Article

The Good, the Bad, and the Ugly: A Comparative Constitutional Analysis of Whistleblowing Speech, the Government's Managerial Domain, and the Imperatives of Democratic Self-Government

Ronald J. Krotoszynski, Jr.†

Since issuing its 1968 landmark decision in Pickering*, which first recognized that the First Amendment protects government employees' speech about matters of public concern, the U.S. Supreme Court has proceeded to whittle away First Amendment*

† John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. The author wishes to thank, and acknowledge with gratitude, the Knight First Amendment Foundation, at Columbia University, for inviting me to participate in its important symposium, *Permission to Speak Freely? Managing Government Employee Speech in a Democracy*, which took place on April 4–5, 2024, and considered, in some detail, various problems associated with protecting the speech rights of government employees. I am also grateful for the opportunity to workshop an earlier draft of this Article at the Free Speech/Media Law Discussion Forum, hosted by the National University of Public Service (Ludovica), in Budapest, Hungary, on June 13–14, 2024. *The Good, the Bad, and the Ugly* reflects the benefit of the very helpful, constructive suggestions and ideas provided by the remarkably talented legal scholars who participated in both events, including, but not limited to, Caroline Mala Corbin, Charlotte Garden, Heidi Kitrosser, András Koltay, Sam Lebovic, Clark Lombardi, Frank LoMonte, David Rabban, and Caprice L. Roberts (with apologies to anyone who should be listed by name but isn't). Jason Carlton, University of Alabama School of Law '26, provided excellent research assistance that greatly facilitated my work on this Article; University of Alabama Bounds Law Library Research Librarian Matthew Neely provided invaluable assistance by identifying and then obtaining relevant U.S., Canadian, and Australian court decisions, statutes, regulations, and secondary literature. I wish to acknowledge, with gratitude, the support of the University of Alabama Law School Foundation, which provided a generous summer research grant that supported my work on this project. Finally, the usual disclaimer applies: Any errors or omissions are the author's sole responsibility.

protections for government employees. The Justices have done so by adopting a series of categorical exclusions to Pickering *that all strongly favor the government as an employer and manager. These subsequent decisions have created a jurisprudential obstacle course that government employees must successfully run in order to invoke the Free Speech Clause at all. The current U.S. approach is plainly bad. However, it could be even worse—it could be ugly. In Australia, the High Court has given the government a green light to censor any and all government employee speech under viewpoint-based speech regulations. Thus, in today's Australia, it's perfectly fine for a public servant to praise the government but not to criticize it.*

By way of contrast, in Canada, no categorical exclusions exist on the scope of constitutionally protected government employee speech, and the government must always be prepared to justify disciplinary actions based on a government employee's speech activity. Canada's approach is good—and clearly better than either the U.S. or Australian doctrines. By taking context fully into account, Canada's government employee speech doctrine allows for courts to consider carefully how to reconcile the three competing interests at stake (namely, the government's interest as a manager of its workforce, government employees' autonomy interests as would-be speakers, and the collective interest We the People possess in access to government employee speech in general and whistleblowing speech in particular). Canada has built a better mousetrap; the federal courts should seriously consider reforming the Pickering/Connick/Garcetti *framework to more closely resemble the Supreme Court of Canada's holistic approach.*

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I. INTRODUCTION: ON RECONCILING THE IMPORTANT CONFLICTING INTERESTS AT STAKE WHEN REGULATING PUBLIC EMPLOYEE SPEECH

Since the dawn of democracy and democratic self-government, politicians inevitably and invariably covet praise and despise criticism. It is in their nature to claim credit when things go well but to avoid blame (and responsibility) when things go badly. When public criticism is particularly well-informed—and, hence, effective—because a government employee publicly discloses highly relevant, deeply embarrassing information held only by the government itself, the criticism stings even more sharply because it has the ring of truth.

Structural political dynamics associated with seeking reelection will lead politicians, of every ideological stripe, to attempt to silence government employees by prohibiting them from providing the body politic with particularly well-informed criticisms of the government and its policies.[1] Thus, it should not be surprising that in democracies around the world, persons holding elected office routinely adopt laws and regulations designed to stifle public criticism from those best positioned to empower voters with the information required to hold the government accountable—namely, government workers.[2] At the same time, however, voters must have access to accurate information about government agencies and their successes and failures in order to cast well-informed ballots on election day.

Not uncommonly, only government employees will have access to information essential to well-informed electoral choices. Thus, a serious conflict arises between the interests of incumbent public officials in suppressing truthful, but damaging,

1. *See* Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 270 (2018) ("Since time immemorial . . . government officers will race to claim responsibility for successes but are far more reticent to acknowledge—much less take responsibility for—government failures.").

2. 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. MIA. L. REV. 449, 469 (2011) (noting 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 arguing that "all presidential administrations, regardless of political party, are prone to suppress bad news whenever possible").

information and the needs of We the People to have this information to enforce democratic accountability.

This conflict certainly exists in the United States but will also arise in any and every democratic polity that recognizes freedom of expression as a fundamental human right. For example, Australia, like the United States, recognizes a constitutional interest in freedom of speech.[3] Moreover, Australia does so despite the absence of an express free speech guarantee in its federal constitution.[4] This in turn gives rise to a collision between the interests of the government as an employer/manager and public employees as speakers/citizens—a clash that the High Court of Australia (HCA), Australia's equivalent of the U.S. Supreme Court, must mediate.

Unfortunately, however, the HCA has adopted an approach to managing this conflict that essentially zeroes out the speech rights of government employees in favor of the managerial prerogatives of department and agency heads.[5] But this approach could seriously impede the use of elections as a means of securing government accountability.

Consider this scenario: Suppose that a sitting Australian Prime Minister—say Scott Morrison—secretly assigned himself multiple important cabinet posts, concurrent with the appointment of sitting ministers ostensibly in charge of these cabinet departments, and suppose further that this bizarre state of affairs went entirely undiscovered during his term of office.[6] Such

3. *E.g.*, *Australian Cap Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 (Austl.); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48–49 (Austl.); *see infra* Part IV (discussing Australia's implied freedom of political and governmental communication).

4. *See, e.g.*, *infra* notes 225–26 and accompanying text (discussing the recognition of an implied freedom of speech in Australian caselaw).

5. *See Comcare v Banerji* [2019] HCA 23, ¶¶ 29–38, 42 (Austl.) (Kiefel, CJ, Bell, Keane, & Nettle, JJ) (holding that a government employee's speech critical of the government does not enjoy any constitutional protection because the public service must appear apolitical to maintain its integrity); *see also infra* Part IV.B–C (discussing *Banerji* in some detail and setting forth the many normative and practical shortcomings of the HCA's approach to government employees' speech).

6. Damien Cave, *The Secret Powers of an Australian Prime Minister, Now Revealed*, N.Y. TIMES (Aug. 16, 2022), https://www.nytimes.com/2022/08/16/world/australia/scott-morrison-minister.html [https://perma.cc/TL7V-QAJD] ("Turns out, the blustery leader that Australia chose to evict from office in May, Scott Morrison, had elevated himself to new heights. After Covid arrived in March of 2020, he wasn't just the prime minister. He swore

an arrangement would mean that the Prime Minister was exercising government power secretly and without any public accountability either to the voters or to Parliament. Yet, this is precisely what happened; Morrison double assigned himself ministerial powers over *five* cabinet departments without disclosing this action to anyone inside or outside the government (other than Australia's Governor General, who said nothing publicly about the dual appointments).[7] That significant government power could be exercised in such a dramatically unaccountable fashion, with no one working in the Prime Minister's office willing to blow the whistle, demonstrates very clearly that Australia provides insufficient protection—and, therefore, incentive—for a public servant to embrace speech over silence.[8]

This sequence of unfortunate events in Australia highlights another important truth about government: Politicians, around the world, will attempt to leverage the accident of working for the government to impose an *omerta* (or code of silence) on government employees' public disclosure of true, but highly embarrassing, information. Indeed, to not do so, when such self-serving action would otherwise be lawful, arguably constitutes a form of political malpractice. In consequence, judges have a critical role to play in safeguarding the speech rights of government

himself in as a second health minister, finance minister, resources minister and home affairs minister, along with appointing himself co-treasurer. And he kept his new roles a secret from the public and most of his colleagues in Parliament.").

7. *Id.*; Adela Suliman, *Australians Slam Former Leader for Secretly Taking Five Cabinet Jobs*, WASH. POST (Aug. 16, 2022), https://www.washingtonpost.com/world/2022/08/16/australia-prime-minister-scott-morrison-jobs [https://perma.cc/HAB6-HCHH] ("[F]ormer prime minister of Australia, Scott Morrison, took up five other ministerial positions while he was in power, unbeknown to the Australian public and many of his colleagues — prompting outrage in the country and online . . . . Morrison . . . was appointed as minister of health, finance, home affairs, treasury and industry between March 2020 and May 2021. . . . These were all significant cabinet roles, which already had ministers in place.").

8. After Morrison's secret cabinet appointments came to light, Australia's parliament adopted a new law to prevent any future prime minister from following Morrison's example. *Ministers of State Amendment Act 2023* (Cth). Under this law, any and all ministerial appointments must be transparent and publicly announced. *Id.* at sch 1 subdiv 6.

employees from governments bent on compelling their silence as the price of working for the state.[9]

In the absence of some sort of external constraint, all relevant political incentives run in favor of imposing a code of silence on government employees as a condition of their employment at a government office. The coerced silence of public employees who possess information relevant to voters, in turn, means that voters will not have the information requisite to render prudent electoral choices.[10] Voters cannot hold the government

9. *See, e.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (holding that John J. McAuliffe, a local police officer, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"). Justice Oliver Wendell Holmes, Jr., then serving on the Supreme Judicial Court of Massachusetts, framed government employment as a mere privilege that government employers could, if they wished, condition on the cession of government employees' constitutional right under the First Amendment to participate in the process of democratic deliberation. *See id.* at 517–18 ("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."). Applying these principles to the case at bar, Holmes concluded that "[o]n the same principle the city may impose any reasonable condition upon holding offices within its control." *Id.* at 518. This approach generally corresponds to—and frames—how the federal courts treated government employers' restrictions on the expressive activities of public employees from December 15, 1791 (the date when the First Amendment became part of the Federal Constitution) to June 3, 1968 (the date when the Supreme Court issued its landmark decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968)). *Compare Pickering*, 391 U.S. at 568 (rejecting the premise 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" and explaining that "[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"), *with* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (rejecting *any* constitutional protection for the speech and association rights of state government employees and holding that "[i]t is clear that such persons have the right under our law to assemble, speak, think and believe as they will" but "[i]t is equally clear that they have no right to work for the State in the school system on their own terms"), *and* United Pub. Workers v. Mitchell, 330 U.S. 75, 94–96, 100 (1947) (upholding the Hatch Act's prohibition of most forms of political activity by federal civil service employees against First Amendment objections and explaining that "Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system").

10. *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 330 (2015) ("[G]overnment employees are crucial safety valves for protecting the people from abuse and incompetence, given their unique access to information and to a range of avenues for transmitting the same.").

accountable for misdeeds they know nothing about.[11] When the press reports truthful information provided by government employees about government misconduct, voters can and will use that information in assessing their electoral choices; in a real and meaningful way, information, in the hands of the voters, is power.[12]

An important question arises from these general principles of democratic self-government: Does a constitutional commitment to the freedom of expression in a democracy require the conveyance of meaningful constitutional free speech protections to government employees who blow the whistle on misconduct or malfeasance within the government office that employs them? In my view, the answer to this question is clearly "yes." As Professor Helen Norton cogently argues, government employees empower We the People to hold government accountable when they blow the whistle, and "[w]e lose this essential check when the [Supreme] Court interprets the Constitution to permit the government to fire its workers for telling the truth about their jobs—particularly when that truth includes their reports of government mismanagement, deceit, or corruption."[13]

If the potential adverse consequences of a government employee choosing speech over silence are too severe, then most public employees will embrace a posture of prudent silence in

11. Obviously, there is an important role for the institutional press in making relevant information available to voters. As the saying goes, "[i]f a tree falls in the forest, but no one hears it . . . ." Democratic self-government relies on a feedback loop involving government officials, voters, and the press, which empowers voters with the information necessary to hold their government accountable through the electoral process. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 537 (1983) (positing that, for the framers, "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"); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443–45 (2014) (arguing that the press can and does play a critical role in the process of democratic self-government by holding those in power accountable).

12. *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1033, 1041–47, 1069–70 (2011) (noting "the common intuition that there does exist a press that performs a special role in our democracy," positing that performance of this important role "is deserving of constitutional status outside the shadow of the Speech Clause," and arguing that the press must be able to access and disseminate truthful information so that voters can secure government accountability).

13. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 67 (2019).

order to avoid those adverse professional consequences, up to and including the loss of their government jobs and significantly diminished employment prospects going forward. The balance of this Article constitutes an extended argument in favor of vigilant and vigorous judicial protection of whistleblowing speech. Such speech is absolutely essential to the effective use of the electoral process as a principal means of securing government accountability.

It is obvious, on the one hand, that democracy suffers when public employees cannot participate in the process of democratic deliberation without putting their livelihoods at risk. As Norton observes, in the contemporary United States, "[f]ederal, state, and local governments employ more than 20 million workers," and "public employees' speech is often important not only to the employees themselves but also to the general public."[14] If the Constitution allows the government to condition employment on public workers' surrender of expressive freedoms otherwise protected by the First Amendment, the damage to the process of democratic deliberation would be vast.

On the other hand, citizens rightfully expect the government to function and to do so on a reliable basis. As Professor Robert C. Post explains, "[m]anagerial authority over speech is necessary for an institution to achieve [its] goals." Accordingly, "[a] government institution's interest in internally regulating speech is therefore its interest in the attainment of the very purposes for which it has been established. . . ."[15] What is more, "this [government] interest remains the same whether or not its [employees] consent to the exercise of government authority."[16]

Critical to managing the government is the maintenance of a politically neutral civil service. As legal commentator Margaret O'Brien notes, "[t]he goal of civil service neutrality is widely recognized as important, and in restricting political activity of public servants, there is an implied assumption that these restrictions are a prerequisite to political impartiality."[17] Even so,

14. *Id.* at 60.

15. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 236 (1995).

16. *Id.*

17. Margaret O'Brien, *Public Employees Restrictions on Political Activity in Canada, Australia, and the United Kingdom*, 15 VIENNA J. INT'L CONST. L. 319, 328 (2021).

however, she adds that "there is disagreement on the necessity of formal regulations or laws to achieve this end."[18]

Despite the government's interest in managing its workforce, efforts to restrict public employees' political speech are at odds with the expressive freedoms the First Amendment protects for the general public. In this regard, Post explains that "[w]hen the state acts to govern the speech of the general public, it often truncates the very process of discussion and exchange by which public ends and public actions are determined,"[19] thereby compromising—violating—core First Amendment values and social objectives. In contrast, however, "[w]hen the state acts internally to manage speech within its own institutions . . . public ends are taken as given."[20] The question of whether government employees' speech should enjoy First Amendment protection thus depends critically on whether the government is simply minding its own store or is instead attempting to distort or disrupt the process of democratic deliberation. In light of this reality, Post concludes that "First Amendment restrictions on the internal management of speech thus turn in the main on whether the management is necessary in order to attain organizational purposes."[21]

In sum, the government clearly possesses a legitimate "managerial authority,"[22] and this government interest is essential to

18. *Id.*; s*ee* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1503–04 (1989) (asserting that the government has a legitimate managerial necessity for regulating government employees' speech while on the job and that such regulations should not automatically be deemed inconsistent with the First Amendment). Professor Sullivan explains that "conditions on public employee speech also may be upheld because some overriding government purpose justifies them, not because they do not pressure rights." *Id.* at 1503. The key for Sullivan, as for Post, is that a reviewing court must impose a meaningful burden of justification on a government employer's invocation of a managerial necessity to regulate or ban public servants' speech rights. *See id.* at 1504 (arguing that limits on government employee speech, such as civil service regulations that limit partisan political activity, "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").

19. POST, *supra* note 15, at 265.

20. *Id.* at 266.

21. *Id.*

22. *See id.* at 240–42, 265–67 (discussing the Court's deference to the government's managerial authority in nonpublic fora). Norton argues that, in general, the government should enjoy a categorical power to regulate public employees' speech only when those employees are specifically hired to speak for

achieving important government policies across myriad areas, including public safety, health care, education, defense, and national security. If the First Amendment conveyed absolute protection on government employees to speak whenever and however they wished, within or outside government workplaces, the business of government could not, and would not, go on.[23] Such an approach would be completely untenable; no constitutional court would write it into a domestic legal system's constitutional law.

Striking and then holding an appropriate balance is, accordingly, essential. Government must be able to organize its workplaces and workforces efficiently and effectively. At the same time, however, the price of government employment cannot include a complete and total loss of government workers' First Amendment rights as citizens and participants in the project of democratic self-government.[24] Striking this balance and

the government itself. NORTON, *supra* note 13, at 64 ("A rule that better accommodates the weighty interests at stake here would permit the government to claim the power to control the speech of its employees as its own only when it has specifically commissioned or hired those employees to deliver a transparently governmental viewpoint for which the public can hold it accountable."). In all other circumstances, Norton posits, "public employee expression that does not meet this demanding transparency-based test for government speech should continue on to the long-standing balancing test that the Court applied to public employees' First Amendment claims for decades prior to *Garcetti*." *Id.* at 65. This approach would seem to be more protective of public workers' speech rights than Post's proposed solution, which would allow government employers to restrict government employees' speech rights in the service of legitimate managerial objectives. *See* POST, *supra* note 15, at 261–67.

23. *See, e.g.*, Bi-Metallic Inv. Co. v. St. Bd. of Equalization, 239 U.S. 441, 445 (1915) ("There must be a limit to individual argument in such matters if government is to go on."). To be sure, in his *Bi-Metallic* opinion, Justice Holmes was writing about the specific issue of an individualized right to be heard in a legislative proceeding involving a proposed general property tax increase. *Id.* at 443–45. *But cf.* Londoner v. City of Denver, 210 U.S. 373, 380–86 (1908) (holding that a property owner has a right to be heard when a municipal government apportions the cost of road and sidewalk improvements to specific parcels of land). The observation, however, holds equally true when the government, as a manager, seeks to organize government workplaces in order to best achieve the offices' purposes and objectives. *See generally* NORTON, *supra* note 13, at 60–67 (acknowledging the legitimate need for the government to hire employees to speak for it, but also cautioning that the government's managerial imperatives should not override any consideration of the importance of government employees' speech to the process of democratic deliberation).

24. *See* Kitrosser, *supra* note 10, at 324–30 (arguing that a categorical rule that excludes any public employee's speech that arguably falls within the scope of the speaker's on-the-job duties will create an unacceptable chilling effect that

successfully maintaining it over time constitute critically important—but also extremely difficult—judicial tasks.

If judges adopt a categorical approach to these questions, then they will invariably strike a balance that unduly favors the government as a manager.[25] Yet, if government employees must have the ability to speak and to participate in democratic deliberation, a balance that simply declares "the government as an employer and manager always wins" will not do. A categorical approach will also likely disregard completely the collective interest that voters have in access to government employees' speech in general and whistleblowing government employees' speech in particular.[26] In consequence, any test for establishing and enforcing the requisite constitutional boundary line must account for (1) the government's managerial interests, (2) government employees' interest in exercising their expressive freedoms, and (3) the body politic's interest in accessing the

denies We the People information essential to securing government accountability via the electoral process); *cf.* NORTON, *supra* note 13, at 64–67 (positing that First Amendment rules should not categorically exclude public employees' speech from First Amendment protection, unless they are clearly speaking for the government itself in some sort of official capacity).

25. *See infra* Part III.A (detailing how the Court in *Connick* and *Garcetti* developed categorical rules that systematically favor the government).

26. By "whistleblowing speech," I mean speech that discloses to the general public important information about the operation of a government agency and especially information that relates to illegal activity, misconduct, or malfeasance within the government agency where the whistleblowing government employee works. Whistleblowing government employees' speech, unlike more generic forms of government employees' speech, "possesses an essential nexus to the electoral process's core function of holding government accountable to the electorate for its actions." Krotoszynski, *supra* note 1, at 302. This characteristic demonstrates the nature of government employees' whistleblowing speech as a public good; it has social value not merely because it facilitates the ability of public workers to exercise agency as citizens by participating in the project of democratic deliberation, but even more so because it empowers We the People to use our votes to enforce government accountability. *See* Julian W. Kleinbrodt, Note, *Pro-Whistleblower Reform in the Post-*Garcetti *Era*, 112 MICH. L. REV. 111, 113 (2013) (arguing that "[w]histleblower speech is critically important because it helps ensure a well-functioning democracy" and observing that information provided by government employees can be crucial to securing accountability); Diane Norcross, Comment, *Separating the Employee from the Citizen: The Social Science Implications of* Garcetti v. Ceballos, 40 U. BALT. L. REV. 543, 570–72 (2011) (arguing that whistleblowing speech can greatly facilitate the ability of voters to hold the government accountable for its actions); *see also* Krotoszynski, *supra* note 1, at 272–75 (distinguishing whistleblowing government employees' speech from more generic forms of government employees' speech and discussing its potential importance to the process of democratic deliberation).

information needed to make informed voting decisions. Such a test will necessarily involve a careful, contextual, and highly individualized judicial effort to reconcile the respective conflicting interests at stake.[27]

Garcetti v. Ceballos provides a salient example of a decision concerning government employees' speech that adopts an inflexible, bright-line rule that denies any and all job-related speech *any* First Amendment protection[28]—an approach that greatly favors the government as a manager and also essentially zeros out the interests of both government employees as potential speakers and We the People as a potential audience for such speech.[29] *Connick v. Myers* serves as a second example of a categorical

27. In the context of procedural due process, the same problem of important but conflicting interests arises. Procedural due process analysis must consider the government's interest in administering social welfare programs accurately and at a reasonable cost, a beneficiary's interest in receiving benefits earned, and the probability that more and better procedures would materially increase the accuracy of the government's decisions concerning benefits. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (describing the balancing test required to determine whether administrative procedures satisfy procedural due process). Rather than simply, but arbitrarily, affording one of these considerations controlling weight, the Supreme Court instead wisely adopted a balancing test that takes all three into full and complete account. *See id.* at 334–35 ("More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."). The *Eldridge* factors are open-ended and highly contextual; accordingly, they can and will lead to disparate results in cases with very similar facts because judges will afford each factor slightly different weight. Even so, this balancing approach is the only way to take into full and complete account *all* of the relevant interests at stake. *See generally* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975) (discussing and explaining, in some detail, precisely how and why procedural due process requires balancing the over-exercise of judicial discretion and judgment).

28. 547 U.S. 410, 424 (2006) ("Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail."); *see id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

29. *See infra* notes 183–97 and accompanying text (discussing and critiquing *Garcetti*).

First Amendment rule that favors the government as a manager, holding that only speech related to a matter of public concern, narrowly defined, enjoys First Amendment protection.[30] Finally, a third categorical rule, established in *Waters v. Churchill*, holds that a government employer may fire an employee for speech mistakenly attributed to the employee (even if the employee said no such thing).[31] All three decisions strongly and systematically favor the government as an employer and manager over public servants as speakers and citizens through the use of categorical rules that take into account only a single factor (namely, the government's managerial interests).[32]

This Article deploys a comparative legal analysis to assess the efficacy of the U.S. Supreme Court's efforts to draw and enforce a workable line of division between the speech rights of government employees and the managerial necessities of government employers. Beginning with the Supreme Court's 1968 decision in *Pickering v. Board of Education*, the Justices have adopted, as a general test, a balancing approach that weighs the government's interest in managing its workplaces against the First Amendment rights of government workers.[33]

Pickering's approach, as developed in subsequent Supreme Court decisions, falls short of the mark in each of the following respects. First, *Pickering* overtly weighs only two of the three relevant interests at stake by largely ignoring the wider body politic's collective interest in government employees' speech.[34] Second, the decision fails to disentangle generic government employees' speech from the distinguishable subset of whistleblowing government employees' speech.[35] Third, *Pickering* systematically under-protects government employees' speech by applying a narrow test of "matter of public concern" before affording such speech *any* protection under the Free Speech Clause.[36] Fourth,

30. 461 U.S. 138, 146–49 (1983).

31. 511 U.S. 661, 676–81 (1994).

32. *See infra* Part III (discussing and critiquing the Supreme Court's use of categorical rules rather than context-specific balancing when addressing many questions concerning government employees' speech).

33. 391 U.S. 563, 568 (1968) ("The 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.").

34. *Id.*

35. *Id.*

36. *Id.*

it categorically excludes from any First Amendment protection government employees' speech that falls within the scope of a public servant's work-related duties.[37] Fifth, and finally, the *Pickering* approach arguably enables a kind of heckler's veto[38] because a government employee's right to reinstatement is contingent on how other employees will react to the fired employee's presence in the government workplace (meaning that if a government employee's continued presence in the government workplace causes material disruption—or *might* cause material disruption—the government employer may fire the employee without violating the First Amendment's Free Speech Clause).[39]

Perhaps *Pickering*'s most important shortcoming is its failure to recognize relevant interests beyond those of government employers and public servants. When whistleblowing speech is at issue, the relevant interests also encompass an underappreciated, and insufficiently protected, collective interest on the part

37. *Id.* at 574 (emphasizing that "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made" and so determining "that it is necessary to regard the [employee] as the member of the general public he seeks to be").

38. *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–60 (1965) (coining the phrase "heckler's veto" and explaining in some detail why a hostile audience reaction to speech about a matter of public concern cannot serve as a constitutionally acceptable basis for silencing a would-be speaker); *cf.* Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949) (holding that an audience's hostile reaction to a speaker is not a valid basis, consistent with the Free Speech Clause of the First Amendment, for silencing an unpopular speaker); Feiner v. New York, 340 U.S. 315, 326–27 (1951) (Black, J., dissenting) (arguing that the First Amendment requires local law enforcement authorities to protect, rather than silence, a speaker whose message provokes a negative response from an audience and explaining that the government's "duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere"). As Justice Hugo L. Black observed in his dissenting opinion in *Feiner*, when a speaker's message provokes a hostile audience response, "[t]here are obvious available alternative methods of preserving public order" beyond immediately seeking to silence the speaker—namely, "to arrest the person who threatens an assault." *Id.* at 327 n.9 (Black, J., dissenting).

39. *See* Pickering v. Bd. Of Educ., 391 U.S. 563, 572–73 (1968) ("What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.").

of We the People in possessing the information essential to holding government accountable through elections. Thus, whistleblowing speech[40] constitutes not only a form of self-expression by government employees but also a public good that benefits the body politic as a whole.

A coherent and comprehensive theory of freedom of speech in a democracy must take account of the value of whistleblowing speech to the voters. Unfortunately, in the United States today, First Amendment doctrine does not meaningfully distinguish between a government employee's generalized personal autonomy interest in speaking truth to power and the community's more granular, and arguably more important, collective interest in speech essential to holding the government accountable for its actions.

Is a better approach possible? It is. In point of fact, Canada has adopted an approach, rooted in proportionality review,[41] that conveys presumptive constitutional protection under the Charter of Rights and Freedoms to *any and all* government employees' speech.[42] Under proportionality review, the government may still prevail if it can show that, on the particular facts and circumstances at bar, its action was (1) prescribed by law (rather than merely ad hoc), (2) reflects a rule or policy that is demonstrably necessary in a free and democratic society, and (3) the government's abridgement of the fundamental right at issue has

40. Again, "whistleblowing speech" comprises speech that discloses wrongful behavior by the government and facilitates voters holding the government and its officers accountable through elections—particularly information that would not otherwise be available publicly without its disclosure by a public servant. *See* explanation and sources cited *supra* note 26.

41. For an excellent general discussion of proportionality review and its centrality to systems of human rights enforcement around the world, see generally Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

42. *See* O'Brien, *supra* note 17, at 329–30, 350 (describing Canada's careful and context-sensitive approach to reconciling the government's managerial needs with the constitutional free speech rights of government employees under section 2 of the Canadian Charter of Rights and Freedoms and praising it as "perhaps the best in achieving a [proper] balance" between these competing and conflicting interests); *cf.* Fraser v. Pub. Serv. Staff Rels. Bd., [1985] 2 S.C.R. 455, 466–468 (Can.) (adopting an open-ended balancing test to govern judicial analysis of such disputes).

been reasonably tailored with respect to the means used to achieve the government's pressing and substantial purpose.[43]

As I will explain in some detail later,[44] Canada's framework for protecting the speech rights of government employees appears to be (much) superior to the U.S. approach for several important reasons.[45] Canada's example clearly establishes that it is possible to convey broader constitutional protection of government employees' speech without turning the courts into a free-form, general forum for government employees' grievances against their public employers.[46] Canada has built a better mousetrap, and we should consider whether incorporating elements of the Canadian approach might provide a useful model for reforming the U.S. approach.

43. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 135–40 (Can.) (applying proportionality review to the *Narcotic Control Act*); *see also* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 41–45 (2006) (describing and discussing proportionality review in Canada under section 1 of the Charter and the *Oakes* test).

44. *See infra* Part II.

45. *See infra* notes 348–60 and accompanying text.

46. *But see* Waters v. Churchill, 511 U.S. 661, 671–77 (1994) (holding that because "the government as employer indeed has far broader powers than does the government as sovereign," it may discipline a government employee based on the mistaken belief that an employee said something potentially disruptive to the government workplace, even when the employee did not make the statement, provided that the employer could "reasonably" have believed that the employee made the potentially disruptive statement). Writing for the *Waters* majority, Justice Sandra Day O'Connor explains that "[i]f an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care." *Id.* at 677. This will prove to be cold comfort to a government employee fired based on the mistaken, but "reasonable," attribution of statements to the employee that the employee did not actually make. More cold comfort: "[A]n employee may be able to challenge the substantive accuracy of the employer's factual conclusions under state contract law, or under some state statute or common-law cause of action," and "[i]n some situations, the employee may even have a federal statutory claim." *Id.* at 679. An employee, like Cheryl Churchill, should not have to rely on contract, tort, or some sort of statutory protection when a government employer misattributes speech to her and then proceeds to fire her. *See id.* at 695 (Stevens, J., dissenting) (noting that "the plurality concludes that a dismissal for speech is valid as a matter of law as long as the public employer reasonably believed that the employee's speech was unprotected" and arguing that "[t]his conclusion is erroneous because it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights, including contractual and statutory rights applicable in the private sector").

Of course, looking in the opposite direction, things also could be *worse* than under the U.S. *Pickering/Connick* approach. One could imagine a constitutional system that has a theoretical commitment to protecting the process of democratic deliberation, but that utterly fails to protect the speech rights of government employees. As it happens, such a system is not merely hypothetical. Australia has adopted precisely this (very unfortunate) approach.[47] Despite holding, in a pair of landmark decisions in 1992, that the constitutional provisions in Australia's 1901 Commonwealth Constitution guaranteeing voting rights[48] also gave rise to an implied freedom of political and governmental communication,[49] public employees who speak out about matters of public concern in Australia must do so at the peril of unemployment.[50]

The United States risks following the path charted by Australia, where restrictions on whistleblowing speech deprive the voting public of information needed to hold the government accountable. Alexander Meiklejohn, arguably the leading proponent of the democratic self-government theory of the First Amendment, explains that "[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."[51] Instead, "[t]he voters must have it, all of them."[52] Democratic self-government cannot function properly if only government employees possess the information necessary for voters to make rational electoral decisions. Because of this fact of democratic life, Meiklejohn posits that "[t]he primary purpose of the First Amendment is, then, that all

47. *See Comcare v Banerji* [2019] HCA 23, ¶¶ 17, 35–38, 42 (Austl.) (Kiefel, CJ, Bell, Keane, & Nettle, JJ) (upholding a statute and implementing regulations that prohibit criticism of the government if a government employer objects to an employee's off-the-clock private speech as "unreasonably or harshly critical").

48. *See Australian Constitution* ss 7, 24, 64, 128 (providing for elections, voting for the federal parliament, and for amendments to the Commonwealth Constitution).

49. *Australian Cap Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 (Austl.); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48–49 (Austl.).

50. *See infra* Part IV.

51. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948).

52. *Id.*

the citizens shall, so far as possible, understand the issues which bear upon our common life."[53]

When the government imposes a code of silence on government employees, it denigrates both the government employee's individual First Amendment interest in speaking and the collective interest of the potential audience in hearing the speaker's message.[54] Denying government employees the ability to participate fully and freely as citizens plainly inflicts an individual First Amendment injury. What is more, the social cost of silencing government employees extends well beyond this personal autonomy interest; prohibiting them from sharing essential information with the body politic also imposes a *collective* First Amendment harm on the electorate that undermines the efficacy of elections as a means of securing government accountability.[55] Thus, "a First Amendment violation actually involves harms beyond the speaker because free speech benefits not just the speaker but also the audience."[56] To date, however, the U.S. Supreme Court has done a relatively poor job of safeguarding either of these important interests under the aegis of the First

53. *Id.* at 88–89.

54. Kleindienst v. Mandel, 408 U.S. 753, 762–65 (1972) (recognizing that would-be audiences possess a First Amendment right to access information and ideas on an in-person basis and explaining that "[w]hile alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests . . . we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular [live, in-person] form of access"); *see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010) (holding that the government may not "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration" and that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each").

55. Anthony Davidson Gray, *Public Servants and the Implied Freedom of Political Communication*, 49 FED. L. REV. 3, 35–36 (2021) ("[T]he government's legitimate interests in terms of an independent, impartial and functional public service must be tempered by acknowledgement of the very valuable contribution that public servants can make to important public policy debates, from their specialised knowledge and expertise."); Krotoszynski, *supra* note 1, at 297–98 (observing that "[g]overnment 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" and arguing that "whistleblowing speech is not merely a private good, but also constitutes a public good, and First Amendment doctrine should reflect this fact").

56. Ronald J. Krotoszynski, Jr. & Caprice L. Roberts, *Reimagining First Amendment Remedies*, 109 IOWA L. REV. 911, 938 (2024).

Amendment's Free Speech Clause in cases involving government employees' speech activity.[57]

This Article conducts a comparative legal analysis of whistleblowing protections in the United States, Australia, and Canada to evaluate how effective the U.S. approach is at balancing each of the relevant interests. Part II (the "good") takes up Canada's system of protecting government employee speech. In our neighbor to the north, no substantive restrictions (whatsoever) exist on the scope of protected government employee speech. Even when a government employee successfully invokes section 2(b) of the Canadian Charter of Rights and Freedoms (Canada's equivalent to the First Amendment),[58] a reviewing court will sustain the government's regulation or even proscription of a government employee's speech only if the government, incident to "proportionality analysis," can provide a sufficient justification for its actions.[59]

Part III (the "bad") considers the First Amendment's limited, and seemingly ever-shrinking, protection of government employee speech from *Pickering* to *Garcetti*. In the United States, categorical limitations on First Amendment protection of government employees' speech systematically exclude vast swaths of such speech from *any* meaningful protection under the First Amendment.

Part IV (the "ugly") shows that, however bad things might be in the contemporary United States, they could be even worse, as demonstrated by the High Court of Australia's weak-kneed

57. *Id.* at 919–20, 938–39 (arguing that government censorship imposes both individual and collective harms and that First Amendment remedies must take both kinds of harms into account); *see also infra* Part III.A.

58. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 2(b) (U.K.). For a helpful and comprehensive discussion of the Canadian Charter and its introduction of an entrenched bill of rights coupled with strong-form judicial review, see Paul Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 MCGILL L.J. 811, 813–65 (1983). For an overview of Canadian freedom of expression jurisprudence under section 2(b) of the Charter, see RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION (2000).

59. *See* MOON, *supra* note 58, at 35 ("Once the court has determined that the state has restricted expression protected by Section 2(b), . . . [it] asks whether the restriction . . . is proportionate to the impairment of the freedom." (citation omitted)); *see also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 1 (U.K.).

efforts to protect government employee speech as an aspect of a more generally implied freedom of governmental and political communication. Australia provides no protection to government employees who have the temerity to criticize the government in general or their employer, in particular.

Part V considers the relevant legal and constitutional values that ideally should inform how courts strike and then maintain the balance between the government as a manager and a government employee as a citizen. Finally, Part VI provides concluding observations about the central importance of government employees' speech to the ongoing process of democratic deliberation.

The judicial failure to reliably protect whistleblowing government employee speech is a *global* one. Judges, across jurisdictions, have a pronounced tendency to defer reflexively to the government when it invokes managerial imperatives to justify keeping government employees tethered to a (very) short free speech leash.[60] Courts arguably have a constitutional obligation to protect whistleblowing speech, however, when they preside over jurisdictions that protect expressive freedoms as a function of democratic self-government. This protection must also ensure that effective remedies exist, on a reliable basis, for government employees who blow the whistle and then suffer retaliation as a consequence, including reinstatement, even if the whistleblower's comments are highly unpopular with co-workers.[61]

II. THE GOOD: CANADA'S CALIBRATED APPROACH TO GOVERNMENT EMPLOYEE SPEECH THROUGH THE CAREFUL USE OF PROPORTIONALITY ANALYSIS

Although Canada initially followed the British doctrine of parliamentary sovereignty (or "supremacy"), since 1982, and the advent of the Canadian Charter of Rights and Freedoms, courts in Canada now exercise a general power of judicial review to

60. *See infra* notes 140–317 and accompanying text.

61. *See* Krotoszynski & Roberts, *supra* note 56, at 964–65 (arguing that bona fide government employee whistleblowers "need affirmative reinstatement relief" that "ensure[s] the government restores both the tangible and intangible aspects of employment" but cautioning that ersatz or "pretextual whistleblowing" would provide a legitimate reason, under standard principles of equity, for a court to decline to reinstate a government employee who publicly disclosed government misconduct).

protect fundamental rights against government abridgment.[62] Among these fundamental rights are the freedoms of speech, press, assembly, and association.[63] As this Part will explain in some detail, in Canada, individuals do not forfeit their right to expressive freedom simply because they work for the government (whether at the national, provincial, or local level).[64] Canadian free speech jurisprudence also features a contextual analysis that does not deny public servants' speech protection because of its content or work-related character.[65] This flexible approach means that Canada's government employers cannot simply adopt speech bans for their employees. In addition, it also empowers Canadian civil servants to make available to the voting public information essential to securing government accountability. No less important, this context-sensitive approach also permits courts to consider the interests of the voting public in hearing what government employees have to say.

A. FREEDOM OF EXPRESSION UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: THE GENERAL FRAMEWORK

The Supreme Court of Canada (SCC) conveyed meaningful protection on government employee speech related to matters of public concern even before the Charter of Rights and Freedoms (Charter) came into force in 1982. In *Fraser* (a pre-Charter decision) and *Osborne* (a post-Charter decision), the SCC made clear that government employees remain citizens and have a legitimate claim to the full protection of section 2(b) of the Charter (Canada's constitutional analogue to the U.S. First Amendment).[66] The SCC consistently has engaged in a careful and context-sensitive analysis of legal restrictions that limit or prohibit expressive activity by public employees.[67]

62. *See* MOON, *supra* note 58, at 33–35 (describing Canadian courts' role in reviewing governmental restrictions on expression).

63. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 2 (U.K.).

64. *See infra* notes 65–135 and accompanying text.

65. *See infra* Part II.C.

66. Fraser v. Pub. Serv. Staff Rels. Bd., [1985] 2 S.C.R. 455, 466–67 (Can.) (noting that public servants must have at least some free speech rights); *see also* Osborne v. Canada (Treasury Bd.) [1991] 2 S.C.R. 69, 71–72 (Can.) (holding that public servants have free expression rights under the Canadian Charter).

67. *See*, *e.g.*, Osborne v. Canada, [1991] 2 S.C.R. 69, 71–72 (Can.). For a discussion of the regulation of the Canadian civil service workforce, see *The 100*

> Section 2 of the Charter provides:
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.[68]

Most obviously relevant to the question of government employee speech rights is section 2(b), which safeguards "freedom of thought, belief, opinion and expression," although section 2(c), on freedom of assembly, and section 2(d), on freedom of association, also could be relevant to the protection of government employee speech.

The SCC has defined protected speech in an extraordinarily broad fashion: Any human activity designed to communicate a message, save for acts of violence and perhaps also threats of violence, comes within section 2(b)'s scope of application.[69] Of course, such a broad standard creates the risk of inviting government employees to file meritless claims. The potentially very high social cost of defining protected speech so broadly washes out at the second step of Charter analysis—proportionality review. Once a plaintiff establishes that the government has burdened or denied a protected Charter right, the burden shifts to the government to justify the restriction.

Section 1 of the Charter provides that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[70] To meet this standard under the governing test set forth in *R. v. Oakes*,[71] the government must identify a written

Years of the Public Service Commission of Canada, 1908-2008, PUB. SERV. COMM'N CAN. 4–26 (July 2018), https://www.canada.ca/en/public-service-commission/services/publications/publications/100-years-public-service-commission-canada-1908-2008.html [https://perma.cc/WPP3-NZPQ].

68. Canadian Charter, of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 2 (U.K.).

69. *See* MOON, *supra* note 58, at 33–53 (describing and explaining the very broad scope of application of section 2(b) as encompassing virtually any and all human activity intended to convey a message, save for acts of violence and perhaps also threats of violence).

70. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 1 (U.K.).

71. [1986] 1 S.C.R. 103, 138–39 (Can.).

statute or regulation on the books ("prescribed by law"), articulate a "pressing and substantial" justification for the restriction, and show that the restriction is narrowly tailored to achieve the government's important interest.[72]

Whereas the SCC's definition of protected speech tends to favor plaintiffs, the proportionality analysis prescribed by section 1 tends to favor the government. Professor Richard Moon expresses concern that the SCC has generally been too credulous of government claims of necessity in freedom of expression cases and perhaps has placed insufficient weight on the social importance of freedom of speech in a democratic society. He explains that "when the court moves to consider limits on the freedom [of expression] under [s]ection 1, the tone of its judgments often changes: the court becomes sceptical about the value of expression and fearful of its harms."[73] This has the effect of rendering largely nugatory the broad definition of constitutionally protected expression at step one of the constitutional analysis. Moon adds that "[i]n its [s]ection 1 analysis, the court seems to regard freedom of expression not as an important aspect of individual liberty or the common good but simply as an activity or interest that is in competition with other individual or collective interests."[74]

Using this deferential approach to proportionality review under section 1 of the Charter, the SCC has sustained against a section 2(b) challenge a federal law that criminalizes hate speech[75] and also a law that bans obscene sexually explicit materials (provided that the materials at issue include violence or dehumanizing/degrading portrayals of women).[76] The SCC accepted that both hate speech and violent/dehumanizing/degrading pornography constitute social evils, and, accordingly, to the extent that a law limits or bans them, it directly advances a pressing and substantial government objective in a sufficiently narrowly tailored way.[77] Thus, in Canada, if speech constitutes a social evil, then any law or regulation that limits such speech

72. *Id.*; *see* MOON, *supra* note 58, at 54–62 (discussing and critiquing Section 1's application in freedom of expression cases under Section 2(b)).

73. MOON, *supra* note 58, at 54.

74. *Id.* at 55.

75. R. v. Keegstra, [1990] 3 S.C.R. 697, 702–03 (Can.).

76. R. v. Butler, [1992] 1 S.C.R. 452, 454–56 (Can.).

77. *See* R. v. Keegstra, [1990] 3 S.C.R. 697, 702–03 (Can.); R. v. Butler, [1992] 1 S.C.R. 452, 454–56 (Can.).

will also directly advance the government's pressing and substantial interest under section 1.

B. CANADIAN PROTECTION FOR GOVERNMENT EMPLOYEE SPEECH UNDER SECTION 2(B) OF THE CHARTER

Turning to the question of section 2(b) and the speech rights of government employees, these general principles apply with full force. The SCC has decided two major government employee speech cases—one involving a dispute that arose before the advent of the Charter, in 1982, and a second involving activity directly governed by the Charter. Importantly, in the Charter-era case, the SCC required the government to redraw restrictions on government employees' speech rights, including both standing for government office and participating in the process of democratic deliberation as citizens.[78]

In Canada, a "Values and Ethics Code for the Public Sector" imposes content and viewpoint restrictions on civil servants, regardless of the potential value to voters of truthful information about wrongdoing or malfeasance within a government agency.[79] Public employees objected to these restrictions and mounted a successful section 2(b) challenge to them.[80] In response, the government redrafted the law to reduce the burden on government employees' speech.[81] As O'Brien explains, current guidance to government employees "specifies that civil servants should consider the *Value and Ethics Code for the Public Sector* while carrying out political activities that are not explicitly included in this definition [of a candidacy for a public office]."[82] As is the case in Australia, if a government employee's speech might embarrass a government employer, the speech may serve as a basis for discipline, up to and including

78. Osborne v. Canada, [1991] 2 S.C.R. 69, 87–93 (Can.) (finding a violation of section 2(b) of the Charter); *id.* at 97–101 (finding that the government failed to justify the law under section 1 proportionality analysis).

79. For a thoughtful and comprehensive overview of the statutes and regulations that limit the ability of civil servants in Canada to engage in speech activity or stand for office, see O'Brien, *supra* note 17, at 329–35. The primary statute on point is the Public Service Employment Act (PSEA). Public Service Employment Act, S.C. 2003, c. 22, §§ 12, 13 (Can.).

80. *See* O'Brien, *supra* note 17, at 330 (discussing caselaw involving the PSEA).

81. *Id.*

82. *Id.* at 332.

discharge.[83] However, that is about as far as the parallels between Australian and Canadian regulation of government employees' expressive activities go.

The applicable regulations implementing the Public Service Employment Act (PSEA)[84] direct a federal civil service employee to consider, before speaking publicly about a matter of public concern, the nature of the political activity, the nature of the employee's duties, the level and visibility of the employee's public duties, and personal visibility.[85] Despite these considerations, and as O'Brien observes, government "employees do not need to request nor receive permission before engaging in non-candidacy political activities."[86] Even so, a public employee who engages in public speech activity is "responsible for ensuring that their ability to perform their duties is not impaired, and does not appear to be impaired, by their engagement in political activity."[87] In addition, the SCC has imposed a burden of justification on the government when it takes adverse action against a government employee based on protected speech activity.[88]

Consistent with the general warp and weft of the SCC's section 2(b) jurisprudence, Canada's approach to constitutional analysis of government employee speech is radically inclusive;

83. Fraser v. Pub. Serv. Staff Rels. Bd., [1985] 2 S.C.R. 455, 472–74 (Can.) (upholding the firing of a Canadian civil servant for engaging in controversial speech activity that embarrassed his government employer).

84. The PSEA is Canada's generic statute that creates and defines civil service employment with the federal government. *See* O'Brien, *supra* note 17, at 330–31 (describing and discussing Canada's PSEA). It serves as the Canadian analogue to the U.S. Civil Service Act. *Compare* Public Service Employment Act, S.C. 2003, c. 22, §§ 12, 13 (Can.) (containing Canada's civil service employment statute), *with* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (containing the United States' initial statute regulating civil service). The Civil Service Reform Act of 1978 was the successor to the first federal law to protect public servants from the evils of the spoils system, namely the Pendleton Civil Service Reform Act, Ch. 27, 22 Stat. 403 (1883). The U.S. laws governing the federal civil service, and requiring that all hiring and promotion decisions be merits-based, now appear at 5 U.S.C. §§ 3301–30.

85. *Political Activities and Non-Partisanship Directorate*, PUB. SERV. COMM'N CAN. 4–5 (2014), https://www.canada.ca/content/dam/canada/public-service-commission/migration/plac-acpl/pdf/guidance-direction-eng.pdf [https://perma.cc/C93H-VE3M].

86. O'Brien, *supra* note 17, at 332.

87. *Id.*

88. *See* Osborne v. Canada, [1991] 2 S.C.R. 69, 94, 98–101 (Can.) (holding that the government must justify a law restricting public servants' speech rights by demonstrating that the law is merely a "minimal impairment" of those rights).

any and all government employee speech—including hate speech while on the clock—enjoys robust constitutional protection. Moreover, this jurisprudential approach antedates the advent of the Charter and continued under the rubric of the Charter after 1982.

1. *R. v. Keegstra* and the Radically Inclusive Nature of Canada's Protections for Government Employee Speech

Canada's jurisprudential approach differs significantly from that followed in both the United States and Australia because, in both theory and in practice, *all* government employee speech triggers constitutional protection under section 2(b) of the Charter. In *R. v. Keegstra*, for example, the SCC found that a public high school teacher, James Keegstra, successfully invoked section 2(b), even though he was teaching his high school students vile anti-Semitic lessons.[89] Chief Justice Brian Dickson explains that "Mr. Keegstra's teachings attributed various evil qualities to Jews," describing them "to his pupils as 'treacherous,' 'subversive,' 'sadistic,' 'money-loving,' 'power hungry' and 'child killers.'"[90] Indeed, Keegstra "taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution" and "[a]ccording to Mr. Keegstra, Jews 'created the Holocaust to gain sympathy' and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil."[91] As bad as all of this is, perhaps even more awful: "Mr. Keegstra expected his students to reproduce his teachings in class and on exams" and "[i]f they failed to do so, their marks suffered."[92]

The public school district fired Keegstra in 1982 and the provincial government then charged him with violations of Canada's hate speech law, section 319(2) of the Criminal Code.[93] A jury convicted him of these charges, but the Alberta Court of Appeal found that section 319(2) violated section 2(b) of the Charter (the freedom of expression guarantee) and was not saved by operation of section 1 (the Charter's proportionality review

89. R. v. Keegstra, [1990] 3 S.C.R. 697, 714 (Can.).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 713.

provision).[94] The SCC granted review and reversed, finding that eradicating hate speech constitutes a pressing and substantial government purpose and that the means used were sufficiently narrowly tailored.[95]

The key point here is not that the SCC sustained a criminal statute that proscribes hate speech. Instead, it is that Keegstra was able to invoke section 2(b) in the first place. The fact that he engaged in his speech activity while on duty, in a public school, did not zero out his ability to invoke section 2(b) as a defense against the hate speech charges. Even when a government employee essentially hijacks the government workplace and uses his government employment to propagate messages deemed criminal under Canada's laws, the SCC required the government to justify its abridgment of Keegstra's speech.[96] This

94. *Id.* at 713–14.

95. *Id.* at 787 (holding that "the infringement of the respondent's freedom of expression as guaranteed by s. 2(b) should be upheld as a reasonable limit prescribed by law in a free and democratic society" because it "[f]urther[s] an immensely important objective and [is] directed at expression distant from the core of free expression values, [and therefore] s. 319(2) satisfies each of the components of the proportionality inquiry").

96. The lower Canadian courts have sustained section 2(b) claims by public school teachers sharing messages critical of their local public school district's policies with parents and students. *See, e.g.*, B.C. Teachers' Fed'n v. B.C. Pub. Sch. Emps.' Ass'n, 2013 B.C.C.A. 241, paras. 50–54, 63–67 (Can.) ("The law supports the exercise by teachers of their right of free expression in schools. There was nothing about this case to exclude it from that principle."); B.C. Pub. Sch. Emps.' Ass'n v. B.C. Teachers' Fed'n, 2005 B.C.C.A. 393, paras. 50–51, 65–70 (Can.) ("School Boards cannot prevent teachers from expressing opinions just because they step onto school grounds."), *leave to appeal refused*, [2006] S.C.C. No. 31162 (Can.); *see also* Paul Clarke & Robyn Trask, *Teachers' Freedom of Expression: A Shifting Landscape——Part One——Critical Political Expression to Parents and Others*, 22 EDUC. & L.J. 303 (2013) (discussing in some detail Canadian cases under section 2(b) of the Charter on the general free speech rights of public school teachers and positing that public school teachers in Canada enjoy relatively robust freedom of expression rights while on the job) [hereinafter Clarke & Trask, *Part One*]. They also have held that public school teachers possess some degree of academic freedom to teach materials that they deem pedagogically appropriate. *See* Morin v. Prince Edward Island Sch. Bd., [2002] 212 Nfld. & P.E.I.R. 69, paras. 56–58, 95–96, 107–08 (Prince Edward Island C.A.), *leave to appeal denied*, 2003 CarswellPEI 90 (S.C.C. 2003) (Can.) (holding that "teachers engaged in their profession" enjoy some autonomy under section 2(b) to select instructional materials and that Morin "was attempting, through the film and assignment, to communicate certain information and opinions that would stimulate discussion and challenge his students"); *see also* Paul Clarke & Robyn Trask, *Teachers' Freedom of Expression: A Shifting Landscape——Part Two——Curricular Speech to Students and Recent Developments*, 23

demonstrates, with crystal clarity, the radically *inclusive* nature of Canada's approach to government employee speech.[97]

2. Pre-Charter Protections for Government Employee Speech: *Fraser v. Public Service Staff Relations Board*

Even before the Charter came into effect in 1982, the SCC upheld the general principle that freedom of expression is an important social value that courts must take into account when the government burdens a citizen's ability to speak. In *Fraser v. Public Service Staff Relations Board*, the SCC found that a civil servant's dismissal in response to his public statements criticizing government policies required a sufficient justification from government to be lawful.[98] The SCC so ruled because, even without an express written constitutional free speech guarantee, freedom of expression nevertheless constituted an important Canadian social value that courts must take into account when the government burdens a citizen's ability to speak. Consistent with this constitutional analysis, the *Fraser* Court took the same highly inclusive approach reflected in *Keegstra* and found that the government's suppression of bizarre anti-metric ravings, as well as public opposition to adoption of the Charter, by a civil

EDUC. & L.J. 85, 107–12 (2014) (discussing academic freedom for public school teachers under section 2(b) regarding instructional materials and pedagogical choices in the classroom) [hereinafter Clarke & Trask, *Part Two*]. In the absence of a showing of *actual harm* to the government's workplace, proportionality analysis will favor government employees, including public school teachers, rather than government employers. *See B.C. Teachers' Fed'n*, 2013 B.C.C.A. at paras. 50–52 (upholding, under section 2(b), the right of teachers to distribute materials critical of the school district and its policies because "open communication and debate about public, political issues is a hallmark of the free and democratic society the *Charter* is designed to protect" and concluding that the government failed to justify squelching the teachers' speech activities because "the teachers' actions were limited and restrained" but noting that "[i]t would be a different case if schools became a political battleground, festooned at election time with competing political messages"). *Keegstra* comes out differently because the government established before the SCC that anti-Semitic hate speech causes serious and legally cognizable social harms. R. v. Keegstra, [1990] 3 S.C.R. 697, 786 (Can.) ("[I]t is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm.").

97. *See* Clarke & Trask*, Part One*, *supra* note 96, at 322–26 (discussing Canada's holistic approach to public school teachers' free expression rights and noting that Canadian courts will always impose a burden of justification on the government when it seeks to silence public school teachers on a theory of managerial necessity or prerogative).

98. [1985] 2 S.C.R. 455, 467 (Can.).

servant in Canada's Department of National Revenue (Canada's IRS) required a sufficient justification from the government to be lawful.[99]

In *Fraser v. Public Service Staff Relations Board*, the Department of Revenue fired Neil Fraser, one of the department's employees, for engaging in very odd anti-metric conversion public advocacy and media appearances where he opposed adoption of the Charter.[100] Writing for a unanimous bench, Chief Justice Dickson found that Fraser enjoyed a right to the protection of his off-the-job speech activity, even though neither the Canadian Charter nor an earlier-enacted statutory bill of rights applied on these facts.[101] Despite the absence of a constitutional or even a statutory free speech guarantee, Chief Justice Dickson opined "[t]hat is not to say, however, that this is not, at least in part, a 'freedom of speech' case. It is."[102] He observed that "'freedom of speech' is a deep-rooted value in our democratic system of government" and serves as "a principle of our common law Constitution, inherited from the United Kingdom by virtue of the preamble to the Constitution Act, 1867."[103]

Thus, despite the lack of any textual warrant conveying an express right of freedom of expression on Neil Fraser,[104] the SCC found that the government had a heightened burden of justification when it fires a public employee for off-the-clock speech activity. To be sure, this principle of free speech "is not an absolute value" and, on the facts at bar, "the value of freedom of speech must be qualified by the value of an impartial and effective public service."[105] If this test sounds familiar to U.S. ears, it is because this is exactly the balancing exercise that *Pickering* adopted under the First Amendment's Free Speech Clause in 1968.

99. *Id.* at 468.

100. *Id.* at 458–59.

101. *Id.* at 462, 467 ("A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democrat democratic rights to far too many people.").

102. *Id.* at 462–63.

103. *Id.* at 464.

104. *See* Ronald J. Krotoszynski, Jr., *Common Law Constitutionalism and the Protean First Amendment*, 25 U. PA. J. CONST. L. 1 (2023) (arguing that judges, not constitutional or statutory text, or the absence of text, determine the scope and vibrancy of expressive freedoms in democratic politics throughout the world).

105. *Fraser*, 2 S.C.R. at 463.

In undertaking the balancing exercise, the *Fraser* court held "that some [sic] speech by public servants concerning public issues is permitted" and government employers may not render government employees "silent members of society."[106] Chief Justice Dickson offers three reasons in support of this constitutional rule. "First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues" and "[a]s a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion."[107] Second, a reviewing court must take account "of the growth in recent decades of the public sector" because "[a] blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people."[108] Third, and finally, "[a]n absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit."[109] In sum, a baseline of protection for government employee speech existed prior to 1982 as part of Canada's common law allowing public servants "some freedom to criticize the government."[110]

Fraser's public appearances and writings "were directed against two policies, the metric conversion program and the Charter."[111] As such, his speech certainly involved matters of public concern but did not constitute whistleblowing speech. This significantly affected the scope of constitutional protection the SCC afforded to Fraser's speech activity. Although reporting on wrongdoing within the government might present a different case, in Chief Justice Dickson's view, "a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies."[112] By way of contrast, however, "a public servant may actively and publicly express opposition to the policies of a government," and such action "would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the

106. *Id.* at 466.
107. *Id.* at 467.
108. *Id.*
109. *Id.*
110. *Id.* at 468.
111. *Id.* at 468–69.
112. *Id.* at 470.

public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability."[113]

This analysis seems to take overt account of the social value of government employee speech in weighing, in a particular case, whether the public servant's interest in speaking should overbear the government employer's preference for a loyal employee who does not cause trouble in the government workplace or more generally.[114] Because Fraser's speech did not involve whistleblowing, the outcome of the case turned on whether or not he was able to perform his job-related duties effectively. In the administrative proceedings that preceded the SCC's review of the case, "the Adjudicator found Mr. Fraser's effectiveness as a public servant was impaired."[115] The SCC sustained this finding, despite the government failing to present direct evidence on point, because "of the inferred effect on clients" dealing with the DNR and, "in a wider sense, impairment to be a public servant because of the special and important characteristics of that occupation."[116]

Based on its review of the whole record, "the Adjudicator's conclusion that Mr. Fraser's ability to perform his own job and his suitability to remain in the public service were both impaired was a fair conclusion" and despite the absence of any direct evidence of impaired job performance "the evidence clearly established circumstances from which the inference of impairment is clearly irresistible."[117] Simply put, "although there is not an absolute prohibition against public servants criticizing government policies, Mr. Fraser in this case went much too far."[118]

3. *Osborne* and the SCC's Charter-Based, Context-Sensitive Approach to Balancing Government Employee Speech Rights Against the Government's Managerial Necessities

The second landmark government employee speech case, *Osborne v. Canada*, arose after the Charter took effect (on April

113. *Id.*

114. *See id.* ("In conducting himself this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.").

115. *Id.* at 472.

116. *Id.*

117. *Id.*

118. *Id.*

17, 1982) and, therefore, directly applies section 2(b). A group of federal employees, subject to the provisions of the PSEA,[119] objected to being prohibited from engaging in electioneering ("political") activity.[120] The trial court rejected the plaintiffs' section 2(b) claims, but the Federal Court of Appeal reversed, holding that the PSEA was unduly vague and did not constitute a "reasonable limit" on the expressive activities of government employees.[121] The SCC granted review in order to consider the constitutionality of the PSEA's speech and expressive activity restrictions on persons working in Canada's federal civil service.[122] The SCC affirmed the decision of the Federal Court of Appeal.[123]

Writing for the plurality, Justice John Sopinka easily found that the challenged provision of the PSEA, section 33, "which prohibits partisan political expression and activity by public servants under threat of disciplinary action including dismissal from employment, violates the right to freedom of expression in s. 2(b) of the *Charter*."[124] Applying *Fraser*, Justice Sopinka concluded that in post-Charter Canada, the arguments in favor of conveying broad constitutional protection on government employees' speech activities are both obvious and compelling.[125] Moreover, he could not "see how it may be said that the oppugned section in the present case does not constitute a violation of the right to freedom of expression."[126] He explains that "[b]y prohibiting public servants from speaking out in favour of a political party or candidate, it expressly has for its purpose the restriction of expressive activity."[127]

Even though the federal government has an important and substantial interest in a politically neutral civil service, the PSEA's restrictions on political speech went far beyond what was necessary to safeguard the government's interest. Justice

119. At the time, this statute appeared as R.S.C. 1985, c. P-33. Canada's Parliament amended the law in 2003. It now appears as S.C. 2003, c. 22, §§ 12, 13.

120. Osborne v. Canada, [1991] 2 S.C.R. 69, 80 (Can.) (reciting the facts and claims of the plaintiffs).

121. *Id.* at 71.

122. *Id.* at 71.

123. *Id.* at 106.

124. *Id.* at 88–89.

125. *Id.* at 92.

126. *Id.* at 93.

127. *Id.*

Sopinka observed that "[t]he result of this broad general language [in section 33] is that the restrictions apply to a great number of public servants who in modern government are employed in carrying out clerical, technical or industrial duties that are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations."[128] Clearly, "[t]he need for impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy."[129] Thus, Justice Sopinka concludes that "[t]o apply the same standard to a deputy minister and a cafeteria worker appears to me to involve considerable overkill and does not meet the test of constituting a measure that is carefully designed to impair freedom of expression as little as reasonably possible."[130] In light of these considerations, "s. 33 fails the minimum impairment test" and section 1's proportionality analysis.[131]

Justices Bertha Wilson and Claire L'Heureux-Dubé authored a concurring opinion that agreed with Justice Sopinka's section 2(b) analysis but disagreed as to whether the SCC should immediately invalidate section 33 of the PSEA.[132] Justice Gérard La Forest also concurred in the plurality opinion and, like the other concurring Justices, objected to the SCC not immediately invalidating section 33.[133] Only one member of the SCC, Justice William Stevenson, dissented on the merits.[134] Accordingly, the SCC's vote in *Osborne*, with respect to the merits of the plaintiffs' section 2(b) claim, was 6-1.[135]

Considered together, *Fraser* and *Osborne* establish an open-ended, context-sensitive approach to reconciling the free expression claims of government employees with the managerial necessities of their government employers. *Osborne*, in particular, is a critically important case because it requires that regulations restricting government employees' expressive freedoms possess a careful and precise means/end fit. It also bears noting that *Keegstra* did not embrace a categorical exclusion of low-value

128. *Id.* at 99.
129. *Id.*
130. *Id.*
131. *Id.* at 101.
132. *See id.* at 78 (Wilson and L'Heureux-Dubé, JJ., concurring).
133. *See id.* at 78 (La Forest, J., concurring).
134. *See id.* at 106 (Stevenson, J., dissenting).
135. *See id.* at 70, 75. Although the SCC has a nine-member bench when at full strength, the *Osborne* Court featured a seven-member bench.

speech from the scope of section 2(b) but, instead, simply considered the low value of the speech activity when engaging in proportionality analysis.

C. CANADA'S HOLISTIC AND CONTEXT-SPECIFIC APPROACH UNDER SECTION 2(B) EFFECTIVELY PROTECTS GOVERNMENT EMPLOYEE SPEECH IN GENERAL AND WHISTLEBLOWING SPEECH IN PARTICULAR

In Canada, *any* and *all* public employee speech enjoys constitutional protection under the Charter.[136] The SCC has never adopted any categorical exclusions, such as a requirement that speech relate to a matter of public concern, or not be related to a government employee's official duties, or the like.[137] Canada, like the United States, uses a balancing test that weighs the government's interest in regulating government employees' speech against the autonomy interest of these individuals as citizens (as well as public servants). And, as with *Pickering*, the threat of disruption to a government workplace is a relevant factor in the balancing exercise. However, unlike *Pickering*, the SCC has made clear, in Chief Justice Dickson's *Fraser* opinion, that government employee speech of a whistleblowing nature must receive broader and deeper judicial protection.[138]

The SCC's approach makes a great deal of sense on both normative and policy grounds. The government as manager can fire an employee whose public ravings about metrification and the Charter cause it embarrassment or might logically be feared to undermine the public's trust in the agency or department.[139] However, it cannot, as a general matter of policy, extract a vow of silence from public servants as the price of working for the government.

Regardless of whether a government employee's specific speech activity is critical to the public's welfare or simply proof positive that a particular public servant harbors highly idiosyncratic viewpoints coupled with a perceived need to share them

136. Clarke & Trask, *Part One*, *supra* note 96, at 304–07, 323–26.

137. Clarke & Trask, *Part Two*, *supra* note 96, at 112–20.

138. Fraser v. Pub. Serv. Staff Rels. Bd., [1985] 2 S.C.R. 455, 472 (Can.) (holding that Canada's federal government employees may criticize the government and "publicly express opposition" to its policies when "the Government [has] engaged in illegal acts, or if its policies [would] jeopardize[ ] the life, health or safety of the public servant or others").

139. *See id.* at 470–75.

widely with the general public, in Canada, the government will always have to shoulder a burden of justification when it punishes, or fires, a government employee because of speech activity that it dislikes. As the next Sections of this Article will show, hopefully convincingly, Canada's baseline rule that the government must always justify punishing a government employee for engaging in speech activity represents a much better approach than the prevailing free speech rules in either the United States or Australia. In Canada, government employees will always get their day in court. Moreover, if they can show that the government lacked a valid reason for disciplining or firing them, or that the contested speech activity was of particular social importance, they will prevail under the *Osborne*/*Fraser* analytical framework.

III. THE BAD: THE U.S. SUPREME COURT'S FAILURE TO RECOGNIZE THE SIGNAL IMPORTANCE OF WHISTLEBLOWING SPEECH AND THE COLLECTIVE INTEREST IN ACCESSING IT

Since its landmark 1968 decision in *Pickering*, First Amendment jurisprudence in the United States comprises a series of problematic precedents, starting in 1983 with *Connick v. Myers*, continuing with *Waters v. Churchill*, in 1994, and ending with *Garcetti v. Ceballos*, which the Justices decided in 2006. At almost every jurisprudential turn in the road since handing down *Pickering*, the U.S. Supreme Court has worked to limit the speech rights of government employees, with *Connick* and *Garcetti* excluding vast swaths of government employee speech from *any* First Amendment protection whatsoever. Worse still, none of these precedents clearly and overtly recognize the importance of whistleblowing government employee speech to the ongoing project of democratic self-government. The picture is a clear one, with the Supreme Court narrowing, rather than expanding, the First Amendment rights of government employees consistently and reliably over time.

A. FROM *PICKERING* TO *GARCETTI*: EVER-DIMINISHING PROTECTIONS FOR GOVERNMENT EMPLOYEE SPEECH IN THE UNITED STATES

In *Pickering*, the Supreme Court first recognized that government employees' speech enjoys meaningful First Amendment

protection—at least when a public employee speaks out about a matter of public concern. To be sure, *Pickering* was undoubtedly important, and certainly a tremendous improvement over what had come before, which treated government employment as a mere privilege that a government employer could condition on the complete waiver of a government worker's expressive freedoms.[140] Despite its merits (and they are several), *Pickering* suffers from a serious shortcoming: The decision fails to adequately recognize the collective interest that exists in general government employee speech and, more specifically, in whistleblowing speech.

The Supreme Court's *Pickering* decision holds that a government employer could not, consistent with the First Amendment, fire a public employee who made critical public statements about his employer in a local newspaper letter to the editor.[141] Marvin Pickering opposed the passage of a tax increase to fund improvements within the local school district for which he worked as a teacher.[142] The letter contained some factual errors,[143] but no evidence existed to suggest that Pickering intentionally made false statements about the proposed bond issue or how his employer would use the new funds (assuming that voters passed the bond issue).[144]

On these facts, the Supreme Court held that the federal courts must apply a balancing test that weighs Pickering's interest in speaking out, as a citizen, about a matter of public concern against the school district's legitimate managerial needs and prerogatives: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting

140. *See supra* note 9 and accompanying text.

141. Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968).

142. *Id.* at 564 ("Pickering . . . was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools."). Pickering wrote an op-ed "letter to the editor" opposing passage of a proposed bond issue for the school district. *Id.* at 575–78. Justice Thurgood Marshall explains that the arguments in Pickering's oped "consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools." *Id.* at 569.

143. *See id.* at 570–72.

144. *Id.* at 572.

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."[145] But this balancing exercise does not occur in a vacuum. If an employee's continued presence in the workplace significantly disrupts the government office, it is likely that the judicial balancing exercise would favor the government's managerial needs.[146]

Connick v. Myers[147] significantly narrowed *Pickering*'s scope of application by holding that only a limited subset of government employee speech enjoys First Amendment protection. Sheila Myers worked as an assistant district attorney for New Orleans Parish District Attorney Harry Connick, Sr.[148] Myers had a number of complaints related to Connick's management

145. *Id.* at 568.

146. *See id.* at 572–73 ("What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."). Quite obviously, if Marvin Pickering's letter had rendered him toxic within the school where he worked, the balance would have swung the other way. *See id.* at 573 ("In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."). It bears noting that the Supreme Court's student speech cases use the same balancing test; for example, a public school student enjoys a First Amendment right to speak out about matters of public concern while on campus, unless the speech presents a serious risk of material disruption to a public school's operations. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 513 (1989) (holding that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" but cautioning that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech"). In the lower federal courts, this balancing test has not been particularly protective of student speech; if a school district makes a facially plausible case that a student's speech presents a theoretical risk of material disruption, the school district usually will win. *See* RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT 301–13 (2019) [hereinafter KROTOSZYNSKI, JR., DISAPPEARING] (reviewing major student speech cases in the U.S. Courts of Appeals and concluding that, if public school officials can plausibly posit that student speech *might* disrupt the learning environment, school district officials will prevail under the *Tinker* balancing exercise).

147. 461 U.S. 138 (1983).

148. *Id.* at 140.

practices within the office, including internal office assignment policies, as well as an allegation that Connick coerced civil service employees to work in his re-election campaigns.[149] On October 7, 1980, Myers distributed a questionnaire to fifteen assistant district attorneys asking for their views regarding a variety of office policies and practices, which included a highly troubling allegation that Connick and his leadership team pressured office employees to work in Connick's electoral campaigns.[150] According to Dennis Waldron, a "First Assistant District Attorney" working in the office, a "mini-insurrection" ensued within the office after Myers distributed the questionnaire.[151] Connick fired Myers later that day for refusing to accept a transfer from the criminal to the civil division, as well as for her insubordination in distributing the questionnaire.[152]

After her termination, Myers filed a section 1983 suit in federal district court, alleging that Connick had violated her First Amendment rights.[153] The district court ruled in her favor because it deemed the questionnaire the real reason for her discharge, found that it sufficiently raised matters of public concern to trigger *Pickering* and that Connick had failed to prove that material disruption to the office's operations actually resulted from the survey.[154] The U.S. Court of Appeals for the Fifth Circuit affirmed this decision; the U.S. Supreme Court granted review and reversed.[155]

Writing for the 5-4 majority, Justice Byron White found that all but one of the questions on Myers's survey instrument related to matters of private, rather than public, concern.[156] The *Connick* majority held that because virtually all of the survey's questions related to matters of private concern, they did not trigger *Pickering* and thus the First Amendment's Free Speech Clause.[157] *Connick* squarely holds that, in order to invoke *Pickering* successfully, it is essential for a government employee plaintiff to establish that the speech at issue relates to a matter

149. *Id.* at 141.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 142.
155. *Id.*
156. *Id.* at 149.
157. *See id.* at 145–48.

of public concern: "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."[158] Moreover, "[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."[159]

So, when is government employee speech about a matter of public concern? The Supreme Court defined the concept narrowly in this context. Justice White explains that "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[160] Under this approach, a court must take into account, at least to some degree, the probable subjective intent of the public employee speaker, rather than simply the speech on its face; "context" matters as to whether the speaker sought to address matters of public, rather than private, concern.[161]

This is a significant departure from how the federal courts define "matter of public concern" in other First Amendment areas, such as whether public protest enjoys the most robust protection under the Free Speech Clause.[162] In cases such as *Snyder v. Phelps*,[163] the Supreme Court has declared the ravings of

158. *Id.* at 146.

159. *Id.*

160. *Id.* at 147–48.

161. *Id.* at 148–49.

162. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–49 (1974) (holding that the *Sullivan* standard prevents the imposition of punitive damages for reporting about matters of public concern and permits recovery for actual, or compensatory, damages only if state tort law imposes a requirement on the plaintiff to show some form of fault). *But cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759–61 (1985) (declining to extend the actual malice standard and other *Sullivan*-like press protections to an inaccurate credit report that Dun & Bradstreet published because a credit report about a private business does not relate to a matter of public concern and "speech on matters of purely private concern is of less First Amendment concern"). The Supreme Court has explained that speech about matters of public concern rests "at the heart of the First Amendment's protection." First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

163. 562 U.S. 443 (2011).

bigoted religious fanatics, including signs bearing the messages "God Hates the USA/Thank God for 9/11" and various homophobic slurs,[164] constitute speech about matters of public concern. Chief Justice John G. Roberts, Jr., writing for an 8-1 majority in *Snyder*, opined that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import" and, what's more, "[t]he signs certainly convey Westboro's position on those issues."[165] In consequence, these wild statements, displayed incident to a highly offensive, organized public protest of the funeral and burial services for Marine Lance Corporal Matthew Snyder, a marine killed while on active duty in Iraq,[166] enjoyed full and robust First Amendment protection.[167]

It is difficult to understand how targeted homophobic slurs constitute speech about matters of public concern, whereas survey questions (meaning speech) related to the morale of employees in the New Orleans District Attorney's office does not. It must be, then, that the motive of the speaker, as ascertained by a reviewing court, rather than the precise content of the speech, prefigures whether speech touches upon matters of "public" or "private" concern in the specific context of government employee speech. The Supreme Court seems to minimize the public concern nature of Myer's speech about coerced political activity and poor management practices in a major U.S. city's district attorney's office, on the one hand, whereas, on the other, the Justices display great credulousness in scoring Westboro's unhinged hate speech as relating to a serious point about matters of public policy; thus, the speaker's motive rather than the content of the speech determines its status as relating to matters of public or private concern.

Even more troubling: If speech occurs in the employment context, it morphs into speech about a matter of "private concern" and therefore garners *no* First Amendment protection. By way of contrast, the exact same language, displayed on a placard carried by a protester on a public street or sidewalk, provided

164. *Id.* at 448, 454.
165. *Id.* at 454.
166. *Id.* at 448.
167. *Id.* at 456.

that the protester does not work for the government office being criticized, will constitute speech about a matter of "public concern" and accordingly will enjoy robust First Amendment protection. This makes no sense at all. Simply put, courts should deem speech to relate to a matter of "public concern" based on the *content of the message* and not the *identity of the messenger*.

Under the majority's reasoning in *Connick*, in order to benefit from First Amendment protection, a government employee's speech must clearly relate to a matter of public concern unrelated to the government office for which the would-be speaker works; if speech relates to a matter of private concern (such as grievances related to the internal management of a government office), a government employer may impose punishments, up to and including discharge, for the employee's speech activity.[168] As Justice White explains, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[169] Thus, First Amendment protection applies when a government employee speaks out "as a citizen upon matters of public concern" but not when an employee speaks "as an employee upon matters only of personal interest."[170]

Whether or not speech relates to a matter of public concern arguably lies in the eye of the beholder, and this creates a significant chilling effect for government employees who speak out about the operation of the government office where they work.[171] Myers's complaints about favoritism infecting professional opportunities within the district attorney's office and allegations of retaliation if Connick's employees had the temerity to complain arguably *did* relate to matters of public concern. After all, a dysfunctional district attorney's office will be less efficient and effective in enforcing the criminal laws within the community that

168. Connick v. Myers, 461 U.S. 138, 146 (1983) ("When 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.").

169. *Id.* at 149.

170. *Id.* at 147.

171. *See* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689–705 (1978) (describing and critiquing the doctrine of a chilling effect, which involves a government rule or policy that prohibits speech but inhibits otherwise lawful speech because the precise contours of the speech proscription are unclear).

it serves. Because the line between protected speech related to a matter of public concern and unprotected speech related to a matter of private concern is, at best, a blurry one, *Connick* significantly deters government employees from speaking out at all. It renders prudent silence the obvious, safest course of action for the over twenty million citizens working for the federal, state, and local governments.

If an employee guesses incorrectly about how to characterize speech, the consequence could easily be unemployment. This is why Professor Norton advocates a much more robust definition of unprotected government employee speech that limits the government's power to muzzle its employees to those employees specifically hired to serve as official spokespersons for the government agency in question.[172] In all other cases, *Pickering* would apply and the employer would be required to show that the employee's speech was unduly disruptive to the operation of the government office.[173] It would be foreseeable that the importance of the employee's speech could impact the balancing exercise, but a court hearing such a case would at least be required to engage in the balancing exercise.

Even more problematic: *Connick*'s limitation of *Pickering*'s protection of government employee speech does not end with the workday. Instead, government employees are also subject to discipline for speech activity that occurs when they are off the clock. Private speech, off-the-clock, that potentially embarrasses a government employer can and does serve as a basis for discipline, up to and including termination from employment.[174] When a San Diego, California, police officer produced sexually explicit performance art, the Supreme Court found that the police department for which he worked possessed a constitutionally adequate basis for firing him because the police officer's off-duty speech did not relate to a matter of public concern.[175] This suggests that speech related to arts, literature, or science—speech not obviously connected to government, governance, and elections—has no purchase on *Pickering* at all.[176]

172. NORTON, *supra* note 13, at 64–65.

173. *Id.*

174. *See* City of San Diego v. Roe, 543 U.S. 77, 80–81 (2004).

175. *Id.* at 78–80.

176. Of course, speech related to the arts, literature, and science can be crucial to the process of democratic deliberation because they empower voters to

In Officer Roe's case, the Supreme Court held that the production of amateur pornography "does not qualify as a matter of public concern under any view of the public concern test" and, accordingly, "[Roe] fail[ed] the threshold test and *Pickering* balancing does not come into play."[177] Because "[t]he speech in question was detrimental to the mission and functions of the employer," the employee was subject to termination for engaging in his off-the-clock creative activity and the First Amendment did not come into play (at all).[178]

It bears noting that *Roe* was a unanimous decision; there was not a single dissenting vote or opinion. Moreover, the Supreme Court issued this decision on a *per curiam* basis, meaning without either full merits briefing or oral argument. It turns out that Officer Roe might have a constitutional right to make amateur pornography, but he did not have a right to do so while remaining a police officer.[179]

The implications of *Connick*, in conjunction with *Roe*, for public employees as participants in the marketplace of ideas are both obvious and bad.[180] Although one might not view making amateur porn as a worthy off-duty hobby, suppose that a government employee engages in historical re-enactment events as a Confederate soldier? Or serves as an officer of a community theater group that presents Dadaist or Grand Guignol works that both upset and offend the sensibilities of some of their neighbors? Or appears in "drag" in a gay pride parade in a state, such as Tennessee or Florida, that has enacted a law declaring such

make more effective arguments in the marketplace of political ideas. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57, 262–63 (1961).

177. *Roe*, 543 U.S. at 84. It bears noting that non-obscene sexually explicit speech is fully protected under the First Amendment. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–48 (2002); United States v. Playboy Ent. Grp., 529 U.S. 803, 811 (2000). *But cf.* Miller v. California, 413 U.S. 15, 23–25, 36–37 (1973) (holding that legally "obscene material is unprotected by the First Amendment" and providing a three-part test to determine whether specific sexually explicit material constitutes "obscenity").

178. *Roe*, 543 U.S. at 84–85.

179. *See generally* McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892).

180. *See generally* Mary-Rose Papandrea, *The Free Speech Rights of "Off-Duty" Government Employees*, 2010 BYU L. REV. 2117 (2010) (reporting on the commonplace practice of government employers disciplining or terminating employees based on off-duty activities that the government employer deems embarrassing or problematic).

performances to constitute a form of public indecency? Even if these laws are ultimately struck down in the federal courts because they are content-based—and arguably viewpoint-based to boot—under the authority of *Roe* and *Connick*, public drag performances might well not constitute speech related to a matter of public concern. If this conclusion is correct, any such activity by a government employee could serve as a basis for discipline (up to, and including, being fired from public employment).

This jurisprudential landscape is obviously grim for public employees. The Free Speech Clause of the First Amendment conveys only limited, contingent, protection on government employees' speech; *Connick* then narrows the scope of this protection by requiring a government worker to establish that the speech that resulted in employer-imposed discipline for speech activity, whether on or off the clock, relates to matters of public, as opposed to private, concern.[181] And, *Roe* clearly establishes that a government employer may impose discipline, up to and including discharge from public employment, for off-duty speech activity if it does not meet *Connick*'s rigid test for speech related to a matter of public concern.[182] Thus, a government employee seeking to invoke First Amendment protection for any and all expressive activity must successfully run a jurisprudential gauntlet where each step in the process provides a basis for dismissal of the government employee's First Amendment complaint.

Matters became significantly worse, however, with the Supreme Court's decision in *Garcetti v. Ceballos*.[183] In *Garcetti*, the Supreme Court held that if a government employee's speech falls within the scope of their official workplace duties, it enjoys no First Amendment protection whatsoever.[184] Writing for the *Garcetti* majority, Justice Anthony M. Kennedy, Jr. explained that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."[185] He squarely rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties" because "[o]ur precedents do not support the existence of a constitutional cause of

181. Connick v. Myers, 461 U.S 138, 142 (1983).
182. *Roe*, 543 U.S. at 80–81.
183. 547 U.S. 410 (2006).
184. *Id.* at 421.
185. *Id.* at 424.

action behind every statement a public employee makes in the course of doing his or her job."[186]

To be sure, the Supreme Court tempered, somewhat, the scope of *Garcetti* in *Lane v. Franks*,[187] which held that Edward Lane's job-related duties did not include testifying in open court about financial improprieties at his public community college.[188] Lane served as the director of a program for at-risk youth at Central Alabama Community College (CACC) and testified in open court about financial mismanagement within his program.[189] CACC's new president, Steve Franks, fired Lane, allegedly in retaliation for his testimony against the CACC's prior president.[190] Both the U.S. District Court and U.S. Court of Appeals, applying *Garcetti*, found that Lane could not invoke *Pickering* because his testimony constituted job-related speech.[191] Accordingly, in the view of the two lower federal courts, a public community college could fire a program director, under the authority of *Garcetti*, for offering unfavorable testimony in open court about the university's then-president because the testimony concerned job-related duties.

The Supreme Court granted review and reversed the U.S. Court of Appeals for the Eleventh Circuit. Writing for the majority, Justice Sonia Sotomayor explained 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."[192] This holds true "even when the testimony relates to his public employment or concerns information learned during that employment."[193]

However, this ruling will provide cold comfort to future employees, embroiled in speech-related disputes with their government employers in circumstances similar to Richard Ceballos, who seek to blow the whistle about misconduct directly related to their work in government offices. This is because work-related speech post-*Lane* still receives no First Amendment protection and this category of speech is hardly self-defining. What's more,

186. *Id.* at 426.
187. 573 U.S. 228 (2014).
188. *Id.* at 238.
189. *Id.* at 231–32.
190. *Id.* at 233–34.
191. *Id.* at 234–35.
192. *Id.* at 238.
193. *Id.*

doubt about whether a federal judge will find that particular speech falls within or outside the scope of a government employee's job-related duties creates a serious and deeply problematic chilling effect.[194] As with *Connick*'s matter of public concern requirement, ambiguity in the scope of First Amendment protection flowing from the job-related/not job-related dichotomy that *Garcetti* establishes will have a powerful chilling effect on public employee speech in general and whistleblowing speech in particular.[195]

Viewed from a less pessimistic point of view, one could point to *Lane* as evidence that *Garcetti* is perhaps less problematic than it first might appear to be. This reading of *Lane* would reflect unjustified optimism. Rather than a cause for celebration, *Lane* plainly provides a basis for concern. After all, both lower courts in *Lane* applied *Garcetti* to withhold any protection from Lane's testimony in open court. Even if the Supreme Court found "it is clear that Lane's sworn testimony is speech as a citizen"[196] (avoiding *Garcetti*) and also that "Lane's testimony is also speech on a matter of public concern"[197] (avoiding *Connick*), in many cases, having to clear the dual hurdles created by *Garcetti* and *Connick* will prove impossible for a (former) government employee fired in retaliation for engaging in what the employee mistakenly believed to be speech activity protected by the First Amendment.

Finally, it very much bears noting that the Supreme Court does not sit to correct factual errors made by the lower federal and state courts. Most government employees, unlike Edward Lane, will not have Justice Sotomayor review the lower courts' characterization of particular speech as related to a government employee's work-related duties. *Lane* is thus something of a hollow hope for the twenty million or so government workers who must guess about whether particular speech would be deemed to fall within the scope of *Garcetti*'s categorical exclusion of public employee speech from any and all First Amendment protection.

194. *See* Schauer, *supra* note 171.

195. *See* KROTOSZYNSKI, JR., DISAPPEARING, *supra* note 146, at 84–85.

196. *Lane*, 573 U.S. at 241.

197. *Id.*

B. MAKING THE BAD BETTER: TAKING FULL ACCOUNT OF WE THE PEOPLE'S COLLECTIVE INTEREST IN GOVERNMENT EMPLOYEE SPEECH TO ENHANCE AND IMPROVE DEMOCRATIC DELIBERATION

Pickering was problematic from the get-go because it adopted a balancing test that weighs the government employee's interest in speaking out about matters of public concern against the disruption to the government workplace caused by the employee's speech.[198] If speech is truthful but highly disruptive, then the government employer could probably fire the employee—not because the government may constitutionally retaliate against employees who engage in truthful speech that is highly critical of its actions, but rather because the government has a legitimate interest in maintaining its operations free and clear of material disruption.[199] As explained above, however, subsequent doctrinal developments have rendered *Pickering* even less effective as a means of ensuring that government employers cannot condition continued employment on their employees' silence.

Perhaps most important, the *Pickering*/*Connick* balancing test is underinclusive. Three—not two—important constitutional interests are at stake when government employees seek to speak out about matters of public concern: the employee's interest in speaking, the government's interest in managing its workplace, and the body politic's interest in having access to information that bears on their electoral decisions—especially when the information is not available to voters via any other means. *Pickering* largely disregards the public's interest in receiving information that government employees might wish to provide the electorate. In cases involving whistleblowing speech, a particularly strong, arguably compelling, collective interest exists in facilitating the ability of government employees to choose speech over silence. The body politic's interest in access to

198. *See* KROTOSZYNSKI, JR., DISAPPEARING, *supra* note 146, at 31–32.

199. The same general standard applies to speech by students, teachers, and staff while on campus at the nation's public schools. *See* Tinker v. Des Moines Indep. Cmty., Sch. Dist., 393 U.S. 503, 514 (1969) (observing that "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred" and holding that "[i]n the circumstances, our Constitution does not permit officials of the State to deny their form of expression").

government employee speech should be, but currently is not, a discrete and free-standing factor in the *Pickering* balancing exercise.

Relatedly, *Pickering* does not overtly distinguish between several different kinds of government employee speech. Some speech represents the public servant's exercise of agency as a citizen, but other speech constitutes whistleblowing that facilitates and enables the use of elections to hold the government accountable. Ironically, in *Connick*,[200] the Supreme Court engaged in a line drawing exercise that established a clear, bright-line rule that excluded a great deal of public employee speech from *any* First Amendment protection at all. Under *Connick*, only speech about a matter of public concern triggers First Amendment protection.[201] If the speech relates to the workplace and working conditions,[202] *Connick* holds that the speech is only, and merely, about matters of private concern to the speaker as an employee. So too, speech related to the arts, sciences, and literature does not necessarily constitute speech about a matter of public concern, as Officer Roe discovered to his dismay with respect to his off-the-clock performance art.[203]

200. 461 U.S. 138 (1983).

201. *Id.* at 146 ("When [public] 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."). Justice Byron White observes that "[p]erhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Id.*

202. *See id.* at 147–50.

203. City of San Diego v. Roe, 543 U.S. 77, 82–84 (2004). One wonders whether other performance art, of the sort in *Finley*, would make the cut for speech about a matter of public concern. The National Endowment for the Arts refused to fund the following projects because the agency rescinded their grants based on the "indecent" nature of their work. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 577–78 (1998). Their work was firmly within the avant garde:

> The oeuvres d'art for which the four individual plaintiffs in this case sought funding have been described as follows:
> "Finley's controversial show, 'We Keep Our Victims Ready,' contains three segments. In the second segment, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. Holly Hughes' monologue 'World

Pickering thus fails to take into adequate account the nature of information as a public good in a democracy.[204] Even if a government employee's whistleblowing speech is highly embarrassing and disrupts the work environment, it could easily still possess significant value as a public good. Whistleblowing speech could prove critically important to enabling voters to use the electoral process as a mechanism for seeking and obtaining needed reforms.[205]

Properly framing and resolving conflicts between the government as an employer and public employees as speakers

> Without End' is a somewhat graphic recollection of the artist's realization of her lesbianism and reminiscence of her mother's sexuality. John Fleck, in his stage performance 'Blessed Are All the Little Fishes,' confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance 'Some Golden States' from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols."

Id. at 596 n.2 (Scalia, J., concurring) (quoting Julie Ann Alagna, Note, *1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545, 1546, n.2 (1991)) (citations omitted). Were a public employee to engage in any of these dramatic performances—or anything resembling them—it seems highly probable that *Pickering* would not apply because artistic speech of this sort does not meet the *Connick* threshold requirement of constituting speech about a matter of public concern. The contrast with the Supreme Court's treatment of homophobic religious zealots' targeted protest of a funeral mass and burial service is astonishing. *See* Snyder v. Phelps, 562 U.S. 443, 453–55 (2011). It is clear that one concept of "matter of public concern" applies to the general public (a generous standard) and another standard applies to government employees (a very restrictive, narrow standard).

204. *See* NORTON, *supra* note 13, at 65 (noting that if a public employee engages in speech activity about a matter of public concern "the court weighs the value of the employee's speech against any detrimental impact on the government's efficient workplace operations, *like any adverse effect on the employer's ability to maintain discipline and harmony among coworkers*" (emphasis added)). Obviously, it is quite foreseeable that if a government employee's whistleblowing speech brings a government office into widespread public contempt or ridicule, because of serious and credible allegations of wrongdoing, that employee's continued presence in the government workplace is highly likely to cause disruption. Krotoszynski, *supra* note 1, at 292 ("To the extent that an employee speaks out on a matter involving serious wrongdoing within her government agency, it is more likely rather than less likely that her continued presence will cause disruption in the workplace.").

205. KROTOSZYNSKI, JR., DISAPPEARING, *supra* note 146, at 91–94.

require a more contextual, dynamic approach than the *Pickering/Connick* paradigm provides. The *Pickering* balancing test also gives rise to a serious chilling effect problem because government employees cannot know, ex ante, just how disruptive their speech will be to the workplace or how valuable to the general public. Instead, public servants must make a bet, wagering their employment and financial security, that a federal court will strike a balance that vindicates their decision to choose speech over silence.[206] As I have observed previously, "[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."[207]

The constitutional and policy issues associated with reconciling the legitimate managerial prerogatives of government employers with the speech rights of government employees hold true across national boundary lines; any democratic polity, including, but not limited to, the United States, Canada, and Australia, will have to engage in this balancing exercise. At least two distinct interests exist with respect to government employee speech—and, again, these interests arise without regard to national borders. The first involves the personal autonomy interest of a government employee in being able to participate on an equal basis with citizens who do not work for the government in the collective project of democratic self-government. Government employees are, after all, also citizens and voters. Working for the government should not come at the price of the complete loss of the ability to participate in the process of democratic deliberation.[208] The government should not be able to condition employment on public employees ceding their ability to act as citizens.[209]

206. Krotoszynski, *supra* note 1, at 273–274, 291–92.

207. *Id.* at 274.

208. *See* Sullivan, *supra* note 18, at 1415–19, 1421–28 (describing, discussing, and critiquing the unconstitutional conditions doctrine).

209. *But cf.* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (observing, without apparent irony, that McAuliffe "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"). In this unfortunate opinion, Justice Holmes squarely rejected the idea that the government could not require a public employee to refrain from participating in the political life of the community. *See id.* at 517–18 ("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

Although this individual autonomy interest is important, a second, collective interest in government employee speech also exists. Government employees often have access to information that is not widely known within the general community. This information can be, and often is, essential to ascertaining whether or not the government's programs and policies are working effectively. When government policies go off the rails, government employees, working within a government agency or department, not uncommonly, have exclusive access to information that all voters need in order to render sensible electoral judgments.[210]

If it is possible to draw and enforce content-based lines between speech related to a matter of public concern and speech of a purely private interest, as *Connick* effectively requires, it should be equally possible to establish and enforce a jurisprudential line that distinguishes between generic public employee speech and speech integral to informing voters about government misconduct and malfeasance. Indeed, it is arguably easier to distinguish whistleblowing government speech from generic government employee speech than it is to determine whether a government employee spoke out about matters of private or public interest. So too, if the courts can reliably discern whether specific speech falls within or outside a government employee's official job-related duties—an ephemeral line that *Garcetti* mandates—they should be equally able to distinguish government employee whistleblowing speech from more generic forms of government employee speech.

Of course, another side of the coin exists and must be acknowledged: The government, as a manager and employer, has a legitimate interest in achieving its policy and programmatic goals. One cannot gainsay that the government, as an employer and a manager, has a legitimate interest in having its employees successfully implement its programs.[211] As Professor Post posits, "[w]hen it exercises the authority of management,

contract. The servant cannot complain, as he takes the employment on the terms which are offered him.").

210. *See* MEIKLEJOHN, *supra* note 51, at 88–89.

211. POST, *supra* note 15, at 234–40 (discussing and explaining the "government's need to manage speech within its institutions" and arguing that government employers must adopt and enforce at least some regulations of employee speech because it is necessary "in order to achieve the institution's legitimate objectives").

the state can constitutionally control speech so as to facilitate the institutional attainment of organizational ends."[212] The problem, of course, is that the boundary line between legitimate managerial claims and the imposition of unconstitutional conditions involving First Amendment rights is quite elusive;[213] drawing an appropriate line between the managerial domain and the constitutional free speech interests of government employees constitutes an exceedingly difficult task.[214] Even so, if government employers are left to their own devices, free and clear of meaningful judicial oversight, one may rest assured that

212. *Id.* at 240.

213. *See* Sullivan, *supra* note 18, at 1419 (arguing that "assuming that some set of constitutionally preferred liberties has been agreed upon, and that burdens on those liberties require especially strong justification, unconstitutional conditions doctrine performs an important function" because "[i]t identifies a characteristic technique by which government appears not to, but in fact does burden those liberties, triggering a demand for especially strong justification by the state"). In other words, if the government may not directly censor speech wearing its regulatory hat, then, by the same constitutional logic, it may not do indirectly that which it cannot do directly by conditioning a government benefit, such as public employment, on the recipient agreeing to cede constitutional rights that the government dislikes. Management of the government's workplaces is not, per se, an unconstitutional condition. *See* POST, *supra* note 15, 236–40, 255–56 (arguing that the government possesses legitimate managerial goals and objectives that require some regulation of public workers' expressive activities while on the job). However, when the government over-regulates public servants, going beyond the point necessary to achieve its legitimate managerial objectives, it imposes an unconstitutional condition on government employment. Indeed, one could easily recast *Pickering* as an unconstitutional conditions case because the *Pickering* balancing test permits the government to silence a public worker's speech only when it can show a bona fide managerial reason for doing so. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568, 572–73 (1968) (holding that a government employer may discipline or discharge an employee for engaging in activity protected by the First Amendment if the employee's continued presence in the government office causes material disruption within the government office); *see also* Sullivan, *supra* note 18, at 1459–60 (noting that governments historically have attempted to impose unconstitutional conditions on government employees on the theory that "the government is 'master in its own house,' and may place rights-pressuring conditions on the privileges of government employment or access to government property that it could not impose as sovereign upon all citizens"). Professor Sullivan argues that the unconstitutional conditions doctrine should be applied vigorously to prevent governments from using the accident of public employment to strip government employees of their First Amendment rights—but she also acknowledges the legitimate managerial needs of government employers. Sullivan, *supra* note 18, at 1504 ("[S]uch conditions 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.").

214. *See* POST, *supra* note 15, at 247–55.

the boundary line invariably will favor the government's interests as a manager (and do so by a wide margin to boot).

To put the matter into clearer focus, We the People expect government offices to be reasonably efficient and reliable. For example, no one wants to spend five hours at the Department of Motor Vehicles (DMV) in order to register a new vehicle. What is more, when we go to the DMV, we do not expect to be subjected to a political or religious diatribe by the government employee assisting us with registering a new car. If government offices are to achieve their programmatic objectives, then those in charge of these offices must be able to hire, manage, and, when necessary, discipline or even fire employees to ensure that the government agency is able to discharge its intended public functions. But to acknowledge that the government has constitutionally legitimate interests in managing its employees is not to say that any and all restrictions on government employee speech should be deemed constitutionally acceptable.[215]

Connick, *Garcetti*, and *Waters*[216] make it possible to zero out completely the social value of a former government employee's speech activity if the plaintiff public servant fails to satisfy the categorical tests established in these cases. These precedents essentially cancel out the application of *Pickering*, even if a government employee's speech obviously could be essential to voters casting well-informed ballots—a result that cannot be reconciled with a meaningful commitment to a free and open process of democratic deliberation.[217] Thus, the Supreme Court's post-*Pickering* precedents authorize the federal courts to exclude from First Amendment protection speech that is essential to democratic self-government without accounting for its value to the voting public.

Even if a former government employee clears the serious hurdles presented by these precedents to invoke *Pickering*, quite often the government employer will still prevail. *Pickering*'s balancing exercise only accounts for the employee's interest in

215. *See* Sullivan, *supra* note 18, at 1419, 1459–60, 1503–04.

216. *Waters* held that a government employer may fire a public employee based on a statement incorrectly (i.e., falsely) attributed to the employee. *See* Waters v. Churchill, 511 U.S. 661, 677–82 (1994); *see also supra* note 46 and accompanying text (discussing and critiquing *Waters*).

217. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (positing that effective democratic self-government requires an open and vigorous process of democratic deliberation that is "uninhibited, robust, and wide-open").

speaking and the government's interest in managing the workplace; accordingly, it strongly favors the government's managerial interest. This is so because, at least potentially, *any* and *all* speech critical of a government office will be disruptive to the office's operation.[218]

By way of contrast, speech praising the government employee's agency or department will be welcomed and potentially rewarded.[219] The contrast with the Free Speech Clause rules

218. *Connick v. Myers* establishes this point. 461 U.S. 138, 141 (1983). Even if the *Connick* majority had agreed that Sheila Myers's speech activity in the district attorney's office related to a matter of public concern, it probably would not have mattered given that the survey allegedly caused a "mini-insurrection" within the office. *Id.* ("Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a 'mini-insurrection' within the office."). Under *Pickering*, a "mini-insurrection" would certainly be sufficient to definitively weigh the balance in favor of the government employer's interests as a manager. It also bears noting that the same test, material disruption, applies to student speech while on campus, and the lower federal courts have consistently deferred to school officials when they claim that student speech presents a material risk of disruption. *See* KROTOSZYNSKI, JR., DISAPPEARING, *supra* note 146, at 301–06 (discussing and documenting the tendency of lower federal courts to defer reflexively when public school officials claim that student or faculty speech could be disruptive to the educational mission of the public school); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 509–10, 514 (1969) (acknowledging that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" but nevertheless holding that school officials may censor student speech if they reasonably foresee it causing "substantial disruption of or material interference with school activities"). I suspect that *Pickering*'s limited protection, coupled with the limitations that *Connick* and *Garcetti* impose on its scope of application, significantly discourage public employees from litigating their free speech rights. Moreover, such litigation would likely bring further attention to the employee's speech, which could complicate the ability of a former government employee to secure a new job (depending on precisely how controversial or offensive the former public servant's speech happened to be). In this regard, it bears noting that the San Diego police officer who made amateur pornography in his spare time—and was fired for doing so—sought and was granted the right to litigate his free speech claims under *Pickering* on an anonymous basis as "John Roe." *See* City of San Diego v. Roe, 543 U.S. 77, 78 (2004) ("Respondent John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site.").

219. This is how things work in Australia, where the applicable regulations affirmatively *encourage* public employees to take to social media to praise their office and its leadership. *See infra* notes 219–35 and accompanying text. In fairness, this dynamic is hardly unique to Australian government employers; sucking up to the boss can often be highly conducive to career advancement for public servants in the United States as well. *See* Jeff Stein et al., *For Some Federal*

applicable to "spoils system" discharges is astonishing. As a general rule, a government employer may not fire an employee because that employee supports the wrong party.[220] Nor may the government employer fire an employee based on a mistaken assumption about the employee's partisan loyalties (in sharp

Workers, Trump and Musk Offer a Career Springboard, WASH. POST. (Mar. 8, 2025), https://www.washingtonpost.com/business/2025/03/08/trump-musk-doge-workforce [https://perma.cc/8M7G-H26S] (reporting on the promotion of mid- and low-level government employees to high-ranking positions at least in part because of their public support of the Trump Administration on social media outlets); *see also* Meryl Kornfield & Hannah Natanson, *Trump Accelerates Push to Reward Loyalty in Federal Workforce*, WASH. POST (June 16, 2025), https://www.washingtonpost.com/politics/2025/06/16/trump-civil-service-loyalty-firings [https://perma.cc/63P3-FQ6T] (reporting on a new requirement that applicants for federal civil service positions submit an essay explaining how they will advance the President's political and policy agenda and noting that "President Donald Trump is accelerating efforts to transform the nonpartisan, merit-based federal workforce into one that demands and rewards loyalty to the president, according to civil servants, public service experts and employment attorneys"). Some empirical evidence suggests that, particularly in authoritarian systems, sycophancy is the key to career advancement if one works for the government. *See Dictators and Sycophantic Supporters: New DCU Research Shines Light on the Logic of Authoritarian Rule and Origins of Personality Cults*, DUBLIN CITY UNIV. (Oct. 18, 2024), https://www.dcu.ie/graduatestudies/news/2024/nov/dictators-and-sycophantic-supporters-new-dcu-research-shines-light#:~:text=However%2C%20the%20research%20also%20shows,personalised%20regime%20as%20a%20result [https://perma.cc/4TQH-AY6H] (reporting that DCU faculty members' research "shows that more sycophantic officials survive in office longer, and are more likely to receive promotions" than less enthusiastic cheerleading employees and noting that "[t]he[ir] analysis shed[s] light on how dictators select and award their loyalists, what loyalists have to do in order to survive and advance, and how authoritarian politics really works on a daily basis"). Unfortunately, "going along to get along" is a phenomenon that does not respect national borders (or, for that matter, the public/private employer dichotomy). *See generally* DEBORAH PARKER & MARK PARKER, SUCKING UP: A BRIEF CONSIDERATION OF SYCOPHANCY (2017) (reporting on anecdotes and research showing that sucking up to the boss as a strategy for career advancement often works). One of the authors, in a published interview, explains that "one of the reasons it's so bad — and this is something that not only the stories confirm, but also historical examples and scholarly research [confirm]" is because "[s]ucking up is effective . . . for all of the things that one would want to say about the practice morally, it works." Lorenzo Perez, *Bootlickers Beware: UVA Professor's Book Takes Aim at Sycophants*, UNIV. OF VA. COLL. & GRADUATE SCH. OF ARTS & SCI. (Mar. 12, 2018), https://as.virginia.edu/news/bootlickers-beware-uva-professors-book-takes-aim-sycophants [https://perma.cc/9Y6Z-EZZC].

220. Branti v. Finkel, 445 U.S. 507, 515–20 (1980) (holding that the First Amendment prohibits a government manager from firing a public defender based on the lawyer's partisan loyalties).

contrast with *Waters*).[221] One would be hard pressed to reconcile these obviously conflicting free speech rules in an intellectually plausible fashion.[222] The unconstitutional conditions doctrine should prevent both the spoils system and impose a code of silence on would-be government critics who work for the state.

In sum, the biggest shortcoming with the *Pickering*/*Connick* approach is its dyadic nature, meaning that the federal courts take into account only two, rather than three, speech interests.[223] Three interests, not two, are at issue in many

221. Heffernan v. City of Patterson, 578 U.S. 266, 273 (2016) ("When 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 and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.").

222. Rewarding employees for serving as cheerleaders while punishing them if they are public critics, instead, should be deemed incompatible with the unconstitutional conditions doctrine. *See* Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 S.D. L. REV. 327, 327 (1989) ("While government allocation of benefits is normally accorded deference, stronger justification is required if an allocation discriminates on the basis of the exercise of a right. This is the key proposition of unconstitutional conditions doctrine."). In this context, the government discriminates against the exercise of an expressive freedom when it punishes employees for critical speech about the government office for which they work just as much as when it rewards or punishes them for having the wrong partisan affiliation. In both instances, the government makes a benefit, namely government employment, conditional based on the employee exercising First Amendment rights in the way that the government employer prefers (or on *refraining* from exercising a First Amendment right). The formal explanation for the Supreme Court affording protection to public servants for retaliation based on misattributed partisan identity, offered by Justice Stephen Breyer for the *Heffernan* 7-2 majority, is that the employer acts constitutionally in firing an employee for speech never spoken, but if spoken, would have been disruptive to the workplace, whereas a partisan motive for a discharge is never lawful unless the employee exercises significant discretionary authority or processes confidential information. *See Heffernan*, 578 U.S. at 272–73. The problem here is obvious. Firing an employee for words never spoken involves attributing speech to an employee and then weaponizing that speech. As a general matter, the Free Speech Clause protects a fundamental right to speak or remain silent. *Waters'* reasoning and result rests in substantial tension with this baseline First Amendment rule. *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943). And, again, from the vantage point of the unconstitutional conditions doctrine, the government should not be able to condition employment on employees surrendering either some or all of their First Amendment-protected expressive freedoms.

223. *See* Jack M. Balkin, Moody v. NetChoice*: The Supreme Court Meets the Free Speech Triangle*, 2024 SUP. CT. REV. 1, 3–4, 7, 33–34 (2024) (discussing the dyadic paradigm the federal courts generally use in free speech cases involving social media platforms). Professor Balkin's complaint about a dyadic

government employee speech cases; the federal courts need to take into account and factor into the jurisprudential equation the interests of the body politic in having access to government employee speech generally and whistleblowing speech in particular. The Supreme Court's failure to consider directly the public's interest in whistleblowing speech means that the federal courts will only consider incompletely the social value of government employee speech as a public good. In a mass, participatory democracy with universal suffrage, this constitutes a very bad approach and a state of affairs that demands serious jurisprudential reform.[224]

IV. THE UGLY: AUSTRALIA'S UNFORTUNATE CONSTITUTIONAL INDIFFERENCE TO THE POTENTIAL CONTRIBUTIONS OF GOVERNMENT EMPLOYEES TO THE PROCESS OF DEMOCRATIC DELIBERATION

In Australia, despite the absence of any constitutional text guaranteeing the freedom of speech, the High Court of Australia (HCA), in a pair of decisions issued in 1992,[225] recognized an "implied freedom" to engage in political and governmental communications (IFPGC). As Professor Leanne Griffiths explains, "[a]lthough Australian law does not have an express guarantee of free speech, the High Court has acknowledged in various decisions that an implied freedom of communication exists under the Constitution in relation to political and governmental matters."[226] This constitutional implication flows from provisions of Australia's Constitution, specifically sections 7, 24, 64, and 128, which all relate to the election of members of the federal legislature and the amendment of the 1901 Commonwealth Constitution. Although the IFGPC is the Australian analogue to the U.S. First Amendment, it does not operate as an individual right and its scope of application is more limited than the U.S. freedom of speech.

framing for speech claims and interests in the context of social media platforms also applies with full force in the context of government employee speech.

224. *See infra* notes 309–18 and accompanying text.

225. *Australian Cap Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 (Austl.); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48–49 (Austl.).

226. Leanne Griffiths, *The Implied Freedom of Political Communication: The State of the Law Post* Coleman *and* Mulholland, 12 JAMES COOK U. L. REV. 93, 93 (2005).

A. THE (VERY) LIMITED SCOPE OF PROTECTION AFFORDED SPEECH UNDER AUSTRALIA'S IFPGC

Australia's 1901 Commonwealth Constitution contains several provisions that require popular elections, including for the selection of members of the federal legislature and also for the ratification of amendments to Australia's Commonwealth Constitution.[227] In *Australian Capital Television Proprietary Limited v Commonwealth*[228] and *Nationwide News Proprietary Limited v Wills*,[229] the HCA reasoned that free and fair elections are simply not possible in the absence of a free and open public debate that informs the act of voting. As Professor Adrienne Stone, a leading scholar of Australia's constitutional framework for protecting freedom of expression, explains, "[s]tated in brief, the High Court reasoned that freedom of political communication is 'indispensable' to the proper operation of these aspects of the Constitution [the electoral provisions]."[230] She adds that the IFPGC "ensures that the choice of representatives exercised by voters under sections 7 and 24 is a 'true choice.'"[231] Subsequent HCA decisions, however, have firmly established that the IFPGC provides relatively thin protection of freedom of speech generally, and government employee speech in particular.[232]

The IFPGC has three characteristics that limit its power to protect the freedom of speech. Perhaps most important, the IFPGC, strictly speaking, is not an individual right, but instead constitutes "a restriction on legislative power which arises as a necessary implication from [sections] 7, 24, 64, and 128 and

227. *Australian Constitution* ss 7, 24, 64, 128 (providing for elections and voting for the federal parliament and for amendments to the Commonwealth Constitution).

228. 177 CLR at 138.

229. 177 CLR at 47.

230. Adrienne Stone, *Expression*, *in* THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION 952, 955 (Cheryl Saunders & Adrienne Stone eds., 2018).

231. *Id.*

232. Some commentators believe that this is exactly as it should be—that elected legislators, not judges, should have primary responsibility for defining and protecting fundamental rights, including freedom of expression. *See* Caroline Henckels, *Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference*, 45 FED. L. REV. 181, 182 (2017) ("[T]he prospect of judges substituting their own views for those of the other branches of government . . . in relation to factual assessments made by other branches of government raises significant concerns about the proper boundary of the judicial role.").

related sections of the *Constitution* and . . . extends only so far as is necessary to preserve and protect the system."[233] In other words, the IFPGC protects a *collective* interest in the process of democratic deliberation, not an *individual* right to participate in the marketplace of political ideas.[234] Indeed, the HCA has gone so far as to describe the IFPGC as best conceptualized as "operat[ing] as a constitutional restriction on legislative power."[235]

Second, the IFPGC's scope of application is limited to speech and expressive activity clearly and directly related to elections, government, and public policy—and nothing else. In *Liberty Works Inc v Commonwealth*, the HCA explained that "the constitutional basis for the implication in the *Constitution* of a freedom of communication on matters of politics and government is well settled."[236] This is so because "a free flow of communication is necessary to the maintenance of the system of representative government for which the *Constitution* provides."[237] In sum, "[t]he freedom is of such importance to representative government that any effective statutory burden upon it must be justified."[238]

Speech wholly unrelated to politics, government, and public policy enjoys no constitutional protection whatsoever in Australia.[239] This approach leaves to legislative caprice the protection of vast swaths of socially important communicative activity that would plainly help to inform, both directly and indirectly, the arguments that citizens advance in the marketplace of political ideas.[240] To date, unfortunately, the HCA has steadfastly refused to embrace this constitutional logic.

233. *Comcare v Banerji* [2019] HCA 23, ¶ 20 (Austl.) (Kiefel, CJ, Bell, Keane & Nettle, JJ).

234. *See Brown v Tasmania* [2017] HCA 43, ¶ 90 (Austl.) (Kiefel, CJ, Bell & Keane, JJ) ("The freedom is better understood as affecting communication on the subjects of politics and government more generally and as effecting a restriction on legislative power which burdens communications on those subjects.").

235. *Liberty Works Inc v Commonwealth* [2021] HCA 18, ¶ 44 (Austl.) (Kiefel, CJ, Keane & Gleeson, JJ).

236. *Id.*

237. *Id.*

238. *Id.* ¶ 45.

239. *Id.* ¶ 44.

240. Meiklejohn, *supra* note 176, at 262–63. *But cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) (arguing that only political speech should enjoy protection under the First

Third, the test used to assess whether a government speech regulation violates the IFPGC clearly constitutes a weak form of rationality review; it does not even approach a U.S.-style intermediate scrutiny level of review[241] (much less strict scrutiny[242]). Under the governing test, a plaintiff seeking to challenge a speech regulation must show that it burdened the plaintiff's protected speech (meaning speech related to government, politics, or public policy).[243] If a plaintiff meets this initial burden, the analysis turns to a second step—namely, whether the challenged law or regulation advances a "legitimate" government interest that "does not impede the functioning" of "representative and responsible government."[244]

If the speech regulation passes this prong of the test, the courts will, finally, apply a test of "structured" proportionality, under which the reviewing court will consider the means/ends fit between the regulation and the government's legitimate interest.[245] The government has no obligation to use the least

Amendment and that legal protection for other kinds of speech, including speech related to the arts, sciences, or literature, "rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives" which is "hardly a terrible fate").

241. Intermediate scrutiny applies to content-neutral regulations of speech. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642, 662 (1994) (explaining that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" and holding that the intermediate scrutiny test requires the government to show that the regulation "furthers an important or substantial governmental interest" that "is unrelated to the suppression of free expression," and, finally, that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (internal citations omitted) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

242. Strict scrutiny applies to viewpoint-, content-, and speaker-based speech regulations and requires the government to demonstrate a compelling interest and that no less restrictive means exist to achieve it. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) (stating the strict scrutiny test).

243. *Clubb v Edwards*, [2019] HCA 11, ¶ 41 (Austl.) (Kiefel, CJ, Bell & Keane, JJ) ("The first step in applying the *McCloy* test is to ask whether the communication prohibition burdens the implied freedom. To answer that question, it is necessary to consider the terms, legal operation and practical effect of the statute.").

244. *Id.* ¶ 44.

245. *See id.* ¶¶ 61–84.

restrictive or most narrowly tailored means to achieve its objective.[246] As the HCA explains this rule, "[t]he issue for the courts is not to determine the correct balance of the law; that is a matter for the legislature"[247] and a reviewing court may reject the means selected by the legislature "only where the disproportion is such as to manifest irrationality."[248]

The judicial review process can be reduced, essentially, to three steps: (1) Does the law effectively burden freedom of communication about political and governmental matters?; (2) if so, does the law advance a legitimate government interest?; and (3) if so, is the law reasonably appropriate and adapted to advance the legitimate government interest?[249] The third prong of the test involves analysis of whether the challenged statute is "suitable," "necessary," and "adequate in its balance"[250]—all three of these queries relate to whether the means/end fit between the regulation and the government's objective is sufficiently tailored (meaning rational and not grossly overbroad).[251] At every step of this process, however, the Australian courts will place a thumb on the scale that favors both the government's ends as well as its means.[252] The tests, both as stated and applied, veritably exude deference to the government.

It should, therefore, not be surprising in the least that the HCA has sustained civil service regulations that effectively

246. *Id.*

247. *Id.* ¶ 66.

248. *Id.*

249. *Brown v Tasmania* [2017] HCA 43, ¶ 156 (Austl.) (Kiefel, CJ, Bell & Keane, JJ).

250. *McCloy v New South Wales* (2015) 257 CLR 178, 194–95 (Austl.).

251. Professor Stone provides a useful overview of how the governing test to decide IFPGC claims has evolved from the HCA's earlier decisions in the 1990s to its more recent decision in *McCloy*. *See* Adrienne Stone, *Proportionality and Its Alternatives*, 48 FED. L. REV. 123, 126–28 (2020).

252. *See Clubb v Edwards* [2019] HCA 11, ¶¶ 100–02, 126–29 (Austl.) (Kiefel, CJ, Bell & Keane, JJ) (upholding a 150 meter (164 yard) ban on protests near reproductive health care facilities—even though a less expansive ban on protest activity near these facilities could easily have achieved the government's interest in protecting the privacy and dignity of clinic patients and staff); *see also* RONALD J. KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE: A COMPARATIVE ANALYSIS OF HOW COURTS AND CULTURE SHAPE THE FREEDOM OF SPEECH 108–10 (2024) [hereinafter KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE] (noting the failure of the HCA to require any meaningful effort at narrowly tailoring the protest ban). *But cf.* McCullen v. Coakley, 573 U.S. 464, 493–95 (2014) (invalidating bans on protest activities near reproductive health care facilities as insufficiently narrowly tailored).

prohibit federal government employees from saying anything, on or off the job, that would potentially embarrass their government employers.[253] In the HCA's view, employing only loyal minions is a legitimate government objective and being forced to retain publicly critical minions would impose an unreasonable burden on the government as employer and workplace manager.[254] Accordingly, the Justices have sustained a content-based, indeed viewpoint-based, code of conduct applicable to federal government employees.[255] They did so in order to protect the government's interest in "responsible government," which requires that a minister in charge of a government department or agency enjoy access to a phalanx of loyal minions to do the minister's bidding.[256]

B. *BANERJI*: RENDERING GOVERNMENT EMPLOYEES "LONELY GHOSTS" IN THE PROCESS OF DEMOCRATIC DELIBERATION

In *Comcare v Banerji*,[257] the HCA decided whether Michaela Banerji's off-the-clock criticism of her employer, Australia's Department of Immigration and Citizenship (DIC), provided a valid basis for her discharge under Australia's Public Service Act (APSA)[258] and the related Australian Public Service Code of Conduct (APSC).[259] Banerji's comments were highly critical of the government's immigration policies, under both Labor (Australia's main progressive political party) and Liberal (Australia's main conservative political party) governments.[260]

253. KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 100.

254. *Id.*

255. *Id.* at 100–11.

256. *See Comcare v Banerji* [2019] HCA 23, ¶¶ 34–36, 38, 42 (Austl.) (Kiefel, CJ, Bell, Keane & Nettle, JJ) (upholding the discharge of a federal government employee for social media posts critical of her government employer because "responsible government" requires loyal subordinates staffing government agencies and "[r]egardless of the political complexion of the government of the day, or its policies, it is highly desirable if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections").

257. *Id.* ¶¶ 17, 35–38, 42.

258. *Public Service Act 1999* (Cth) ss 10(1), 13(11), 15(1), 33(1) (Austl.).

259. *Id.* at s 13 (setting out the APSC).

260. *Banerji*, [2019] HCA 23 ¶¶ 2, 6.

However, she offered her criticisms on an anonymous basis using a social media platform (Twitter, now known as X). Thus, a person reading Banerji's posts would have had no idea (whatsoever) that the speaker actually worked for the DIC. Essentially, the question presented was whether Australia's IFPGC protects off-the-job government employee speech about matters of public concern.

The APSC provides that classified employees "must at all times behave in a way that upholds: (a) the APS Values and APS Employment Principles; and (b) the integrity *and good reputation of the employee's Agency and the APS*."[261] Implementing regulations provide more granular guidance on exactly what this means.[262] Public comments that would "compromis[e] the employee's ability to fulfil his or her duties professionally in an unbiased manner (particularly where comment is made about Department policy and programmes)," "so harsh or extreme in [their] criticism of the Government, a member of Parliament or other political party and their respective policies that it calls into question the employee's ability to work professionally, efficiently, or impartially," or is "unreasonably or harshly critical of departmental stakeholders, their clients or staff" can and do serve as a basis for employee discipline, up to and including discharge.[263]

The administrative tribunal charged with deciding Banerji's application for unemployment benefits found that the APS Guidelines violated her rights under the IFPGC to criticize the government and its policies. The *Banerji* majority opinion, jointly authored by Chief Justice Susan Kiefel and Associate Justices Virginia Bell, Patrick Keane, and Geoffrey Nettle, made short work of the administrative decision. The tribunal "approach[ed] the matter, wrongly, as if the implied freedom of political communication were a personal right like the freedom of expression guaranteed by [sections] 1 and 2(b) of the *Canadian Charter of Rights and Freedoms* or the freedom of speech guaranteed by the First Amendment to the *Constitution of the United*

261. *Public Service Act 1999* (Cth) s 13(11)(a)–(b) (emphasis added).

262. *Banerji and Comcare (Compensation)* [2018] AATA 892, ¶ 36 (Austl.).

263. *Banerji*, [2019] HCA 23 ¶ 17; *see Austl. Pub. Serv. Comm'n, Guidelines on Official Conduct of Commonwealth Public Servants 1995* (ACT) 32–35 (Austl.) [hereinafter *APS Guidelines*] ("[P]ublic servants should be careful to conduct themselves in their private lives in ways that do not adversely affect the reputation or the Service.").

States."[264] Of course, the IFPGC *does not guarantee* any individual "right" as such, "[a]s has been emphasised by this Court repeatedly, most recently before the Tribunal's decision in this matter in *Brown v. Tasmania*, the implied freedom of political communication is not a personal right of free speech" but rather "a restriction on legislative power."[265] What's more, "even if a law significantly restricts the ability of an individual or a group of persons to engage in political communication, the law will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole."[266]

The HCA goes on to uphold, unanimously, Four members of the seven member court, in their joint opinion, explain that "the impugned provisions . . . present as a plainly reasoned and focussed response to the need to ensure that the requirement of upholding the APS Values and the integrity and good reputation of the APS trespasses no further upon the implied freedom than is reasonably justified."[267] The joint opinion emphasizes the importance of a politically neutral civil service to the operation of "responsible government," meaning the staffing of senior executive branch posts by incumbent members of the federal parliament. The Justices posit that "[t]here can be no doubt that the maintenance and protection of an apolitical and professional public service is a significant purpose consistent with the system of representative and responsible government mandated by the *Constitution*."[268]

It necessarily followed from this premise that the government possessed a legitimate purpose in banning civil service employees from engaging in speech activity that criticizes or might embarrass their government employer. To use the magic words, the APSA and APSC, as well as the agency's own implementing regulations, advanced "a legitimate purpose consistent with the system of representative and responsible government" because it was "suitable, necessary and adequate in its balance."[269] The joint opinion goes out of its way to emphasize the signal

264. *Banerji*, [2019] HCA 23 ¶ 19.
265. *Id.* ¶ 20.
266. *Id.*
267. *Id.* ¶ 42.
268. *Id.* ¶ 31.
269. *Id.* ¶¶ 32–47.

importance of government ministers enjoying loyal minions (like Gru): "Regardless of the political complexion of the government of the day, or its policies, it is highly desirable if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections."[270]

The other three members of the HCA authored opinions concurring in the result reached in the joint opinion but offer slightly different reasoning. All three of these concurring judgments take care to extol the signal importance of government ministers having a loyal and dutiful work force at their disposal.[271] What all four opinions have in common is a complete disregard of the collective interest in at least some kinds of government employee speech. Even if the IFPGC is not an individual right, but rather a systemic or structural safeguard of the process of democratic deliberation—a safeguard essential to the conduct of free and fair elections—the HCA should nevertheless have recognized that, at least in some circumstances, government employee speech can be essential to using elections as a means of enforcing government accountability.[272]

One of the concurring opinions, by Justice James Edelman, merits brief mention. Justice Edelman observes, accurately, that "[f]or much of the century since Federation, any public expression of political opinion by a Commonwealth [federal] public servant could be grounds for termination of employment."[273] Happily, however, "the absolute ban on public political communication by public servants has been tempered" and "the Code that now regulates their behaviour no longer turns public servants into lonely ghosts."[274] Even so, the APSC "still casts a

270. *Id.* ¶ 34.

271. *Id.* ¶¶ 101, 150, 202 (Gageler, Gordon & Edelman, JJ, concurring).

272. Gray, *supra* note 55, at 39 (arguing that "[p]ublic servants have a very important role to play in Australia's system of representative government" because "[t]hey are key players in ensuring that the promise of the original free speech cases, that of the sovereignty of the people, accountability and informed decisions at election time, is upheld").

273. *Banerji*, [2019] HCA 23 ¶ 164 (Edelman, J, concurring).

274. *Id.*

powerful chill over political communication," a kind of chill that in the United States "would be struck down as unconstitutional in a heartbeat."[275]

Justice Edelman explains that Australia is emphatically *not* the United States: "But, unlike [in] the United States, in Australia the boundaries of freedom of speech are generally the province of parliament; the judiciary can constrain the choices of a parliament [federal or state] only at the outer margins for reasons of systemic protection."[276] The IFPGC is "highly constrained," does not constitute "an individual freedom," and is, instead, merely "an implied constraint that operates directly upon legislative power."[277]

In Edelman's view, the contested restrictions on government employee speech were plainly consistent with the IFPGC because they are "necessary for the effective functioning of representative and responsible government" essential to the ability of "parliament to make, and the executive to implement, policy decisions that promote other values."[278] Here, "Australia's constitutional tradition and the importance of that purpose to responsible government" renders the APSA "valid in all of its applications."[279]

C. AUSTRALIA'S ABJECT FAILURE TO RECOGNIZE THE POTENTIAL CENTRALITY OF WHISTLEBLOWING SPEECH TO THE PROCESS OF DEMOCRATIC DELIBERATION

Two glaring problems arise from the HCA's approach in *Banerji*. First, the decision fails to credit the potential importance of government employee speech as a general matter and, more specifically, the particular importance of

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* ¶ 165.

279. *Id.* ¶ 166. *But cf.* Gray, *supra* note 55, at 39 (arguing that government employees in Australia facilitate democratic self-government when they provide essential information to the voters). Professor Gray strongly objects to *Banerji*'s complete failure to consider how government employee speech can constitute a public good essential in a democratic polity. *See id.* at 10–12, 28–29. He argues that "Australian democracy, and accountable government, is weaker as a result of decisions like this" and expresses the hope that "in [the] future, the political free speech of public servants is accorded more protection than this case provides" because "[o]ur democracy can only be enriched by a full consideration of their views, opinions and experiences." *Id.* at 39.

whistleblowing speech. Second, and no less important, it also completely disregards the non-trivial interest that government employees possess in their roles as citizens of a democratic polity.

Turning to the first shortcoming of the HCA's *Banerji* decision, government employee speech obviously can be, and often is, essential to the process of democratic deliberation. The HCA has taken pains, repeatedly, to emphasize that the IFPGC is not a "personal right" but rather a collective interest and a limitation on the scope of legislative power at the federal and state levels of government: "The freedom operates as a constitutional restriction on legislative power and should not be understood to be a personal right."[280] It exists "as necessarily implied because the great underlying principle of the Constitution is that citizens are to share equally in political power and because it is only by a freedom to communicate on these matters that citizens may exercise a free and informed choice as electors."[281]

Second, independent of the particular value of whistleblowing speech as a public good, government employees are citizens and voters—just like the millions of Australians who do not work for a government employer. As of December 31, 2024, Australia's total population stood at 27.4 million persons.[282] About ten percent of the total population currently works in a government job at the national, state, or local level of government—some 2.5 million Australian citizens.[283] Quite obviously, democratic deliberation suffers greatly when almost ten percent of the potential voters in Australia have to avoid engaging in speech critical of the government on pain of facing discipline, up to and including

280. *Liberty Works Inc v Commonwealth* [2021] HCA 18, ¶ 44 (Austl.) (Kiefel, CJ, Keane & Gleeson, JJ).

281. *Id.*

282. *National, State and Territory Population: December 2024*, AUSTL. BUREAU OF STATS. (June 19, 2025), https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release [https://perma.cc/F42V-Z5GX] ("Australia's population was 27,400,013 people at 31 December 2024.").

283. *Public Sector Employment and Earnings: 2023-24 Financial Year*, AUSTL. BUREAU OF STATS. (Nov. 7, 2024), https://www.abs.gov.au/statistics/labour/employment-and-unemployment/public-sector-employment-and-earnings/latest-release [https://perma.cc/CB8L-LC3B] (reporting that "[t]here were 2,517,900 public sector employees in the month of June 2024," which included "365,400 employees in Commonwealth government (including defence force personnel)," "1,939,100 in State government," and "213,500 in Local government").

termination from their public employment. These citizens, no less than citizens working in the private sector, should be able to contribute freely to the public debate about elections, candidates, and public policies. Unfortunately, however, *Banerji* ignores both the *collective* and *individual* contributions that government employee speech can and does make to the process of democratic self-government.[284]

Even if one accepts these limitations and shortcomings, it seems obvious that an implied freedom that only protects a collective interest in democratic deliberation rather than a personal autonomy interest must nevertheless afford at least some protection to government employees who speak out about matters of public concern to protect this collective interest in democratic deliberation.[285]

A collective interest in speech requires both general protection of government employee speech (banishing ten percent of voters from the marketplace of political ideas should be completely unacceptable in a democratic society) and, more specifically, protection when government employees blow the whistle on misconduct within the government agency for which they work (such speech is essential to securing government accountability).[286]

The IFPGC suffers from other significant shortcomings. For example, under the current test for IFPGC claims, namely

284. *See* MEIKLEJOHN, *supra* note 51, at 25–27, 89–91 (arguing that free and open debate, open to all voters, is essential to using elections as a means of securing government accountability). Professor Meiklejohn also places great emphasis on the importance of the voting public having access to the information necessary to render prudent electoral verdicts—and not uncommonly only government employees possess this information. *See id.* at 89–91.

285. O'Brien, *supra* note 17, at 351–52, 355 (arguing that Australia fails to provide any meaningful protection to government employees' expressive activities, whether on or off the job, and also maintains confusing and vague standards regulating government employee speech, leaving employees to guess about what could lead to discharge, because "[t]he Australian courts have also failed to provide protection or assistance to public employees in understanding these restrictions").

286. Gray, *supra* note 55, at 28 (criticizing the HCA's *Banerji* decision for its "lack of explicit recognition in the judgment of the specific value of the speech of public servants in terms of democratic governance and holding governments to account" and complaining that "[a]ll of the judgments recognise the potential for the *Code of Conduct* provisions to impinge on the freedom of individuals to communicate about political matters" but "there is little express recognition of the particularly valuable role that public servants can play in this space, given their knowledge of the internal workings of government").

"structured proportionality," if the government has a legitimate interest, and arguably uses reasonably adapted means to achieve that end, the HCA will sustain the government's speech regulation.[287] This test veritably radiates deference to the elected branches of Australia's federal and state governments.[288] Indeed, the HCA held that, when applying proportionality analysis, the government's preferred balance between regulation and speech should stand, "unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom."[289]

In truth, *Banerji* simply reflects the relative weakness of the IFPGC vis-á-vis the Free Speech Clause of the First Amendment. The HCA has never been particularly bold or aggressive in its efforts to enforce the implied freedom against either federal or state laws that regulate speech activity.[290] Indeed, the government seems to win IFPGC cases, provided a law features *any* effort at tailoring.[291] To date, the HCA has invalidated only flat bans on speech activity (which were at issue in both *Australian Capital Television* and *Nationwide News*, the 1992 landmark decisions that first established the IFPGC).[292]

The HCA is institutionally far more deferential, across the board, to the political branches than the U.S. Supreme Court or

287. KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 107–09.

288. *Id.*; *see* Gray, *supra* note 55, at 29–31 (criticizing the weakness of the IFPGC standards of review as applied in *Banerji* and objecting that "I must respectfully disagree that there was no obvious and compelling alternative to achieving the government's legitimate ends").

289. *Liberty Works Inc v Commonwealth* [2021] HCA 18, ¶ 85 (Austl.) (Kiefel, CJ, Keane & Gleeson, JJ); *see also Comcare v Banerji* [2019] HCA 23, ¶ 38 (Austl.) (Kiefel, CJ, Bell, Keane & Nettle, JJ) ("If a law presents as suitable and necessary in the senses described, it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom. In this case, that directs attention to the quantitative extent of the burden and the importance of the impugned provisions to the preservation and protection of the system of representative and responsible government mandated by the *Constitution*.").

290. *See* Stone, *supra* note 230, at 954–57 (discussing the history of freedom of political communication jurisprudence in Australia).

291. KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 107–09 (describing the burden on the government in IFPGC cases as being "quite modest," noting that it "involves little more than rationality review," and explaining that "[m]ost federal and state laws that burden speech—if tailored at all—easily survive this relatively weak form of judicial scrutiny").

292. Stone, *supra* note 230, at 955.

the Supreme Court of Canada.[293] In part, this reflects Australia's adherence to the doctrine of "democratic constitutionalism," which is a variant of parliamentary sovereignty.[294] Under democratic constitutionalism, primary responsibility for defining and protecting fundamental rights rests with the legislative, not the judicial, branch of government.[295]

In fact, the 1901 Australian Constitution does not feature a bill of rights and sets forth only three express rights guarantees.[296] These include an analogue to the U.S. Constitution's

293. *See* Adrienne Stone & Cheryl Saunders, *Introduction*, *in* THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION, *supra* note 230, at 1, 6–10 (discussing in some detail Australia's principal reliance on democratically elected legislators, rather than unelected judges, to safeguard fundamental human rights—notably including the freedom of expression); Scott Stephenson, *Rights Protection in Australia*, *in* THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION, *supra* note 230, at 905–15 (explaining that the framers of Australia's 1901 Commonwealth Constitution feared judges empowered with judicial review far more than they feared elected legislators and sought to avoid Australian courts enjoying the sort of power to set social policy); *cf.* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 865–69 (2020) (discussing major U.S. Supreme Court substantive due process cases from the late nineteenth century—the U.S. cases that would have given Australia's constitution drafters serious pause about the wisdom of vesting courts with a general power of judicial review).

294. HAIG PATAPAN, JUDGING DEMOCRACY: THE NEW POLITICS OF THE HIGH COURT OF AUSTRALIA 41–50, 59–65 (2000); *see* Patrick Emerton & Lisa Burton Crawford, *Statutory Meaning without Parliamentary Intention*, *in* LAW UNDER A DEMOCRATIC CONSTITUTION 39, 52–58 (Lisa Burton Crawford et al. eds., 2019) (discussing Australia's constitutional commitment to legislative supremacy and a relatively minor role for the judiciary in making or modifying major social policies); Stone & Saunders, *supra* note 293, at 8–10, 22 (explaining that because Australia's Constitution contains only minimal human rights guarantees, which get renormalized as limitations on government power, and that the system relies largely on legislators rather than judges to protect fundamental rights, Australia may be considered a democratic constitutional system).

295. *See* JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 9–13 (2010) (presenting a robust defense and justification for parliamentary sovereignty over juristocracy and, more specifically, Australia's democratic constitutionalism, as the best possible approach to safeguarding human rights); P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 54–55 (1987) (describing and discussing parliamentary sovereignty in the United Kingdom and explaining that in the United Kingdom "[s]tatutes are of paramount authority, and any conflict between a statute and a judicial decision must be decided in favor of the statute").

296. *Australian Constitution* ss 80, 116, 117.

Privileges and Immunities Clause in Article IV, Section 2[297] that prohibits discrimination by one state against citizens of another state,[298] a provision barring the establishment of an official religion and protecting the free exercise of religion,[299] and a jury trial guarantee.[300] In all three instances, however, the HCA's efforts at enforcing these provisions have been halting and tepid (at best).[301] What is more, the Justices have conceptualized these enumerated rights not so much as individual rights guaranteed against the state but, rather, as mere limitations on the scope of legislative power.[302]

Thus, as with the IFPGC, the HCA reads down even expressly enumerated constitutional "rights" in Australia's 1901 Constitution as constituting limitations on legislative power rather than as substantive, judicially enforceable human rights vested in Australia's residents. This result should not be seen as shocking or even surprising, given that the drafters of Australia's 1901 Constitution expressly sought to avoid enshrining a system of entrenched human rights that would be enforced through judicial review.[303] Having reduced these express constitutional guarantees to structural limits on government power,

297. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

298. *Australian Constitution* s 117 ("A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.").

299. *Id.* at s 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.").

300. *Id.* at s 80 ("The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.").

301. *See* KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 106–07, 112–13.

302. As Professors Saunders and Stone explain, "the Australian Constitution is directed primarily to establishing the federal system and creating institutions of government for the Commonwealth, but not the State, sphere." Stone & Saunders, *supra* note 293, at 8. In other words, the failure to empower courts to protect fundamental human rights, including the freedom of expression, constitutes a design feature rather than a bug. *See id.*

303. LUKE BECK, AUSTRALIAN CONSTITUTIONAL LAW 30 (2020); *see* Stephenson, *supra* note 293, at 905–15 (discussing in some detail the conscious decision to omit a bill of rights from the Australian Constitution).

the HCA grants very broad judicial deference to the federal and state parliaments in deciding whether a particular statute falls within the bounds of these express constitutional limitations.[304]

Viewed against the larger backdrop of Australian constitutional law in general and its almost complete vesting of the protection of fundamental rights with elected legislators rather than judges, *Banerji* is consistent with the general warp and weft of judicial review in Australia. The courts are very much the junior partner of the political branches; voting and elections, not judicial decisions, are supposed to serve as the primary means of securing fundamental human rights "Down Under." Indeed, if a law regulating speech has a legitimate purpose and an arguably rational means/end fit, the HCA will not invalidate it on IFPGC grounds.[305] The IFPGC is thus a very distant, and rather sickly, cousin to the U.S. First Amendment.

Even if one takes these structural considerations into account, however, *Banerji* remains a deeply flawed, highly problematic, "ugly" decision.[306] There is every reason to believe that elected politicians will exploit their authority to muzzle government employees, barring them from making public criticism of government workplaces, to distort and disrupt the process of democratic deliberation.[307] A structural conflict of interest

304. *See* KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 106–07, 112–13 (discussing the very limited human rights guarantees set forth in Australia's Commonwealth Constitution of 1901 and observing that section 116, a direct analog to the Religion Clauses of the First Amendment, suffers from even *weaker* judicial enforcement than the IFPGC, a state of affairs that strongly suggests that even when the drafters included an express human rights provision, the Australian courts are not much minded to enforce these provisions vigorously).

305. *See id.* at 106–17 (noting that the burden on the government to justify restrictions to justify limitations on the implied freedom of speech is "at best, quite modest").

306. *See* Gray, *supra* note 55, at 31 ("The government's clear difficulty with what Ms Banerji did was that it was embarrassing to them. It was critical of their policies."). Viewpoint discrimination is fundamentally inconsistent with any plausible general theory of the freedom of expression because it represents an effort by the government to close off the marketplace of political ideas from ideas that the government dislikes or fears. This is not to say that the government could never justify speech regulations that feature viewpoint, or speaker-based, discrimination—but any and all such regulations should require the most compelling of justifications to survive judicial review.

307. *See* KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 110–11 (arguing that the HCA's decision in *Banerji* constitutes a "gag rule on federal civil servants" and disrupts "the collective interest in government employees engaging in whistleblowing speech").

plainly exists when elected politicians seek to limit, or proscribe, government employees from criticizing the government's policies and management.[308] If one accepts that the IFPGC does not give rise to a personal right but, instead, supports a collective interest in a wide-open and robust process of democratic deliberation, no obvious reason exists for failing to convey *any* meaningful protection on government employees who seek to speak out about matters of public concern or to blow the whistle on wrongdoing within the agency or department for which they work.

Indeed, the viewpoint-based nature of the APSA and APSC make the *Banerji* Court's analysis astonishingly ugly and completely misguided in fact.[309] As one perspicacious legal scholar, Margaret O'Brien, observes, "Australia's application and enforcement of the laws heavily weigh against any criticism of the government."[310] Simply put, "the Australian system fails to provide protections for its public servants who wish to engage in political activity, providing that almost any criticism of the government will result in disciplinary action."[311] Professor Anthony Gray, echoing O'Brien's concerns, objects that "the government's legitimate interests in terms of an independent, impartial and functional public service must be tempered by acknowledgment of the very valuable contribution that public servants can make to important public policy debates, from their specialised knowledge and expertise."[312] Under *Banerji*, however, the government has essentially no burden of justification to meet when

308. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 15–22, 101–03 (1980) (arguing in favor of a "representation-reinforcing" approach to judicial review that would involve judges deploying it mainly to prevent self-interested legislators from enacting laws that distort the democratic process, such as creating malapportioned legislative electoral districts). Professor Ely's proposed model for judicial review plainly would require beady-eyed judicial scrutiny of any and all laws that seek to prevent government employees from speech activity critical of the government, its incumbent officials, and their policies. *See id.* at 102–03.

309. O'Brien, *supra* note 17, at 339 ("While neutrality is intended to mean restriction from both negative comment and positive comment, many of the prominent court cases involving restrictions on public employee's political activity have been regarding criticism of the government."); *id.* at 351 (observing that "much of the dispute over these regulations revolves around negative comments made about governmental agencies or their policies" and noting that "the language used in the guidance issued by the APS specifically references negative comments, as opposed to all political comments in general").

310. *Id.* at 351.

311. *Id.* at 355.

312. Gray, *supra* note 55, at 35–36.

it silences government workers (at least with respect to *criticism*, rather than *praise*, of the government and its policies).[313]

If Australian civil servants must be loyal minions, ready, willing, and able to work with equal alacrity for a Liberal Party minister or a Labor Party minister, isn't a ban on *all* public comments about the agency's work essential? If employees serve as cheerleaders for the policies of the government du jour—which the applicable statute and regulations do not merely allow but affirmatively encourage[314]—won't a new minister, empowered incident to a change of control in the national parliament, worry about the loyalty of civil servants who praised the prior minister's policies? At least the U.S. Hatch Act[315] prohibits political activity across the board, as opposed to solely political activity criticizing the incumbent administration.

Banerji makes *Pickering*, even as weakened by subsequent decisions including *Connick*, *Garcetti*, and *Roe*, look incredibly robust. The HCA's reasoning seems to be that, if government employees were free to speak their minds about matters of public concern, ministers might not repose faith in them to work as honest brokers in the implementation of the government's policies. Strangely, however, the APSA and APSC do not prohibit any and all public statements about matters of public concern by government employees covered by Australia's civil service protections; they only prohibit *critical* comments.[316] Government employees are quite free to make positive public comments about the work of their departments.[317] But, even if one assumes all of

313. O'Brien, *supra* note 17, at 339 (noting that the applicable Australian civil service regulations provide that "employees should feel encouraged to make a 'positive comment on social media about your agency['] " (quoting *Making Public Comment on Social Media: A Guide for Employees*, AUSTL. GOV'T DEP'T OF SOC. SERVS. (2019) [hereinafter *Making Comment on Social Media*], https://www.dss.gov.au/system/files/resources/8746-social-media-policy-final-2021.pdf [https://perma.cc/P86C-2PHP])). These same regulations, however, specifically provide that "criticism of the administration or work of your agency will 'almost always . . . be seen as a breach of the Code.'" *Id.*

314. *Making Comment on Social Media*, *supra* note 313.

315. 5 U.S.C. §§ 7321–26 (2018).

316. *See Making Comment on Social Media*, *supra* note 313; *see also* O'Brien, *supra* note 17, at 339, 350–51 (discussing how Australia's civil service speech regulations and guidelines only prohibit criticism of the government but affirmatively encourage employees to make public statements of support).

317. *See APS Guidelines*, *supra* note 263 (prohibiting critical or embarrassing public comments but permitting civil service employees to praise or laud their government office and its leadership). The APS Guidelines are facially

the limitations, which the HCA repeatedly has emphasized, about the IFPGC protecting a collective or communal interest in speech related to democratic self-government,[318] the *Banerji* opinion remains deeply problematic because it fails to consider, at all, the interest of the body politic in at least some kinds of government employee speech.

It might well be that the process of democratic deliberation could go on, and generate sensible electoral judgments, without Michaela Banerji's policy critiques of the DIC. However, if the Australian equivalent of a Daniel Ellsberg were to leak documents showing that the government had been lying to the voters for years about the efficacy of crucial government policies (such as a war in southeast Asia), the collective interest in access to that information would be both profound and obvious. It is inconsistent with the underlying normative theory of the IFPGC to sustain a ban on speech that is critical of the government without considering the voters' collective interest in whistleblowing speech. Even if government employees do not have any individually protected interest in speaking, for example, as citizens, a serious question remains about whether some kinds of government employee speech might be essential to the use of elections to hold the government accountable (and therefore squarely within the core of the IFPGC).

V. THE NEED FOR CONSTITUTIONAL COURTS TO EMBRACE JUDICIAL DISCRETION WHEN RECONCILING PUBLIC EMPLOYEES' SPEECH RIGHTS WITH THE GOVERNMENT'S LEGITIMATE INTEREST IN MANAGING ITS WORKFORCE

If the courts fail to provide meaningful protection to government employees who engage in whistleblowing speech, persons holding employment with the government will be far less willing to share critically important information about malfeasance and misconduct with the public. Quite clearly, democratic self-

viewpoint-based; they only restrict negative or critical public commentary. *See Making Comment on Social Media*, *supra* note 313; *see also* O'Brien, *supra* note 17, at 339, 351 (noting that the Australian laws and regulations seek only to prohibit criticism of the government and its policies from government employees).

318. *See* KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE, *supra* note 252, at 119 (discussing the HCA's classification of the IFPGC as protecting a communal interest, rather than an individual right).

government will suffer in consequence.[319] After all, "[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."[320]

Since its landmark decision in *Pickering*,[321] the U.S. Supreme Court has pursued a halting and half-hearted First Amendment jurisprudence that excludes from *any* constitutional protection a great deal of government employee speech. Public employees who can show that their speech falls within a restrictively defined universe of speech related to a matter of public concern, and who can also demonstrate that their speech does not relate to their official government duties, will find themselves facing an uncertain outcome under *Pickering*'s open-ended balancing test.[322] This test also fails to consider expressly the value of the government employee's speech to the body politic. Simply put, the *Pickering* test as it presently exists is binary, but, to take full account of the community's interest in whistleblowing speech, it must include that collective interest as an express third factor.

Even more problematic: Under *Pickering*/*Connick*/*Roe*, government employers are entirely free, like private employers, to regulate their employees' speech on or off the clock.[323] Under current doctrine, perhaps best represented by *Roe*, employers have broad authority to impose discipline on government employees for expressive activity whether it takes place on or off the job; the fact that speech takes place outside the workplace does not mean that it cannot serve as a basis for discipline (up to and including discharge from employment). *Roe*'s holding that employers can discipline government employees' statements

319. *See* Krotoszynski, *supra* note 1, at 273 ("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.").

320. *Id.* at 274.

321. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

322. *See* Papandrea, *supra* note 180, at 2122 (noting that the framework adopted by the U.S. Supreme Court since *Pickering* "has left the expressive rights of 'off-duty' government employees engaging in non-work related expressive activities particularly unclear").

323. *See id.* at 2145–58 (discussing in some detail how lower courts fail to distinguish meaningfully between on-the-job and off-duty government employee speech and will generally apply *Pickering* and *Connick* to off-duty speech activity by public workers).

made outside of the workplace is in tension with a relatively recent Supreme Court case holding that public schools should have less authority to regulate off-campus speech by their students.[324] Unlike *Roe*, the public school case counsels that the location of speech activity should affect the balancing exercise.

The test for protected government employee speech should account for contextual factors, including whether the employee was on the clock, at the workplace, or speaking about matters related to their work. Professor Mary-Rose Papandrea persuasively posits that "off-duty, non-work-related speech by government employees should be entitled to presumptive protection under the First Amendment."[325] When a government employee speaks while on the job, the speech is far more likely to affect directly the government's legitimate managerial interests than when speech takes place off-site and off-the-clock. Simply put, the managerial needs of the government should count for less when a government employee's speech activity is less likely to be attributed to the government.[326] The Supreme Court's current jurisprudence fails to take sufficient account of this important matter of context.

In sum, *Pickering*'s shortcomings, as well as those of related cases in the same doctrinal line, including *Connick* (which narrowly defines speech about a matter of public concern)[327] and *Garcetti* (which completely withholds protection for government

324. Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 201 (2021) (Alito, J., concurring) ("A public school's regulation of off-premises student speech is a different matter. While the decision to enroll a student in a public school may be regarded as conferring the authority to regulate *some* off-premises speech (a subject I address below), enrollment cannot be treated as a complete transfer of parental authority over a student's speech."). Just as enrollment in a public school does not vest public school officials with carte blanche authority to regulate a student's off-campus, after-hours speech on social media, government employment should not vest the state with comprehensive powers of censorship over public workers.

325. Papandrea, *supra* note 180, at 2120.

326. *See id.* at 2158 (arguing that "the Court should abandon a threshold public concern requirement in such cases" because "[w]hen an employee engages in speech outside of work on topics that are not directly related to work, the government employer's interest in restricting that speech is low"). Taking this approach would certainly better align *Pickering*/*Connick* with *Mahanoy Area School District*.

327. Connick v. Myers, 461 U.S. 138, 148–49 (1983) (holding that a public employee's statements about morale in a government office, general trust in supervisors, and the need for a "grievance committee" do not constitute a matter of public concern).

employee speech if it arguably relates to a government worker's official duties),[328] are many and varied. The main problems arise from the Supreme Court's consistent efforts over time to limit judicial discretion in cases involving government employee speech.

The Supreme Court's strong preference for the creation and enforcement of bright-line categorical rules, instead of more open-ended balancing tests, has led to rules that systematically favor the government as manager and zero out the government employee as citizen and speaker. It did not have to be this way. *Pickering*, standing alone, adopts an analytical approach not much dissimilar from Canada's mode of analysis under *Osborne* and *Fraser*.[329] These decisions reject any form of rigid, categorical analysis in favor of an open-ended balancing approach that, in theory, will take into account any and all relevant factors.

Had the Supreme Court simply expanded the relevant inputs required to apply *Pickering*, rather than restricted *Pickering*'s scope of application altogether, First Amendment jurisprudence regarding the speech rights of government employees would probably look more like Canada's than Australia's. Indeed, if Australia's approach has any redeeming qualities at all (and, arguably, it does not), the principal virtue is that *Banerji*'s approach will reliably produce consistent results over time (awful results, to be sure, but consistent results insofar as government employees seeking to invoke the IFPGC will always lose). An open-ended balancing approach of the sort Canada has adopted,[330] avoids this problem because it takes into account *all* relevant factors in a highly context-sensitive judicial analysis.

328. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("When public employees make statements pursuant to their official duties, they are not speaking as citizens for first amendment purposes . . . .").

329. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The 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."), *with* Osborne v. Canada, [1991] 2 S.C.R. 69, 90 (Can.) (holding that courts must find "the proper legal balance between the right of an individual to speak freely on important public issues and the duty of an individual, *qua* federal public servant, to fulfil properly his or her functions").

330. *See supra* notes 78–97 and accompanying text (discussing and analyzing Canada's approach to affording constitutional protection to government employee speech under section 2(b) of the Charter).

To be sure, risks arise from this approach too. The biggest risk of an open-ended balancing approach rooted in proportionality analysis[331] arises from the risk of judges reaching different (inconsistent) results in cases presenting more-or-less the same facts. A balancing approach will inevitably mean that some claimants will win, whereas others will lose, in largely identical cases. Upon considered reflection, however, this constitutes a design feature rather than a bug. When important conflicting interests are present in constitutional adjudication, zeroing out utterly one interest or the other simply will not do—instead, the interests must be reconciled through a balancing exercise.[332]

Things could be different. Suppose that the Supreme Court, after deciding *Pickering*, had moved in a different jurisprudential direction—namely by expanding the *Pickering* analysis to include whether a government employee spoke in a whistleblowing capacity, whether the information disclosed by the government employee would likely have been available to We the People through some other means, and whether speech that causes workplace disruption is still deserving of First Amendment protection.

The Justices could have accounted for the concerns raised in *Garcetti* and *Connick* by incorporating them as factors in the *Pickering* balancing test rather than categorical exclusions that zero out all First Amendment protection for a public servant's speech. If speech relates to a government employee's official duties, perhaps that should counsel against conveying the broadest possible protection on the speech. But surely it should not be the *only* relevant factor in the decisional matrix. Under *Garcetti*, it is.[333]

331. *See* Jackson, *supra* note 41, at 3098–100, 3110–21 (describing and explaining in some detail how proportionality review works in Canada, Germany, and other constitutional democracies). For an excellent and comprehensive overview of proportionality review and its operation in other democratic countries that feature a written constitution and observe the rule of law, see PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATIONS, REASONING (Grant Huscroft et al. eds., 2014).

332. Mathews v. Eldridge, 424 U.S. 310, 334–35 (1976) (adopting an open-ended balancing exercise for assessing procedural due process claims).

333. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that the Free Speech Clause of the First Amendment does not protect government employee speech, at all, if the speech relates to the public servant's workplace duties and responsibilities).

So too, if a police officer, in his spare time, attends Ku Klux Klan rallies bedecked in white robes and a hood, or makes and distributes amateur porn on *OnlyFans*, the low value of the speech, at least if measured by its potential to contribute to and facilitate the process of democratic deliberation, should be relevant factors in striking an appropriate balance between the government as manager and the government employee as citizen. Even *Waters*, which allows a government employer to fire an employee based on entirely misattributed speech never uttered by a public servant,[334] could have been folded into the *Pickering* balancing exercise. Under a reformed *Pickering* test, courts could, and indeed *should*, consider the set of facts that a government employer believed to be true as a relevant factor in the balance—but without affording this single consideration dispositive (meaning controlling) weight. After all, surely the First Amendment protects silence just as much as it protects the decision to speak.[335]

Pickering thus held great promise as a means of operationalizing a judicial balancing exercise that is probably unavoidable—at least if federal courts are to give full effect to both the government's interest in managing its work force and to the Free Speech Clause of the First Amendment. From *Connick* forward, however, this promise has gone largely, arguably completely, unrealized. Canada's approach, reflected in decisions such as *Osborne* and *Fraser*, does a far better job of grappling honestly, openly, and *transparently* with the difficult task of

334. 511 U.S. 661, 679–82 (1994); *see* also *supra* note 46 (discussing and critiquing *Waters* in some detail).

335. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("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."). Coerced speech is just as offensive to baseline values of freedom of expression as is government censorship; attributing words to government employees that they never actually spoke constitutes a kind of forced speech. *See id.* ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). To fire Cheryl Churchill because her boss thought, incorrectly, that she criticized him, and then to stand by that decision, even if she did no such thing, is, quite literally, to put words in her mouth.

accommodating and reconciling fundamentally conflicting social and constitutional values.

Arguably, the biggest shortcoming in the government speech jurisprudence of the constitutional courts in the United States and Australia is a normative one—namely, the utter failure to take meaningful account of the critical role that whistleblowing speech often plays in facilitating the use of elections to secure government accountability. Unfortunately, however, this failure replicates across jurisdictions that purport to protect the freedom of speech in order to promote democratic self-governance (Canada excepted). Indeed, other democratic polities that feature constitutionally protected freedom of expression, such as Australia, do *even less* to facilitate whistleblowing government employee speech than does the U.S.[336]

A defensible balancing exercise must take into account the social value of the speech activity. It is true that this involves making content-based distinctions, and it is also true that content-based distinctions are generally thought to be anathema to core free speech values.[337] The Supreme Court's government employee speech doctrine, however, is already rife with content-based restrictions and exclusions.[338] First Amendment doctrine more broadly is riddled with content-based distinctions; core political speech receives broader and deeper First Amendment

336. The United Kingdom provides another example of a jurisdiction that has adopted a categorical approach, drawing clear lines about permitted and prohibited government employee speech activity. *See* O'Brien, *supra* note 17, at 341–47 (discussing the extensive categorical rules that govern public employees' speech activity in the United Kingdom). O'Brien explains that most civil servants in the United Kingdom are subject to extensive restrictions on their expressive activities, including political activities, and generally "must receive permission from the[ir] department" to engage in any kind of political activity. *Id.* at 344–46. Moreover, "[p]ermission is not usually granted to employees whose job functions require significant amounts of interaction with members of the public, or who are viewed as being involved in decisions affecting the public and where subsequent political activity would likely become known to members of the public." *Id.* at 346.

337. *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 811–14 (2000) (holding that content-based restrictions on speech can only be justified if they satisfy strict scrutiny); *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

338. City of San Diego v. Roe, 543 U.S. 77, 83–85 (2004) (holding that a government employer may fire a public worker for creating and distributing non-obscene, but sexually explicit, video content).

protection than commercial speech or sexually explicit speech.[339] Some government employee speech, namely whistleblowing speech in circumstances where highly relevant information is held only by the government itself, constitutes an important social good—a social good that facilitates democratic self-government. That characteristic should be overtly placed in the *Pickering* balance.

Of course, things could be much worse. Australia's HCA, in *Banerji*, blesses a regulatory scheme that permits discharge of government employees for any off-duty speech on social media that potentially "embarrasses" the government employer.[340] The standards for potential discipline are content-based, viewpoint-based, and also vague and overbroad to boot. None of this mattered to the HCA; the Justices unanimously sustained both a statute and administrative regulations that effectively gag government employees and prevent them from speaking out about matters of public concern in a critical way (but that affirmatively encourage government employees publicly to praise their bosses and their bosses' policies).[341] This approach grossly disserves the

339. *Compare* Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310, 340–41 (2010) (invalidating, on a strict scrutiny basis, federal election law provisions that restricted political speech based on both its content and the identity of the speaker), *with* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–64 & 564 n.6 (1980) (observing that intermediate, rather than strict, scrutiny should be applied to laws burdening commercial speech, because "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation'" (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977))), *and* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."). It bears noting as well that the Supreme Court has also fashioned special First Amendment doctrines relying on content and/or speaker distinctions for both government and professional speech. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 534 (2001). It is fair to say that contemporary First Amendment doctrine is replete with content-based distinctions. Adding one more, "whistleblowing speech," as a subcategory of government employee speech, should not be unduly burdensome, or difficult, for the federal courts to accomplish.

340. *See supra* Part IV.B (discussing and analyzing the HCA's decision in *Comcare v Banerji* [2019] HCA 23 (Austl.)).

341. *See Comcare v Banerji* [2019] HCA 23, ¶ 42 (Austl.) (Kiefel, CJ, Bell, Keane & Nettle, JJ) (discussing the HCA's reasoning); *see also APS Guidelines*, *supra* note 263, at 33–35 (stating that public comment by government employees is improper if it includes criticism of the government or its policies that indicate the employee "is incapable of professionally, efficiently or impartially

process of democratic deliberation that, in theory, animated and supported the HCA's recognition of the IFPGC in the first place.

Canada's approach, which is by far the least categorical and most context-sensitive of the three systems surveyed in this Article, necessarily involves the widest margin of judicial discretion. Even the most offensive and egregious government employee speech, including clear forms of hate speech, will trigger the application of section 2(b) of the Charter. A would-be government employee speaker need not worry about whether a judge will deem her speech to be related to a matter of public concern or within the scope of the person's official duties. A reviewing court will find any and all government employee speech protected under section 2(b) of the Charter.[342] The hard question will arise incident to proportionality review, when a reviewing court will balance the government employee's interest in speaking against the government's interest in managing the government's workplace.[343]

To be sure, in Canada, when a court engages in proportionality review, it will certainly matter whether the speech relates to a matter of public concern. A Toronto police officer making amateur porn in his spare time, like the San Diego, California officer in *City of San Diego v. Roe*,[344] would not be tossed out of court because the speech activity at issue is decidedly low brow. However, when engaging in proportionality analysis, a reviewing court would certainly take the social value of the speech activity into account, as well as the adverse effects, if any, that the speech activity caused or might foreseeably cause, with respect to the government employer's ability to achieve its institutional objectives.[345] Thus, a government employer would have a freer hand to discipline or fire an employee who engages in low-value speech that is highly disruptive.

performing his or her official duties," could cause serious workplace disruption, or "amount to gratuitous personal attacks").

342. MOON, *supra* note 58, at 33–53 (describing the SCC's interpretation of section 2(b) as encompassing almost all activity that communicates a message, except for acts of violence and possibly of threats of violence).

343. *See id.* at 54 (noting that the SCC's use of section 1 proportionality analysis often gives significant deference to government claims of necessity).

344. 543 U.S. 77 (2004).

345. *See, e.g.*, R. v. Keegstra, [1990] 3 S.C.R. 697, 787 (Can.) (weighing the "value" of a public teacher's speech right to teach anti-Semitic "lessons" against the magnitude of the harm this speech caused to governmental and societal goals and finding that disciplinary and criminal actions were justified).

By way of contrast, however, a government employer would face a significantly higher burden of justification in Canada if it sought to fire or discipline an employee who blows the whistle on misconduct within the government agency where the employee works. Proportionality analysis would not merely permit, but arguably would *require*, a reviewing court to consider the social value of speech activity when deciding whether to validate a government employer's claim of managerial necessity. This is a superior approach to the U.S. analytical framework, which imposes categorical limits on the scope of protected employee speech. In the United States, speech or expressive activity that is not clearly related to matters of public concern generally, and politics and government more specifically, is not protected (at all) if a government employer deems it problematic.[346] So too, if speech relates to a government employee's official duties, no constitutional protection attaches, regardless of the social or even constitutional importance of the speech at issue.[347]

Canada's approach defines protected speech broadly—rather, very broadly—but then gives the government a clear opportunity to show that the facts sufficiently justify the abridgement of section 2(b), thereby rendering the government's actions constitutionally acceptable. No public employee speech lies completely outside the scope of section 2(b)'s protection, save

346. *See Roe,* 543 U.S. at 84 (finding that "Roe's expression does not qualify as a matter of public concern under any view of the public concern test" and holding that, in consequence, "[h]e fails the threshold test and *Pickering* balancing does not come into play"). *Roe* holds that a government employer may fire an employee who engages in speech that the employer deems "detrimental" to the office (meaning merely embarrassing or controversial), if the speech does not relate to a matter of public concern. *See id.* at 80–83. The general requirement that a public servant's speech relate to a matter of public concern to trigger the First Amendment's Free Speech Clause flows directly from *Connick*. *See* Connick v. Myers, 461 U.S. 138, 142–43 (1983) (holding that *Pickering* only applies when a government employee speaks about a matter of public, as opposed to private, concern).

347. Recall that in *Garcetti*, the government employee, an attorney, believed that a law enforcement officer offered false testimony to a court in order to obtain a search warrant. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006). Because the speech related to Ceballos's official duties, the Supreme Court held that he could not claim any First Amendment protection. *Id.* at 410–12. In Canada, the fact that an employee's speech related to her official duties would be a relevant factor in the proportionality analysis (a government employer has a stronger claim to regulate speech within the scope of an employee's job), but it would not foreclose a finding that the government employer both violated section 2(b) and that the actions were not justifiable under section 1.

perhaps for actual acts of violence.[348] At the same time, of course, this open-ended balancing approach will never confer automatic protection on government employees; the government will always enjoy a clear chance to defend the constitutionality of its behavior.

Of course, a more categorical approach, at least for the most socially valuable forms of government employee speech, might better empower Canadian public workers to choose speech over silence with less fear of becoming free speech martyrs. Under this approach, Canadian courts might consider putting a heavier thumb on the scale than *Osbourne* currently mandates for whistleblowing speech (i.e., a more categorical rule within the more general Canadian framework of balancing under the proportionality doctrine). This would signal a stronger judicial commitment to safeguarding section 2(b) rights in such cases—and would even more clearly incentivize Canada's public servants to choose speech over silence when a government agency's behavior puts the public's safety and welfare at risk. In short, although the SCC's approach is superior to that currently followed in both the U.S. and Australia, it could be slightly modified to, even more effectively, facilitate securing democratic accountability. This constitutes a quibble, however, as Canada's existing doctrinal approach plainly takes some account of the whistleblowing character of a government employee's speech, including the potential value of the speech to the body politic.

It would also be possible, with proportionality analysis, for Canada's courts to signal that some kinds of government employee speech are more important than others. If it is possible to separate out hate speech from other kinds of government employee speech, and to afford it less constitutional protection under section 2(b), it should be equally feasible to identify and more

348. Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 586–88 (Can.) (holding that section 2(b) protects any and all activity that a would-be speaker chooses to convey a message, except for "threats of violence or acts of violence," or "the destruction of property, or assaults, or other clearly unlawful conduct"). *But cf.* J.A. Manwaring, *Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of* Dolphin Delivery Ltd., 19 OTTAWA L. REV. 413, 415 (1987) ("In *Dolphin Delivery*, the Supreme Court of Canada does not provide persuasive reasons for its decision [affording such broad scope to [s]ection 2(b)]."). For a critical analysis of the SCC's expansive construction of activity protected under section 2(b) and how it arguably warps proportionality analysis, see KROTOSZYNSKI, JR., *supra* note 43, at 30–36.

robustly protect particularly valuable government employee speech, such as whistleblowing speech.[349] As Professor Stone has observed, proportionality analysis may be well-suited to line-drawing exercises of this sort.[350] To date, however, the SCC has done a more robust job of identifying low-value government employee speech than it has with respect to high-value government employee speech.[351] To be sure, some Canadian provincial courts have approached government employee speech, in the workplace no less, in a highly thoughtful, careful, and measured way.[352] Thus, in Canada, a public school teacher has a constitutional right to criticize the district to the parents of enrolled students without facing discipline or discharge.[353]

349. *See* KROTOSZYNSKI, JR., *supra* note 43, at 37 (noting that "[a]s the social costs of right increase, the willingness of judges strictly to enforce that right decreases" and positing that "[b]ecause the Supreme Court [of Canada] has so broadly defined the scope of protected expression, it has made it correspondingly easier for the government to regulate speech activity under [s]ection 1"). In other words, under proportionality analysis, it would be perfectly plausible for the courts to require a higher burden of justification for imposing punishment on a government employee when the speech activity at issue constitutes whistleblowing speech rather than more generic speech activity.

350. *See* Stone, *supra* note 230, at 965–66 (discussing the potential normative and policy benefits of proportionality analysis as a jurisprudential tool and exploring how it might further develop going forward in Australian constitutional jurisprudence); Susan Kenny, *Evolution*, *in* THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION, *supra* note 230, at 119, 124–25 (arguing that proportionality review both incorporates and animates important substantive concerns associated with meaningful judicial protection of fundamental constitutional rights).

351. *See* R. v. Keegstra, [1990] 3 S.C.R. 697, 713–14, 795–96 (Can.) (holding that a public high school teacher's anti-Semitic classroom "lessons" were protected but finding that the government had a sufficiently pressing and substantial reason to justify imposing criminal punishment on Keegstra); Fraser v. Pub. Serv. Staff Rels. Bd., [1985] 2 S.C.R. 455, 468–69, 471–72 (Can.) (holding that a government employee's intemperate public remarks about the Charter and metrification constituted protected speech but sustaining Fraser's discharge because his remarks plainly undermined public confidence in his agency).

352. *See*, *e.g.*, B.C. Teachers' Fed'n v. B.C. Pub. Sch. Emps.' Ass'n, 2013 B.C.C.A. 241, paras. 50–54, 63–67 (Can.) (holding public school teacher speech critical of the school district protected); B.C. Pub. Sch. Emps.' Ass'n v. B.C. Teachers' Fed'n, 2005 B.C.C.A. 393, paras. 50–51, 65–70 (Can.) (same), *leave to appeal refused*, [2006] S.C.C. No. 31162 (Can.); *see also* Clarke & Trask, *Part One*, *supra* note 96, at 322–26 (noting that the Canadian courts, at all levels, consistently have eschewed any categorical exclusions for public school teacher speech, which even includes speech with parents of current students highly critical of their employer and its educational policies).

353. *B.C. Teachers' Fed'n*, 2013 B.C.C.A. at paras. 63–67.

Given the reasoning and outcomes in U.S. cases, such as *Garcetti*[354] and *Connick*,[355] it is highly unlikely that a U.S. schoolteacher talking with parents about school district policies related to their duties would enjoy any meaningful First Amendment protection because the speech arguably relates to their employment (*Garcetti*) and/or does not constitute speech about a matter of public concern rather than private concern (*Connick*). Indeed, one might plausibly wonder if even Marvin Pickering's letter to the editor about a school bond issue pending before local voters would enjoy protection under the Free Speech Clause post-*Garcetti*.[356] Perhaps it still would because Pickering's duties in the school district, as a classroom teacher, did not involve school district finances and budgeting. Had he worked in the school district's accounting office, however, he would clearly be out of luck under *Garcetti*.

In these two material respects, Canada conveys broader and deeper protection on government employees than does either the United States or Australia. The SCC's open-ended balancing approach also can and does take directly into account the importance of government employee speech to the body politic. Accordingly, among these three jurisdictions, it plainly constitutes "the good."[357]

Canada's approach admittedly vests judges with more discretion than the U.S. framework, but when the government can claim a legitimate reason for regulating employee speech (both on and off the job), a categorical approach is very likely to mean that the government will automatically win. When conflicting, important interests are at stake, however, the better approach involves carefully balancing and reconciling the relevant

354. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (holding that speech related to a public servant's workplace duties enjoys no First Amendment protection whatsoever).

355. Connick v. Myers, 461 U.S. 138, 146–50 (1983) (holding that only speech related to matters of public concern, rather than private concern about workplace conditions, triggers the Free Speech Clause of the First Amendment).

356. Pickering v. Bd. of Educ., 391 U.S. 563, 566–68 (1968) (discussing Marvin Pickering's critical letter to the editor and finding it enjoyed protection as speech under the First Amendment).

357. *See* O'Brien, *supra* note 17, at 350 ("Despite its flaws, Canada's system is perhaps the best in achieving a balance between the interests of the government and the interests of civil servants."). O'Brien also notes that the Canadian courts and administrative authorities "have provided the most guidance in helping their public servants understand the law and comply with it, in a way that still leaves room for political expression." *Id.*

conflicting interests—in government employee speech cases, the government's managerial domain and the free speech interests of public servants as speakers in conjunction with the interests of We the People as a potential audience—rather than zeroing out one interest or the other.[358] Yet, this is precisely the road that the U.S. Supreme Court has traveled, after its landmark decision in *Pickering*, in cases including *Connick*, *Waters*, and *Garcetti*.

In circumstances where the government will almost invariably have a plausible case to make, a categorical rule that reflexively credits the government's managerial justifications for restricting or banning government employee speech will invariably mean that the government employee loses and the public employer wins. Simply put, judges must both possess and exercise discretion if *Pickering* is to avoid becoming something of a "Procrustean Bed"[359] that reliably generates consistent, but unjust

358. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (adopting an open-ended balancing test to assess procedural due process claims that takes account of the government's interests, the interests of individuals seeking to obtain government benefits to which they claim to be entitled, and the risks of error inherent in the process the government voluntarily provided). Procedural due process cases present a largely identical problem—conflicting but important interests that both implicate important constitutional values. *See* Goldberg v. Kelly, 397 U.S. 254, 261–66, 269–71 (1968) (holding that recipients of public benefit programs have a constitutionally protected property interest in such benefits and that the government's interest in administering public benefit programs correctly does not justify denying participants fair procedures before the government terminates their benefits). Simply ignoring the government's interest as an overseer of important public benefit programs, such as those administered by the Social Security Administration and the Veteran's Administration, will not work. Nor, however, is it feasible to deny beneficiaries of those programs, who possess significant reliance interests and legitimate claims of entitlement to their benefits, a fundamentally fair process, which must include notice, a meaningful opportunity to be heard, and a reasoned decision based on the record. *See id.* at 262 n.8, 264–68. *See generally* William Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 450–52, 470, 487–90 (1977) (discussing the conflicting interests at stake in government benefits cases but arguing that the federal courts should recognize a right, under the rubric of procedural due process, for individuals to be protected against "procedural grossness" at the hands of the government).

359. THOMAS BULFINCH, THE AGE OF FABLE OR BEAUTIES OF MYTHOLOGY 192–93 (William H. Klapp ed., 1903) (discussing Procrustes and his nefarious "hospitality" to wayward travelers that involved murder via a bed). If a guest was too big for the bed, Procrustes would lop off their limbs; if too small, he would stretch them. *Id.*; *see* NASSIM NICHOLAS TALEB, THE BED OF PROCRUSTES: PHILOSOPHICAL AND PRACTICAL APHORISMS ix–x (1st ed. 2010)

and unreasonable, results. These results, moreover, poorly serve the First Amendment's central concern—namely, facilitating democratic self-government.[360] An approach that incorporates more judicial discretion, such as Canada's, as part of a holistic, contextual, but nevertheless structured balancing exercise, would provide a better framework for protecting government employee speech from government censorship than the current U.S. framework under *Garcetti*, *Connick*, *Roe*, *Waters*, and (what is left of) *Pickering*.

If Canada's experience suggests that things could be better in the United States, Australia's example demonstrate with convincing clarity that they could easily be worse. More specifically, Australia's treatment of would-be government employee speakers is even more problematic than the *Pickering*/*Connick*/*Garcetti* approach in the United States.[361] Essentially, Australian law provides that if the government possesses a legitimate

(providing an alternative version of this myth in which Procrustes uses two beds: a short bed for murdering tall victims and a long bed for killing short victims). The metaphor of a "Procrustean Bed" involves ignoring relevant factors (lopping them off) or giving undue weight to factors that are, in fact, relevant to a more limited degree (stretching them). The Roberts and Rehnquist Courts have shown a disturbing, and fairly consistent, affinity for categorical tests that seek to limit, if not eradicate entirely, judicial discretion in First Amendment cases involving expressive freedom—thereby rendering free speech jurisprudence in the United States something of a Procrustean bed. *See* Ronald J. Krotoszynski, Jr., *The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation*, 2020 U. CHI. LEGAL F. 145, 145–55 (2020). In my view, "the constitutional tests used to frame and decide First Amendment cases must be sufficiently open-ended to permit judges to take all relevant factors and considerations into account." *Id.* at 146.

360. Harry Kalven, Jr., *The* New York Times *Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204–06, 209–10 (1964) (arguing that protecting the process of free and open public debate from government censorship, and especially from any rules or doctrines that resemble seditious libel, constitutes the Free Speech Clause's most important jurisprudential work). Professor Kalven, an important, indeed iconic, scholar of the First Amendment, cogently (and correctly) posits that "[t]he central meaning of the First Amendment is that seditious libel cannot be made the subject of government sanction." *Id.* at 209. Seditious libel treats criticism of the government and its officers as a crime. Quite obviously, "[t]he concept of seditious libel strikes at the very heart of democracy" because "[p]olitical freedom ends when government can use its powers and its courts to silence its critics." *Id.* at 205.

361. O'Brien, *supra* note 17, at 351, 355 (noting that Australia's approach essentially bans government employees from making any public criticism of the government—no matter how well-informed or useful such criticism might be to voters—and utterly "fails to provide protection" to employees who seek to participate in the process of democratic self-government).

reason for regulating a government employee's speech, whether undertaken on or off the clock, and makes some effort to tailor the scope of the restriction, then the government will win. In consequence, if the government does not wish to tolerate employee speech critical of incumbent ministers and their policies, it need not do so.

The outcome in Australia, however, reflects a significant structural difference in the role of the courts in safeguarding fundamental rights.[362] For better or worse, under democratic constitutionalism, judges in Australia are broadly deferential to the policy choices, including the means/end fit that elected legislators embrace in statutes (including statutes that regulate core political speech).[363] As Professors Cheryl Saunders and Adrienne Stone explain, "the Australian Constitution is directed primarily to establishing the federal system and creating institutions of government for the Commonwealth, but not the State, sphere."[364]

Even so, the same logic that led the HCA to imply a right to freedom of governmental and political communication in 1992 would support a less deferential approach to government speech regulations whenever a legislative body suffers from a structural conflict of interest. Quite obviously, a structural conflict of interest arises when elected politicians seek to use legislative power to silence public criticism of them and their work.[365] For elections to be free and fair, voters must have the information necessary to use their ballots to hold the government accountable for its actions; government employees can and do play a critical role in empowering voters to enforce accountability on election day.[366] Yet, in *Banerji*, the HCA granted broad, arguably abject, deference to the political branches to decide how best to regulate

362. Stone & Saunders, *supra* note 293, at 10 (observing that "[t]he prevailing approach to constitutional reasoning, widely accepted as appropriate, is often described as 'Australian legalism,'" an approach that "gives priority to constitutional text and structure and generally eschews express reliance on external considerations but nevertheless allows for some flexibility in outcomes, drawing on judicial techniques honed in the development of the common law").

363. *Id.* at 8 ("The Australian Constitution is thin, in terms of substance rather than status. Most notably, it provides little direct protection for rights; on one view of the jurisprudence, no protection at all, if rights can be distinguished from limits on power." (citation omitted)).

364. *Id.*

365. *See* ELY, *supra* note 308, at 101–03.

366. Gray, *supra* note 55, at 39; O'Brien, *supra* note 17, at 355–58.

government employee speech.[367] This approach is not merely bad; it's completely misguided and undermines the IFPGC as a mechanism for protecting the collective interest in the process of democratic deliberation.

VI. CONCLUSION: EMBRACING THE GOOD WHILE AVOIDING THE BAD AND THE UGLY

The United States would benefit from considering the examples that Canada and Australia provide regarding the critical role of courts in safeguarding the process of democratic deliberation that informs the act of voting. The Supreme Court of Canada has embraced an approach that categorically rejects any bright-line rules that fence out particular government employee speech from constitutional protection. Any and all government employee speech enjoys protection under section 2(b) of the Charter, including James Keegstra's anti-Semitic tirades and Neil Fraser's intemperate, and quite odd, attacks on metrification and the Charter. This broad and inclusive approach does not impose unacceptably high costs on government employers, or on the public. The government may always attempt to justify imposing discipline on an employee by showing a sufficiently important need to limit a public employee's expressive activities.

The key difference between the jurisprudential approaches in Canada and the United States is that the Canadian government *always* labors under a duty to justify muzzling a civil servant, whereas, in the United States, categorical rules essentially zero-out First Amendment protection for important forms of government employee speech. U.S. First Amendment doctrine currently relies on a series of categorical rules—literally *all* of which favor the government as manager over government employees as would-be speakers.

By way of contrast, for those who might think that the United States goes too far in affording government employees First Amendment protection, Australia sounds a strong cautionary note running in the opposite direction. The HCA's abject deference to the national parliament's content- and viewpoint-based regulations of government employee speech is difficult, and arguably impossible, to reconcile with normative and policy-based justifications for recognition of the IFPGC in the first

367. *Comcare v Banerji* [2019] HCA 23, ¶¶ 35–37 (Austl.) (Kiefel, CJ, Bell, Keane & Nettle, JJ).

place. If a constitutional commitment to using voting and elections to select those who will make public policy necessarily implies limits on the government's ability to censor political and governmental speech, then the contributions of government employees to the process of democratic deliberation merit some consideration (and constitutional protection). Whistleblowing speech, in particular, would seem squarely related to the process of democratic deliberation and to empowering voters to use their ballots as a means of holding the government accountable to the people.

Moreover, Australia's principal reliance on the political branches to safeguard fundamental rights makes the free and fair nature of the political process even more essential; if elections and voting are the safeguards of all substantive rights in Australia (rather than the courts enforcing substantive constitutional rights via judicial review), then it is imperative that voters have access to any and all relevant information.[368] *Banerji*, however, makes it far less likely that voters will possess critical information if government employees are the only potential source. Expecting public servants to embrace professional martyrdom is hopelessly unrealistic; if we want government employees to speak up when serious misconduct is taking place within a government agency, we must ensure that adequate constitutional protections exist for those employees who step forward and blow the whistle. *Banerji* sends the unfortunate message that government employees who speak out about matters of public concern must do so at their own personal, professional, and financial risk. *Banerji* does absolutely nothing to encourage public servants to exhibit civic courage[369] by stepping forward when

368. *See* MEIKLEJOHN, *supra* note 51, at 25–26, 88–89.

369. See Vincent A. Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 680–85 (1988) (discussing Justice Louis Brandeis's embrace of the concept of "civic courage" in his famous *Whitney* concurring opinion and positing that protecting and facilitating speech conducive to the public good and sound governance rests at the very heart of the First Amendment's free speech project). Professor Blasi emphasizes that "the ideal of civic courage expressed in the *Whitney* opinion constitutes one of the generative ideas of the first amendment tradition," and "[w]e think differently about free speech issues than we otherwise would because of the ideal of civic courage." *Id.* at 684, 694. If effective democratic self-government requires citizens, including government employees, to demonstrate civic courage, then constitutional speech protections must be designed and deployed to encourage and protect such activity. In today's

government officers (such as the Prime Minister) engage in unlawful, indeed arguably unconstitutional, behavior.

Although protections for government employee speech are decidedly worse in Australia, the *Pickering*/*Connick*/*Roe* chain of decisions in the United States unfortunately follows the same general trajectory. The U.S. approach fails to protect reliably both government employees who speak out about matters of public concern (exercising their agency as citizens in a democracy) and, worse still, government employees who engage in whistleblowing speech (thereby empowering other citizens to play their role in holding government accountable through the electoral process). Subsequent cases, notably including *Garcetti* and *Waters*, further undermine First Amendment protections for government employees. In cases like *Connick*, *Garcetti*, and *Waters*, the Supreme Court has expressed concern that the absence of categorical rules that limit the First Amendment exposure of government employers would unduly compromise the government's ability to manage its workplaces. To be sure, as Professor Post argues, a legitimate managerial domain exists and government employers must be able to manage employees to achieve the institutional missions of government agencies and departments.[370]

Even so, Canada's example shows that categorical rules are not essential to safeguarding the legitimate managerial prerogatives of government employers. A more contextual, open-ended approach has not led Canadian courts to suffer from a deluge of government-employment related cases or transformed the Supreme Court of Canada into a kind of judicial Office of Personnel Management or Civil Service Review Board. If the Canadian courts are capable of developing and deploying more open-ended, context-sensitive free speech rules, the federal courts in the United States should be capable of doing so as well.

In conclusion, whistleblowing speech by government employees often provides the only means of providing We the People with the information essential to using ballots as a means of securing government accountability. When fashioning doctrinal rules in this area, courts should consider not only the autonomy

Australia, however, they plainly are not. In consequence, angry government agency bosses are entirely free to engage in naked forms of retaliation when public servants exhibit civic courage and speak truth to power (thereby enabling voters to cast better-informed ballots on election day).

370. POST, *supra* note 15, at 234–39, 247–57, 265–67.

interests of the would-be speaker and the managerial needs of the government employer, but also the value and importance of the information to the body politic. Unfortunately, courts, both in the United States and abroad, to date have failed to take into adequate account the voting public's interest in hearing what government employees have to say about mismanagement and malfeasance within their government workplaces. If we require professional and financial martyrdom as the potential price for blowing the whistle on misconduct within a government agency, democratic deliberation—and ultimately democracy itself—will suffer greatly as a result.