



PERMISSION TO SPEAK FREELY: AN INTRODUCTION

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INTRODUCTION

In our polarized, paranoid politics, the speech of public employees has produced political controversies across multiple fronts. The culture wars that have entangled the nation’s classrooms directly implicate the speech rights of educators. The war over the regulatory and administrative state directly implicates the rights and political activity of civil servants. Labor conflict within the public sector directly implicates the speech rights of both unions and union members. And the speech acts of public employees—tweeting a political opinion, blowing the whistle on official misconduct, or challenging a policy decision—easily become sites of political controversy, conspiracy theorization, and partisan conflict.

Each of these domains and developments has been the subject of deep debate in many fields of academic inquiry. But they have not been treated as instances of a broader problem: how a modern, bureaucratized democracy should manage the speech of its government employees. The issues are complex, requiring the balancing of competing democratic values: transparency versus autonomy; delegation

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versus supervision; objectivity versus diversity; tolerance of debate and disagreement versus the need to reach some form of functional consensus for collective governance to continue. They require parsing the intersection of First Amendment law, administrative law, labor law, democratic theory, and the brute science of American political contestation. It is no surprise that the law, philosophy, and politics of public employee speech are fraught and unsettled.

In the spring of 2024, the Knight First Amendment Institute at Columbia University gathered an interdisciplinary group of experts to explore these problems. Over the course of a two-day event—a private workshop followed by a public symposium—we debated and discussed normative and doctrinal problems in many of the vexed subfields of the law: academic freedom; education policy; whistleblowing and transparency; and unionization in the public sector. The five articles in this collection (plus a sixth, published elsewhere¹) are one outcome of those enlightening, clarifying conversations.

Fittingly, given the range and complexity of the legal and political problems involved, these six articles cover a diversity of subjects and make a range of interventions in a range of fields. They do not speak with one voice. But in this introduction, I want to draw out a number of themes and analytical approaches that I have taken both from participating in the events at the Knight Institute and from reading these articles alongside one another.

I. THE HIGH STAKES OF PUBLIC EMPLOYEE SPEECH RIGHTS

There is a tendency to imagine public employees as a class apart—as a small group of faceless bureaucrats whose political activity and speech rights are of marginal concern to the mainstreams of American political life and First Amendment jurisprudence. These articles suggest otherwise.

Indeed, public employees emerge in these articles as a far less exceptional class of Americans. They work in a variety of jobs: They are postal workers, scientists, bus drivers, accountants, teachers, representatives on local boards, plumbers, and professors. And there are more than 21 million public employees in the U.S.—to

¹ Ronald J. Krotoszynski, Jr., *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*, 110 MINN. L. REV. 205 (2025).

determine their speech rights is to determine the speech rights of a population twice as large as the entire population of Cuba or Greece or Hungary or Israel.²

Moreover, the politics of public employee speech are far from a niche issue; they are intertwined with some of our era's most vital and vituperative political conflicts. Educational speech, for instance, has been a controversial flashpoint in political discourse as well as a site of intense regulatory activity. Between 2021 and 2023, according to PEN America, state governments introduced an astonishing 307 educational gag orders aiming to regulate the discussion of gender, race, and sexuality in the nation's classrooms. By November 2023, 40 such orders were in place in 22 states, affecting at least 1.3 million schoolteachers, 100,000 university and college faculty, and many, many more students.³ Unsurprisingly, all of this attention has had a chilling effect. According to one August 2022 RAND survey, one in four teachers have been directed by school administrators to "limit discussions about political and social issues in class."⁴ And while most of the speech controversies generated by the spring 2024 campus protests in response to the conflict in Gaza centered on student speech, a number of university and college instructors found themselves scrutinized, investigated, or disciplined for social media posts, speech at protests, or speech in classrooms.⁵

Meanwhile, the political commitments and speech activity of public employees have been enmeshed in broader debates about the role of the state in American democracy. During the War on Terror, whistleblowers and government leakers—Chelsea Manning, Edward Snowden, Daniel Hale, Terry Albury, and others—

² Nicholas Saxon et al., *Census of Governments, Survey of Public Employment & Payroll Summary Report: 2022*, U.S. CENSUS BUREAU REPORT (June 14, 2023), <https://perma.cc/AR7W-FQYY>; CONGRESSIONAL RESEARCH SERVICE, CURRENT FEDERAL CIVILIAN EMPLOYMENT BY STATE AND CONGRESSIONAL DISTRICT (Sept. 23, 2024), <https://perma.cc/Y2MX-H4JD>; BUREAU OF LABOR STATISTICS, UNION MEMBERS—2023 (2024), <https://perma.cc/PCM3-UW6U>.

³ *America's Censored Classrooms 2023*, PEN AM. (2023), <https://perma.cc/8RTU-Z8E8>. See also UCLA L. SCH., CRT FORWARD TRACKING PROJECT, TRACKING THE ATTACK ON CRITICAL RACE THEORY, <https://perma.cc/K2GU-FKZV>; MOVEMENT ADVANCEMENT PROJECT, LGBTQ YOUTH: LGBTQ CURRICULAR LAWS, <https://perma.cc/UT9T-BBUN>.

⁴ Ashley Woo et al., *Walking a Fine Line—Educators' Views on Politicized Topics in Schooling*, RAND RESEARCH REPORT (Aug. 10, 2022), <https://perma.cc/2R2X-NPW9>.

⁵ See, e.g., Ryan Quinn, *War in Gaza Fuels Faculty Free Speech Battles*, INSIDE HIGHER ED (Dec. 18, 2023), <https://perma.cc/DU4C-UWZD>; Ryan Quinn, *DePaul Adjunct Ousted for Optional Gaza Assignment*, INSIDE HIGHER ED (June 3, 2024), <https://perma.cc/LG3K-B5SX>.

played a central role in informing public conversations about secretive national security and foreign policies; their actions triggered a long and unresolved debate about the ethics of disclosure and the laws of state secrecy.⁶ Then, during the Trump presidency, dissidents within the civil service generated controversy by taking to social media to dissent from particular policies (or, in one infamous example, to the pages of the *New York Times* to declare, in an anonymous op-ed, that they were “part of the resistance”).⁷ Out of this culture of controversial insider disclosures developed a thick and strange tapestry of theorizing about a “deep state”—in which, according to one’s political preferences, civil servants were either technocratic heroes working quietly to keep American democracy on the rails or an elitist cabal undermining a democratically elected administration.⁸

Such an environment proved fertile for further attacks on the administrative state in general and on public employees in particular. In October 2020, for instance, President Donald Trump issued an executive order that sought to convert a number of civil servants from positions that enjoyed employment protections to political appointees who could be fired at will. The order was barely implemented before Joe Biden reversed it two days into his presidency, but it indicated the precarious status of the civil service, a precarity which seems to continue—there is some evidence that Trump would seek to reimplement the order in his next term.⁹

⁶ SAM LEOVIC, *STATE OF SILENCE: THE ESPIONAGE ACT AND THE RISE OF AMERICA’S SECRECY REGIME* ch. 10 (2023).

⁷ See, e.g., Wynne Davis, *Rogue National Park Accounts Emerge on Twitter Amid Social Media Gag Orders*, NPR (Jan. 25, 2017), <https://perma.cc/GKG3-UXA3>; Yasmeen Abutaleb et al., *Top Trump Health Appointee Taking Medical Leave After Insurrection Remarks*, WASH. POST (Sept. 16, 2020), <https://perma.cc/37RG-CS9L>; Lenny Bernstein et al., *NIH Staffer to Retire After He Was Exposed as the Blogger Behind Anti-Fauci, Anti-mask Stories*, WASH. POST (Sept. 21, 2020), <https://perma.cc/6U7S-8BCK>; *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://perma.cc/4S87-M9KR>; DENNIS C. GRUBE, *MEGAPHONE BUREAUCRACY: SPEAKING TRUTH TO POWER IN THE AGE OF THE NEW NORMAL* (2019).

⁸ For reflections on these trends, see, e.g., Loren DeJonge Schulman, *Civil Servants Can’t Stop Trump. Stop Asking Them To*, WASH. POST (Sept. 7, 2018); DAVID ROHDE, *IN DEEP: THE FBI, THE CIA, AND THE TRUTH ABOUT AMERICA’S “DEEP STATE”* (2020).

⁹ Donald P. Moynihan, *Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174 (2022); Steven Greenhouse, *Project 2025’s Plan to Gut Civil Service with Mass Firings: “It’s Like the Bad Old Days of King Henry VIII,”*

And another executive order issued by Trump a few weeks earlier had more lasting consequences. Executive Order 13950, “Combating Race and Sex Stereotyping,” prohibited the use of so-called “divisive concepts” in diversity trainings within the civil service. It provided a model for a number of the educational gag orders subsequently imposed on the nation’s classrooms—one way that public employee speech politics easily cross domains we imagine to be discrete.¹⁰

Finally, the years of the Trump administration marked a turning point in long-running political struggles over unionization in the public sector. In the *Janus v. AFSCME* decision in 2018, the Supreme Court ruled that public employees have a constitutional right to refuse to pay union fees. The decision upended public sector labor law, posing a direct threat to the vitality of public sector unions and thus to one of the central bastions of the union movement writ large. (In 2023, almost 50 percent of the unionized employees in the nation worked in the public sector; 32.5 percent of public sector employees were unionized, compared with only six percent of private sector employees.) The majority decision was based on what Justice Alito termed the “fundamental free speech rights” at stake: When “public employees are forced to subsidize a union . . . this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.” Ironically, *Janus* constitutes one of the Court’s only strong and forceful defenses of the First Amendment rights of public employees.¹¹

The question of public employee speech thus lies at the heart of some central conflicts in American politics. It does so, I think, because it straddles a central fault line at the intersection of two deep and unresolved structural problems in the law and practice of democratic life.

GUARDIAN (Sept. 25, 2024), <https://perma.cc/5JH7-B2JL>; *Conservative Groups Draw up Plan to Dismantle the US Government and Replace It with Trump’s Vision*, AP (Aug. 29, 2023), <https://perma.cc/22MP-FDTD>.

¹⁰ *Educational Gag Orders*, PEN AM. (Nov. 8, 2021), <https://perma.cc/7TY8-A8RR>.

¹¹ *Janus v. American Fed. of State, County & Municipal Employees*, 585 U.S. 878, 884–86 (2018); Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821 (2019); Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21; Robert Barnes & Ann E. Marimow, *Supreme Court Rules Against Public Unions Collecting Fees from Nonmembers*, WASH. POST (June 27, 2018), <https://perma.cc/Y39B-PDVL>; Sarah Jaffe, *With Janus, the Court Deals Unions a Crushing Blow. Now What?*, N.Y. TIMES (June 28, 2018), <https://perma.cc/9JVU-GV3Y>; Lisa Rein, *Trump’s Fight with Federal Employee Unions Gets Real on Monday*, WASH. POST (July 8, 2018), <https://perma.cc/8ZVK-22H4>.

The first is the legitimacy of the administrative state. Since at least the New Deal, those seeking to legitimize the U.S. state have done so by seeking to place the bureaucracy outside of politics—by appealing to the expertise and objectivity of the bureaucrat and by establishing elaborate rules and procedures to ensure neutrality. As the ongoing assault on the regulatory state reveals, these strategies have not succeeded in protecting the bureaucracy from accusations that it is an undemocratic, elitist threat to the liberties of “ordinary” Americans; the efforts to ensure procedural neutrality may also have eroded the bureaucracy’s political capacity to substantively govern. By 2022, only about 20 percent of Americans trusted the government to do what is right most of the time. Civil servants fare somewhat better, but only 52 percent of Americans have at least a “fair amount” of confidence in civil servants, down from 61 percent in 2018. Under such conditions, it is no surprise that the question of public employee speech rights has become controversial. But examining the political speech of public sector employees may help us rethink the relationships between objectivity, expertise, and democratic governance and thus the normative foundations of the modern state itself.¹²

The second problem concerns the place of First Amendment rights in the project of democratic self-governance. That democracy requires robust free speech rights is noncontroversial. But as has become plainly apparent in recent decades, the First Amendment has been taken up with particular force by the libertarian right and turned into a tool to wage war on the very possibility of administrative governance—it has been “weaponized,” as Justice Kagan famously observed in her *Janus* dissent.¹³

¹² PEW RESEARCH CENTER, AMERICANS’ VIEWS OF GOVERNMENT: DECADES OF DISTRUST, ENDURING SUPPORT FOR ITS ROLE 4, 61 (June 6, 2022). On the legitimacy crisis of the administrative state, see Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Mark Tushnet, *Introduction: The Pasts & Futures of the Administrative State*, 150 DAEDALUS 5 (2021); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

¹³ See, e.g., Jedediah Purdy, *The Roberts Court v. America*, 23 J. IDEAS (2012); Adam Liptak, *First Amendment, “Patron Saint” of Protesters, Is Embraced by Corporations*, N.Y. TIMES (Mar. 23, 2015); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015); Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 3, 2013); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017).

A central challenge today, therefore, is to find a way to delineate a philosophy and doctrine for the First Amendment that maximally protects civil liberties without destabilizing the very possibility of collective governance. Part of the problem lies in the abstraction and anachronism of some of our fundamental assumptions about free speech, which are rooted in classically liberal conceptualizations about the value of self-expression to autonomous individuals, about the exchange of ideas in “free markets,” and about the self-righting processes of unregulated systems. But these frameworks are not easily applied in the context of public employee speech. For this reason, and as the articles in this collection reveal, the question of public employee speech rights is thus a particularly promising place to seek new ideas and frameworks for conceptualizing and clarifying the politics of free speech more broadly.

II. FREE SPEECH BEYOND THE RIGHTS OF THE SPEAKER

Broadly speaking, the jurisprudence of public employee speech rights can be divided into three eras. For the first two-thirds of the 20th century, public employment was considered a privilege, which meant that the government, as the granter of that privilege, could attach conditions to it—including limitations on the speech rights of its employees. One “may have a constitutional right to talk politics,” as Oliver Wendell Holmes famously put it, “but [one] has no constitutional right to be a policeman.”¹⁴ In some parts of the state, such as the national security branch, this remains the dominant approach today. More than five million federal employees who have signed agreements to clear publications and speeches through “pre-publication review” have contracted away their rights to speak freely on matters related to their employment, and courts have considered this a straightforward matter of employment law, raising no free speech concerns.¹⁵

¹⁴ Arch Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUB. ADMIN. REV. 77 (1955).

¹⁵ Jack Goldsmith & Oona A. Hathaway, *Prepublication Review and the Quicksand Foundation of Snepp*, JUST SECURITY (Jan. 31, 2022), <https://perma.cc/SS3J-B5VS>; Jack Goldsmith & Oona A. Hathaway, *How the U.S. Government Built the Largest System of Prior Restraint in U.S. History*, JUST SECURITY (Feb. 7, 2022), <https://perma.cc/323Y-ACUF>; Ramya Krishnan, *The Government’s Own Documents Show That Prepublication Review Is Broken*, JUST SECURITY (Apr. 4, 2019), <https://perma.cc/4PRS-YC6N>; Jonathan C. Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775 (1982).

But beginning in the late 1960s, with the *Pickering v. Board of Education* decision, a second era opened in which the courts began to recognize that many public employees retained some free speech rights even in their role as employees—particularly the right to speak out on matters of “public concern.” The courts sought to balance this right against the rights of the government to manage its employees, which led to an era of complex, subtle decisions as courts sought to establish tests to properly weigh these competing interests.

And then in 2006, in the controversial *Garcetti v. Ceballos* case, the new and divided Roberts court tilted the balance strongly in favor of the managerial prerogative—essentially denying free speech rights to (most) public employees when they speak on matters relating to their employment. The result, according to Erwin Chemerinsky, is that public employment has effectively become a “free speech dead zone.”¹⁶

What is striking across all three eras is how focused the courts have been on thinking about the problem of public employee speech by reasoning from the rights of the individual employee/speaker. This is most apparent in the most restrictive eras: before 1968 and after 2006. In both eras, courts argued that, just as citizens cannot bring free speech claims against their private sector employers, they should not be able to bring free speech claims against their public sector employers. To do so would undermine the capacity of the government to function—and no individual right to speech could trump the collective democratic interest in a properly functioning government.

But even in the *Pickering* era, when courts did recognize that the public had an interest in learning from the speech of government employees, there was a tendency to reason from the rights of the individual speaker. To be fair, the conceptual and normative underpinnings of the doctrine in the *Pickering* strain of cases are far from transparent. In key decisions, the Supreme Court went out of its way to clarify that it was deciding cases on the facts in front of them. “Because of the enormous variety of fact situations in which critical statements by teachers and other public

¹⁶ Erwin Chemerinsky, *Free Speech Dead Zones*, 2022 U. ILL. L. REV. 1695 (2022); Robert Roberts, *Democracy at Risk: The Public Employee Freedom of Speech Crisis*, 55 ADMIN. & SOC’Y 613 (2023); Robert Roberts, *Developments in the Law: Garcetti v. Ceballos and the Workplace Freedom of Speech Rights of Public Employees*, 67 PUB. ADMIN. REV. 662 (2007); DAVID H. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION: THE DEVELOPMENT OF THE PUBLIC EMPLOYMENT RELATIONSHIP* (1971).

employees may be thought by their superiors . . . to furnish grounds for dismissal,” explained the Court in *Pickering*, “we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.”¹⁷ In the subsequent *Connick v. Myers* case, in which the Court elaborated that speech must be about a matter of “public concern” to warrant free speech protections, it repeated this same warning against issuing general standards.¹⁸ As a result, public employee speech rights is a domain where one feels quite powerfully the iterative nature of First Amendment jurisprudence, where a sequence of idiosyncratic employee speech acts—a not-entirely-accurate letter to a newspaper from a teacher complaining about the school budget, an assistant district attorney polling her co-workers about problems in her office, a prosecutor complaining to a superior about a criminal charge he believed to be incorrect—has led to decisions establishing the parameters for the speech rights of millions of public employees. It is no surprise that there is room for debate—among both scholars and judges—about the theory underpinning these decisions.¹⁹

But from a sufficient distance, it is striking that even when the courts have tried to balance First Amendment rights against the government’s interest as an employer, they have tended to conceptualize free speech rights as belonging to individual speakers. Take the case of *Pickering*, which framed the central problem as balancing “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.”²⁰ Even though the same decision went out of its way to explain that part of what makes teacher speech valuable is its role in informing the public about how the government is operating, the Court stopped well short of orienting its decision around this public interest in employee speech—perhaps because in this case, *Pickering*’s speech was based on publicly available information, not on any special value *Pickering*’s employment added to his knowledge of the political situation. Instead, the Court considered

¹⁷ *Pickering v. Board of Ed. of Township High School District 205*, 391 U.S. 563, 569 (1968).

¹⁸ *Connick v. Myers*, 461 U.S. 138 (1983).

¹⁹ Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985 (2012).

²⁰ *Pickering*, 391 U.S. at 568 (emphasis added).

Pickering as a “member of the general public,” with the same speech rights as a regular citizen.²¹

One way of reading the subsequent doctrine is to see courts struggling to divide the public employee into two legal persons—a private citizen, with a full set of speech rights, and an employee, with much-reduced rights to free speech.²² While this has meant, in some times and places, that courts have ruled that individual employees have rights to free speech to help inform public debate, even the most speech-protective decisions have tended to get to that position by emphasizing the employee’s rights as an individual citizen-speaker, with the benefits to the public good being a subsidiary benefit existing somewhere downstream. At other times, as in *Garcetti*, reasoning from the rights of the individual citizen has led courts to dismiss public employee speech claims altogether.

The articles in this collection, by contrast, put the social value of speech front and center. They value the First Amendment claims of public employees not by analogizing to individual citizens but by considering the range of democratic interests served by the free speech of government employees.

Ronald Krotoszynski is perhaps most explicit in criticizing even the *Pickering* era of jurisprudence for undervaluing the public interest in hearing employee speech. He calls for a new jurisprudence that would take more seriously the “damage to the process of democratic deliberation” that occurs when citizens are denied the opportunity to hear from government employees complaining about government policy, a jurisprudence that would pay more attention to the “public good that benefits the body politic as a whole” when employees speak out about their work as employees.²³ In Frank LoMonte’s exploration of the problematic rise of laws gagging dissenting members of political boards who wish to speak out publicly, he likewise emphasizes the value of dissenting official speech to voters seeking information about their representatives. He is most concerned about the impact of

²¹ Kozel, *supra* note 19.

²² R. George Wright, *A Democratic View of Public Employee Speech Rights*, 70 CATH. U. L. REV. 347 (2021).

²³ Krotoszynski, *supra* note 1, at 214, 221.

gag rules not on the rights of the political officials but on the “First Amendment right of their constituents to receive information.”²⁴

The two articles in this collection that explore speech rights in the field of public education likewise emphasize the broad array of democratic interests implicated in educational speech. Heidi Kitrosser, who has elsewhere analyzed the “special value of public employee speech” to collective democratic life,²⁵ argues in her contribution here that allowing state governments to exercise control over content in public classrooms and libraries is not a form of legitimate self-government because of the threats it poses to “public knowledge and debate” and thus to the First Amendment’s underlying structural goal: “to enable self-government through an informed and capable citizenry.”²⁶ In Caroline Mala Corbin’s article exploring “Don’t Say Gay” laws and policies requiring teachers to use students’ preferred pronouns, she likewise argues that it would be a fundamental error to think only of the rights of the teacher because the “Free Speech Clause cares as much about ensuring an unimpeded stream of speech for audiences as it does about ensuring speakers have the freedom to speak their mind.”²⁷ Corbin suggests that focusing on the rights of the audience—the students—will provide a way to reject First Amendment claims of a teacher’s right to use incorrect pronouns while upholding First Amendment challenges to bans on discussing issues related to sexuality and gender identity.

Similarly, the two articles focused on public sector unions also center the collective, democratic benefits of speech rights. Sarah Milov’s historical account of political struggles over Progressive-era efforts to gag postal employees—struggles that led to the Lloyd-La Follette Act of 1912, which both recognized the right of public sector workers to unionize and created the nation’s first whistleblower protections—emphasizes that postal workers “understood their fight for speech rights not in individualistic and expressive terms, but as a precondition for public accountability.” What mattered was “the public’s right to hear information that bears

²⁴ Frank D. LoMonte, *Forced Unanimity and the First Amendment*, 7 J. FREE SPEECH L. 145 (2026).

²⁵ Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301.

²⁶ Heidi Kitrosser, *The Government Speech Doctrine Goes to School*, 7 J. FREE SPEECH L. 95 (2026).

²⁷ Caroline Mala Corbin, *Regulating LGBTQ Speech in the Classroom*, 7 J. FREE SPEECH L. 65 (2026).

on matters of public concern.”²⁸ In Kate Andrias’ exploration of the inadequate ways that courts have conceptualized the rights of public sector unions to collectively bargain and strike, Andrias suggests that the problems can be attributed to the insufficient attention paid to the “democratic purposes” of the First Amendment. “Unions’ advocacy,” she argues, “informs the citizenry and adds to public discussion, furthering the First Amendment’s goal of advancing a robust public debate.”²⁹

One of the central challenges in First Amendment law and politics today is to balance the individual, expressive right to free speech with the First Amendment’s structural role in producing a collective democratic culture. It is no accident, I think, that many of these essays take inspiration from the work of Alexander Meiklejohn to buttress their accounts; nor is it surprising that more individualistic theories centered on ideas of self-fulfillment are noticeably absent. The problem of public employee speech leads one to consider the structural role of the First Amendment in democratic life.

III. THE IMPORTANCE OF INSTITUTIONS

If, as Frederick Schauer has argued, a great deal of First Amendment jurisprudence is defined by a deliberate disinterest in institutions—avoiding differentiating between institutions, declining to pay attention to the institutional location of particular forms of speech—then the domain of public employee speech is a significant anomaly.³⁰ The entire topic, after all, is defined by the status of the speaker as an employee of a government institution. And while some parts of the jurisprudence seem to encourage a great deal of focus on institutional dynamics—such as, for instance, *Connick*’s requirements that courts pay attention to the “time, place, manner,” and context of employee speech in order to determine if it was disruptive to the workplace—even the simplest rules about employee speech acknowledge a surprisingly variegated institutional landscape and a surprisingly variegated set of free speech considerations.

²⁸ Sarah Milov, *Gags and Grievance: The Labor Origins of Whistleblowing*, 7 J. FREE SPEECH L. 181 (2026).

²⁹ Kate Andrias, *Speaking Collectively: The First Amendment, the Public Sector, and the Right to Bargain and Strike*, 7 J. FREE SPEECH L. 21 (2026).

³⁰ Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

Take, most significantly, *Garcetti*, with its seemingly categorical rule that the First Amendment does not apply to speech that is a work-product. The majority decision features two significant carve-outs to this rule, each produced by the acknowledgement of rival institutional structures. The first is whistleblower speech, established by a complex legislative landscape. Part of the reason that the majority decision was not concerned about robbing the public of knowledge about government inefficiency and misconduct in denying First Amendment rights to employees was because such disclosures were protected by the “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrong-doing.”³¹ As the dissenting opinion pointed out, this was a simplistic, and somewhat optimistic, description of the whistleblower protections, which vary greatly across different jurisdictions and different domains of governance. Most famously, of course, the rules are different in the national security branch, where a discrete set of whistleblower statutes covers a narrow set of disclosures and requires following an elaborate internal procedure.³² But the same sort of considerations apply across the board. To understand how whistleblowing works in practice requires understanding the various definitions of a whistleblower as a particular kind of political actor and the institutional landscape produced by the whistleblower statutes as well as transparency and reporting institutions.³³ Coming to any realistic sense of the protections afforded to the public’s right to know would thus require a quite complex picture of the a institutional landscape—and that is leaving to one side entirely the very real psychological and social

³¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

³² WHISTLEBLOWING NATION: THE HISTORY OF NATIONAL SECURITY DISCLOSURES AND THE CULT OF STATE SECRECY (Hannah Gurman & Kaeten Mistry eds., Columbia University Press 2020); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and The First Amendment*, 94 B.U. L. REV. 449 (2014); Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL’Y REV. 281 (2014); RODNEY M. PERRY, CONGRESSIONAL RESEARCH SERVICE, INTELLIGENCE WHISTLEBLOWER PROTECTIONS: IN BRIEF (Oct. 23, 2014); Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531 (2008).

³³ For introductions to whistleblowing laws, see Kathleen Clark, *White Paper on the Law of Whistleblowing*, SSRN ELECTRONIC JOURNAL (Nov. 1, 2012), <https://perma.cc/82G6-QPPM>; Jonathan P. West & James S. Bowman, *Whistleblowing Policies in American States: A Nationwide Analysis*, 50 AM. REV. PUB. ADMIN. 119 (2020); ANDREA M. MUTO, CONGRESSIONAL RESEARCH SERVICE, COMPILATION OF FEDERAL WHISTLEBLOWER PROTECTION STATUTES (Apr. 25, 2024).

pressures that even legally-protected whistleblowers face and which serve as an additional set of institutional constraints on disclosures.³⁴

Garcetti's second carve-out was the domain of "academic freedom." While the majority decision did not develop any clear analysis of the subject, it did concede that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests."³⁵ Important questions remain about the contours and substance of academic freedom: whether it belongs to the institution or the professor; how it applies to extracurricular speech, to research activity, to campus governance, and to classroom instruction; whether it covers students. Regardless of the answers to these ongoing questions, the significant point is that to acknowledge academic freedom as a distinct domain of speech law is to acknowledge the importance of a distinctive set of institutional logics at work. Crucially, despite the fact that we call it academic *freedom*, this is not a domain of simple autonomy. It is instead a domain of expression structured by a series of disciplinary rules and viewpoint discrimination rules determined not purely by the university as an institution but by an interlocking set of disciplinary and professional institutions and standards. Academic freedom thus provides a model for a distinctive, institutionally-centered account of the politics of public employee speech—one focused on the specific social and political function of academia and the institutional structures required to support that function.³⁶

One issue is whether the example of academic freedom could be deployed in other domains of public sector employment. Academic freedom, with its relatively deep history, social prestige, and well-organized set of institutional defenders, could provide a seedbed or an inspiration for recognizing similar sets of distinctive speech rights in other institutional locations. In 2020, for instance, the U.S. District Court for the District of Columbia ruled that Trump-era regulations and firings intended to shape the activity of the U.S. Agency for Global Media violated the First

³⁴ For a discussion of some of these factors see, e.g., KATE KENNY, *WHISTLEBLOWING: TOWARD A NEW THEORY* (2019); C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* (2016).

³⁵ *Garcetti*, 547 U.S. at 422.

³⁶ DAVID M. RABBAN, *ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT* (2024); THE FUTURE OF ACADEMIC FREEDOM (Louis Menand ed., 1996); ROBERT POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

Amendment rights of journalists employed by the Voice of America. The court did so by directly analogizing between the constitutional rights of government-employed journalists and those of government-employed academics. Whether such frameworks could be further extended into the knowledge branches of the regulatory state is an open question.³⁷

At the same time, a more worrying issue is whether academic freedom is at risk of erosion from within, as the actual conditions of contemporary university life depart from the ideals embodied in jurisprudence and political philosophy. Less than one in three faculty at universities and colleges in 2021 were tenured or on the tenure track; academic freedom looks very different for the vast majority of teachers on the nation's campuses, many of whom lack basic job security. A new round of legislative assaults on tenure and on the university governance process likewise threatens to undermine the institutional structure of academic freedom.³⁸

To think about the conditions of adjunct employment, about disciplinary knowledge formations, about whistleblowing laws and the psychology of whistleblowing is to think much more sociologically and institutionally about free speech than we are accustomed to doing. And while the articles in this collection vary in the extent to which they embrace this sort of approach to First Amendment questions, they do all engage with institutional logics in provocative ways. Krotoszynski opens his account by considering the problem of political power and political incentives in the government. LoMonte dwells on the purpose and interior dynamics of political boards. Milov focuses not on whistleblowing laws in the abstract but on the particular mechanisms allowing clerks to petition Congress and on the institutional value of such forms of speech. Andrias centers the particular institutional logic of the union—"effective collective bargaining"—in her analysis of union speech rights.³⁹ Corbin centers the institutional logic of educative spaces in her analysis of classroom speech. And Kitrosser, perhaps most explicitly, calls for an approach to academic speech emerging from "descriptive understandings of what

³⁷ *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333 (D.D.C. 2020).

³⁸ Glenn Colby, *Data Snapshot: Tenure and Contingency in US Higher Education*, ACADEME MAG. (Mar. 2023), <https://perma.cc/5BRE-KC76>. *America's Censored Classrooms*, *supra* note 3.

³⁹ Andrias, *supra* note 29, at 41.

university life and academia entail and on normative views regarding the features that imbue them with constitutional value.”⁴⁰

Institutions are everywhere in discussions about public employee speech—and thinking institutionally promises a way to develop a more realistic, subtle, and sophisticated philosophy and jurisprudence of free speech in the public sector, and perhaps beyond.

IV. THE PROBLEM OF POLITICAL LEGITIMACY

From the point of view of the government, there are at least three reasons for regulating the speech of an employee. The first and most abstract argument is that governments, like any other workplaces or organizations, require some internal discipline for the effective performance of the organizational mission. Second, there are arguments derived from the government speech doctrine, which asserts that speech acts made by government employees are actually the government’s speech—not the individual employee’s—and that the government must therefore be able to control them. Finally, there are arguments that the legitimacy of the government requires some control over the expression of its public employees, that the government’s reputation for efficiency, neutrality, and expertise requires some regulation of the speech of dissident or discordant voices.

While these arguments frequently blur in discussions of the government’s interest in regulating employee speech, there are good reasons to distinguish between them. There can be no doubt that some internal discipline is essential to government efficacy; the question concerns the substance and limits of those internal regulations—a subject that may implicate free speech concerns in some instances but is primarily a question of public administration and management.⁴¹

In its simplest form, the government speech doctrine is likewise uncontroversial: If a government hires a speaker to express a particular viewpoint on behalf of the government, it should be able to enforce that policy. The challenge here is the capacious way in which the government speech doctrine has been deployed to capture all sorts of expressive activity well beyond this legitimate function. Helen Norton has elsewhere written powerfully about the need to limit the government speech

⁴⁰ Kitrosser, *supra* note 26, at 114.

⁴¹ ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 234–40 (1995). One could imagine a fruitful dialogue between public administration and First Amendment scholars on these issues.

doctrine to a relatively narrow set of employee speech acts, and a number of the essays in this collection build on this argument in insightful ways.⁴²

The problem of government legitimacy, however, is more complicated. The idea that a reputation for efficiency, neutrality, and expertise would make the government legitimate in the eyes of the public was a product of the early and middle decades of the 20th century. It emerged from multiple, intersecting impulses: the backlash against the corruption of the spoils system;⁴³ a broader commitment to the ideals of objectivity and expertise in the emergent fields of social science and the professions; and the emphasis on proceduralism that emerged from the particular ways that the threat of totalitarianism heightened anxieties about the democratic legitimacy of the administrative state while souring American liberals on more substantive visions of the public good.⁴⁴ However historically overdetermined this legitimization project was, from the perspective of 2024 it clearly isn't working and hasn't worked for some time.

To some extent, no doubt, the lack of trust in governments is a product of broader political contestation. Indeed, in an era of heightened polarization, one can see evidence of a widening disjuncture between the old norms and the new realities of political conflict and communication in an age of social media. For instance, the relatively obscure Hatch Act of 1939—the capstone of a long process to prevent federal employees from engaging in partisan politics—has been in the headlines in recent years, after the Office of Special Counsel recommended that Trump advisor Kellyanne Conway be fired for “persistent, notorious and deliberate Hatch Act violations” and later gave Joe Biden’s press secretary, Karine Jean-Pierre, a warning

⁴² Helen Norton, *Constraining Public Employee Speech: Government’s Control of its Workers’ Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 8 (2009).

⁴³ Michael Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. POL. 747 (1982); ROSENBLOOM, *supra* note 16; Leon D. Epstein, *Political Sterilization of Civil Servants: The United States and Great Britain*, 10 PUB. ADMIN. REV. 281 (1950).

⁴⁴ DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2015); DAVID CIEPLEY, *LIBERALISM IN THE SHADOW OF TOTALITARIANISM* (2007); EDWARD A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); SAMUEL MOYN, *LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES* (2023).

for a single Hatch Act violation.⁴⁵ There is every reason to suspect that similar conflicts will emerge with increasing frequency in the years ahead.

And it is possible that this is a good thing. Daniel Walters, for instance, has recently argued that underpinning almost all democratic theories of the administrative state is an assumption that legitimacy will emerge when political conflict has been settled. Following the work of political theorist Chantal Mouffe, Walters instead suggests that we reject that goal as both unfeasible and undesirable—at best, an appeal to neutrality or consensus can only mask ongoing disagreements and in the process runs the risk of potentially exacerbating them. Instead, Walters argues, we should embrace an agonistic vision of politics, in which conflict is never settled and democratic legitimacy emerges instead from the ways in which institutions embrace and accommodate ongoing disagreements in a pluralist democracy. Walters’ account is focused primarily on the field of administrative law—he brackets both questions of free speech and entire domains of governance, such as the national security state—but the approach strikes me as potentially generative in thinking through the problems of public employee speech.⁴⁶

Indeed, a number of the articles in this collection embrace political conflict and disagreement as essential to democratic politics. LoMonte criticizes gag rules as an effort to project an illusion of consensus, and he favors instead the airing out of political disagreements, even if they are ugly or fractious. Krotoszynski argues that the public benefits from hearing from government employees who disagree with government policy. He dubs such forms of political speech “whistleblowing”—a more agonistic vision of that term than is found in many whistleblowing statutes, which, in a proceduralist fashion, limit the category to speech disclosing particular classes of “objective” wrongs. Sarah Milov’s account of labor struggle in the public sector likewise embraces a broad and conflictual vision of whistleblowing, one inspired by Laura Weinrib’s argument that early First Amendment advocacy was part of a radical “right to agitation” rather than a liberal defense of neutral speech

⁴⁵ *What Is the Hatch Act? Explaining Why Trump Was Urged to Fire Kellyanne Conway*, N.Y. TIMES (June 13, 2019); Betsy Klein, *Biden’s Press Secretary Violated Hatch Act, Watchdog Says*, CNN (June 13, 2023), <https://perma.cc/PA6K-JEXE>.

⁴⁶ Walters deals with free speech in a footnote and questions the applicability of agonistic theory to “certain technical areas” of the administrative state, such as national security, management of risk in financial markets, and regulation of the electric grid. Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 50 n.260 & 91–92 (2022).

rights.⁴⁷ A similar approach underlies Andrias' account of labor conflict in the public sector. Heidi Kitrosser's articulation of an anti-distortion principle that should guide government-established knowledge institutions may seem, from one angle, like an effort to create yet another layer of procedural regulations in order to establish neutrality. But a central part of the argument is concerned with ensuring that governments do not have the power to impose their own viewpoints across all public institutions, suggesting that such a unitary form of governance would sit uneasily in a pluralist society. Better instead to have competing forms of public institutions, operating according to different principles and different values—and if those institutions are in conflict, so be it.

In today's hyperpartisan, litigious political culture, there is, of course, a risk in embracing political conflict, especially if we are to wrap political contestation in the protections afforded by the First Amendment. As Byron White explained in *Connick*, "government offices could not function if every employment decision became a constitutional matter."⁴⁸ Scholars of public employee speech may benefit from thinking about these potential problems in dialogue with existing work on the unintended political consequences of transparency and open-government initiatives—like the Freedom of Information Act—whose benefits to democratic public discourse have been sometimes underwhelming and which have often turned out to benefit an anti-regulatory, anti-governance political agenda.⁴⁹

And, more broadly, an approach to public employee speech that centers such things as the interests of the audience, the institutional context, and the inevitability of conflict will lead to a complex First Amendment jurisprudence. Whatever benefits such complexity may have in producing a more realistic account of free speech rights in the public sector, and however much it may help us generate new ideas about the role of free speech in democracy, a jurisprudence focused on balancing such factors will also put a lot in the laps of the judiciary—far from a democratic panacea.

⁴⁷ LAURA M. WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016).

⁴⁸ *Connick v. Myers*, 461 U.S. 138, 138 (1983).

⁴⁹ See, e.g., David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018); TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION (David E. Pozen & Michael Schudson eds., 2018); MARK FENSTER, *THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION* (2017).

But as the essays in this collection remind us, the question of First Amendment speech rights is not only a question of jurisprudence. It is also a fundamentally political question, determined not purely by litigation in the courts but also by the actions of the government, by political struggles fought within the public sector, and by broader social movements committed to equality before the law, to the right to education, and to the right to participate in the processes of self-government. In thinking about the vexed problem of public employee speech, we therefore need a variety of tools and frameworks. The essays in this collection—and the conversations at the Knight Institute from which they emerged—are one contribution to that ongoing, collective project.