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The Disappearing First Amendment: On the Decline of Freedom of Speech and the Growing Problem of Inequality Among Speakers

by

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Chapter 1

Two Steps Forward, One Step Back: On the Decline of Expressive Freedoms Under the Roberts and Rehnquist Courts

> ***"All right," said the Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.***
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> ***"Well! I've often seen a cat without a grin," thought Alice; "but a grin without a cat! It's the most curious thing I saw in all my life!"***[2]

The contemporary Supreme Court's approach to enforcing the First Amendment is not unlike Lewis Carroll's Cheshire Cat: Over time, the Justices have rendered the Free Speech Clause a "grin without a cat," at least if one believes that the First Amendment, properly construed and applied, encompasses not merely freedom from government censorship, particularly in the form of content and viewpoint discrimination, but also the right to demand government support for expressive activities related to the project of democratic self-government. By way of contrast, during the Warren and Burger Courts, federal judges routinely required government to facilitate private speech activity. These subsidies came in a variety of forms – including access to government property for speech activity, government employment, and forums associated with educational institutions (including both K-12 schools and public colleges and universities).

In times past, the government, unlike a private citizen or corporation, could not pick and choose which speakers, and what kinds of speech, it would lend its support.[3] Instead, the federal courts generally assumed a duty on the part of government to facilitate speech activity – unless it

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[2] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 93-94 (1869).

[3] *See*, *e.g.*, Hague v. CIO, 307 U.S. 496, 515-16 (1939).

could justify with convincing clarity that its decision to withhold its assistance from a would-be speaker was based on considerations founded on the necessity of reserving government property for its intended purposes in order to achieve them.[4] Something less than impossibility would suffice as a justification – but the government had a general duty to justify refusals to assist would-be speakers.[5] Today, however, the federal courts no longer reliably require government to subsidize private speech.[6] Instead, the Supreme Court increasingly has permitted government to pick and choose which messages, and messengers, it will lend its support – or even tolerate.[7]

Nevertheless, the Cheshire Cat's grin clearly remains. Even as the Supreme Court has reduced government obligations to subsidize speech, the Justices have been increasingly protective of the rights of private speakers who possess the resources necessary to speak.[8] Although the Supreme Court has not formally tethered speech rights to the ownership of private property, the end results of doctrinal changes over the past forty years have more-or-less led to this outcome. If one can speak without the government's assistance, the Supreme Court has aggressively scrutinized government efforts to control – or even shape – the marketplace of

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[4] *Id.* at 516 (noting that the public's right to use public property for speech activity "must not, in the guise of regulation, be abridged or denied"); *see* Edwards v. South Carolina, 372 U.S. 229, 235-37 (1963).

[5] *See*, *e.g.*, Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968).

[6] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464-68 (2009); *see also* Oberwetter v. Hilliard, 639 F.3d 545, 552-54 (D.C. Cir. 2011) (holding that "the government is free to establish venues for the exclusive expression of its own viewpoint").

[7] *See* Walker v. Texas Division, Sons of Confederate Veterans, 135 S. Ct. 2239, 2246-52 (2015); *see also* Morse v. Frederick, 551 U.S. 393 (2007); Rust v. Sullivan, 500 U.S. 173 (1991).

[8] *See* Citizens United v. Federal Elec. Comm'n, 558 U.S. 310 (2010).

ideas.[9] On the other hand, if one requires the government's assistance in order to speak, the government is increasingly free to grant or withhold its assistance as it sees fit.[10] As Kathleen Sullivan has suggested, the Roberts Court's strongly libertarian vision for the First Amendment "emphasizes that freedom of speech is a negative command that protects a system of speech, not individual speakers, and thus invalidates government interference with the background system of expression no matter whether a speaker is individual or collective, for-profit or nonprofit, powerful or marginal."[11]

This chapter begins, in Part I, by considering the important and underappreciated ways in which speech rights have declined, or eroded, rather than expanded over time. In Part II, it continues by considering the significantly more speech-friendly baselines that existed under the Warren and Burger Courts. Using the Selma-to-Montgomery March as an exemplar of the potential breadth of the government's obligation to facilitate private speech activity, this part argues that, not too long ago, the federal courts were considerably more willing to use the First Amendment as a basis for imposing positive obligations on the government to facilitate expressive activities. Part III posits that the contemporary Supreme Court has increasingly linked the ability to speak to the ownership of property sufficient to support speech activity. Moreover,

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[9] *See* Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 143-46, 155-63 (2010) (discussing the Roberts Court's libertarian gloss on the Free Speech Clause as a proscription against government efforts to control the marketplace of ideas by regulating either speakers or their messages).

[10] *See id.* at 149-50 (arguing that the Roberts Court has rejected an egalitarian theory of the freedom of speech and, accordingly, has declined to follow earlier "free-speech-as-equality cases" in which government "uses the First Amendment to redistribute speaking power" by "preventing government from conditioning grants of resources on speakers' curtailment of their speech" or "[b]y in effect requiring public subsidies for speech").

[11] *Id.* at 176.

this trend tends to undermine significantly the equality of citizens within the process of democratic deliberation. If we are truly committed to the principle of equal citizenship and "one person, one vote," then we should be just as concerned about the openness and inclusiveness of the deliberative process that informs voting as we are with the relative weight or strength of a person's vote. Part IV provides a general overview of the remainder of this book. Finally, Part V concludes by providing a brief overview and synthesis of both this chapter and the book as a whole.

I. The Contraction of the First Amendment as a Source of Positive Rights

Notwithstanding a general narrative that emphasizes the ways in which the protection of expressive freedoms has increased over time in the United States,[12] in some important contexts

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[12] *See*, *e.g.*, Ronald K.L. Collins, *Exceptional Freedom – The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 (2012) (noting the "line of cases in which the Court has extended near absolute protection to expression," cautioning that "there are other cases in which the Roberts Court has been quite parsimonious in its protection of free speech," but concluding that "there is nonetheless something remarkable in how the Roberts Court has re-conceptualized the way we think about certain free speech issues and has likewise reinvigorated a measure of free speech liberty, albeit to the consternation of many"); Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W.VA. L. REV. 231, 236-37, 297-99 (2014) (arguing that "conservative libertarianism has become one of the most powerful currents in First Amendment jurisprudence," noting that under this "libertarian approach to the First Amendment" the Supreme Court has "invalidate[d] laws or policies that in their view threatened to subordinate individual liberty to liberal or progressive goals," and positing that "[a]t the heart of this view is a conception of individuals as free, equal, and independent of one another"); Sullivan, *supra* note ___, at 145-46, 156 (positing that the Roberts Court views freedom of speech "as serving the interest of political liberty," suggesting that this approach "represent[s] a triumph of the libertarian over the egalitarian vision of free speech," and concluding that under this libertarian approach "both governmental redistribution of speaking power and paternalistic protection of listeners from the force of speech are illegitimate ends that, as a categorical matter, cannot justify political speech regulation"). Professor Heyman generalizes contemporary First Amendment jurisprudence as "protect[ing] against government actions that invade individual liberty, interfere with the political process, or threaten to 'drive certain ideas or viewpoints from the marketplace.'" *Id*. at 299. Professor Sullivan concurs, suggesting that under the Roberts Court's liberty-based approach to protecting freedom of expression, "government may not attempt to shift relative influence among private speakers any

contemporary First Amendment rights have contracted, rather than expanded. In fact, First Amendment analysis increasingly seems to reflect the views and approach expressed by Oliver Wendell Holmes, Jr., in *Davis v. Commonwealth*.[13]

Writing as a member of the Supreme Judicial Court of Massachusetts, Holmes squarely rejected a claim of a right of access to the Boston Common for the purpose of engaging in speech activity. Holmes explained that "[f]or the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."[14] The Supreme Court of the United States affirmed, with Justice Edward Douglass White positing that "[t]he right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[15] In other words, citizens have a right to speak, but not necessarily a right to speak using government-owned property in order to do so.

In the United States, we maintain a strong commitment to the theoretical equality of all speakers, and all speech, but contemporary First Amendment doctrine ignores the gross disparities that exist in practice between those with the ability to use money to advance an agenda and those without it. In other places, such as much of Europe, a similar commitment to equality exists, but it is operationalized to advance the actual equality of speakers on the ground, rather

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more than it may give relative preference to some ideas." Sullivan, *supra* not ___, at 156.

[13] 162 Mass. 510 (1895), *aff'd*, 167 U.S. 43 (1897).

[14] *Davis*, 162 Mass. at 511.

[15] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

than as a merely theoretical commitment to equality of opportunity. Substantive equality, not procedural equality, is what counts.

Thus, in France or Germany, limits on campaign contributions and expenditures are quotidian – necessary government policies that seek to keep the playing field of democratic politics level (or reasonably so).[16] In these jurisdictions, the idea that government efforts to equalize the voice of speakers are inconsistent with a meaningful commitment to freedom of expression simply don't wash.[17] By way of contrast, modern First Amendment jurisprudence all too often takes the view that if a would-be protestor cannot use a public park, street, or sidewalk for speech activity, that person should instead buy advertising time on a commercial radio or television station or rent a billboard adjacent to a major road or highway.[18]

As Anatole France wryly observed, "the majestic equality of the law forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[19] In the context of speech rights, those with property have an enhanced ability to speak relative to those without it. Yet, as a formal matter, we claim to observe a rule of one person, one vote, and to embrace

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[16] *See* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 144-57 (2004) (Robert Badinter & Stephen Breyer eds., 2004) (discussing strict limits on candidate and issue advertising, as well as political contribution limits, in contemporary France and Germany).

[17] *Id*. at 148-51.

[18] To use a quote often attributed to Marie-Antoinette, but better attributed to Rousseau, "Qu'ils mangent de la brioche." JEAN-JACQUES ROSSEAU, CONFESSIONS (1766), *reprinted and translated in* JEAN-JACQUES ROSSEAU, THE CONFESSIONS, AND CORRESPONDENCE, INCLUDING THE LETTERS TO MALESHERBES 225 (Christopher Kelly, ed. & trans., 1995).

[19] ANATOLE FRANCE, LE LYS ROUGE 118 (1894) (Calmann Lévy ed., 1896).

the formal legal equality of all citizens as voters.[20] Obviously, government efforts to create a level playing field by silencing some voices and enhancing others would present serious normative and doctrinal difficulties. The First Amendment serves as a strong bulwark against both content and viewpoint based government efforts to regulate speech.[21]

Yet, surely it is possible to imagine a world in which the government may not silence speakers with the means to speak even though it also affirmatively facilitates – by subsidizing those without means – speech related to the project of democratic self-government.[22] Using public resources to facilitate the exercise of expressive freedoms need not imply a generalized power to squelch speech by persons and entities that are able to speak without any government support. An important, and related, question involves whether government support of speech activity should be entirely discretionary – or whether the federal courts might use the First

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[20] *See* Reynolds v. Sims, 377 U.S. 533 (1964). As Chief Justice Earl Warren explained in *Reynolds*, "[s]imply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568. This rule obtained because "[l]egislators represent people, not trees or acres." *Id.* at 562. He also posited that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.* If voting is foundational – and constituitive of the legitimacy of the political institutions of government at the federal and state level – then the process of democratic deliberation, which is essential to the legitimacy of the electoral process, must be no less important or "foundational."

[21] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989). For a general discussion of the rule against content-based speech regulations, see Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128-42 (1981).

[22] *See* Alexander Meiklejohn, *The First Amendment Is Absolute*, 1961 SUP. CT. REV. 245, 260–63. Professor Meiklejohn forcefully argues for direct public subsidies of political speech: "In every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the considerations of public policy." *Id.* at 261; *see* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 21-27, 88-89 (1948).

Amendment as a basis for requiring public subsidies of speech activity (particularly if the speech relates to democratic self-government).[23]

In a case upholding a protest ban at the Jefferson Memorial, in Washington, D.C., Judge Thomas Griffith, of the U.S. Court of Appeals for the District of Columbia Circuit, unironically observed that "[o]utside the Jefferson Memorial, of course, Oberwetter and her friends [would-be protestors] have always been free to dance to their hearts' content."[24] This sentiment plainly echoes Anatole France's trenchant observation about how formal legal equality can constitute an empty, if not meaningless, form of equality. Moreover, suppose that on the facts presented – as was the case in *Williams v. Wallace*,[25] Judge Frank M. Johnson, Jr.'s bold decision that facilitated

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[23] I recognize that, as a general matter, constitutional rights in the United States are negative, not positive, in nature and, consistent with this approach, the federal courts do not generally impose positive duties on the government to facilitate the exercise of constitutionally-protected rights by individual citizens. *See* David P. Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864 (1986). The First Amendment, at least since the 1930s, has been different; the Supreme Court has regularly and consistently required government to facilitate speech even when it would prefer not to do so. *See*, *e.g.*, Hague v. C.I.O., 307 U.S. 496 (1939) (holding that a city could not prohibit the use of a public park for speech activity). As Justice Owen Roberts explained, "[w]herever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515. Thus, the First Amendment does impose *positive* obligations on the government to use its resources to facilitate speech activity. This same approach requires government to protect unpopular speakers from being silenced by a hostile audience – even at considerable public expense. *See* Gregory v. City of Chicago, 394 U.S. 111 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949). It also prohibits government from attempting to shift the cost of protecting unpopular speakers to those speakers. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133-34 (1995). Thus, existing doctrinal rules already require government to use its resources to support speech activity – even when it would prefer not to do so. The question, then, is the scope of this duty, rather than the existence of such a duty.

[24] Oberwetter v. Hilliard, 639 F.3d 545, 554 (D.C. Cir. 2011).

[25] 240 F. Supp. 100 (M.D. Ala. 1965).

the iconic Selma-to-Montgomery March – the only property available to facilitate the protest activity happens to be government-owned property?

Government arguably has both a duty to facilitate speech about democratic self-government and an interest in ensuring that democratic politics function on an inclusive basis. To the extent that the government's legitimacy flows from the consent of the governed, that consent must be the process of a free, open, and inclusive debate.[26]

II. The Problem Defined: Could the Selma March Take Place Today?

In March 2015, major celebrations took place to mark the fiftieth anniversary of the Selma-to-Montgomery March. To be sure, Selma was a defining moment in the nation's long road to equal citizenship for all.[27] The NAACP's Selma Project, including the March 21-25, 1965 protest march from Selma, Alabama to Montgomery, Alabama, and March 25, 1965 mass protest rally on the steps of the Alabama state capitol helped to secure the enactment of the Voting Rights Act of 1965.[28] As legal historian Jack Bass observes, "[t]he drama of the Selma

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[26] Sullivan, *supra* note ___, at 144-45, 150-55.

[27] *See*, *e.g.*, President Barack Obama, Second Inaugural Address (January 21, 2013), *available at* https://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama (last visited July 15, 2016) ("We, the people, declare today that the most evident of truths – that all of us are created equal – is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.").

[28] 42 U.S.C. §§ 1973-1973p (2016). Historians have generally credited the Selma Project, and the Selma-to-Montgomery March, with catalyzing the legislative process and securing enactment of the Voting Rights Act. *See* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965 133-78 (1978); *see also* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 254-55 (1993) (noting the causal relationship between the Selma March and enactment of the Voting Rights Act). The Voting Rights Act led to the mass enfranchisement of minority citizens in the states of the former Confederacy. *See* U.S. COMM'N

march produced a sense of national outrage that energized Congress to join the other two branches of government in recognizing the historical dimensions of the problem" and the Voting Rights Act "brought spectacular results."[29]

Speaking at the Selma March's concluding rally, the Rev. Martin Luther King, Jr., observed that "Selma, Alabama, has become a shining moment in the conscience of man."[30] He added that, "[t]he confrontation of good and evil compressed in the tiny community of Selma, generated the massive power that turned the whole nation to a new course."[31] It was, without question, both fitting and proper to take note of this important civil rights milestone on the event's fiftieth anniversary.

Yet, to celebrate Selma as an important historical milestone, and as an exemplar of the systemic legal and social change that peaceful protest activity can bring about, rings somewhat hollow because, under existing First Amendment law, a march of the same majestic scale and scope could not take place – at least if the government now, like Alabama's state government then, did not wish to permit such a large-scale protest event using a main regional transportation artery. This state of affairs should be a matter of some general concern because the process of democratic self-government requires an active and ongoing dialogue within the body politic. Just

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ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 1-9, 29-52 (1975).

[29] Bass, *supra* note ___, at 254-55.

[30] Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March, *How Long? Not Long!*, March 25, 1965 (Montgomery, Alabama), *available at* http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march/ (visited May 19, 2015).

[31] *Id.*

as government may not condition voting on wealth or property,[32] it should be able to shepherd its considerable resources in ways that limit participation in the process of democratic self-government to those who can afford to purchase access to the marketplace of ideas.

The active intervention of the federal courts was needed in order to make the Selma March possible. The Selma March took place under an injunction issued by U.S. District Judge Frank M. Johnson, Jr., who creatively read and applied the First Amendment to justify the court's remarkably broad remedial order.

The crux of Judge Johnson's opinion in *Williams v. Wallace*[33] rested on the proposition that the right to protest on public property should be commensurate with the scope of the constitutional wrongs being protested.[34] Johnson reasoned that:

> [I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.[35]

Given the gravity of the constitutional wrongs that the plaintiffs established in open court, Judge Johnson issued an injunction of extraordinary scope; his order required state and federal officials

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[32] *See* Harper v. Va. Bd. of Elec., 383 U.S. 663, 667-68 (1966) ("We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.").

[33] 240 F. Supp. 100 (M.D. Ala. 1965). Although the Supreme Court did not directly review Judge Johnson's decision in *Williams*, it did cite his decision favorably in a subsequent case decided three years later. *See* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 184 n.11 (1968).

[34] *See Williams*, 240 F. Supp. at 106-09.

[35] *Id.* at 106.

to facilitate a five-day march, using the main highway in the region, and culminating with a mass voting rights rally at the Alabama state capitol attended by over 25,000 marchers.[36]

Then and now, Judge Johnson's "proportionality principle" was controversial. Burke Marshall, who headed the Civil Rights Division of the Department of Justice during the early 1960s, characterized Judge Johnson's opinion as a novelty in the law.[37] Nicholas deBelleville Katzenbach, who served as Attorney General under President Lyndon Johnson, also criticized Judge Johnson's reasoning in the Selma march case. He described the *Williams* decision as an "unusual opinion" and as "interpret[ing] existing doctrine imaginatively."[38] Katzenbach also "question[ed] that rule [the proportionality principle] as a practical measure of the applicability of the first amendment."[39] To be sure, the "proportionality principle" constituted something of a doctrinal innovation.[40] However, if viewed against the larger warp and weft of existing First Amendment law in the 1960s, it was not quite as radical as it might seem today.

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[36] Roy Reed, *25,000 Go to Alabama's Capitol; Wallace Rebuffs Petitioners; White Rights Worker Is Slain*, N.Y. TIMES, Mar. 26, 1965, at A1. For a fuller account of the march and Judge Johnson's iconic opinion and order in *Williams v. Wallace*, see RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE PROTEST," AND THE RIGHT TO PETITION FOR A REDRESS OF GRIEVANCES 185-207 (2012).

[37] Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785, 788-89 (1965).

[38] Nicholas DeB. Katzenbach, *Protest, Politics, and the First Amendment*, 44 TUL. L. REV. 439, 443-44 (1969).

[39] *Id.* at 445.

[40] *See* Ronald J. Krotoszynski, Jr., *Celebrating Selma: On the Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1420-25 (1995) (describing and discussing Judge Johnson's proportionality principle).

Consider, for example, *Brown v. Louisiana*,[41] a 1966 case involving a silent protest against racial discrimination that took place in a local public library. Holding a civil rights protest in a public library might, at first blush, seem incongruous with the very purposes that lead governments to establish and to maintain public libraries in the first place. In fact, Justice Abe Fortas noted this anomaly in his majority opinion: "It is an unhappy circumstance that the locus of these events was a public library – a place dedicated to quiet, to knowledge, and to beauty."[42]

Nevertheless, in *Brown*, the Supreme Court overturned the protestors' criminal trespass convictions, holding the silent protest to be protected under the First Amendment. The Justices did so because the use of the library for the silent protest was not fundamentally inconsistent with its more regular uses:

> Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. Perhaps the time and method were carefully chosen with this in mind. Were it otherwise, a factor not present in this case would have to be considered. Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations.[43]

Moreover, this outcome obtained because the facts at bar squarely implicated "a basic constitutional right – the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances."[44]

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[41] 383 U.S. 131 (1966).

[42] *Id.* at 142.

[43] *Id.*

[44] *Id.* at 141.

Brown v. Louisiana, like *Williams v. Wallace*, starts from a baseline assumption that government property that can be used for First Amendment activity should be available for such activity, absent a very good reason – a reason, moreover, entirely unrelated to antipathy toward the viewpoint of the would-be speakers or the content of their message. Thus, in the 1960s, federal courts assumed that government had a duty to facilitate peaceful protest by making public space available for First Amendment activity – even non-obvious venues like public libraries and major U.S. highways were potentially available for expressive activities.

However, times have changed since then. Under the public forum doctrine, government may restrict the use of government-owned property for peaceful protest if the specific property at issue does not constitute a public forum.[45] In other words, the analytical baseline has shifted significantly from one that puts the burden on the government to justify excluding expressive activities from its property, to one that requires persons wishing to use government property for speech activity to first establish that the property at issue constitutes either a public forum or a designated public forum.[46] In this respect, the scope of public property available for First Amendment activity has contracted, rather than expanded, over time.

III. The Ever-Expanding First Amendment Universe Theory Reconsidered: The Important, But Underappreciated, Growing Relationship of Property to Speech

Of course, the standard account of the modern First Amendment is one of the triumph of free speech, and expressive freedoms, including assembly, association, and petition, over a wide

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[45] *See* United States v. Kokinda, 497 U.S. 720 (1990); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[46] Pleasant Grove City v. Summum, 555 U .S. 460, 469-72 (2009).

variety of government interests.[47] As Professor Marty Redish has argued, "democracy invariably involves an adversarial competition among competing personal, social, or economic interests."[48] The Supreme Court's efforts to disallow content-based and viewpoint-based speech restrictions, creating and facilitating a marketplace of ideas, permits this "adversarial competition" to take place, largely, if not completely, free of government control or manipulation.[49] Moreover, in many material respects, this generally-accepted narrative holds true: The Supreme Court has vindicated free speech interests in a wide variety of contexts. Moreover, the Justices have done so even when the government offers important interests to justify restricting speech.

For example, in *Snyder v. Phelps*,[50] the Supreme Court held that the First Amendment protected a highly offensive, targeted protest of Marine Lance Corporal Matthew Snyder's funeral. Snyder had been killed while on active duty in Iraq and the Westboro Baptist Church picketed Snyder's funeral to call attention to the church's opposition to homosexuality. Despite the outrageous and highly offensive nature of the church's protest, and the entirely plausible arguments for restricting the protest in order to secure the privacy and dignity interests of the

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[47] *See* MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY (2013).

[48] *Id.* at 27.

[49] *See id.* at 181 (arguing that "[e]ven at its worst, a First Amendment grounded in principles of adversary democracy is far preferable to a logically flawed or deceptively manipulative appeal to democratic and expressive theories grounded in some vague notion of the pursuit of 'the common good' as a basis for the selective suppression of unpopular ideas"); *see also* Sullivan, *supra* note ___, at 160-63 (observing that a libertarian approach to defining the First Amendment's scope involves a "central distinction between the use of public and private resources").

[50] 131 S. Ct. 1207 (2011).

grieving family,[51] the Supreme Court held the church's protest was protected under the First Amendment.[52] Chief Justice John G. Roberts, Jr. explained that "[a]s a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[53]

Snyder represented an expansion and extension of an earlier precedent, *Hustler Magazine, Inc. v. Falwell*,[54] which held an intentionally outrageous parody to be protected under the First Amendment.[55] Chief Justice William H. Rehnquist, writing for a unanimous Supreme Court in *Falwell*, explained that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[56] Despite the fact that Hustler Magazine intentionally had designed the parody to inflict maximum emotional harm on its target, the Rev. Jerry Falwell, Sr., the Supreme Court squarely held that neither a bad motive nor the inherent "outrageousness" of the parody could serve as a basis for imposing civil liability on Hustler Magazine under the law of tort. This was so because "[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures

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[51] *See* RONALD J. KROTOSZYNSKI, JR., PRIVACY REVISITED: A GLOBAL LEGAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE 5, 26-30, 182-83 (2016) (discussing *Snyder* and the strong priority that U.S. constitutional law affords to free speech interests over privacy interests).

[52] *See Snyder*, 131 S. Ct. at 1216-20.

[53] *Id.* at 1220.

[54] 485 U.S. 46 (1988). For a relevant and thoughtful discussion of *Falwell* and its rejection of the imposition of majoritarian civility standards on speech, *see* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 624-32 (1990).

[55] *Falwell*, 485 U.S. at 52-55.

[56] *Id.* at 50.

as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.'"[57]

Moreover, *Snyder* is only one of a whole series of recent Supreme Court decisions that vindicate a wide variety of free speech claims. The contemporary Supreme Court has protected false speech about military honors,[58] violent video games,[59] and depictions of animal cruelty.[60] So too, the Justices have held that data constitutes speech and that a Vermont privacy statute that prohibited the transfer of physicians' prescription data for marketing purposes constituted an impermissible content-based speech regulation.[61]

Perhaps most famously, in *Citizens United v. Federal Election Commission*,[62] the Supreme Court, by a 5-4 vote, invalidated key provisions of the Bipartisan Campaign Reform Act of 2002 because the law prohibited political speech by corporate entities. In holding that strict limits on uncoordinated political advocacy by corporations violate the First Amendment, Justice Anthony Kennedy explained that "the First Amendment protects speech and speaker, and the ideas that flow from each."[63] In consequence, "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[64]

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[57] *Id.* at 51 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[58] United States v. Alvarez, 132 S. Ct. 2537, 2544-45 (2012).

[59] Brown v. Enm't. Merchs. Ass'n, 131 S. Ct. 2729, 2735-39 (2011).

[60] United States v. Stevens, 559 U.S. 460, 468-74, 481-82 (2010).

[61] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

[62] 558 U.S. 310 (2010).

[63] *Id.* at 341.

[64] *Id.* at 340-41.

Thus, the generally accepted view, which posits that the First Amendment has flourished under the Roberts and Rehnquist Courts, has a factual strong basis. In myriad contexts, and with great regularity, the Supreme Court has broadly interpreted and applied the First Amendment and invalidated both federal and state laws in order to advance the freedom of speech. However, even as the Supreme Court has *expanded* the scope of the First Amendment's application in some contexts, it concurrently has *reduced* its scope of application in others. Moreover, this trend of reducing some expressive freedoms while expanding others has not received sufficient scholarly attention.[65] Instances of the federal courts contracting First Amendment rights constitute an important counter-trend to the more generally observed, and often celebrated, ever-expanding First Amendment universe meme.

The speech rights of government employees, including constitutional protection for whistle blowers, provide an illustrative example of the Supreme Court reducing First Amendment protection rather than expanding it. To be sure, First Amendment protection for government employees who speak out about matters of public concern has never been

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[65] *But see* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011). Dean Chemerinsky concedes that the Roberts Court has issued many decisions broadly protective of freedom of speech, *see id.* at 723-34, but argues that other First Amendment decisions are not protective of First Amendment values, *see id.* at 725-34. He argues that "a look at the overall pattern of Roberts Court rulings on speech yields a clear and disturbing conclusion: it is not a free speech Court." *Id.* at 734. With all due respect to Dean Chemerinsky, he misses the key distinction that separates recent Supreme Court decisions vindicating free speech claims from those failing to vindicate free speech claims: When a would-be speaker does not need a subsidy from the government in order to speak, the speaker invariably wins; however, when a speaker needs a government subsidy in order to speak, the speaker more often than not loses. *See infra* text and accompanying notes ___ to ___. Accordingly, it would be more accurate to say that the Roberts Court is not a "free speech subsidy" Court.

particularly robust. The original, unmodified *Pickering/Connick*[66] standard protected a public employee who spoke out about a matter of public concern, but *only* if the employee's continued presence in the government workplace after whistle blowing was not unduly disruptive. Thus, the *Connick/Pickering* test, even at is zenith, plainly sanctioned a kind of heckler's veto[67] by hostile co-workers.

In 2006, the Supreme Court held that government employee speech is not protected, despite relating to a matter of public concern, if the speech at issue falls within the scope of an employee's official duties.[68] *Garcetti* involved a police warrant officer making false statements containing "serious misrepresentations"[69] to a judge in order to obtain a search warrant. Richard Ceballos, a supervising deputy district attorney in Los Angeles, California, discovered evidence that false testimony might have been used to secure a search warrant and investigated the matter. Despite the obvious public interest in preventing police from obtaining search warrants using

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[66] *See* Connick v. Myers, 461 U.S. 183 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

[67] *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140-41 (1965). Professor Kalven is generally credited with coining the phrase "heckler's veto" as a way of describing the potential problem of permitting an audience's hostile reaction to serve as a basis for limiting, or even proscribing, the speech. *See* Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 400 (1989) (observing that "[i]t was Kalven who gave us the idea of the 'heckler's veto'").

[68] Garcetti v. Ceballos, 547 U.S. 410 (2006). *But see* Lane v. Franks, 134 S. Ct. 2369, 2378 (2014) (holding that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes" and noting "[t]hat is so even when the testimony relates to his public employment or concerns information learned during that employment"). *Franks* does not overrule *Garcetti*, however, and merely clarifies that sworn testimony in a judicial proceeding constitutes "citizen," rather than "employee," speech related to a matter of public concern. *See id.* at 2378-80.

[69] *Garcetti*, 547 U.S. at 414.

false representations of fact, the Supreme Court held that the First Amendment offered Ceballos no protection for his actions because his speech related to his official duties.

We protect most government workers from being fired over their partisan identity, thereby constitutionalizing civil service protection in order to safeguard government workers from retaliation based on their partisan commitments and beliefs.[70] This same principle should apply with full force with respect to whistle blowers. This is particularly important because the Supreme Court also has held that the press has no special right of access to information held by the government.[71] Thus, if government misconduct is to out, so that public officials may be held democratically accountable, the electorate must have information that only government employees can provide. First Amendment protection of whistle blowers is necessary to facilitate and enable the process of democratic self-government – a core purpose of the First Amendment.[72]

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[70] *See* Elrod v. Burns, 427 U.S. 347, 359 (1976) (plurality opinion); *see also* Branti v. Frankel, 445 U.S. 507, 515-18 (1980) (affirming and applying *Elrod* and holding that "the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes"). Over time, the Supreme Court has expanded *Elrod*'s scope to disallow other aspects of the spoils system, such as using government contracts to reward political supporters and punish political opponents. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 720-21 (1996). Under the Supreme Court's current jurisprudence, the First Amendment only permits consideration of partisan identity with respect to government employees who possess policy making authority or enjoy regular access to confidential information. *See id.* at 718-19. In fact, this protection even applies when an employer mistakenly attributes a partisan identity to an employee and retaliates against the employee based on this mistake of fact. *See* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1417-19 (2016). *But cf.* Waters v. Churchill, 511 U.S. 661, 679-80 (1994) (sustaining the discharge of a nurse employed at a public hospital based on comments that the nurse did not actually make because the erroneously-attributed comments did not relate to a matter of public concern but rather to work-related matters of private concern).

[71] *See* Houchins v. KQED, 438 U.S. 1 (1978).

[72] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

Of course, the contraction of expressive freedom is not solely a function of the federal and state courts failing to enforce the First Amendment with sufficient vigor. The actions of police and prosecutors also significantly burden the exercise of First Amendment rights. Simply put, First Amendment rights are not only a function of the actions of judges and courts; the vibrancy of expressive freedoms in the United States significantly depends on the willingness of police, prosecutors, and other local officials to respect the right of ordinary citizens to express dissenting viewpoints.[73]

For example, in Ferguson, Missouri, police used a wide variety of tactics to impede peaceful protests, including tear gas, rubber bullets, Tasers, flash grenades and snipers.[74] Moreover, local officials imposed a requirement that the protests be "respectful" and police implemented a "five second rule" that required protesters to keep moving and not to congregate.[75] Although U.S. District Judge Catharine D. Perry enjoined the five second rule, and ordered local law enforcement officers to respect the right of the plaintiffs to peacefully protest the death of Michael Brown,[76] she could not enjoin the use of common law enforcement

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[73] Popular viewpoints in a democracy do not usually face the prospect of censorship. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (holding that the purpose of the First Amendment "is to invite dispute," that "the vitality of civil and political institutions in our society depends on free discussion," and, accordingly, this "is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest").

[74] *See* Abdullah v. County of St. Louis, 52 F. Supp. 3d 936 (E.D. Mo. 2014); *see also* John Nichols, *The Constitutional Crisis in Ferguson, Missouri*, THE NATION, Aug. 14, 2014, http://www.thenation.com/blog/181145/police-overreaction-has-become-constitutional-crisis-ferguson-missouri.

[75] *Abdullah*, 52 F. Supp. 3d at 942.

[76] *See id.* at 948-49.

practices, such as arrests for failure to follow a lawful police order, that can be and are used to impede public protests.[77]

These trends also support a larger thesis involving the reduction, if not complete loss, of an obligation on the part of government to expend public resources to facilitate speech. We seem to have evolved from the position that government must provide the support necessary to enable all persons, rich and poor alike, to take an active, meaningful role in the process of democratic self-government[78] to a model premised on a highly abstract concept of equality that promotes the formal equality of opportunity rather than the actual reality of equality on the ground level.[79] One

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[77] *See id.* at 948 ("This injunction does not prevent defendants or other law enforcement agencies from using all lawful means to control crowds and protect against violence. Missouri's refusal-to-disperse law is not restricted by this injunction.").

[78] *See*, *e.g.*, Cox v. Louisiana, 379 U.S. 536, 552 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that a public official plaintiff suing a media defendant for defamation must prove malice aforethought in order to ensure 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"); Edwards v. South Carolina, 372 U.S. 229, 235-37 (1963) (holding that "South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances" by arresting and convicting them for "breach of peace" based on student protestors conducting a civil rights rally at the South Carolina state capitol and noting that government may not attempt to criminalize speech simply because their views were unpopular); Terminiello v. Chicago, 337 U.S. 1, 4 (1949 ("Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); Stromberg v. California, 283 U.S. 359, 369 (1931) (holding that the First Amendment exists to safeguard "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic" and constitutes "a fundamental principle of our constitutional system").

[79] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such [political] speech, the guiding principle is freedom— the 'unfettered interchange of ideas'– not whatever the State may view as fair."); Citizens United v. FEC, 558 U.S. 310, 341 (2010) ("The First Amendment protects speech and speaker, and the ideas that flow from each."); *see also* Ofer

could also characterize the modern approach as pursuing procedural – rather than substantive – equality among speakers.

The reduction in the scope of First Amendment protection for government workers who speak out about official misconduct is only one example of a larger trend – a trend that also includes reduced access to public property for speech activity. In myriad ways, in the contemporary United States, freedom of expression faces serious challenges and threats.

Other salient examples of contracting speech rights in the U.S. include:

- Bans on hate speech on college and university campuses.
- Police and prosecutor actions against demonstrators, including pretextual arrests designed to impede and harass protest efforts, and the filing and subsequent dropping of charges by public prosecutors to impede or prevent protest activities.
- More generalized restrictions on government workers' speech, including efforts by Florida and Wisconsin to prevent employees from discussing climate change in official documents.
- Restrictions on citizen investigations and reportage, such as Iowa's "ag gag" statutory prohibition on video recording by employees in meat processing facilities and similar state laws prohibiting photographing or reporting on industrial farming operations.
- Forced speech, including state regulations that require medical care professionals to give (mis)information about various treatments and their effects, particularly in the context of abortion service providers.
- Failure to reliably protect journalists engaged in news gathering activities integral to reporting on matters of public concern.

Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 NYU J.L. & LIBERTY 343 (2014) (arguing that the Roberts Court has adopted a highly formalist approach to defining and enforcing constitutional rights, including First Amendment rights).

- Reduced speech rights for students in the public schools, including restrictions on student speech both inside and outside the school house.

These developments, although occurring independently of each other, suggest that the contemporary commitment to safeguarding the freedom of speech is far from absolute (despite fairly regular suggestions to the contrary in the academic literature).[80]

Another troubling trend that emerges from the Supreme Court's most recent First Amendment decisions: First Amendment law increasingly links the ownership of property to the ability to exercise free speech rights. Accordingly, if you lack property, your speech rights have been in decline for many years, and at least since the 1970s, when the Supreme Court first started to deploy the public forum doctrine.[81] This doctrine, as developed and applied over time, has permitted government officials to restrict large swaths of government-owned property from being used for protest.[82] Citizens have a right to speak and protest – but only if they can do so without any direct support from the government.[83]

If you have property, then your speech rights have never been more robust – the world is your oyster. On the other hand, however, if you lack property, your speech rights are subject to

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[80] It bears noting that Dean Erwin Chemerinsky has noted that the narrative of an ever-expanding universe of expressive freedom does not present and entirely accurate picture. Chemerinsky, *supra* note ___, at 723-25, 734. He concedes that "the Roberts Court sometimes rules favor of free speech claims," but that its records overall demonstrates "that it is not a free speech Court at all." *Id.* at 724.

[81] Southeastern Productions, Ltd. v. Conrad, 420 U.S. 546 (1975).

[82] United States v. Kokinda, 497 U.S. 720 (1990); Members of the City Council of the City of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984).

[83] *See*, *e.g.*, Oberwetter v. Hilliard, 639 F.3d 545, 552 (D.C. Cir. 2011) ("National memorials are places of public commemoration, not freewheeling forums for open expression, and thus the government may reserve them for purposes that preclude expressive activity.").

very broad forms of government discretion to make property available for the use of impecunious citizens – or to withhold access. All citizens have a theoretical right to speak, but enjoy the ability to speak in practice only if they possess the means of doing so without any government aid or support. This approach to allocating First Amendment rights has profound, and quite negative, implications for the marketplace of ideas – and especially for democracy and democratic participation by ordinary citizens.

The Supreme Court tends to frame equal citizenship in highly formal terms that relate to the equal voting power of all citizens at the ballot box.[84] However, if we actually care about a meaningful form of substantive equal citizenship, formal equality at the ballot box is simply not enough to get the job done. Instead, citizens must possess equal *dignity* in the process of democratic deliberation that culminates in the act of casting a ballot. Moreover, persons who lack dignity are not usually not capable of acting as equals in the process of democratic deliberation. Indeed, the Constitutional Court of the Republic of South Africa has directly embraced this proposition – dignity is precondition to the democratic equality of all persons.[85]

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[84] Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). Even more controversial cases involving voting rights, such as Shaw v. Reno, 509 U.S. 630 (1993), also arguably reflect a commitment to the equal rights and dignity of citizens as citizens. The *Shaw* majority characterized its holding against the placement of voters in particular districts based on their race as necessary to vindicate the equal status and dignity of all voters – which would be injured were they treated merely as members of racial voting blocs. *See* Miller v. Johnson, 515 U.S. 900, 911-12 (1995).

[85] KROTOSZYNSKI, *supra* note ___, at 111-14. In South Africa, "[t]he inability to create subcategories of citizenship – favoring some groups and disfavoring others through a caste system – makes it significantly more difficult to backslide into a regime that subordinates some groups in order to enhance the relative status of other groups." *Id.* at 111.

The equal dignity of citizens requires an equal ability to speak freely and openly – to share thoughts, ideas, and concerns with other citizens. However, equal citizenship must also encompass autonomy, or agency, as a speaker. We could think of this as the ability to be an authentic citizen; a citizen whose decisions to speak, or not to speak, are the product of an entirely voluntary choice. Both coerced speech and compelled speech are inconsistent with the authenticity of a speaker, and hence degrade or destroy the agency – and dignity – of the speaker.

Wealthy citizens invariably have the ability to speak authentically because they can use their financial resources to buy or contract around whatever efforts government might make to compromise their agency as speakers. For example, the Koch Brothers are authentic speakers; they enjoy a full measure of citizenship. Whether or not one agrees with their point of view, it possesses a greater persuasive force precisely because it is self-evidently genuine. Moreover, as citizens, the Koch Brothers are not compromised by being forced to say something that they do not mean or believe – or prevented from sharing thoughts, ideas, and concerns because the government threatens to impose a burden or withhold a benefit if they speak their minds freely.

The problem with compelled speech and compelled silence is not simply – or only – that it distorts the marketplace of political ideas. (Although, for the record, it certainly has these effects.) When speakers are forced to say things that they do not believe – or are prevented from saying things that they do believe – related to the project of democratic self-government, democracy itself suffers. Because only a democratic discourse conducted by citizens who possess equal dignity as citizens will ensure that, as Meiklejohn puts it, everything that needs to

be said *is* said.[86] Democracy, over the longer term, requires something more the verisimilitude – it requires genuinely honest and open democratic engagement.[87]

As Associate Justice Robert H. Jackson so astutely noted in *Barnette*, "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."[88] This is because a citizenry who lack meaningful agency as citizens will not prove capable of sustaining democratic self-government over time.[89] Thus, if we truly embrace the concept of the equality of all citizens, this concept has to encompass a real, meaningful, and sustained commitment to the intellectual freedom – the freedom to think – just as it encompasses their freedom to vote. Thus, intellectual freedom must be an implied premise of a full, participatory democracy.[90]

The First Amendment, if considered from this vantage point, should be no less concerned with indirect efforts to command and control citizens as speakers and thinker than it is about obvious and direct forms of coercion – such as bans on particular ideas or ideologies. Direct forms of coercion are perhaps the easiest to ferret out and eradicate, but indirect forms of coercion – the use of government power to force speakers to act inauthentically – are no less harmful to the vibrancy of the marketplace of ideas. A speaker forced to compromise her agency

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[86] MEIKLEJOHN, *supra* note ___, at 25 ("What is essential is not that everyone shall speak, but that everything worth saying shall be said.").

[87] *See id.* at 90-91.

[88] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[89] *See* MEIKLEJOHN, *supra* note ___, at 21-27, 89-91.

[90] *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV.1934, 1946, 1961 (2014); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 403-04 (2008).

as a speaker is simply not an equal citizen. And the effects of this compromised agency will not begin and end with the particular context in which the coercion occurs. Thus, silencing a high school student who wishes to use social media to post comments critical of his teachers, or forcing a medical professional to tell patients things she believes to be medically false, degrade the speakers, deny their agency, and erode their ability to participate as equals in the process of democratic deliberation.[91]

Moreover, the problem of compelled speech is most acute when the speech at issue is likely to be attributed to the individual and not to the state. So too, the problem of compelled silence is most acute when it has the effect of preventing a citizen, of whatever age, from making contributions to the marketplace of political ideas that she thinks to be necessary and important. For example, public employees concerned about misconduct within the government agency where they work are uniquely positioned to provide crucially important information that permits the larger electorate to enforce democratic accountability on election day.

Of course, the promise of an election is change. But, for elections to be free and fair, everything has to be on the table (at least in theory). Government speech controls that deny the equal dignity of citizens compromise the freedom, and the fairness, of elections by making citizens comprehensively less able, and less willing, to engage actively in the process of

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[91] Moreover, being forced to serve as the mouthpiece of government – or to be silenced by the government – is profoundly disempowering. Particularly when one feels that, as a practical matter, they lack the ability to choose. A high school student cannot simply say "keep your education." *See* Morse v. Frederick, 551 U.S. 393 (2007). Nor can a medical doctor realistically tell the government "keep your license" in order to avoid providing either medically unnecessary treatments or medically false information to a patient. *See* Texas Medical Providers Performing Abortion Servs. v. Lackey, 667 F.3d 570, 578-80 (5th Cir. 2012); Planned Parenthood v. Rounds, 530 F.3d 724, 729, 734-36 (8t h Cir. 2008) (en banc). As a practical matter, they do not have a realistic option of "just saying no" to the terms the government sets as a precondition of gaining access to the government benefit they seek.

democratic self-government. It might be less obvious than a wealth or religious requirement for exercising the right of suffrage; to be sure, the effects are certainly more subtle. But the effects are nevertheless real and fundamentally inconsistent with the underlying first principles of why we hold regular elections in the first place and use voting to legitimate the policies that elected officials adopt once in office.

We can and should take justifiable pride in the scope of expressive freedoms in the contemporary United States. U.S. citizens enjoy the broadest, and deepest, protection of freedom of expression in the world. At the same time, however, a meaningful commitment to democracy and equal citizenship requires that government not be permitted to act like a private citizen or corporation when deciding whether to permit the use of its property, workplaces, and schools for expressive activities and protest.[92]

Although the Supreme Court has been vigilant in preventing government from using its authority to censor private speech, it has been considerably less vigilant in requiring government to facilitate speech using public property or taking place in the context of a government-operated enterprise, such as a public school, university, or workplace, in which the government may claim a managerial role or function.[93] Nor has the Supreme Court moved with sufficient dispatch to check government efforts to coerce private speech as a condition of obtaining a government benefit or holding a government-issued professional license. Simply put, equal citizenship requires the ability of each and every person to speak autonomously and authentically – the abilty

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[92] *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 16-18 (1996) (arguing that disparities in wealth can and will create significant distortionary effects in the marketplace of ideas because the public "will, in effect, hear only" the viewpoints of the rich and warning that "the voice of the less affluent may simply be drowned out").

[93] *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

of a citizen to engage in political agency cannot be reserved to those wealthy enough to afford the ability to think and speak freely.

IV. Tracing the Evolving Boundaries of the First Amendment: An Overview of the Arguments and Proofs That Follow

The chapters that follow will explore the ways in which expressive freedoms have become less, rather than more, secure since the days of the Warren and Burger Courts. The first three chapters consider areas in which government subsidies are necessary to facilitate speech. Chapter 2 considers a critically important question: Access to public space for speech activity. The public forum doctrine, coupled with an increasingly lax application of the rules governing regulations of the use of public forums, have together worked to limit significantly access to public places for speech activity. As noted earlier, it is highly doubtful that a protest of the size and scale of the Selma march could take place today if government officials objected to it.

Chapter 3 considers how government can and does leverage its power as an employer to restrict the exercise of First Amendment rights by its employees. Although the unconstitutional conditions doctrine generally prohibits government from conditioning benefits on the surrender of constitutional rights,[94] in the context of government employee speech, however, the federal courts have generally accepted the imperatives of the government as a manager over unconstitutional conditions-based objections by government employees.[95]

Chapter 4 continues and expands this theme in the context of public education – both at the K-12 level and in the context of higher education. To be sure, federal courts have generally rejected campus speech codes when litigation occurs, but university officials at public colleges

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[94] *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1988).

[95] *See* Post, *supra* note ___, at 151-57, 164-71.

and universities still routinely adopt very broadly crafted speech restrictions – and apply them aggressively to banish disfavored content and viewpoints. Federal court interventions have failed to secure expressive freedoms reliably on the ground level; this, in turn, raises some serious questions about the merits and efficacy of the federal courts efforts to secure First Amendment more generally.

Chapter 5 considers the problem of transnational speech and regulations that limit the ability of speakers to enter the United States and the ability of U.S. citizens to exercise First Amendment rights when abroad. This chapter also considers the problems presented by pervasive forms of security aimed at preventing crime. Simply put, surveillance programs based on Big Data present serious threats to vibrancy of the marketplace of ideas. At the same time, however, the federal courts have been very reticent to apply First Amendment values to these national security programs – particularly in the face of a widely-held perception that the risk of terroristic attacks is both real and growing.[96]

Chapter 6 considers the ways in which government both compels speech, misidentifies its identity as a speaker, and attempts to limit speech that could be embarrassing to the government itself (such as recording police officers when in public). In some instances, federal courts disallow government efforts to compel or mislabel speech – but the federal courts have not been consistent in disallowing forced speech (even by medical professionals treating patients) nor have they required the government to abjure efforts to use sock puppets to hide its identity as speaker.[97] As Professors Helen Norton and Danielle Citron and have warned, "[iIf a message's

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[96] *See* Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115.

[97] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); *see* Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DEN. U. L. REV. 899, 903-10, 936-39 (2010); Gia B.

governmental source is obscured . . . political accountability mechanisms provide no meaningful safeguard."[98]

Chapter 7 examines the failure of the federal courts to deploy the First Amendment to protect news gathering. To be sure, threats to the ability of journalists to report on matters of public concern initially arise from the actions of non-judicial actors – namely federal and state prosecutors who seek to force journalists to disclose confidential sources incident to criminal proceedings. However, the federal courts also bear some responsibility for the failure to protect news gathering. The Supreme Court has consistently refused to give independent force and effect to the Press Clause of the First Amendment, which could easily be interpreted as conveying some level of constitutional protection to news gathering activites.[99]

In Chapter 8, the analysis turns to non-judicial government actors, including police and prosecutors, who can use their discretion to squelch the exercise of First Amendment rights. Because the powers at issue are essential to the discharge of their official law enforcement duties, the federal courts are not particularly well positioned to prevent the misuse of discretionary law enforcement authority to suppress dissent. The vibrancy of expressive freedom within a

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Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1009-26 (2005); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 896-97 (2000). As Professor Sarah Joseph has argued, "[t]he need for caution in promoting social media as an instrument of progressive political change must be acknowledged" because of the risk of government "subvert[ing] the utility of social media through the extensive use of 'sock puppets,' which would poison people's trust in the platforms." Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 187 (20xx).

[98] Norton & Citron, *supra* note ___, at 909.

[99] Branzburg v. Hayes, 408 U.S. 665 (1972); *see* Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819 (2012); Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029 (2015).

community very much depends on the commitment of local police and prosecutors to respect the right of citizens to express dissenting viewpoints. (Police and public prosecutors do not, as a general rule, target protests that express politically popular viewpoints – precisely because both police and prosecutors are directly, or indirectly, democratically accountable.)[100] Any effort to assess the health and vibrancy of First Amendment freedoms in the contemporary United States must take account of non-judicial actors who can facilitate – or constrain – public protest. Simply put, judges are not the only government officers with responsibility for securing First Amendment rights.

Chapter 9 posits that the modern Supreme Court has adopted a libertarian approach to defining and enforcing the First Amendment that strongly protects the right of all persons, including fictive persons, to use property in order to speak. Speakers with the financial wherewithal to buy or rent property, or air time, or billboards may speak without the fear of government censorship of their message. To be sure, these efforts to create an open and vibrant marketplace of ideas advance important First Amendment values and transform the First Amendment into a structural bulwark of democracy.

Not unlike other structural protections of liberty, such as the separation of powers and federalism, the freedom of speech helps to secure democratic accountability and to check the abuse of government power by incumbent government officials. However, to say that government may not silence those with the financial ability to speak does not answer an entirely different question, namely, should the government have an obligation to use its resources to

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[100] *But see* Watson v. Memphis, 373 U.S. 526, 535 (1964) (holding that "constitutional rights may not be denied simply because of hostility to their assertion or exercise").

facilitate speech by those who otherwise lack the resources to speak?[101] Moreover, should the ability to participate in democratic self-government be largely a function of property ownership? If we are truly committed to a meaningful form of equal citizenship, then federal courts should consider using the First Amendment to create positive rights in addition to negative rights.

Finally, Chapter 10 offers a brief summary of the preceding chapters and some concluding thoughts. If one takes seriously the concept of equal citizenship, then the government's obligation to support the machinery and mechanics of voting must extend beyond the ballot box itself[102] to encompass processes integral to making the act of voting meaningful. This will require recasting the First Amendment as not merely a source of negative rights, but as a source of affirmative obligations as well.

V. Conclusion

The standard account of the modern First Amendment, which posits that the Supreme Court consistently has broadened scope of First Amendment protections since the Warren Court era, has much to recommend it. In contexts involving viewpoint-based, content-based, and speaker-based government restrictions on speech, the standard account largely holds true. It also holds true with respect to commercial speech and commercial speakers. In these contexts, the Supreme Court has been both vigilant and consistent in enforcing the First Amendment.

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[101] *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."). The equal voting weight of votes, however, would seem to require if not an equal ability to participate in and influence the electoral process, then at least a *meaningful* opportunity for such participation. Such an opportunity for many citizens will require that government facilitate, rather than impede, participation in the process of democratic self-government.

[102] *See* Bush v. Gore, 531 U.S. 98 (2000).

On the other hand, however, the contemporary Supreme Court has been less inclined to require government to facilitate private speech using its resources than were its predecessors. Whether would-be speakers seek to use government property for expressive activity, to speak while holding government employment, to speak while enrolled in a government-sponsored university or college, or to speak while receiving government subsidies or holding a professional license, the Supreme Court has been significantly more sympathetic to government managerial claims than it has been to the First Amendment objections of would-be speakers. The federal courts also have done little to respond to the risks presented by police and prosecutor tactics designed to suppress expressive activity. Because of these developments, the ability to exercise First Amendment rights increasingly depends on a would-be speaker possessing the financial wherewithal to buy or rent the property necessary to support expressive activity.

In sum, the overall picture of freedom of expression in the contemporary United States is mixed. In many respects, the First Amendment's scope of application has never been wider. In other respects, however, First Amendment rights have receded in important ways because the federal courts have narrowed expressive freedoms in contexts where would-be speakers require government support. If the First Amendment exists to facilitate democratic self-government, the federal courts should consider more carefully the government's affirmative constitutional duty to support and facilitate expressive activities – and to refrain from conditioning access to government-controlled benefits on either compelled speech or coerced silence. Simply put, government cannot enjoy the same freedom of action to exercise its property rights to restrict, suppress, or control speech that a private citizen or corporation may enjoy.

THE DISAPPEARING FIRST AMENDMENT: ON THE DECLINE OF FREEDOM OF SPEECH AND THE GROWING PROBLEM OF INEQUALITY AMONG SPEAKERS

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II. Chapter Descriptions

Chapter 1: Introduction: Two Steps Forward, One Step Back: On the Decline of Expressive Freedoms Under the Roberts and Rehnquist Courts.

The contemporary Supreme Court, not unlike the Roman god Janus, has exhibited two faces in its approach to enforcing the First Amendment. In many important contexts, the Justices have read the First Amendment broadly to protect speech of all stripes, by a wide variety of speakers. However, expressive freedoms have also declined in important respects as well. This chapter will provide a general overview of the book's central thesis and provide a road map for the chapters that follow.

Chapter 2: Access to Public Property for First Amendment Activity.

Chapter 2 will consider how access to public property for speech activity has declined over the past half-century. Going back to *Hague v. CIO*,[103] the Supreme Court has required government entities to make public property available for speech activity. As late as the 1960s, the federal courts generally held that government property should be available for speech activity. Under the public forum doctrine, however, the ability of government to restrict access to public property for speech activity has increased significantly; simply put, the presumption of access to government property for speech activity no longer exists.

Today, government enjoys broad discretion to ban protest from public property – even from property like national parks and public memorials that would otherwise seem to constitute traditional public forums.[104] Moreover, even in a traditional public forum, the federal courts

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[103] 307 U.S. 496 (1939).

[104] *See*, *e.g.*, Oberwetter v. Hilliard, 639 F.3d 545, 552-54 (D.C. Cir. 2011) (upholding a ban on protest activity at the Jefferson Memorial).

routinely have sustained content neutral, reasonable time, place, and manner restrictions that significantly restrict the availability of public property for speech activity.

Chapter 3: Government Employees.

In *Pickering*, 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.[105] Over time, however, this rule has eroded significantly. Now, if an 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 falls within the scope of the employee's duties.[106] The same outcome also applies if a government employer disciplines or fires an employee based on the mistaken belief that a particular employee made the comments.[107] Thus, the contemporary Supreme Court has limited the constitutional protections available to government employees who wish to call attention to misconduct or inefficiency in government operations. This, of course, makes it less likely that the people best able to inform the public about misconduct in public institutions will come forward. The result will be that government officials' bad behavior will go undiscovered and, in consequence, uncorrected.

Chapter 4: Colleges, Universities and the Public Schools.

Public universities have regulated speech and protest on campus much more heavily in recent years than was the case 30-40 years ago, during the era of massive Vietnam and civil rights protests. Evidence also suggests that academic freedom is less robust now than it was

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[105] Pickering v. Board of Educ., 391 U.S. 512 (1968).

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

[107] Waters v. Churchill, 511 U.S. 661 (1994).

during the Red Scare years. Public universities generally defended faculty alleged to subscribe to Marxist or Socialist ideologies in the McCarthy years, but today professors, like Gene Nichol at UNC, who speak out on issues of public concern can face retaliation (both personally and with respect to their institutions).

Students also have been subjected to discipline for exercising their First Amendment rights. For example, President David Boren, at the University of Oklahoma, summarily expelled undergraduate students who led a racist sing-along event on a bus to an off-campus fraternity event – apparently without any sort of formal hearing or process.[108] So too, the University of South Carolina has expelled a student for writing a racist epithet on a white board in a university library conference room and then posting a video to Youtube.com.[109] And, a contretemps arose at the University of Michigan regarding a screening of "American Sniper" – with the screening being cancelled and then rescheduled.[110] Although anecdotes are not a data set, the commitment of public colleges and universities to protect vigorously speech by students, faculty, and staff seems to be on the decline. To date, the federal courts' response has been, at best, tepid.

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[108] Matt Pearce & Sarah Parvini, *Universities Show Resolve on Fraternity Transgressors*, L.A. TIMES, Mar. 19, 2015, at A8; Adam Kemp, *National SAE Leader Disputes OU President David Boren's Statement in Facebook Post*, DAILY OKLAHOMAN (Oklahoma City), Mar. 31, 2015, at A4.

[109] Kimberly Hefling & Jesse J. Hollan, *USC N-word Snapchat Is One in a Number of College Incidents*, POST & COURIER (Charleston, SC) (Apr. 3, 2015, 9:10 PM), http://www.postandcourier.com/article/20150403/PC16/150409764; Hudson Hongo, *South Carolina Student Suspended for Racist and Dumb WiFi Complaint*, GAWKER (Apr. 4, 2015, 4:30 PM), http://gawker.com/south-carolina-student-suspended-for- racist-and-dumb-wi-1695718047. University of South Carolina President Harris Pastides immediately suspended the student from her studies and the university would not comment on whether it was initiating expulsion proceedings against her. *See* Associated Press, *South Carolina College Student Suspended Over Racial Slur*, YAHOO NEWS, Apr. 4, 2015, https://www.yahoo.com/news/south-carolina-college-student-suspended-over-racial-slur-155117568.html.

[110] Fredrik deBoer, *Closed Campus*, N.Y. TIMES, Sept. 13, 2015, at MM64-66; Derek Draplin, *Mixed Reactions as UM Screens "Sniper,"* DETROIT NEWS, Apr. 11, 2015, at A5.

At the K-12 level, a broad-based movement exists to encourage state governments to ban the use of social media by K-12 students if posts to sites like Facebook would upset or "torment" school teachers or administrators. (This is language from the model statute – one variation of this model law is currently pending here in Alabama.) These laws are so broadly written that even a fair public criticism of a teacher or school administrator could be the basis of criminal proceedings against juvenile offenders. The Supreme Court also has been less than vigilant in protecting student speech rights since its landmark decision in *Tinker* and the lower federal courts have issued conflicting decisions regarding the scope of student speech rights outside the classroom.[111] Although the ability of school administrators and teachers to maintain good order and discipline in our public schools undoubtedly constitutes pressing and important government objective – perhaps even a "compelling" government interest – the legitimate pedagogical goals and objectives of public school officials cannot serve as a blank check that justify any and all forms of censorship of student speakers.

Chapter 5: National Security, Big Data, and Transborder Speech.

National security efforts, such as the PRISM program and other, similar activities sanctioned by section 215 of the Patriot Act, present some very serious risks to the exercise of expressive freedoms. A surveillance state may be many things, but it is not likely to be a successful democracy. Surveillance produces a significant chilling effect that impedes democratic discourse – something that the Court of Justice of the European Union recently noted in its landmark *Digital Rights Ireland* decision.[112] Surveillance can and does function as a

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[111] *See*, *e.g.*, Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727 (2012) (providing a relevant discussion of the conflicting lower federal court precedents).

[112] Digital Rights Ireland Ltd. v. Minister of Communications, Marine, and Natural Resources, Joined Cases C- 293 & C- 594/12, paras. 58– 62, 69– 71 (2014), http://

powerful tool for social control; programs like PRISM seriously burden the exercise of expressive freedom by incenting self-censorship.

Relatedly, transborder speech is increasingly important, but appears to enjoy less protection than domestic speech.[113] For example, *Holder v. Humanitarian Law Project*[114] sustained a flat ban on any contact with organizations listed on a State Department terrorist-group watch list. HLP sought to teach peaceful dispute resolution techniques, and principles of international law, to Kurdish rebels (members of the PKK). The Supreme Court sustained the federal government's ban. *HLP* raises troubling questions about the rigor with which the First Amendment will be applied in circumstances where U.S. citizens seek to exercise First Amendment freedoms outside the United States. In an increasingly globalized marketplace of ideas, we need to ensure that First Amendment rights do not end at the water's edge. Simply put, the locus of expressive activity should not prefigure the government's ability to engage in censorship, yet good evidence exists that this is not really the case under current doctrine.[115]

Chapter 6: Compelled Speech, Speech Bans, and Mis-Attributed Government Speech.

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curia.europa.eu/ juris/ document/ document.jsf?text=&docid=150642&pageIndex= 0&doclang=en&mode=req&dir=&occ=first&part=1&cid=404289 [http:// perma. cc/54C5-A8WLf (invalidating EU Directive 2006/24, which required the collection and storage of literally *all* electronic communications, because of the lack of adequate procedural and administrative safeguards, and observing that "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").

[113] *See* TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES (2013).

[114] 561 U.S. 1 (2010).

[115] *Id.* at 61-76, 126-31, 156, 215, 303.

The state and federal government have regulated the speech of medical professionals – particularly in the context of abortion procedures.[116] The federal courts have not reliably moved to invalidate coerced speech by medical providers – some of it demonstrably false. So too, some state governments, such as the Scott Administration in Florida, have forbidden state government employees from using the words "global warming" or confirming the existence of this meteorological phenomenon.[117] Compelled speech by medical service providers, and speech bans limiting the scope of government employees' professional speech, both raise serious First Amendment problems.

Government attempting to hide its identity as a speaker, and doing so successfully, presents another risk to core First Amendment values. In a variety of contexts, the government seeks to enter the marketplace of ideas, but also to hide or disguise its identity as a speaker.[118] The *Johanns* case, involving the Cattleman's Beef Promotion and Research Board, provides a

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[116] *See* David Orentlicher, *Abortion and Compelled Physician's Speech*, 43 J.L. MED. & ETHICS 9 (2015); Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L. MED. & ETHICS 22 (2015); *see also* Paula Berg, *Toward a First Amendment Theory of Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 202-07 (1994) (discussing government efforts to prescribe the professional speech of medical professionals in government-subsidized medical facilities).

[117] *See* Editorial, *Central Florida 100, Our Panel of 100 Influential Leaders Discusses the Most Important Issues Affecting You*, ORLANDO SENTINEL, Dec. 30, 2015, at A13 ("Florida Gov. Rick Scott refuses to allow staff to utter the words 'climate change.' Meanwhile, Florida's southern counties and cities are grappling, planning and addressing preparation for rising oceans as tides flood their cities."); *Governor Is No Scientist, Just a Crafty Linguist*, SUN-SENTINEL (Fort Lauderdale), Mar. 15, 2015, at B1 (noting that "Florida Gov. Rick Scott has unofficially banned the terms 'climate change' and 'global warming,' with state employees and agencies told not to use the phrases in documents and emails" and reporting that "Scott denied the report, while avoiding the words 'global warming' and 'climate change' in remarks to the media).

[118] *See* Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U.L. REV. 899, 936-39 (2010).

good example of this phenomenon.[119] Government creates an entity and then uses it to convey messages to the public designed entirely by the government, but propagated as if the speech of a non-governmental entity. "Beef. It's what's for dinner." was a message designed, approved, and funded by the U.S. Department of Agriculture.[120] Few members of the public probably know this, however.[121] Despite the probability of the general public mis-attributing the speaker, which was the USDA, the Supreme Court sustained the program against a First Amendment challenge.[122]

With the growing importance of social media, anonymous or pseudonymous government speech presents a growing problem. Even if private citizens should be permitted to speak anonymously,[123] it's far from clear that this should be so for the government itself. Or for private corporations.[124] Truth in advertising requires government to self-identify itself when it speaks.

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[119] Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[120] *See id.* at 554-55.

[121] *Id.* at 578-79 (Souter, J., dissenting)

[122] *Id.* at 562-63 (holding that "[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech" and this rule "is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object").

[123] *See* Rebecca Tushnet, The Yes Men *and The Women Men Don't See* in A WORLD WITHOUT PRIVACY: WHAT LAW CAN AND SHOULD DO? 83, 86-87 (Austin Sarat ed., 2015) (advocating for anonymous and pseudonymous speech on the Web and positing that "[p]seudonyms offer one way for people to maintain boundaries between different aspects of their identities, but without isolating themselves" and "can create rich communities and interactive works of art").

[124] *See* Ronald J. Krotoszynski, Jr., *Afterword: Responding to a World Without Privacy: On the Potential Merits of a Comparative Law Perspective* in Sarat, *supra* note ___, at 234, 256-65 (arguing that anonymous or pseudonymous speech by the government or for-profit corporations could distort, rather than enhance, the marketplace of ideas). As I have argued previously, "there's a dark side to anonymous and pseudonymous speech" because "the same anonymity that protects a woman criticizing the failure of the armed forces to deal effectively

Big Brother watching presents one set of issues, but Big Brother speaking, while attempting to hide its identity, presents another set of issues that merit sustained and critical attention.[125]

Chapter 7: Failure to Protect Journalists Engaged in News Gathering and Reporting

The federal government seems more willing than ever to prosecute journalists for reporting truthful information about government security programs – including the aggressive use of contempt proceedings to coerce journalists into naming their sources. It is certainly true that we have never had a First Amendment newsman's privilege or a federal law providing a generic press shield,[126] but government plainly exercised more restraint in pursuing journalists even 20 or 30 years ago than today. Voluntary self-restraint of this sort, which facilitated the press's role in making democracy work, has demonstrably eroded.

It also bears noting that the federal courts have generally been less willing to deploy the Press Clause to protect journalists engaged in news gathering activities – activities essential to the ability of the press to report on matters of public concern than they have in the not-so-distant past.[127] Police and prosecutors also have adopted practices aimed at harassing journalists in order to impede reporting – such as intentional, mass arrests of working journalists covering events

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with sexual assault empowers the government itself to propagandize the population." *Id.* at 257. Moreover, "[t]he presence of anonymous or pseudonymous speech by institutional speakers – whether government agencies or corporations – risks engendering a kind of skepticism toward all such speech on the internet." *Id.* at 262.

[125] Norton & Citron, *supra* note ___, at 909 (arguing that "because government has no individual autonomy interest in self-expression, government's expressive interests do not include an interest in speaking without identifying itself as the speaker" and positing that mis-identified government speech risks compromising "political accountability").

[126] *But see* Branzburg v. Hayes, 408 U.S. 665 (1972).

[127] *See id.* at 709-11 (1972) (Powell, J., concurring) (positing that the institutional press must enjoy some measure of constitutional protection, as an incident of the First Amendment, for news gathering and news reporting activities).

such as the Occupy Protests and the protests in Ferguson, Missouri.[128] The failure of the federal courts to check efforts to impede news gathering and reporting obviously creates serious risks to the process of democratic self-government – which relies on the Fourth Estate in order to function.[129]

Government efforts to impede news gathering activities extend beyond efforts to impede or frustrate professional journalists and include efforts to suppress news gathering activities by would-be citizen journalists. Despite an ongoing problem with police misconduct, state governments have legislated to prohibit the filming of government officials, including police, when in public. To take a relevant example, Illinois maintains a state law that, in some circumstances, arguably prohibits filming police officers, without affirmative consent, while they are in public.[130] Generic privacy laws that prohibit unconsented to recording can also be deployed to impede citizens from recording police encounters with citizens. As one

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[128] Victoria Cavaliere, *Charges Dismissed in Last Cases from Occupy Wall Street March*, REUTERS (Oct. 8, 2013, 5:42 PM), http://www.reuters.com/article/2013/10/08/us-usa-occupy-casesidUSBRE99713H20131008; John Nichols, *The Constitutional Crisis in Ferguson, Missouri*, THE NATION (Aug. 14, 2014, 2:09 PM), http://www.thenation.com/blog/181145/police-overreaction-has-become-constitutional-crisis-fergusonmissouri#.

[129] *See* Christina E. Wells, *Protest, Policing, and the Petition Clause: A Review of Ronald Krotoszynski's* Reclaiming the Petition Clause, 66 ALA. L. REV. 1159, 1164-67 (2015). Professor Wells cogently argues that "law enforcement officials thwart protests by engaging in online surveillance to gather information about the protestors, using it to facilitate pretextual arrests, and participating in coercive information gathering through individual interrogations of protestors." *Id.* at 1166. Moreover, "many journalists covering protests have been harassed or arrested." *Id.* Wells is surely correct to posit that "[s]urveillance of protestors and arrests of journalists are likely to chill protest activity or at the very least manipulate the public's access to protestors' messages." *Id.* at 1166-67.

[130] Rebecca G. Van Tassell, Comment, *Walking a Thin Blue Line: Balancing the Citizen's Right to Record Police Officers Against Officer Privacy*, 2013 BYU L. REV. 183, 187-88 ("The two-party recording statute in Illinois is unique, and undoubtedly the harshest in the country. Containing no explicit expectation of privacy or secrecy requirement, the Illinois recording statute requires the consent of all parties and protects absolutely all conversations.").

commentator observes, "[i]n many instances, law enforcement officers can utilize these statutes to arrest citizens that are recording the officers' interactions with the public."[131]

Of course, the federal courts should reject such a ban on First Amendment grounds – after all, police officers have no reasonable expectation of privacy when in public.[132] The ostensible purpose of applications of general privacy statutes to prevent recording of police activity in public is to protect the safety and privacy of the police officers. But, even absent such a targeted privacy law, non-targeted proscriptions against "impeding" or "interfering" with a law enforcement officer also may be used to prevent the filming of police engaged in law enforcement activity (although that label seems grossly inappropriate with respect to recent spate of police shootings, including the deaths of African American citizens at the hands of police officers in Baton Rouge, Louisiana,[133] Cleveland, South Carolina,[134] and St. Paul, Minnesota[135]).

The social media reporting that followed the shooting of Walter Scott, in North Charleston, South Carolina, by Officer Michael Slager demonstrates quite clearly how speech, in

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[131] *Id.* at 183-84.

[132] Caycee Hampton, Note, *Confirmation of a Catch-22:* Glik v. Cunniffe *and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549, 1559 (2011).

[133] *See* Richard Fausset & Richard Perez-Peña, *U.S. Examines Police Killing in Louisiana*, N.Y. TIMES, July 7, 2016, at A1.

[134] *But see* Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (finding police video taping protected under the First Amendment). The lower federal and state courts have been uneven in applying the First Amendment to protect recording police officers in public. *See* David Murphy, Comment, *"V.I.P. Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL. L. REV. 319, 326 ("Despite 'sweeping' decisions like *Glik* that strongly protect videographers' rights, police engage in arrests and intimidation tactics to suppress videographers from filming police conduct in public."). For a general discussion of how generic anti-recording statutes can be used to prevent the public from filming police, and a discussion of court decisions sustaining this practice, see *id.* at 326-38.

[135] *See* Mitch Smith & Matt Furber, *A Plea for United as Hundreds Mourn Minnesota Man*, N.Y. TIMES, July 15, 2016, at A17.

the form of public reportage, can help to secure other civil rights and liberties.[136] As two journalists commenting on this sad event noted, "[t]he South Carolina shooting demonstrates the power of citizen-captured video in the most salient way."[137] Without question, empowering citizen-journalists, through the vigilant defense of speech rights, would pay dividends with respect to securing other constitutional rights.

Bans on reportage also have been adopted by several states with respect to industrial farming practices that animal rights activists believe constitute animal cruelty. These so-called "ag-gag" laws are specifically drafted with the purpose and intent of preventing activists from sharing the conditions under which farm animals live with the general public.[138] Professors Alan Chen and Justin Marceau explain that "Ag Gag laws seek to stifle whistle blowing and reporting regarding practices at commercial agricultural facilities."[139] To date, however, the state and

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[136] *See* Alan Blinder & Manny Fernandez, *Residents Trace Police Shooting to a Crime Strategy Gone Awry*, N.Y. TIMES, Apr. 10, 2015, at A1; Michael Eric Dyson, *Racial Terror, Fast and Slow*, N.Y. TIMES, Apr. 17, 2015, at A31.

[137] Farhad Manjoo & Mike Isaac, *Right Time, Right Place, Right App for Capturing Interactions with Police*, N.Y. TIMES, Apr. 9, 2015, at A17.

[138] *See* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1439-40, 1466-71 (2015); Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How* United States v. Alvarez *Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566 (2014). Professors Chen and Marceau observe that "Ag Gag laws provide a timely and straightforward case study of the First Amendment's role in protecting high value lies because a key component of these laws is the criminalization of misrepresentations made in order to gain access to agricultural facilities." *Id.* at 1439; *see also* Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, ATLANTIC ONLINE (Mar. 20, 2012, 9:06 AM), http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674 (discussing an Iowa statute that prohibits undercover investigation of factory farm practices).

[139] Chen & Marceau, *supra* note ___, at 1439 n.9.

federal courts have not acted aggressively to invalidate these statutes.[140] Laws that seek to punish activity because of its communicative aspects, rather than despite them, should be deemed constitutionally invalid.[141]

Chapter 8: Police, Public Prosecutors, and Non-Judicial Actors.

Non-judicial actors play an important role in determining the scope of protected speech rights; if police and prosecutors arrest and charge protestors, then drop charges that seem questionable on First Amendment grounds, the damage is done. Arrest and release plainly has a serious chilling effect on the expression of dissent. Even so, however, this modus operandi is increasingly commonplace as a tactic for managing protest; it also almost always evades judicial scrutiny. Chapter 7 considers the impact of non-judicial actors in defining and limiting the scope of First Amendment rights.

Chapter 9: The Increasingly Strong Link Between Property and Speech and the Concomitant Growing Inequality in Speech Rights.

In many areas, we see an increasing loss of First Amendment rights where the exercise of those rights requires access to public property or to public support. If you have property, your First Amendment rights are more secure than ever, but in a democracy premised on the equal citizenship, if not equal dignity, of all persons, we should be concerned about linking expressive

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[140] *But cf.* Animal Legal Def. Fund v. Otter, 118 F.3d 1195, 1202-04, 1207-09 (D. Idaho 2015) (invaliding, on First Amendment grounds, Idaho's ag gag statute as an impermissible content-based restriction of speech that does not advance a compelling state interest in a sufficiently narrowly tailored way).

[141] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that "a government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (emphasis added)).

freedom to the ownership of property (whether in the form of land or cash). If one compares and contrasts *City of Ladue v. Gilleo*,[142] which invalidated a city ordinance that prohibited a private land owner from displaying a political sign on her home's lawn, with *Taxpayers for Vincent*,[143] which upheld, against a First Amendment challenge, a Los Angeles County ordinance that prohibited the use of utility polls for political speech, the centrality of property to the exercise to free speech rights comes into very clear focus.

Selective government subsidies of speech activity can create significant distortionary effects on the marketplace of ideas.[144] As Professor Kathleen Sullivan has observed, "[i]f government could freely use benefits to shift viewpoints in a direction favorable to the existing regime, democratic self-government would be undermined."[145] She persuasively posits that selective distribution of government subsidies can interfere with a "distributive concern whenever the content of a liberty includes some equality principle or entitlement to government neutrality" and that the "[t]argeting of benefits can destroy such equality and neutrality as readily as can imposition of harms."[146]

However, in the context of the process of democratic self-government, the absence of subsidies itself will inevitably produce market distortions that do not rest comfortably with the formal equality that we proclaim for all voters. Subsidies can have distortionary effects – but so

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[142] 512 U.S. 43 (1994).

[143] 466 U.S. 789 (1984).

[144] *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

[145] *Id.* at 1496.

[146] *Id.*

too can wholly unregulated markets in which the power to speak is a function of one's wealth.[147] As Professor Owen Fiss has argued, "[j]ust as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship."[148] Accordingly, "[t]he state should be allowed to intervene, and sometimes even required to do so … to correct for the market."[149]

In doctrinal terms, the most obvious solution would be for the federal courts to more readily recognize a positive aspect of the First Amendment; the notion that the government has an affirmative duty to facilitate speech related to the process of democratic self-government. If such a doctrinal innovation is too powerful a medicine in a constitutional culture that generally abjures the recognition of positive constitutional rights,[150] the second best solution would be to deploy the unconstitutional conditions doctrine more aggressively to disallow government efforts to use its largesse to squelch speech.[151]

Chapter 10: Conclusion.

The final chapter will briefly offer some concluding thoughts. If we genuinely believe that the First Amendment exists to facilitate the process of democratic self-government, then the federal courts need to consider more carefully and more reliably the government's obligations to

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[147] *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412-16 (1986).

[148] *Id.* at 1415.

[149] Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 791 (1987).

[150] *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). *But cf.* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 260 (proposing that "[i] n every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the considerations of public policy").

[151] *See* Sullivan, *supra* note ___, at 1496-97, 1503-06.

use resources to support expressive activities. A serious and meaningful commitment to equal citizenship requires more than merely abstract equality. Even if government may not legitimately seek to equalize all speech and all speakers by leveling down speakers with the financial means to disseminate their message effectively without any government aid or support, the First Amendment, properly defined and applied, should require that the government suffer inconvenience and shoulder financial burdens in order to facilitate the process of democratic self-government.[152] The contemporary federal courts are both too lenient and too demanding; they are too lenient in permitting government to adopt policies that chill or prevent speech that requires some sort of government support, and are also too demanding in disallowing reasonable government efforts to ensure that democracy functions as a fair fight.

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[152] *See*, *e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (holding that a local government could not seek to shift the cost of protecting unpopular speakers on to the speakers themselves because such a policy would empower popular majorities to impose a heckler's veto on those seeking to disseminate unpopular ideas or messages).

Chapter 3

Reduced First Amendment Protection for Government Employee Speech and the Underappreciated Importance of Whistle Blowing Speech to Securing Government Accountability Through the Electoral Process

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.[1] Without information, the electoral process cannot serve as an effective means of ensuring government accountability for both its actions and its failures to act.[2]

[1] *But see* Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 B.Y.U. L. REV. 1819, 1830-34 (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 non-existent").

[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 BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA (1973); Jerome 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, 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

Professor David Anderson observes that for 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."[3] The press obviously plays a crucial role in facilitating the process of democratic deliberation and government accountability.[4] But, the press can play this role only if journalists are able to obtain and disseminate accurate information about the government's activities.[5]

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.[6] 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

U.S. 241, 254-58 (1974) (invalidating on First Amendment grounds a Florida law the required a newspaper to afford candidates for public office a "right of reply" if a newspaper opposed the candidate's election).

[3] Anderson, *supra* note ___, at 537.

[4] *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2434-37 (2014).

[5] *Id.* at 2446-47; *see* West, *supra* note ___, 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).

[6] *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 (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").

to the voters – who express a collective judgment on the success, or failure, of the incumbent officers on election day through their ballots.[7]

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.[8] Because intelligence agencies invariably operate in largely non-transparent ways, only an insider – a whistle blower – could credibly confirm the existence of government domestic spying programs like PRISM. 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.[9] Or by aiding or inhibiting the reelection of a sitting member of Congress – or even a presidential candidate – through selective data dumps.[10] Truly, information is power –

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[7] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27, 36-38 (1948).

[8] *See* Editorial, *Edward Snowden, Whistle Blower*, N.Y. TIMES, Jan. 2, 2014, at A18;; *see also* Siobhan Gorman, Carol E. Lee & Janet Hook, *Obama Vows Spying Overhaul; NSA Leaker Snowden's Revelations Hasten Call to Revamp Suveillance Court and Patriot Act*, WALL ST. J., Aug. 10, 2013, at A1.

[9] *See* Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1952-58 (2013).

[10] *See* Office of the Director of National Intelligence, Intelligence Community Assessment: Assessing Russian Activities and Intentions in Recent U.S. Elections (Jan. 6, 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 , Davis Sawyer & Scott Shane, *Hacking the Democrats*, N.Y. TIMES, Dec. 14, 2016, at A1 (reporting on how the Russian government used sophisticated

particularly when the information is purloined from smart phones, email accounts, and web surfing habits. Very few people would want to share with God and country all of their most intimate communications and on-line activities.

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.[11] 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."[12] Instead, "[t]he voters must have it, all of them."[13]

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?

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cyber attacks to damage Hillary Rodham Clinton's credibility and, in the process, enhanced Donald Trump's electoral chances); Michael D. Sheer & David E. Sanger, *Putin Led Scheme to Aid Trump, Report Says*, N.Y. TIMES, Jan. 7, 2017, at A1 (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).

[11] *See* MEIKLEJOHN, *supra* note ___, at 37 ("n 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.").

[12] *Id.* at 88.

[13] *Id.*

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. A government employee who possesses information relevant to government misconduct has a choice to make: She could release the information to the 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.[14] For example, if we wished to encourage strongly public disclosure about matters of public concern, we would provide very robust legal protections against a government employer retaliating against a government employee who engages in whistle blowing activity.[15]

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[14] *See* Louis Michael Seidman, *Powell's Choice: The Law and Morals of Speech, Silence, and Resignation by High Government Officials* in SPEECH AND SILENCE IN AMERICAN LAW 48, 78-80 (Austin D. 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).

[15] We should also consider whether threatening whistle blowing 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). Current First Amendment law routinely taxes the cost of 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 (2010); Hustler Magazine, Inc. v. Falwell,

Simply put, ambiguity in the scope 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. 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 whistle blowing speech.[16] 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. Such protection for "whistle blowing 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 whistle blowing activities.[17] Nor has Congress enacted legislation that provides comprehensive and reliable protection to government

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485 U.S. 46 (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, 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 – but, at present, does not.

[16] *See infra* text and accompanying notes ___ to ___.

[17] *See* Julian W. Kleinbrodt, Note, *Pro-whistleblower Reform in the Post-*Garcetti *Era*, 112 MICH. L. REV. 111, 118-28 (2013) (discussing and critiquing the shortcomings and limitations associated with the contemporary *Connick/Pickering* doctrine in the context of whistle blowing government employee speech).

employees who disclose truthful, but embarrassing, information about significant failures in the operation of government programs.[18]

This chapter 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.[19] Part II then contrasts the approach of the Rehnquist and Roberts Courts, which has 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.

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

[19] Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 512 (1968).

Part IV proposes the creation of a new First Amendment speech category: Namely, "whistle blowing" 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; whistle blowing speech conveys important benefits on the body politic that transcend the government's 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 chapter.

Government employees are not uncommonly uniquely situated to provide voters with information essential to holding government accountable. First Amendment doctrine, under the existing *Connick*/*Pickering* doctrine, fails to take this consideration into account. 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, whistle blowing speech, an important subset of government employee speech, clearly facilitates the process of holding government democratically accountable through the electoral process.

Just as political speech enjoys enhanced First Amendment protection vis á vis other kinds of speech, such as commercial speech[20] and sexually-explicit speech,[21] so too, government

[20] *See* Central Hudson Gas & Elec. Co. v. Public 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).

[21] *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 artisitic freedom); Andrew Koppelman, *Does*

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 whistle blowing speech, only government employee speakers can engage in whistle blowing 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.

I. The Warren and Burger Court's Contingent Protection of Government Employees as Citizen-Participants in the Process of Democratic Self-Government.

Government employees have never enjoyed robust First Amendment protection for their speech activity – whether on the job or off the clock.[22] Nothing even remotely close to a First Amendment privilege for whistle blowing 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.[23] The *Pickering* test, however, was never particularly robust – it involves a balancing exercise that considers the employee's interest in

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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 those who peruse such materials).

[22] *See*, *e.g.*, McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (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").

[23] Pickering v. Board of Educ., 391 U.S. 512 (1968).

speaking out about a matter of public concern and then weighs this private interest against a government employer's interest in maintaining a well-functioning workplace.

Marvin L. Pickering was a high school teacher in Will County, Illinois. 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.[24] 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.[25] 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.[26] 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."[27] The Illinois state courts upheld the school district's discharge of Pickering as an appropriate action to rein in an insubordinate school district employee.[28]

The U.S. Supreme Court granted review and reversed the Illinois Supreme Court. 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. He

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[24] *Id.* at 575-78 (appendix reprinting Mr. Pickering's letter to the editor).

[25] *See id.*

[26] *Id.* at 566-67.

[27] *Id.* at 564-65 (internal quotations and citation omitted).

[28] *Id.* at 565.

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 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."[29] On the other hand, however, Justice Marshall emphasized that "it cannot be gainsaid 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."[30] 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."[31]

From its inception, the *Pickering* doctrine thus required federal courts to weigh the disruption associated with the continued employment of a whistle blower 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. Moreover, the value of information to

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[29] *Id.* at 568.

[30] *Id.*; *see also* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

[31] *Pickering*. 391 U.S. at 568.

voters will often correlate positively with the potential disruption that release of the information might cause to the government office about which it relates. 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 co-workers.

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.[32] 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. 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 whistle blowing activity.

To be sure, Justice Marshall did emphasize the importance and value of having government employees participate in the process of democratic deliberation. 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."[33] Moreover,

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

[33] *Pickering*, 391 U.S. at 572.

"[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."[34] In this regard, one should bear in mind that Marvin Pickering was less a crusading whistle blower than an angry crank; his claims about the school district's policies were poorly informed and, in fact, contained numerous factual inaccuracies.[35]

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 whistle-blowing 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 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.[36] 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,

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[34] *Id.*

[35] *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").

[36] *Id.* at 571-75.

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."[37] 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."[38]

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.[39] To be sure, in *Connick v. Myers*,[40] the Burger Court narrowed *Pickering*'s scope by requiring that the speech at issue relate to a matter of public, rather than private, concern.

Writing for the *Connick* 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

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[37] *Id.* at 572-73.

[38] *Id.* at 573.

[39] *See*, *e.g.*, Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 414-15 (1979); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977); Perry v. Sindermann, 408 U.S. 593, 598 (1972);

[40] 461 U.S. 138 (1983).

scrutinize the reasons for her discharge."[41] 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."[42]

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."[43] 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."[44] Justice White strongly argued that speech primarily related to internal employment disputes does not seriously implicate core First Amendment values.[45] Thus, "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

[41] *Id.* at 146.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 146-47.

[45] S*ee 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.").

taken by a public agency allegedly in reaction to the employee's behavior."[46] *Connick* sets forth 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."[47]

Even though *Connick* 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.'"[48] 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.[49]

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

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[46] *Id.*

[47] *Id.* at 148.

[48] Rankin v. McPherson, 483 U.S. 378, 380 (1987).

[49] *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.").

with the Warren and Burger Court precedents that permitted government employees to invoke the First Amendment to contest allegedly retaliatory discharges from government employment. 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.

II. Reduced Protection for Government Workers' Speech Activity Under the Rehqnuist and Roberts Courts.

Whatever the limits and shortcomings of the *Connick*/*Pickering* doctrine, the Warren and Burger Courts applied the doctrine more generously than their successors. The Rehnquist and Roberts Courts, although never flatly 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" that it embraces.[50] The protection of government employee speech is *always* contingent on the reaction of other employees with the workplace. If a whistle blower's mere presence in the government office produces significant disruption that

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[50] HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140– 41, 145 (1965) (discussing the concept of "heckler's veto," which entails using an adverse public reaction as a justification for silencing an unpopular speaker); *see* Owen E. 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 authorship to Professor Kalven).

impedes the office's work, then the government employer may fire the whistle blowing employee without violating the First Amendment.[51]

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.[52] To state 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

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[51] *See Connick*, 463 U.S. at 151-53.

[52] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (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:

> There 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 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. 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's 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").

government workers. For example, in *Waters v. Churchill*,[53] 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. 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.

Justice Sandra Day O'Connor, writing for the *Waters* majority, observed that "practical realities of government employment" require that in "many situations. . . the government must be able to restrict its employees' speech."[54] 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."[55] 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 matter of public concern.[56] This result obtains because "[m]anagement can spend only so much of their time on any one employment decision."[57] 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.

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[53] 511 U.S. 661 (1994).

[54] *Id.* at 672.

[55] *Id.*

[56] *Id.* at 680-81.

[57] *Id.* at 680.

The Supreme Court further curtailed its protection of government employee speech in *Garcetti v. Ceballos*.[58] 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 misrepresentation."[59] 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.[60] Following his testimony, Ceballos claimed that he was reassigned and subjected to other forms of retaliatory action by his government employer.[61]

Writing for the *Garcetti* majority, Justice 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 scope of the employee's work-related duties. 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."[62] Consistent with this view, the *Garcetti* majority held that "when public employees make statements pursuant to their official duties, the employees are not

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[58] 547 U.S. 410 (2006).

[59] *See id.* at 414-15.

[60] *Id.*

[61] *Id.* at 415-16.

[62] *Id.* at 418.

speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[63]

The Supreme Court limited the scope of *Garcetti* by finding that testimony offered under subpoena does not automatically constitute employment-related speech.[64] 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."[65] Moreover, "[t]hat is so even when the testimony relates to his public employment or concerns information learned during that employment."[66] 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*.[67] 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."[68] 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

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[63] *Id.* at 421.

[64] Lane v. Franks, 134 S. Ct. 2369, 2378-79 (2014).

[65] *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.").

[66] *Id.* at 2378

[67] *See id.* at 2579-80.

[68] *Id.* at 2578.

requires employees who speak out about matters that arguably fall within the scope of their employment to do so at their own peril.

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 falls within the scope of the employee's duties.[69] 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 or her employment.[70]

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. This, of course, makes it less likely that the people best able to inform the public about misconduct in public 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.[71] Moreover, enhanced First Amendment protection for whistle blowing 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 whistle blowing speech.

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

[70] Waters v. Churchill, 511 U.S. 661 (1994).

[71] *See infra* text and accompanying notes ___ to ___.

III. The Paradox of Conferring Comprehensive First Amendment Protection Against Government Employers Retaliating Against a Government Employee Based on the Employee's Partisan Affiliation.

Dean 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.[72] Department of Motor Vehicles (DMVs) are already widely thought to be highly dysfunctional places[73] – were DMV employees free to engage in speech activity at will, while on the job, DMVs would be even less functional. 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, Dean Post observes that "the allocation of speech to managerial domains is a question of normative characteristics."[74] 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 employer.

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[72] *See* Post, *supra* note ___, at 164-65, 171-76.

[73] *See* Zootopia (2016) (presenting DMV offices in Zootopia, an otherwise paradisical urban metropolis populated by peacefully-coexisting anthropomorphic animals, as being staffed entirely with slow talking, slow moving, and slow acting sloths).

[74] *Id.* 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.[75] 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.[76] Indeed, 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.[77] 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 asssociations.[78]

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[79] that violates the First Amendment.[80] As Justice Stephen Breyer explains,

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[75] *See* Elrod v. Burns, 427 U.S. 347, 355-60, 372-73 (1976) (plurality opinion).

[76] *See* Branti v. Finkel, 445 U.S. 507, 517-19 (1980).

[77] *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 720-21 (1996).

[78] Heffernan v. City of Paterson, 136 S. Ct. 1412, 1417-19 (2016).

[79] For descriptions and thoughtful discussions of the problem a 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).

[80] *Heffernan*, 136 S. Ct. at 1418.

"The 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."[81] 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."[82] 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.[83]

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 balancing test – but only in a highly formalized way. The 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.[84]

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

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[81] *Id.* at 1419.

[82] *Id.*

[83] *See id.* at 1418-19.

[84] *See Branti*, 445 U.S. at 517-19.

hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[85] 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 policymaking duties or processing confidential information, the fact that the person's presence in the office is highly disruptive is entirely irrelevant.

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."[86] This result obtains because to permit a government employer to retaliate against an employee – whether 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."[87] 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."[88]

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[85] *Id.* at 518.

[86] *Heffernan*, 136 S. Ct. at 1418.

[87] *Id.*

[88] *Id.* at 1419.

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

IV. The Need to Provide Enhanced Protection to Government Workers Who Facilitate Democratic Accountability by Engaging in Whistle-blowing 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. 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.[89]

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[89] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

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.[90]

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"[91] 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 sleeve.[92]'

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.

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[90] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1459-61, 1503-05 (1989).

[91] *See* KALVEN, JR., *supra* note ___, at 140-41, 237 n.327 (identifying the First Amendment problem that permitting government to cite an audience's hostile reaction to a speak to serve as a basis for requiring the speaker to cease and desist from speaking presents because it essentially makes the speech rights of a political minority seeking lawful change contingent on the good will of a potentially hostile majority).

[92] 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 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 School Dist. v. Doyle, 429 U.S. 274, 286-87 (1977).

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 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 whistle blower 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*/*Pckering* analysis works. Unruly co-workers who behave badly in the wake of whistle blowing activity provide the government employer with a constitutionally acceptable predicate for firing the worker who called problems within the agency to the attention of the body politic.

In strong contrast with 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. The Supreme Court has explained 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. 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. If disruption to the 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,[93] 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. An ideological commitment could easily be as important – if not more important – to a government employee as a private citizen engaged in the project of democratic deliberation.

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.[94] Snowden certainly exercised his individual autonomy as a speaker by leaking classified information about PRISM – but his speech also

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[93] ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 254-61, 282-90 (1995); *see* Post, *supra* note ___, at 164-67, 170-75.

[94] *See supra* Gorman, et al., *supra* note ___, at A1.

conveyed particularlized knowledge that we should care about collectively because it facilitated the citizenry's ability to hold government accountable (or not). In some instances, the efficacy of democratic elections to serve as an effective brake on bad government behavior necessarily rests on information that only a government employee possesses. 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 whistle blowing should be afforded more constitutional protection 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 *Sndyer v. Phelps*[95] seem to hold that a matter of public concern lies, more or less, in the eye of the beholder. If Westboro Baptist Church's lunacy[96] 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.[97] 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

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[95] Snyder v. Phelps, 562 U.S. 443 (2011).

[96] *Id.* 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.*

[97] *Id.* at 458-61.

second-guess even a marginally plausible claim that speech relates to a matter of public concern."[98]

As the social cost of protecting speech increases, it becomes correspondingly easier to deem the government's interest in restricting the speech compelling.[99] If 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 viewpoint discrimination makes this liberal approach to defining – or, more aptly, refusing to define – a matter of public concern quite understandable (indeed, even predictable).

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. For example, we protect partisan identity in nearly absolute terms in order to avoid the unconstitutional conditions problem that would arise if we permitted

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[98] RONALD J. KROTOSZYNSKI, JR., PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE 271 n.169 (2016); *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, 674, 679-80 (1990).

[99] William W. Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1640-43, 1646-48 (1996).

government as an employer to cage its employees as citizens.[100] But government employees act no less as citizens when they contribute to the process of democratic deliberation by providing information relevant to the function of elections in securing government accountability.

First Amendment theory and doctrine should be sufficiently supple to take account of this important contextual consideration. 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. To state the matter simply, whistle blowing speech is not merely a private good, but also constitutes a public good, and First Amendment doctrine should reflect this fact.

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[100] *See* Sullivan, *supra* note ___, at 1416, 1503-04. Sullivan cautions that the *Connick/Pickering* line "present the obvious danger that courts will find justification for requiring public employee conformity or silence too lightly." *Id.* at 1504 fn.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.

Accordingly, the Supreme Court should adopt a kind of modified Hand formula[101] to govern the analysis of whistle blowing 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

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[101] 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 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). To be sure, the Hand Formula does have its fans. *See*, *e.g.*, Richard 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.

Id.; *see also* Dennis v. United States, 183 F. 3d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). In the context of whistle blowing speech, a reviewing court would consider the gravity of the wrongdoing exposed by the government employee's whistle blowing 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 would probably not have come to light absent the whistle blowing speech.

employee speech, namely "whistle blowing speech," that would be eligible for more robust protection under the First Amendment.

One might object that the protection of whistle blowers 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 forms of whistle blowing activity by government employees.[102] But, these statutes often contain serious gaps and omissions. More often than not, an employee who engages in whistle blowing speech will quickly find herself standing in the unemployment line. If I am correct to posit that whistle blowing 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 objection could be leveled at the Supreme Court's use of the First Amendment to constitutionalize civil service protections and, in so doing, protect governemnt employees from retaliation for partisan activity. The existence of the Hatch Act,[103] and similar state laws, did not prevent or deter the Justices from applying the First Amendment vigorously to

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[102] [cite relevant examples of such state laws]

[103] 18 U.S.C. §§ 61h, 18 U.S.C. § 61o (2016). 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 (1883), § 2, 22 Stat. 403-404. 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 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 95.

protect government employees from being compelled to engage or refrain from engaging in partisan activity.[104]

In fact, Justice Stevens relied 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.[105] 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. Under the same analytical logic, the existence of laws conveying limited protection on whistle blowers should support, rather than undermine, the creation of a constitutional privilege that shields whistle blowers from retaliation by their 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 to have government employees engaged as partisan agents for political parties to function. 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

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[104] 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").

[105] *See id.* at 370-73.

government, then the electorate must have accurate, truthful information about areas in which the government's efforts are failing.

V. Conclusion

Existing First Amendment theory and practice underprotects government employee speech in general and grossly underprotects whistle blowing speech by government employees. The *Connick*/*Pickering* doctrine leaves government employee speech's protection largely, if not entirely, in the hands of their co-workers 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 co-workers might present a better (stronger) case for discipline. Given that the First Amendment, as a general matter, prohibits viewpoint discrimination, 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 mis-attributed speech – or even speech that did not

happen – hardly protects the government employee as a citizen-speaker.[106] Nor does denying protection to government workers who speak on a matter of public concern within the context of their employment duties.[107] The Rehnquist and Roberts Courts took an already weak scope of protection for government employee speech and rendered it even weaker. Thus, in this important context, First Amendment rights have contracted, rather than expanded, over time.

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, whistle blowing 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 whistle blowing 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

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[106] *See* Waters v. Churchill, 511 U.S. 661, 680-81 (1994).

[107] *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. *See id.* at 425. *But cf.* Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

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; if they 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, precisely to facilitate the ability of ordinary citizens to enforce government accountability, then stronger medicine is clearly needed. First Amendment theory and doctrine can and should take account of these values by conveying targeted and robust protection to whistle blowing speech by government employees.