<sup>76</sup> By the early 2000s, the Rehnquist Court, with a firm conservative majority in place, proceeded to erode the *Pickering* line of cases by creating ever-broader general exceptions to its application.

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73. *Id.* at 147–48.

74. *Rankin v. McPherson*, 483 U.S. 378, 380 (1987).

75. *See id.* at 381 ("But then after I said that, and then Lawrence said, yeah, he's cutting back medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him.").

76. *Compare Connick*, 461 U.S. 138 (finding a question related to compelled political activity by employees of a district attorney constituted a matter of public concern and triggered First Amendment protection), *and Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–75 (1968) (holding that a letter to the editor about a referendum on public school bonds constitutes a matter of public concern and triggered First Amendment protection against the discharge of the government employee who wrote the letter), *with Garcetti v. Ceballos*, 547 U.S. 410, 419–21 (2006) (acknowledging the importance and value of disclosures by government employees, notably including "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion," but nevertheless denying First Amendment protection to comments made within the scope of a government employee's work-related duties, even if they relate to a matter of public concern), *and Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (acknowledging the potential social value of employee speech but concluding that "the government as employer indeed has far broader powers than does the government as sovereign" and this authority extends to firing an employee based on a misattributed comment that, if actually made, could cause workplace disruption).

## II. REDUCED PROTECTION FOR GOVERNMENT WORKERS' SPEECH ACTIVITY UNDER THE REHNQUIST AND ROBERTS COURTS

Whatever the limitations and shortcomings of the *Connick/Pickering* doctrine, the Warren and Burger Courts applied the doctrine more generously than did their successors. The Rehnquist and Roberts Courts, although never squarely overruling the *Connick/Pickering* doctrine, moved to strictly cabin its potential scope of application. In so doing, the Rehnquist and Roberts Courts made an already weak framework for protecting government employee speech even less robust. To be sure, the *Connick/Pickering* doctrine affords only a modest degree of protection to government employees who speak within the government workplace. The doctrine's most objectionable feature is the "heckler[']s veto"<sup>77</sup> that it embraces.<sup>78</sup> The protection of government employee speech is *always* contingent on the reaction of other employees within the workplace. If a whistleblower's mere presence in the government office produces significant disruption that impedes the office's work, then the government employer may fire the whistleblowing employee without violating the First Amendment.<sup>79</sup>

Despite the relatively weak protection that the *Connick/Pickering* doctrine confers on government employees, it represented a major improvement from the approach it replaced—namely that the government as an employer enjoys the same freedom of action to fire a troublesome employee that a private employer would enjoy.<sup>80</sup> To state

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77. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140–41, 145 (1966) (coining the phrase "heckler's veto," and arguing that the hostile reaction of an audience to a speaker, or heckler's veto, cannot consistent with the First Amendment serve as an acceptable basis for government censorship of speech); see Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1416–17 (1986) (discussing the concept of the heckler's veto and attributing the concept's creation to Professor Kalven).

78. See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 89–93, 96–105 (Jamie Kalven ed., 1988) (discussing in some detail the concept of "heckler's veto," which entails using an adverse public reaction as a justification for the government silencing an unpopular speaker). The hostility of a government employee's coworkers, based on her speech, clearly constitutes a form of heckler's veto because the government's power to fire the worker is contingent on the hostile reaction of an audience, in this instance, the speaker's coworkers in the government agency or office. See Papandrea, *supra* note 34, at 2165 ("Another problem with the *Pickering* balancing test as most courts have applied it is that it permits adverse public reaction to the expressive activities to be considered on the government's side of the balance. As a result, it theoretically matters very little what an employee says.").

79. See *Connick*, 463 U.S. at 151–53.

80. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (holding that the government, in its capacity as an employer, has the same right to retain or discharge an employee that a private employer enjoys). Justice Oliver Wendell Holmes, then on the Supreme Judicial Court of Massachusetts, explained that

[t]here are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose

the matter simply, imperfect protection of government employee speech is preferable to no protection of government employee speech; the perfect solution should not be the enemy of the merely good.

The Rehnquist and Roberts Courts have weakened significantly even the modest protection of government employee speech that the *Connick/Pickering* doctrine conveys on government workers. For example, in *Waters v. Churchill*,<sup>81</sup> the Supreme Court held that if a government employer fires an employee based on speech mistakenly attributed to the employee, *Pickering* does not provide any basis for contesting the discharge.<sup>82</sup> Rather than emphasizing the autonomy interests of the speaker and the potential value of a government employee's speech to the process of democratic deliberation, *Waters* emphasizes the importance of the government's managerial interest in maintaining order within government workplaces.<sup>83</sup>

Justice Sandra Day O'Connor, writing for the *Waters* plurality, observed that "practical realities of government employment" require that in "many situations . . . the government must be able to restrict its employees' speech."<sup>84</sup> Moreover, "when an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech."<sup>85</sup> The "practical realities" of supervising government employees permit a government employer to fire an employee based on a mistaken belief that the employee made either an unprotected statement or a disruptive statement about a

any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here.

*Id.* at 517–18. In other words, a government employee, as an employee, does not possess any right to freedom of speech that his employer is not inclined to recognize. *See id.* *But cf.* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech To Protect Its Own Expression*, 59 DUKE L.J. 1, 49–50 (2009) (arguing that "requiring public employees to relinquish their free speech rights as a condition of employment suppresses expression at a great cost to key First Amendment values in promoting individual autonomy, contributing to the marketplace of ideas, and facilitating citizen participation in democratic self-governance").

81. 511 U.S. 661 (1994) (plurality opinion).

82. *See id.* at 674–75.

83. *See id.* (conceding that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions," but nevertheless granting government employers broad authority to fire based on mistaken factual assumptions about an employee's speech because "where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate"); *see also* Bruce Bodner, Note, *Constitutional Rights—United States Supreme Court Gives Public Employers Greater Latitude To Curb Public Employee Speech—Waters v. Churchill*, 114 S. Ct. 1878 (1994), 68 TEMP. L. REV. 461, 462–63 (1995) (noting that *Waters* advanced managerial control principles at the expense of government employees' First Amendment rights and predicting that "[t]his expansion of management rights will discourage critical public employee speech and undermine efforts to improve the delivery of public services through the promotion of employee participation and identification of inefficient management practices in the workplace").

84. *Waters*, 511 U.S. at 672.

85. *Id.*

matter of public concern.<sup>86</sup> This result obtains because “[m]anagement can spend only so much of their time on any one employment decision.”<sup>87</sup> In sum, managerial necessities permit government employers to act in good faith, but mistakenly, based on a reasonable belief about an employee engaging in either unprotected or protected-but-disruptive workplace speech.

The Supreme Court further curtailed its protection of government employee speech in *Garcetti v. Ceballos*.<sup>88</sup> In *Garcetti*, Richard Ceballos, a deputy district attorney working in the L.A. County District Attorney’s Office, was subjected to discipline for testifying in open court his belief that a police officer submitted an affidavit in support of a request for a search warrant that contained “serious misrepresentations.”<sup>89</sup> Ceballos did this even though his supervisors had decided not to amend or correct the police officer’s affidavit in support of the warrant request.<sup>90</sup> Following his testimony, Ceballos claimed that he was reassigned and subjected to other forms of retaliatory action by his government employer.<sup>91</sup>

Writing for the *Garcetti* majority, Justice Anthony M. Kennedy found that even if speech relates to a matter of public concern, a government employee may not claim the protection of the First Amendment if the speech falls within the scope of the employee’s work-related duties.<sup>92</sup> He explained that “[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.”<sup>93</sup> Consistent with this view, the *Garcetti* majority held that

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86. *Id.* at 680–81.

87. *Id.* at 680.

88. 547 U.S. 410 (2006).

89. *See id.* at 412–13, 420.

90. *Id.* at 414–15.

91. *Id.* at 415–16.

92. *See id.* at 414–18, 421.

93. *Id.* at 418. The *Garcetti* majority noted that this rule might not apply in the context of speech by professors employed at a public college or university. *See id.* at 425. Justice Kennedy explained 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.” *Id.* Nevertheless, he concluded that “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.* However, as Justice David H. Souter observed in dissent, the majority plainly failed to address this question, and the Supreme Court has not yet issued a definitive ruling on this question. *See id.* at 438–39 (Souter, J., dissenting) (arguing that the *Garcetti* rule does not apply to college and university professors at state-operated institutions of higher learning and expressing the “hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities”). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws

“when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>94</sup>

The Supreme Court subsequently limited the scope of *Garcetti* in *Lane v. Franks*,<sup>95</sup> by finding that testimony offered under subpoena does not automatically constitute employment-related speech.<sup>96</sup> Instead, a government employee who offers sworn testimony in a civil or criminal judicial proceeding usually speaks as a “citizen” rather than as an “employee.”<sup>97</sup> Moreover, “[t]hat is so even when the testimony relates to his public employment or concerns information learned during that employment.”<sup>98</sup> Accordingly, a public university employee who testified about financial irregularities within the university spoke as a citizen, not as an employee, about a matter of public concern—and could therefore claim the benefit of *Pickering*.<sup>99</sup> But *Lane* is hardly a broad repudiation of *Garcetti*—after all, testimony in open court is citizen speech only when it is “outside the scope of his ordinary job duties.”<sup>100</sup>

Accordingly, a public employee in a district attorney’s office, like Richard Ceballos, whose job includes regular court appearances, would still be speaking as a government employee, rather than as a citizen, when in court. *Lane* certainly cabins *Garcetti*, but it still requires employees who speak out about matters that arguably fall within the scope of their employment to do so at their own peril.<sup>101</sup> Under *Garcetti*, if a government employer fires an employee based on antipathy toward comments regarding a matter of public concern, the employee enjoys no First Amendment protection if the speech arguably falls within the scope of the employee’s duties.<sup>102</sup> Moreover, under *Waters*, the same outcome also applies if a government employer disciplines or fires an employee based on the mistaken belief that a particular employee made comments about a matter of public concern that come within the scope of her employment.<sup>103</sup>

Thus, the contemporary Supreme Court has limited quite significantly the constitutional protections available to government employees who wish to call attention to misconduct or inefficiency in government operations.<sup>104</sup> This, of course, makes it less likely that the people best able to inform the public about misconduct in public

that cast a pall of orthodoxy over the classroom.”).

94. *Garcetti*, 547 U.S. at 421.

95. 134 S. Ct. 2369 (2014).

96. *Id.* at 2378–79.

97. *Id.* at 2378 (“Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.”).

98. *Id.*

99. *See id.* at 2379–80.

100. *Id.* at 2378.

101. For thoughtful critiques of *Garcetti*’s shortcomings, see Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725–27 (2011); Papandrea, *supra* note 34, at 2118–20, 2136–39.

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

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

104. *See* Papandrea, *supra* note 34, at 2122 (“Since *Pickering*, however, the Court has cut back dramatically on the free speech rights of public employees, especially with its most recent decision in *Garcetti v. Ceballos*.”).

institutions will come forward. The result will be that government officials' bad behavior will go undiscovered and, in consequence, uncorrected. A better approach would link the importance of a government employee's speech and the scope of the First Amendment protection afforded to the speaker.<sup>105</sup> Moreover, enhanced First Amendment protection for whistleblowing speech would not either imply or require any reduced *Connick/Pickering* protection for government employee speech about a matter of public concern that does not constitute whistleblowing speech.<sup>106</sup>

### III. THE PARADOX OF CONFERRING COMPREHENSIVE FIRST AMENDMENT PROTECTION AGAINST GOVERNMENT EMPLOYERS RETALIATING AGAINST A GOVERNMENT EMPLOYEE BASED ON THE EMPLOYEE'S PARTISAN AFFILIATION

Professor Robert Post has written lucidly and persuasively about the importance of affording government the ability to manage workplaces to ensure that government offices function efficiently and achieve their objectives.<sup>107</sup> For example, Departments of Motor Vehicles (DMVs) are already widely thought to be highly dysfunctional places;<sup>108</sup> were DMV employees free to engage in speech activity at will, while on the job, DMVs would be even less functional.<sup>109</sup> The problem, however, is distinguishing between legitimate government efforts to manage and supervise government offices and illegitimate efforts to use the accident of government employment to squelch a government employee's speech.

The line is, at best, an ephemeral one. In this regard, Professor Post observes that "the allocation of speech to managerial domains is a question of normative characterization."<sup>110</sup> Yet, if federal courts fail to make serious efforts to maintain meaningful boundaries that cabin effectively the scope of this "managerial domain," government employees can be either silenced or coerced into speech that has nothing to do with the legitimate managerial imperatives of the government as an employer.

105. See *infra* notes 142–58 and accompanying text.

106. See *infra* notes 152–54 and accompanying text.

107. See Post, *supra* note 44, at 164–65, 171–76.

108. See *ZOOTOPIA* (Walt Disney Pictures 2016) (presenting DMV offices in Zootopia, an otherwise paradisiacal urban metropolis populated by peacefully coexisting anthropomorphic animals, as being staffed entirely with slow-talking, slow-moving, and slow-acting sloths).

109. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 234–40 (1995) (discussing and explaining the "government's need to manage speech within its institutions" and positing that some regulation of employee speech is essential because it is necessary "in order to achieve the institution's legitimate objectives"). Post argues persuasively that "[m]anagerial authority is controlled by First Amendment rules different from those that control the exercise of the authority used by the state when it acts to govern the general public." *Id.* at 240. Accordingly, "[w]hen it exercises the authority of management, the state can constitutionally control speech so as to facilitate the institutional attainment of organizational ends." *Id.*; see also *id.* at 247–55 (discussing and defining the boundary that separates managerial authority from more general regulatory authority).

110. Post, *supra* note 44, at 171; see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713, 1788–89 (1987) (describing and discussing the "managerial domain" of government action that affects speech).

An additional paradox exists: Since the 1970s, the Supreme Court has vigorously prohibited punishing government employees based on their partisan affiliations.<sup>111</sup> If an employee does not hold either a policy-making position or have access to confidential information, a government office may not use either the employee's partisan affiliation—or lack of one—as a basis for discharging her.<sup>112</sup> Indeed, since deciding *Elrod v. Burns*,<sup>113</sup> the first case in this line of precedents, the Supreme Court consistently has expanded this rule's scope of application to encompass even the termination of a contract with a government agency over a business owner's partisan affiliation.<sup>114</sup> In a kind of mirror-image of *Waters v. Churchill*, the Supreme Court has held that the First Amendment disallows a government agency from firing a government employee based on a *mistaken appraisal* of an employee's partisan commitments and associations.<sup>115</sup>

In other words, even if an employee does not actually hold a particular partisan commitment or associational link, a government employer that uses partisan affiliation in error has a chilling effect on the ability of government employees to participate in the political process—a chilling effect<sup>116</sup> that violates the First Amendment.<sup>117</sup> As Justice Stephen G. Breyer explains, “[t]he constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities.”<sup>118</sup> Moreover, in terms of a potential chilling effect on the exercise of First Amendment rights, “[t]he discharge of one [employee] tells the others that they engage in protected activity at their peril.”<sup>119</sup> This chilling effect simply does not depend on whether the employer accurately perceives the employee's partisan beliefs and commitments—it is the act of punishing an employee based on her political commitments, whether real or imagined, that produces the chilling effect on the exercise of First Amendment rights.<sup>120</sup>

Perhaps most significant, the potential disruption that an employee's partisan affiliation might cause to the smooth operation and managerial efforts of a government agency are quite irrelevant to the proscription against a government employer retaliating against an employee based on her partisan identity. These concerns are included in the Supreme Court's framework—but only in a highly formalized way.<sup>121</sup> The

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111. See *Elrod v. Burns*, 427 U.S. 347, 355–60, 372–73 (1976) (plurality opinion).

112. See *Branti v. Finkel*, 445 U.S. 507, 517–19 (1980).

113. *Elrod*, 427 U.S. at 372–73.

114. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720–21 (1996).

115. *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417–19 (2016).

116. For descriptions and thoughtful discussions of the problem of government regulations or policies producing a “chilling effect,” see Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 689–705 (1978); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481–85 (2013).

117. *Heffernan*, 136 S. Ct. at 1418.

118. *Id.* at 1419.

119. *Id.*

120. See *id.* at 1418–19.

121. The government employer cannot rely on vague claims of potential disruption in the workplace, but, instead, must mount a necessity defense that involves demonstrating an operational need to use a partisan screen for the position; to date, however, the Supreme Court has

exclusion of positions that involve policy making or confidential office information reflect a balancing of interests that assumes that for such positions, the government's managerial interests will usually overbear the First Amendment interests of an employee in freedom of speech, association, and assembly.<sup>122</sup>

As Justice John Paul Stevens explained in *Branti*, “the ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>123</sup> In this respect, the *Elrod* line of cases does take some account of the potential for disruption that employing a political opponent of the office's elected supervisor might cause. But, if the position is merely clerical in nature, and does not involve either policy-making duties or processing confidential information, the fact that the person's presence in the office is highly disruptive is entirely irrelevant.<sup>124</sup>

Thus, as *Heffernan* explains, as a general matter, “[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment.”<sup>125</sup> This result obtains because to permit a government employer to retaliate against an employee—whether based on real or imagined partisan commitments—would “discourag[e] employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities” because “[t]he discharge of one tells the others that they engage in protected activity at their peril.”<sup>126</sup> Moreover, when an employer acts on a mistaken belief in the context of a partisan firing, the First Amendment still confers protection because “[t]he upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.”<sup>127</sup>

In other words, the potential chilling effect of partisan discharges justifies a broad and almost categorical rule of First Amendment protection. Whatever dysfunction or

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validated only operational needs based on a policy-making authority and the regular receipt and possession of confidential information as sufficient to overcome the employee's First Amendment rights against forced association and coerced speech. Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2097–98 (1999); Martin H. Brinkley, Note, *Despoiling the Spoils: Rutan v. Republican Party of Illinois*, 69 N.C. L. REV. 719, 720–21 (1991); Christopher V. Fenlon, Note, *The Spoils System in Check? Public Employees' Rights to Political Affiliation & the Balkanized Policymaking Exception to § 1983 Liability for Wrongful Termination*, 30 CARDOZO L. REV. 2295, 2313 n.68 (2009). Beyond serving these interests, a government employer would be hard pressed to justify requiring a particular partisan identity, or lack of one, as a condition of government employment.

122. See *Branti v. Finkel*, 445 U.S. 507, 517–519 (1980).

123. *Id.* at 518.

124. See *supra* note 121.

125. *Heffernan*, 136 S. Ct. at 1418.

126. *Id.* at 1419.

127. *Id.*



disruption results from the employee's continued presence in the office is a cost that the First Amendment requires the government employer to bear. Unlike a *Pickering* case involving a government employee who merely speaks out as a citizen about a matter of public concern, the government may not invoke managerial necessities to justify sacking a person who wears the wrong partisan label. Yet, it is quite obvious that the problem of a chilling effect is identical; whether an employee speaks out on a matter of public concern or engages in partisan activity outside the office, other employees will get the message that if they wish to retain their employment, they should avoid attracting negative attention from their elected boss.

The juxtaposition of these lines of precedent is puzzling. The First Amendment prohibits the operation of government workplaces on a spoils system basis; the Supreme Court has held that this kind of retaliatory motive is flatly unconstitutional even if the employee's continued presence proves to be highly disruptive.<sup>128</sup> The *Elrod/Branti* doctrine creates a prophylactic rule that treats partisan antipathy as a constitutionally impermissible basis for adverse employment decisions. By way of contrast, however, the *Pickering/Connick* doctrine permits employers to use potentially pretextual claims of possible workplace disruption as a basis for firing government employees who speak out on matters of public concern.<sup>129</sup>

As the next Part explains in some detail, this differential First Amendment protection of government employees' partisan identities, on the one hand, and public ideological and policy commitments, on the other, is not self-evidently justified. These lines of precedent should—but do not—reflect a great degree of alignment with respect to the relative importance of government employees' First Amendment rights and the managerial imperatives of public employers.

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128. See *id.* at 1417–19; see also Brinkley, *supra* note 121, at 720 (observing that the “*Elrod, Branti, and Rutan* holdings” effectively “bar officials from conditioning” public employment on partisan loyalty and thereby “checkmated a weakened, but tenacious, political tradition”); Fenlon, *supra* note 121, at 2297 (noting that “in order to justify a political patronage dismissal, the government must demonstrate a significant interest in replacing public employees with individuals who are politically loyal to their employer” and that under this rule “termination of public employees because of their political affiliation [usually] fails under heightened scrutiny and violates the First Amendment”). To provide a concrete example, suppose that a non-confidential, non-policy-making employee in a government office, say a clerk in a county tax assessor's office, runs unsuccessfully for the elected county tax assessor's position—but loses in the general election to another candidate for the office, who subsequently assumes the office. Under the *Elrod/Branti* doctrine, her new boss, the person against whom she contested the general election, would not be permitted to fire her even if the campaign was highly contentious and bitterly contested, thus rendering the losing candidate's mere presence in the tax assessor's office highly disruptive.

129. See Papandrea, *supra* note 34, at 2118–20 (discussing the very weak scope of First Amendment protection that the *Pickering/Connick* doctrine conveys on government employees and arguing that “[e]mployees do not stop being citizens when they are at work; likewise, they do not stop being employees when they are not”). Professor Papandrea persuasively argues that “*Pickering's* balancing test, which weighs the value of the employee's speech against the government-employer's interest in restricting it, fails to limit government control over its employee's speech activities sufficiently.” *Id.* at 2120.

IV. THE NEED TO PROVIDE ENHANCED PROTECTION TO GOVERNMENT WORKERS WHO FACILITATE DEMOCRATIC ACCOUNTABILITY BY ENGAGING IN WHISTLEBLOWING ACTIVITY

The Supreme Court's *Elrod* line of cases plainly seeks to prevent the government, as an employer, from imposing an unconstitutional condition on its employees—namely, that they refrain from partisan activity that the elected head of the government agency dislikes.<sup>130</sup> Protecting the right of government workers to avoid coerced silence—or coerced partisan activity—is clearly an important, and justifiable, First Amendment objective. After all, Justice Robert Jackson famously posited:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>131</sup>

Consistent with this approach, the mere accident of a citizen holding a position with a government employer should not zero out the application of this constitutional verity.<sup>132</sup> Accordingly, I do not suggest that cases like *Heffernan*, *Branti*, and *Elrod* reach the wrong outcome on the merits—a government employer should not be able to demand partisan loyalty as a condition of employment if the position does not involve either policy-making functions or regular receipt of confidences. However, it does seem exceedingly strange to protect partisan identity in almost absolute terms, and generally without much regard for the potential disruption that will be associated with a person's presence in a government workplace, while permitting a “heckler's veto”<sup>133</sup> in the context of truthful, non-misleading speech about a matter of public concern. Indeed, many public employees probably care much more deeply about particular public policy issues or ideological commitments than they do about their ability to wear their party preference on their sleeves.<sup>134</sup>

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130. See MARTIN & SUSAN J. TOLCHIN, *PINSTRIPES PATRONAGE: POLITICAL FAVORITISM FROM THE CLUBHOUSE TO THE WHITE HOUSE AND BEYOND* 5–6, 24–28 (2011).

131. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

132. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1459–61, 1503–05 (1989).

133. See KALVEN, *supra* note 77, at 140–41, 237 n.327 (positing a serious First Amendment problem arising from government's invocation of an audience's hostile reaction to a speaker as a constitutionally acceptable basis for requiring the speaker to cease and desist from speaking because such an approach essentially makes the speech rights of a political minority seeking lawful change contingent on the goodwill of a potentially hostile majority); see also Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 632 (1990) (arguing that the First Amendment should preclude the use of tort law and civil juries to censor highly offensive speech because the use of a liability standard based on the offensiveness or outrageousness of speech “would enable a single community to use the authority of the state to confine speech within its own notions of propriety”).

134. To be sure, if a government employee engages in misconduct or fails to perform her duties reliably, alleging that discipline or discharge reflects an impermissible partisan motive

In sum, it cannot be gainsaid that the protection of employee speech about matters of public concern has waned, rather than expanded, under the Rehnquist and Roberts Courts. Moreover, a strong case can be made that the Warren Court's initial effort to reconcile the managerial imperatives of government employers with the rights of government employees to speak as citizens was insufficiently protective in *Pickering* itself. To the extent that an employee speaks out on a matter involving serious wrongdoing within her government agency, it is more likely rather than less likely that her continued presence will cause disruption in the workplace.

The *Pickering* test thus seems to endorse a de facto heckler's veto: Insubordinate agency employees who are disruptive in the presence of a whistleblower should be subject to discipline. Firing the employee who calls public attention to serious government wrongdoing or misconduct is to punish the wrong party. Yet, this is precisely how the *Connick/Pickering* analysis works.<sup>135</sup> Unruly coworkers who behave badly in the wake of whistleblowing activity provide the government employer with a constitutionally acceptable predicate for firing the worker who called problems within the government agency to the attention of the body politic.<sup>136</sup> In strong contrast with

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will not necessarily save the employee from an adverse employment action. In such a case, the question would turn on whether the government's motive was a permissible one (misconduct) rather than an impermissible one (a partisan purge). See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286–87 (1977); see also Massaro, *supra* note 22, at 17–20, 68 (discussing the pernicious effects of *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* in the context of government employee speech).

135. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (applying a balancing test that weighs a government employee's interest in speaking about a matter of public concern against the workplace disruption that the speech either causes or might cause); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (using potential disruption in the workplace as a permissible basis for firing a government employee who speaks out about a matter of public concern); see Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2019 (2012) (“Through its contemplation of scenarios in which the disruption caused by speech provides a lawful basis for discipline, the *Pickering* test can be understood as constitutionalizing a ‘heckler’s veto’ for controversial expressions.”); Norton, *supra* note 80, at 47 (warning that “unexamined deference to government’s fears about onlookers’ reactions to workers’ off-duty speech threatens to institutionalize the long-maligned ‘heckler’s veto’”). But see Papandrea, *supra* note 34, at 2156 (noting disagreement in the lower courts regarding “whether any actual or expected external disruption resulting from an offended public can play a role in the *Pickering* balancing” and observing that “[s]ome courts have held that only actual or potential disruption of internal operations could outweigh an employee’s right to engage in otherwise protected expressive activities”).

136. See Kozel, *supra* note 135, at 2019–20; Levinson, *supra* note 22, at 17–19, 59–61; Massaro, *supra* note 22, at 4, 20–25. Massaro notes that efforts to engage workplace colleagues regarding problems in the workplace are particularly perilous because engaging one's coworkers could be deemed intrinsically “disruptive” of the workplace. *Id.* at 24 (observing that “if a worker engages others to join in the chorus he or she may pose a threat, and thus can be removed” and, moreover, “that worker can be removed when an employer merely anticipates that the chorus might get too large and disruptive”). Massaro correctly concludes that the *Pickering/Connick* framework permits an employer to “prevent a grievance from spreading and, as it gains support, from capturing the public’s interest.” *Id.*

the near absolute protection conveyed on a government employee with respect to her partisan identity and activity, government employees who speak out about matters of public concern risk serious adverse consequences—up to and including potential discharge from their government employment.

On the other hand, however, the Supreme Court has held, repeatedly, that government almost never acts legitimately when it seeks to punish an employee because of the presence, or absence, of a commitment to a particular political party.<sup>137</sup> If an employee does not have policy-making responsibilities or access to confidential information, no matter how potentially disruptive her partisan activities outside the workplace, the government employer must simply absorb these costs. The contrast with the level of protection for employees who choose to speak about a matter of public concern is both dramatic and, it seems to me, inexplicable.

Simply put, if potential disruption to a government workplace is the evil which justifies a government employer in disciplining or discharging an employee, the precise source of the workplace disruption should be quite irrelevant to the analysis. From a Post “managerial necessity” perspective,<sup>138</sup> keeping a government office functioning should be a sufficient justification either in both cases or in neither case. The better course of action, it seems to me, would be to afford broader and more robust protection to government employees who speak out about a matter of public concern.

Moreover, to date the federal courts have not taken into account the value of information to the public when fixing the precise scope of First Amendment protection to be afforded a government employee’s speech. Not all government employee speech has equal worth in the marketplace of ideas. More specifically, not all government employee speech is integral to facilitating government accountability through the electoral process.

For example, Edward Snowden’s shocking revelations about massive government domestic spying programs galvanized a broad-based response—both within the government itself and also within the larger political community.<sup>139</sup> Snowden certainly exercised his individual autonomy as a speaker by leaking classified information about PRISM; but his speech also conveyed particularized knowledge that we should care about collectively because it facilitated the citizenry’s ability to hold government accountable (or not).<sup>140</sup> In some instances, the efficacy of democratic elections

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137. TOLCHIN & TOLCHIN, *supra* note 130, at 5–6, 24–28.

138. POST, *supra* note 109, at 254–61, 282–90; *see* Post, *supra* note 44, at 164–67, 170–75.

139. *See* Gorman, et al., *supra* note 9.

140. *See* Hu, *supra* note 10, at 1686–93; Megan Blass, Note, *The New Data Marketplace: Protecting Personal Data, Electronic Communications, and Individual Privacy in the Age of Mass Surveillance Through a Return to a Property-Based Approach to the Fourth Amendment*, 42 HASTINGS CONST. L.Q. 577, 579–82 (2015); Bruce Ackerman, *Breach or Debate*, FOREIGN POL’Y (Aug. 1, 2013), <http://foreignpolicy.com/2013/08/01/breach-or-debate/> [<https://perma.cc/J4W2-LCAF>]. For a comprehensive and thoughtful treatment of the government’s reasons for resisting disclosure of national security surveillance programs—and also the reasons why transparency about such programs is necessary, *see* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

to serve as an effective brake on bad government behavior necessarily rests on information that only a government employee possesses.<sup>141</sup> If we do not effectively protect government employees who share such information with the body politic, then the body politic is far less likely to have access to relevant information about the government and its operations.

Government employee speech that constitutes whistleblowing should be afforded broader constitutional protection under the First Amendment than more generic government employee speech that merely relates to a matter of public concern. The Supreme Court has given a remarkably broad scope to the concept of a “matter of public concern.” Precedents like *Snyder v. Phelps*<sup>142</sup> seem to hold that a matter of public concern lies, more or less, in the eye of the beholder.<sup>143</sup>

If Westboro Baptist Church’s lunacy<sup>144</sup> comprises speech about a matter of public concern, then virtually *any speech* that relates to any question that implicates, or could implicate, government policy constitutes speech related to a matter of public concern.<sup>145</sup> To state the matter bluntly, if the phrase “God Hates Fags” is speech about a matter of public concern, then what isn’t? As I have observed previously,

the protean nature of the public concern test in the United States essentially makes the press itself the judge of what constitutes reportage of a matter of public concern; courts are highly unlikely to second-guess even a marginally plausible claim that speech relates to a matter of public concern.<sup>146</sup>

As the social cost of protecting speech increases, it becomes correspondingly easier to deem the government’s interest in restricting the speech compelling.<sup>147</sup> If

141. See Massaro, *supra* note 22, at 44; Norton, *supra* note 80, at 21–22, 49–50; Kleinbrodt, *supra* note 18, at 113–14.

142. 562 U.S. 443 (2011).

143. Post, *supra* note 133, at 668–69 (noting that “[a]lthough the ‘public concern’ test rests on a clean and superficially attractive rationale, the Court has offered virtually no analysis to develop its logic” and positing that, “as matters now stand, the test of ‘public concern’ ‘amounts to little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it’” (internal citation omitted)). Post explains that because free and open public deliberation is essential to the functioning of democratic self-government, “every issue that can potentially agitate the public is also potentially relevant to democratic self-governance,” and, accordingly, “[t]he normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate.” *Id.* at 670.

144. *Snyder*, 562 U.S. at 448–49. Westboro congregants brandished signs bearing slogans including “God Hates Fags,” “God Hates the USA/Thank God for 9/11,” and “Thank God for Dead Soldiers.” *Id.* at 448.

145. See *id.* at 458–61.

146. RONALD J. KROTOSZYNSKI, JR., PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE 271 n.169 (2016); see also Post, *supra* note 133, at 678–80 (positing that “the criterion of ‘public concern’ lacks internal coherence” and is entirely dependent on “a wide array of particular variables inherent in specific communicative contexts”).

147. William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on*

everything is speech about a matter of public concern, then government regulations that limit or restrict such speech by government employees will be inevitable. More specifically, if virtually all government employee speech could conceivably relate to a matter of public concern, then the net amount of workplace disruption that such speech could occasion is very high indeed—and potentially crippling to the ability of a government office to function. At the same time, the Supreme Court's strong commitment to respecting a First Amendment that disallows content and

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*Commercial Speech*, 43 UCLA L. REV. 1635, 1640–43, 1646–48 (1996). Professor Van Alstyne argues, with some persuasive force, that if one defines speech in very broad and inclusive terms, the social costs of accommodating speech will increase correspondingly, rendering it less difficult for the government to justify regulating, or even banning, speech activity on government property. In the specific context of the *Discovery Network* decision, he posits that “[i]n ‘leveling up’ commercial speech . . . the Court has done less leveling up than leveling down.” *Id.* at 1648. The result is arguably perverse: “For an increasing number of limitations that may make reasonable sense in restraining commercial vendors now tend to be sustained even if (and sometimes, according to *Discovery Network*, only if) applied ‘equally’ to political and social advocacy uses as well.” *Id.* (emphasis in original); see Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1187 (1988) (arguing that low value speech, such as commercial speech, “is not a central theoretical concern of the [F]irst [A]mendment” and should be subject to government regulation more readily than core political speech). *But cf.* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424–28 (1993) (holding that Cincinnati could not treat commercial publications less favorably than non-commercial publications unless commercial periodicals containing nothing but advertising contributed in a distinctive way to creating the problem that the city’s regulation sought to address).

The problem arises because when all speech is deemed equally worthy of First Amendment protection, federal courts are not unlikely to level down the level of constitutional solicitude that they afford to non-commercial, core political speech. See Van Alstyne, *supra*, at 1639–40. This has happened in other areas of constitutional law, such as the right to a jury trial in criminal cases under the Sixth Amendment. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”). Before the Supreme Court held the Sixth Amendment right to a jury trial incorporated, via the doctrine of substantive due process, against the states, see *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Sixth Amendment required that a person be convicted of criminal charges by the unanimous vote of a twelve-person jury. In order to accommodate variations in state criminal procedure regarding a petit jury’s size and operation, however, the Supreme Court post-*Duncan* quickly permitted the states to allow convictions based on non-unanimous jury votes, see *Apodaca v. Oregon*, 406 U.S. 404 (1972), and to use a jury comprised of as few as six members, see *Williams v. Florida*, 399 U.S. 78 (1970). To be sure, the Supreme Court did disallow a jury comprised of only five members. See *Ballew v. Georgia*, 435 U.S. 223 (1978). Thus, the Supreme Court’s incorporation of the right to a jury trial to state criminal proceedings—in theory broadening the scope of application of the right—had the perverse effect of watering-down the right to a jury trial in federal criminal trials. In sum, as the scope of a right’s application expands, it becomes correspondingly easier to justify imposing limits or restrictions on the exercise of that right. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 452–56 (1985) (arguing that the federal courts should seek to protect jealously the “central core” of the First Amendment to ensure that it functions effectively as a check on the suppression of dissent—and dissenters—in times of national crisis).

viewpoint discrimination<sup>148</sup> makes this liberal approach to defining—or, more aptly, refusing to define—a matter of public concern quite understandable (indeed, even predictable).<sup>149</sup> However, the value of information to the public ought to be part of the constitutional metric that we use to assess how much disruption government must tolerate in order to facilitate government employee speech.<sup>150</sup>

For example, we protect partisan identity in nearly absolute terms in order to avoid the unconstitutional conditions problem that would arise if we permitted government as an employer to cage its employees as citizens.<sup>151</sup> But government employees act no less as citizens when they contribute to the process of democratic deliberation by

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148. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790–92 (2011); *United States v. Playboy Entm't Grp., Inc.* 529 U.S. 803, 811–12, 818 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394–95 (1992). As Professor Post explains, the need to maintain the open and free-flowing debate required to sustain the process of democratic self-governance should lead us to be very cautious before excluding “speech from public discourse, particularly if, as a normative matter, the content of the speech at issue cannot definitively be excluded as irrelevant to matters of self-governance.” Post, *supra* note 133, at 674.

149. See *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (alteration in original) (internal quotations omitted)); see also Elena Kagan, *The Changing Face of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 70–71; Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

150. See Blasi, *supra* note 147, at 449–52 (arguing that the federal courts should seek to protect dissenting speech most aggressively in times of disorder or perceived threat because such speech possesses particular importance, or value, in such perilous times). Professor Blasi posits that:

[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.

*Id.* at 449–50. Like radically unpopular dissenters in periods of perceived national crisis, government workers who engage in whistleblowing speech risk swift and sure retributive action by their employer and coworkers alike; accordingly, the doctrinal standards applied under the First Amendment to such speech must be more robust and constrain judicial discretion more effectively than the current *Pickering/Connick* doctrine. See *id.* at 474 (arguing that “[i]n crafting standards to govern specific areas of first amendment dispute, courts that adopt the pathological perspective should place a premium on confining the range of discretion left to future decisionmakers” and that “[c]onstitutional standards that are highly outcome-determinative of the cases to which they apply are thus to be preferred”). My proposal to afford whistleblowing speech targeted First Amendment protection simply seeks to apply Blasi’s “pathological perspective” approach in the context of government employee speech integral to the process of democratic self-government.

151. See Sullivan, *supra* note 132, at 1416, 1503–04. Professor Sullivan cautions that the *Connick/Pickering* line “present[s] the obvious danger that courts will find justification for requiring public employee silence or conformity too lightly.” *Id.* at 1504 n.390. She posits that government claims of managerial necessity to restrict government employee speech, including partisan or ideological speech, “should be treated as infringing speech and thus in need of strong justification, but as arguably justified by the need for an efficient or depoliticized bureaucracy.” *Id.* at 1504.

providing information relevant to the function of elections in securing government accountability. If we assume, with some good cause, that government entities seek to tout good news and suppress bad news, then we need to create sufficient First Amendment breathing room for courageous government employees who chose speech over silence.<sup>152</sup>

First Amendment theory and doctrine should be sufficiently supple to take account of this important contextual consideration.<sup>153</sup> Government employee speech certainly implicates the individual autonomy interest of the government employee as a citizen and speaker; but government employee speech also has important value to its audience when the content relates to official wrongdoing, inefficiency, or misconduct.<sup>154</sup> To state the matter simply, whistleblowing speech is not merely a private good, but also constitutes a public good, and First Amendment doctrine should reflect

152. Sally Yates, the Acting Attorney General who refused to defend President Donald Trump's anti-Muslim immigration order provides an example of a government employee who chose courage—and was summarily dismissed from her position as a result of this choice. See Anemona Hartocollis, *Sally Yates Tells Harvard Law Students Why She Defied Trump*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/sally-yates-trump-travel-ban-harvard-law.html> [<https://perma.cc/2A3D-6B5A>]; Sarah Posner, Opinion, *Sally Yates Just Publicly Confirmed Important Facts About the Trump-Russia Story*, WASH. POST: THE PLUM LINE (May 8, 2017), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/05/08/sally-yates-just-publicly-confirmed-important-facts-about-the-trump-russia-story> [<https://perma.cc/4772-QL3V>].

153. The government employee speech doctrine already draws a distinction between speech regarding a matter of public concern and other kinds of speech. *Connick v. Myers*, 461 U.S. 138, 145–48 (1983). Moreover, the *New York Times v. Sullivan* line of cases also relies on a distinction between speech related to a matter of public concern and other kinds of speech—as well as distinctions based on the subject of the speech—namely whether the subject of the allegedly false speech is a public official, a public figure, or a private figure involved in a matter of public concern. See Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 889–90, 901–02, 901 n.96, 912 n.146 (2013); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755–61 (1985) (discussing how the First Amendment limits the scope of defamation law to ensure robust and wide-open public debate about public officials, public figures, and matters of public concern).

154. Tiffany Smiley, Opinion, *Our Postwar Trauma at the VA*, WALL ST. J. (Dec. 28, 2016), <https://www.wsj.com/articles/make-the-va-great-again-1482882642> [<https://perma.cc/QR3B-QT5U>] (discussing the inefficiencies and pathologies associated with obtaining medical services through the Department of Veterans Affairs and asking “[i]n a world where technology is making almost all aspects of life easier, why isn’t there a website, a liaison, or an advocate” to assist veterans seeking medical benefits for service-related injuries). The myriad dysfunctions that currently plague the Department of Veterans Affairs medical care system are known only because VA employees had the courage to speak out—and many have suffered direct forms of retaliation as a result. See Tori Richards, *Whistleblowers Claim Retaliation for Revealing VA Horrors*, NBC NEWS (Jan. 29, 2017, 4:01 EST), <http://www.nbcnews.com/news/us-news/whistleblowers-claim-retaliation-revealing-va-horrors-n707996> [<https://perma.cc/F4M7-PQUU>] (reporting on the failure of the VA to provide timely treatment to veterans at multiple facilities and on targeted retaliation against VA employees who disclosed the agency’s systematic failures to provide care to veterans entitled to receive it).



this fact; we should encourage civic courage in such circumstances by effectively protecting it against targeted forms of retaliation.<sup>155</sup>

Accordingly, the Supreme Court should adopt a kind of modified Hand formula<sup>156</sup> to govern the analysis of whistleblowing speech by a government employee. Speech that facilitates securing government accountability through the electoral process has social value not merely because of the speaker's autonomy interest in speaking, but also because of the importance of the information to the electoral process and the associated democratic deliberation that informs it. It would not require much of an extension of existing doctrine to carve out a separate category of employee speech, namely "whistleblowing speech," that would be eligible for more robust protection under the First Amendment than more generic government employee speech related to a matter of public concern.

One might object that the protection of whistleblowers is a matter for Congress and state legislatures to consider and decide. It is certainly true that the federal government and most state governments afford statutory protection to at least some

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155. See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 692-96 (1988) (arguing that First Amendment theory and doctrine presuppose the necessity of individual citizens taking risks, thereby displaying "civic courage," in order to ensure that the process of democratic self-government functions effectively).

156. *Dennis v. United States*, 341 U.S. 494, 510 (1951). *Dennis* sustained convictions under the Smith Act based on membership in the Communist Party. To be sure, Chief Justice Fred M. Vinson's majority opinion in *Dennis* is generally reviled because it permits government to criminalize political beliefs in the absence of any concrete criminal behavior based on those beliefs. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877, 911-13 (1963); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 752-55 (1975); Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 11 (1965). On the other hand, however, the Hand formula does have its fans. See, e.g., Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986). I cite *Dennis* not to endorse the decision's outcome or precise reasoning, but instead to illustrate that a cost/benefit analysis that balances the social value of speech is feasible. Vinson wrote that:

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

*Dennis*, 341 U.S. at 510 (alterations in original); see also *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). In the context of whistleblowing speech, a reviewing court would consider the gravity of the wrongdoing exposed by the government employee's whistleblowing speech discounted by the probability of it being reported or discovered by another source. To the extent that the government employee's speech was the only means of exposing the alleged wrongdoing, it should receive greater protection than identical speech that probably would not have come to light absent the whistleblowing speech.

forms of whistleblowing activity by government employees.<sup>157</sup> But these statutes often contain serious gaps and omissions.<sup>158</sup> More often than not, an employee who engages in whistleblowing speech will quickly find herself standing in the unemployment line.<sup>159</sup> If I am correct to posit that whistleblowing speech has a particularized and identifiable social value, because of its ability to facilitate government accountability through the democratic process, then the scope of its protection should not be solely a matter of legislative grace.

In fact, the same potential objection could be leveled at the Supreme Court's use of the First Amendment to constitutionalize civil service protections and, in so doing, protect government employees from retaliation for partisan activity (or the lack of it). The existence of the Hatch Act,<sup>160</sup> and similar state laws, did not prevent or deter

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157. See, e.g., Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201-1222 (2016)); Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1087-120 (2004) (providing a comprehensive compendium of state whistleblower protection laws and describing their scope of application); *id.* at 1121-23 (listing and summarizing federal whistleblower protection laws); Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 589-91, 597-601 (1999). A wide variety of federal and state laws confer highly targeted and limited protection on whistleblowers; variations in such laws include "the standard for disclosure, whether internal disclosure is required, whether disclosures for violation of federal laws are protected, and the entities to which disclosures may be made." Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 68 (2005); see *id.* ("A variety of state laws protect whistleblowers. The character and content of these laws vary.").

158. Professor Cherry observes that most states do not provide comprehensive protection for whistleblowers—regardless of whether an employee works for the government or for a private employer. Cherry, *supra* note 157, at 1045-46. Moreover, she also cautions that "the current federal regulatory approach is piecemeal." *Id.* at 1121.

159. Both federal and state statutory protections for whistleblowing inevitably protect only employees who rely on internal reporting procedures, rather than releasing information about wrongdoing to the press or other outside parties. See Gerard Sinzduk, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1633, 1638-39 (2008) (noting that "[m]ost state whistleblower statutes restrict the parties to whom a whistleblower may report in order to receive protection from retaliation" and that the main federal law, the Whistleblower Protection Act of 1989, does not protect employees who make external disclosures either). Accordingly, "[i]f an employee blows the whistle on a specific type of violation, then that employee is protected from retaliation by federal law," but, on the other hand, noting that such "piecemeal," incomplete protection quite often leaves an employee with "no remedy whatsoever." Cherry, *supra* note 157, at 1121; see Sinzduk, *supra*, at 1633-34 (noting that virtually no whistleblower protection laws convey protection on employees who "choose to report to the media or other non-governmental third parties").

160. 5 U.S.C.A. §§ 7321-326 (West 2007 & Supp. 2017). The first federal effort to cabin the practice of using federal jobs to animate a partisan spoils system was the Civil Service Act. See Civil Service Act, ch. 27, §2, 22 Stat. 403, 403-04 (1883). The Supreme Court has generally sustained civil service laws that proscribe partisan political activity by government employees. See *United Public Workers of America v. Mitchell*, 330 U.S. 75, 95-103 (1947). In *Mitchell*, Justice Stanley Reed explained that "[t]o declare that the present supposed evils of

the Justices from applying the First Amendment vigorously to protect government employees from being compelled to engage—or to refrain from engaging—in partisan activity.<sup>161</sup>

In fact, Justice William J. Brennan, Jr.'s *Elrod* opinion relies directly on the existence of civil service protections to support the conclusion that the First Amendment generally disallows the creation and maintenance of a partisan spoils system.<sup>162</sup> Rather than giving preemptive effect to federal and state civil service laws, the *Elrod* Court cited the existence of such laws to help establish the illegitimacy of patronage systems.<sup>163</sup> Under the same analytical logic, the existence of laws conveying limited protection on whistleblowers should support, rather than undermine, the creation of a constitutional privilege, grounded in the First Amendment's Free Speech Clause, that shields whistleblowers from retaliation by their public employers.

Provided that speech occurs outside the workplace (as Pickering's did), there is little that separates partisan activity/speech and citizen speech related to democratic accountability. If anything, speech that facilitates democratic accountability is more important to the process of democratic self-government than partisan activity or speech by government employees. Non-government employees can engage in partisan activity; it is not essential to have government employees engaged as partisan agents for political parties to function—but it is arguably necessary to remove politics from the operation of the civil service in order for it to function.<sup>164</sup> By way of contrast, voters have to have information that only government employees can provide. If elections are to function as an effective means of securing democratic accountability from the government, then the electorate must have accurate, truthful information about areas in which the government's efforts are falling short of the relevant mark.<sup>165</sup>

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political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." *Id.* at 99.

161. See *Elrod v. Burns*, 427 U.S. 347, 379–80 (1976) (Powell, J., dissenting) (arguing that maintaining the health and vibrancy of the political parties is a sufficient justification for a patronage system for government employment, noting the existence of federal and state civil service protections, but observing that "the course of such reform is of limited relevance to the task of constitutional adjudication in this case").

162. See *id.* at 370–73.

163. *Id.* at 371–73; *cf. id.* at 386–87 (Powell, J., dissenting) (arguing that the existence of statutory civil service protection against patronage-based hiring decisions adequately protects the First Amendment rights of government employees and objecting that the majority's "*ad hoc* judicial judgment runs counter to the judgments of the representatives of the people in state and local governments, representatives who have chosen, in most instances, to retain some patronage practices in combination with a merit-oriented civil service").

164. See, e.g., *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556, 564–67 (1973); *Mitchell*, 330 U.S. at 95–103.

165. MEIKLEJOHN, *supra* note 8, at 25–27, 36–38, 70, 88–89.

## CONCLUSION

Existing First Amendment theory and practice underprotects government employee speech in general and grossly underprotects whistleblowing speech by government employees. The *Connick/Pickering* doctrine leaves government employee speech's protection largely, if not entirely, in the hands of their coworkers and supervisors. If a government employee engages in highly unpopular speech, the *Connick/Pickering* doctrine authorizes government workplace managers to invoke a heckler's veto as a basis for dismissing the troublesome employee—even though, viewed from a different vantage point, the insubordination of the speaker's coworkers might present a better (stronger) case for discipline. Given that the First Amendment, as a general matter, prohibits viewpoint discrimination,<sup>166</sup> it is unfortunate that government employee speech is essentially subject to viewpoint-based regulation in the guise of a balancing test. Government employees, as citizen-speakers, merit more robust protection for their autonomy as speakers.

Of course, some protection as a citizen-speaker is better than no protection. The Warren and Burger Courts deployed the First Amendment to convey modest protection on government employee speech under a test that favors the government as a manager over the government employee as a speaker and citizen. Whatever the shortcomings of the *Connick/Pickering* test prior to the Rehnquist and Roberts Courts, the most recent decisions on the speech rights of government employees have exacerbated, rather than reduced, them. Allowing a government employer to fire an employee based on misattributed speech—or even speech that did not happen—hardly

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166. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principal underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96–98 (1972) (holding invalid a viewpoint-based regulation of speech and explaining that viewpoint-based regulations of speech are presumptively inconsistent with the First Amendment); see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 12–13, 169 (1995) (noting that viewpoint-based regulations of speech are particularly objectionable because they represent efforts by government to tilt the marketplace of ideas in one direction, thereby foreclosing the normal operation of democratic politics, and arguing that “[w]hen government regulates on the basis of viewpoint, it will frequently be acting for objectionable reasons”). Justice Thurgood Marshall explained the rule against viewpoint discrimination in these terms:

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

*Mosley*, 408 U.S. at 96 (internal citation omitted); see *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) (“The First Amendment’s prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court.”).

protects the government employee as a citizen-speaker.<sup>167</sup> Nor does denying protection to government workers who speak on a matter of public concern within the context of their employment duties.<sup>168</sup> The Rehnquist and Roberts Courts took an already weak doctrinal framework for protecting government employee speech and rendered it even less protective.<sup>169</sup> Thus, in this important context, First Amendment rights have contracted, rather than expanded, over time.<sup>170</sup>

To be sure, some government employee speech contributes little, perhaps nothing, to the process of democratic deliberation. Nevertheless, it should be protected because government employees do not lose their status as citizens and voters simply because they work for the state. Like other citizens who do not hold government employment, government employees have a right to participate in the process of democratic deliberation; this autonomy interest certainly merits First Amendment protection. However, a subset of government employee speech, whistleblowing speech, possesses an essential nexus to the electoral process's core function of holding government accountable to the electorate for its actions. The failure of the federal courts to take into account this critically important informational value of whistleblowing speech constitutes a major failure of judicial vision (if not judicial courage).

In sum, the Supreme Court has failed to recognize and incorporate an important First Amendment value in the context of government employee speech: the clear relationship of government employee speech to holding government accountable through the democratic process. In many circumstances, relevant information about government misconduct will be known only by government employees. Accordingly, if government employees do not speak, the information simply will not come to the attention of the electorate, and government accountability to the people will be impeded as a result. If one of the principal animating purposes of the First Amendment is to facilitate the process of democratic deliberation,<sup>171</sup> precisely to facilitate the ability of ordinary citizens to enforce government accountability, then stronger medicine is clearly needed.<sup>172</sup> First Amendment theory and doctrine can and should take account of these values by conveying targeted and robust protection to whistleblowing speech by government employees.

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167. See *Waters v. Churchill*, 511 U.S. 661, 680–81 (1994).

168. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). If applied literally, the *Garcetti* rule would essentially eliminate any protection for college and university professors because their employment encompasses their teaching and writing. *Garcetti* notes, but does not decide, the question of whether a different rule would apply in this context because of the First Amendment's protection of academic freedom in the context of higher education. *Id.* at 425. *But cf.* *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603–04 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Swezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

169. See Chemerinsky, *supra* note 101, at 725–27 (noting the narrowing of protections for government employee speakers under the Roberts Court).

170. See Papandrea, *supra* note 34, at 2122 (observing that the Rehnquist and Roberts Courts “ha[ve] cut back dramatically on the free speech rights of public employees”).

171. See MEIKLEJOHN, *supra* note 8, at 22–27, 36–41, 88–89, 91.

172. *Id.* at 25–27. Professor Meiklejohn argued forcefully that “public intelligence” is required for democratic self-government to function, *see id.* at 70, in addition to the citizenry possessing the information necessary to reach sound collective judgments about the government on election day. *See id.* at 88.