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ABSTRACT

Although scholars offer a variety of explanations for the modern Supreme Court's public employee speech jurisprudence, they share a common presumption. According to the standard account, the modern era of public employee free speech law began in 1968, with the Court's adoption of a balancing test in Pickering v. Board of Education. Contrary to this view, this Article argues that Pickering balancing is better characterized as a relic from a bygone era rather than the start of a new one. Balancing was once the Court's standard method of judging First Amendment claims. When Pickering was decided, however, balancing was under attack. Consistent with the overall demise of free speech balancing, this Article shows that the Court began abandoning Pickering balancing the moment the standard was announced. Pickering itself was not decided on balancing grounds, and the public employee speech cases that followed it in the Supreme Court have avoided balancing. When Pickering is put into proper perspective, it is possible to identify an overlooked explanation for the modern Court's public employee speech rulings. This Article tells the story of how the unconstitutional conditions doctrine, unbeknownst to courts and commentators fixated on Pickering balancing, has been the true driving force behind a major area of First Amendment law for nearly fifty years.

AUTHOR NOTE

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I. INTRODUCTION

Oliver Wendell Holmes, Jr. famously remarked that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[1] Public employee free speech doctrine has undoubtedly evolved since Holmes's day, but exactly how is disputed. Commentators have pointed to numerous principles behind the modern Supreme Court's public employee speech jurisprudence: the government-speech doctrine,[2] categorical balancing,[3] neo-formalism,[4] the managerial prerogative,[5] the return of the privilege doctrine,[6] the increasing privatization of the public workplace,[7] and policy preferences.[8]

This Article offers an alternative account. It argues that the modern Court for the most part has applied the unconstitutional conditions doctrine to speech restrictions on public employment. And when the Court has relied on other principles, it has remained faithful to the essential logic of the unconstitutional conditions doctrine. Under this analytical framework, the dispositive factor is whether the condition—the speech infringement—is germane to the public benefit—government employment.

Although scholars posit different theories to explain the Supreme Court's current doctrine, they share a common presumption. The consensus view maintains that the modern era of public employee free speech law began in 1968, with the Court's opinion in *Pickering v.*

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1 McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892).

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

3 Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2008).

4 Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173 (2007).

5 Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008).

6 Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907 (2011).

7 Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1 (2013).

8 Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1064-67 (2013) (concluding that "the only robust free speech rights government employees have is [*sic*] the right to refuse to support unions").

Board of Education.[9] The *Pickering* framework, to be sure, sounds nothing like an unconstitutional conditions test. "The problem in any case," the *Pickering* Court asserted, "is to arrive at a balance between the interests of the [public employee], 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."[10] Commentators read *Pickering* as requiring an open-ended, fact-dependent inquiry.[11] The dispositive factor is the weight of the burden on speech compared with that of the asserted public interest.[12] Unconstitutional conditions analysis, by contrast, turns on the relationship between a means—the unconstitutional condition—and an end—the benefit subject to the condition.[13] The approaches are quite distinct. One depends on relatedness, the other on significance.

Contrary to the standard account, this article argues that *Pickering*'s balancing standard belongs to the bygone era of free speech balancing that began in the 1930s. During its heyday in the 1950s and early 1960s, balancing was the Court's standard approach for resolving First Amendment challenges.[14] When *Pickering* was decided, however, free speech balancing was under attack from

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9 Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5, 7 (1999) (characterizing *Pickering* as the Supreme Court's "first modern public employee-free speech case"); *see also*, Norton, *supra* note 2, at 8-10 (tracing "longstanding test for assessing" public employee speech claims back to *Pickering*); Rhodes, *supra* note 4, at 1176-77 (asserting that *Pickering* began the era of constitutional protection for public employee speech).

10 Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 568 (1968).

11 Rhodes, *supra* note 4, at 1177 (describing *Pickering* balancing test as "*ad hoc*" and "fact- dependent"); Schoen, *supra* note 9, at 8 (characterizing the Court's balancing approach in *Pickering* as "highly fact-intensive"); Paul Ferris Solomon, *The Public Employee's Right of Free Speech: A Proposal for A Fresh Start*, 55 U. CIN. L. REV. 449, 453 (1986) (referring to *Pickering* balancing test as "open-ended").

12 *See* Solomon, *supra* note 11, at 453.

13 *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (discussing the unconstitutional conditions analysis in length and its many applications throughout first amendment jurisprudence).

14 *See* Solomon, *supra* note 11, at 450-52 (discussing the cases leading up to the seminal decision in *Pickering*).

members of the Court and academics. Balancing no longer survives as a general First Amendment doctrine.[15]

Consistent with the overall demise of free speech balancing, the Court began departing from *Pickering* balancing in the public employment context essentially the moment the standard was articulated. *Pickering* itself was not decided on balancing grounds, and the public employee speech cases that followed it in the Supreme Court essentially pay lip service to the balancing standard. The inquiry has largely shifted to the relationship between the speech restriction and the privilege of public employment. This doctrinal development is obscured, to be sure, by the salience of the public-concern test, which the Court derived from the language of *Pickering*'s balancing standard and has applied in several public employee speech cases. This test, however, can be easily recast in unconstitutional conditions terms, and would make more sense doctrinally if formulated in this way. The Court's public employee speech decisions since *Pickering*, in short, have followed the arc of the unconstitutional conditions doctrine.

With this claim in mind, this Article proceeds according to the following outline. Part II describes the unconstitutional conditions doctrine. This section explains that the doctrine emerged as a judicial device designed to ensure that the government does not exceed the boundaries of its lawful discretion over the provision of public benefits. Using the doctrine, the early twentieth-century Court permitted the state to impose restrictions on the receipt of public benefits where the reason for the restriction was related to the reason that the state created the public benefit in the first place. In other words, the doctrine did not force the state to compromise the legitimate policy behind a benefit. Provided that the condition was germane to the same ends that the state was pursuing through the benefit, it was safe. The doctrine precluded the state, however, from leveraging a gratuitous benefit to achieve unconstitutional ends unrelated to the reason behind the benefit.

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[15] In United States v. Stevens, 559 U.S. 460 (2010), the Court rejected the balance of interest test as a "startling and dangerous" method for determining whether speech is protected under the First Amendment. "The First Amendment's guarantee of free speech," the Court explained, "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Stevens*, 559 U.S. at 470.

Part III discusses the balancing test. When the first public employee speech case reached the Court in 1947, the emerging view on the Court of First Amendment law was pragmatic. Rather than apply the existing unconstitutional conditions doctrine to restrictions on the privilege of public employment, the Court essentially created a new, and controversial, free speech doctrine. Part IV revisits *Pickering*. This section shows that the majority opinion followed the unconstitutional conditions doctrine discussed in Part II. Lower courts and commentators misinterpret *Pickering* as requiring a balance of interest test. The balancing standard articulated in the case is pure dicta. Part V surveys the post-*Pickering* landscape. It divides the Court's public employee free speech doctrine into four categories of cases, and demonstrates the relevance of the unconstitutional conditions doctrine in three of these categories. In the fourth category—cases concerning public employees who are disciplined for controversial or insubordinate remarks—the Court has relied on the public-concern and citizen-speaker tests. Each of these tests can and should be replaced with the unconstitutional conditions doctrine. Part VI offers concluding remarks.

II. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE—AN OVERVIEW

The unconstitutional conditions doctrine regulates the government's power to bargain. When the government bargains, it does not impose a fine, imprisonment, or any other sanction on individuals who refuse the deal. It offers terms and conditions that may be accepted or rejected. The unconstitutional conditions doctrine addresses conditions that require the recipient of a public benefit to forfeit a constitutional right.[16]

[16] Not every condition triggers the unconstitutional conditions doctrine. Where no constitutional right is forfeited, the unconstitutional conditions doctrine has no place. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60, 70 (2006) (holding that the Solomon Amendment's conditional funding provision is not an unconstitutional condition because the First Amendment would not prevent Congress from directing the schools to provide equal access to military recruiters); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 323 (1935) ("If a state has power to impose a certain requirement by direct penal sanction, it can impose it as a condition to the grant of a privilege.").

Before the emergence of the unconstitutional conditions doctrine, courts upheld the imposition of unconstitutional conditions under the privilege doctrine. This now defunct doctrine was expressed as early as 1791, when the First Congress debated whether to prohibit federal excise tax collectors from electioneering.[17] Representative Joshua Seney of New Hampshire argued that the law did not violate speech rights because "it would be optional to accept the offices or not."[18] Others took the opposite view that the proposal was "unconstitutional, as it will deprive [excise officers] of speaking and writing their minds; a right of which no law can divest them."[19] Representative Fisher Ames of Massachusetts complained that the electioneering ban "will muzzle the mouths of freemen."[20] The Bill of Rights had not even been ratified, yet there were First Amendment problems already.

The privilege doctrine started from the premise that government benefits are "optional."[21] The government has no obligation to provide them in the first place. Adherents to the doctrine reasoned that because the government has the "greater" power of declining to offer a benefit, it also has the "lesser" power of offering benefits but with strings attached.[22] Even conditions that required the beneficiary to forfeit a constitutional liberty, such as the right to attend a political rally in the case of Holmes's policeman, were permissible under the privilege doctrine.[23]

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17 2 ANNALS OF CONG. 1926 (1791).

18 *Id.*

19 *Id*. at 1925.

20 *Id*. at 1926.

21 Doyle v. Cont'l Ins. Co., 94 U.S. 535, 542 (1876) (holding that a state law permitting a foreign corporation to conduct business locally on the condition that it abstain from removing cases to federal court was constitutional because the law "gives the company the option" of accepting such terms).

22 W. Union Tel. Co. v. State of Kansas ex rel. Coleman, 216 U.S. 1, 54 (1910) ("I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power.") (Holmes, J., dissenting); Davis v. Massachusetts, 167 U.S. 43, 48 (1897) (sustaining a city ordinance that required a permit to speak on public property on the ground that the city's "right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser").

23 McAuliffe v. Mayor of New Bedford, 155 Mass. 216 (1892); *Davis*, 167 U.S. at 48 (upholding condition that restricted speech on public property).

The unconstitutional conditions doctrine shares the same conceptual foundation as the privilege doctrine. It takes for granted that government benefits are a privilege that need not be offered at all.[24] Unlike the privilege doctrine, however, proponents of the unconstitutional conditions doctrine contend that, under certain circumstances, the government may not condition a privilege on the waiver of a constitutional right.[25] A brief recounting of the development of the doctrine elucidates the special circumstances that render a condition unconstitutional.

In its early formulation, the unconstitutional conditions doctrine prohibited conditions that burdened a constitutional right. In the 1926 case of *Frost v. Railroad Commission*, for example, the Supreme Court held that a state could not condition the commercial use of public highways on compliance with regulations governing common carriers.[26] The majority explained that the restriction threatened the viability of commercial truckers, who needed to use the highways to stay in business but could not afford to operate as common carriers.[27] The Court's rationale, however, applied on its face to unconstitutional conditions of all degrees of magnitude. "A state is without power," Justice Sutherland wrote for the majority, "to impose an unconstitutional requirement as a condition for granting a privilege."[28] Other Supreme Court opinions were equally unequivocal.[29]

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[24] William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445 (1968) (describing common ground between unconstitutional conditions doctrine and privilege doctrine).

[25] *See id.*

[26] Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583 (1926). Common carriers were generally subject to broader regulatory controls than private carriers. In *Frost*, the state railroad commission was empowered to fix the rates and fares of common carriers, and impose other conditions that it regarded as necessary for public convenience. *Id*. at 590.

[27] In the words of the majority, the statute left contract carriers with "a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Id*. at 593.

[28] *Id*. at 598.

[29] *See, e.g.*, Terral v. Burke Const. Co., 257 U.S. 529, 532-33 (1922) (holding that a state's power to deny a benefit "is subject to the limitations of the supreme fundamental law"); Western Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918) (stating that "a constitutional power cannot be used to accomplish an unconstitutional end).

Arguments from the state that unconstitutional conditions were sometimes incidental to the state's legitimate regulatory authority persuaded the Court in *Stephenson v. Binford* to qualify the doctrine.[30] At first blush, the condition on public road use in *Stephenson* appears indistinguishable from the restriction held to infringe unconstitutionally on the due process rights of commercial truckers in *Frost*. The law in *Frost* required truckers to do business as common carriers.[31] The statute in *Stephenson* forbade truckers, among other things, from charging lower shipping rates than the competitor common carriers charged.[32] Both regimes, in short, prevented truckers from doing business on their own terms.

In *Frost*, however, the Court was bound by the conclusion in the ruling below construing the statute *not* to be a regulation of the use of the highways.[33] The Court understood the statute instead as an attempt to leverage the state's authority over the use of public roads to convert private carriers into common carriers.[34] Under the due process clause of the Fourteenth Amendment, states could not impose common carrier status on private shippers by mere legislative fiat.[35] The state did not challenge this rule in *Frost*.[36] The "naked question" in the case, then, was whether the state could achieve the same end "by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege."[37]

In *Stephenson*, by contrast, the ruling below upheld the minimum rate requirement as a valid exercise of the state's regulatory authority over the use of the public roadways.[38] Justice Sutherland, writing again for the majority, agreed. Public roads, he explained, existed primarily

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30 Stephenson v. Binford, 287 U.S. 251 (1932).

31 *Frost*, 271 U.S. at 589-90, 592.

32 *Stephenson*, 287 U.S. at 261-62.

33 *Id*. at 275 & n. 1 (citing pertinent section from *Frost* and quoting the state supreme court opinion).

34 *Frost*, 271 U.S. at 592 (describing case at hand as "that of a private carrier, who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier").

35 *Id*. at 592 (citing cases).

36 *Id*.

37 *Id*. at 592.

38 Stephenson v. Binford, 53 F.2d 509, 515-16 (S.D. Tex. 1931) (affirming statute as having the regulatory purpose of creating a "safe and dependable" system of transportation).

for the public at large.[39] The preferred use of the state's roadways was as a means of transport for private motorists, not as a place of business for commercial shippers.[40] To preserve the roads for their primary function, the state could go as far as prohibiting truckers altogether from using publically-subsidized roads.[41] The conditions on commercial use at issue in *Stephenson*, Sutherland further reasoned, were constitutional because they conserved the roads for public use.[42]

Stephenson teaches several important lessons about the unconstitutional conditions doctrine that remain true today. First, contrary to the initial articulation of the doctrine, not every unconstitutional condition makes a government action illegitimate. The validity of a condition depends on "germaneness."[43] A germane condition is one that serves the same policy ends that are responsible for the existence of the benefit itself.[44] In *Stephenson*, the benefit—public roads—existed primarily for the purpose of providing the public a means of transportation. The Court permitted the price floors on commercial carriers once it deemed this restriction to be operating in furtherance of the benefit's animating purpose.[45]

Second, *Stephenson* demonstrates that the unconstitutional conditions doctrine determines how closely a challenged restriction will be scrutinized. The plaintiffs in *Stephenson* argued that the rate controls infringed upon their due process rights.[46] The controlling rule

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39 *Stephenson*, 287 U.S. at 264.

40 *Id*.

41 *Id*.

42 *Id*. at 272-74 (determining that the price controls had a "definite tendency to relieve the highways" of commercial traffic and therefore were a "means to the legitimate ends of conserving the highways").

42 *Id*. at 272.

43 *See, e.g.*, Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2011-12 (2012); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1458-68 (1989); Hale, *supra* note 16, at 350-59.

44 Rust v. Sullivan, 500 U.S. 173, 198 (1991) (providing that a condition that furthers the purposes of a federal grant program does not violate constitutional rights); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987) (explaining that the state had the right to prohibit or condition construction provided that the restriction served to protect the public's view of the beach).

45 *Stephenson*, 287 U.S. at 272-74.

46 *Id.* at 263.

on rate controls provided that a state lacked the power to impose price floors on private businesses unless the regulated entities fit within the narrow category of businesses "affected with a public interest."[47] Most likely, Justice Sutherland would have voted to strike the law had he applied this rule.[48]

Justice Sutherland expressly confined his inquiry, however, to the separate question of whether the rate controls were a legitimate use of the state's power to conserve the public roadways.[49] Once he determined that the rate controls were germane to the state's power to regulate the public roads, the Justice applied a different, more deferential standard of review.[50] All that was necessary to sustain the rate controls was an "actual" relationship, regardless of the degree, between the reason for the price floors and the reason for the provision of public roads.[51] The rate restrictions passed this test.

In the public employment context, as we shall see, the germaneness inquiry determines the threshold question of whether the First Amendment applies. Restrictions that are germane to the purpose of the public employment in question are not subject to First Amendment scrutiny, while non-germane speech restrictions are. Understanding that the germaneness inquiry is a threshold determination helps in spotting when the Court has (and hasn't) relied on the unconstitutional conditions doctrine.

Finally, *Stephenson* illustrates that the standard of review for determining whether a condition is germane has long been subject to some ambiguity. Justice Sutherland raised two potentially relevant factors in drawing the line between germane and non-germane conditions: (1) the closeness of the relationship between the condition

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47 Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 430 (1927).

48 According to Robert Hale, there was "little doubt" that Justice Sutherland would have stricken the rate controls had he regarded them as non-germane to the state's interest in highways conservation. Hale, *supra* note 16 at 349 (relying on Sutherland's opinions invalidating rate controls in Williams v. Standard Oil Co., 278 U.S. 235 (1929) and Ribnik v. McBride, 277 U.S. 350 (1928), as well as the justice's dissent in the Supreme Court's decision to uphold the price floors in Nebbia v. People of New York, 291 U.S. 502 (1934)).

49 *Stephenson*, 287 U.S. at 265.

50 *Id*. at 272.

51 *Id*.

and the legitimate ends that the condition purports to serve,[52] and (2) the relative significance of the legitimate ends within the context of the benefit subject to the condition.[53] *Stephenson* set a minimal threshold with regard to the first factor.[54] With regard to the second factor, however, Sutherland emphasized that the transportation of the public was the primary reason for which public highways were constructed.[55] Was a closer relationship between means and ends required where the desired ends were not so crucial to the existence of the public benefit? *Stephenson* does not say.

Since *Stephenson*, moreover, the Court has not been entirely consistent in how it has defined the line between germane and non-germane conditions. In the 1976 case of *Elrod v. Burns*, for example, a plurality of the Court maintained that an unconstitutional restriction on government privileges was valid only if it furthered some vital government ends by the means least restrictive of constitutionally protected rights.[56] More recently, the Court has articulated a less exacting standard. Under this standard, conditions that advance the purpose of the benefit, rather than a vital governmental ends, are permissible.[57] At the same time, the modern Court demands a stronger connection between ends and means than the minimal relationship required under *Stephenson*. It has stated that an "essential nexus" must exist between an unconstitutional condition and a legitimate end.[58] Conditions that have only "little" relevance to the reason behind the public benefit, furthermore, are now regarded as non-germane.[59]

III. THE BALANCING TEST

The public employment speech cases from the pre-*Pickering* era are commonly viewed as something of a lagging indicator, a holdout

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52 *Id*.

53 *Id*. at 264.

54 *Id*. at 265.

55 *Id*. at 264, 271.

56 Elrod v. Burns, 427 U.S. 347, 363 (1976).

57 Rust v. Sullivan, 500 U.S. 173, 198 (1991).

58 Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

59 Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (maintaining that a condition is invalid where there is "little or no connection" between the constitutional infringement and the public benefit).

from the Supreme Court's acceptance of the unconstitutional conditions doctrine in cases dealing with non-employment public benefits. Despite the fact that the Supreme Court renounced the privilege doctrine in the 1920s, scholarship on public employee speech law gives the impression that the justices carved an exception for public employees, who continued to work on the government's terms, unconstitutional conditions included, until the 1960s.[60]

The standard account correctly identifies in the pre-*Pickering* era a considerable degree of deference to the state, but it gets the source of the Court's deference wrong, mistakenly identifying the persistence of the privilege doctrine where the pre-*Pickering* Court's free speech jurisprudence was the culprit. The Court's general approach in First Amendment cases during this era was to weigh the interest of individual speakers against the public interest. The Court's proponents of balancing, moreover, regarded political actors to be in a better position to strike the appropriate balance between competing societal interests. As a result, balancing generally favored regulation.

A. *Schneider v. State of New Jersey*

The era of First Amendment balancing began innocuously enough. In 1939, the Court in *Schneider v. State* heard a challenge to several municipal ordinances that restricted the use of public streets for the purpose of distributing handbills, pamphlets, and other printed materials.[61] Before addressing the particulars of the challenged ordinances, the Court drew a distinction between lawful regulations of conduct that have the indirect effect of restricting speech—it gave the example of a traffic regulation that may be used to arrest a speaker who "take[s] his stand in the middle of a . . . crowded street"—and unlawful regulations of speech.[62] After introducing the conduct-speech dichotomy, the Court offered the following guidance:

> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the

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60 Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1466 (2007) (providing that the privilege doctrine controlled cases involving restrictions on public employment until *Pickering*); Kathryn B. Cooper, Garcetti v. Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 74 (2006) (same).

61 *See* Schneider v. New Jersey, 308 U.S. 147 (1939).

62 *Id*. at 160-61.

> challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[63]

The last sentence would be interpreted as an invitation, in each case, to balance the competing interests in speech, on the one hand, and the maintenance of social order, on the other.[64] Taken in context, however, it is an unlikely candidate for a doctrinal shift. After the Court made the statement, it went on to strike down the ordinances as insufficiently tailored to the reasons asserted in support of restricting handbill distribution.[65] The justices did not actually take up the "delicate" task of "weighing the circumstances."

B. *Mitchell, Douds,* and *Dennis*

A trilogy of Supreme Court opinions made the use of the balancing test more explicit. The first two cases presented the classic unconstitutional conditions problem. The laws in question did not directly prohibit speech; they imposed a speech restriction as a condition on a public benefit. In both cases, *United Public Workers of America (C.I.O.) v. Mitchell* and *American Communications Association, C.I.O., v. Douds*, the Court ignored the germaneness inquiry central to unconstitutional conditions analysis. The justices

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63 *Id*. at 161.

64 Am. Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950) (citing *Schneider* as support for the application of a balance of interest test to a speech restriction attached as a condition to the receipt of a government benefit).

65 Three of the ordinances made it unlawful to circulate handbills on public streets; the fourth prohibited door-to-door solicitation without a police permit. *Schneider*, 308 U.S. at 154-58. The bans on circulation were justified on anti-littering grounds, *id*. at 162, while the permit requirement was defended as a fraud protection measure. *Id*. at 159. The police-power theory behind the circulation ban failed because, as the Court dryly put it, "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Id*. at 162. Similarly, the Court found that laws against fraud and trespass were sufficient to remove any justification for the permit requirement. *Id*. at 164.

instead determined the constitutionality of the condition under a balancing test.

In *Mitchell*, decided in 1947, the Court declared that to resolve a challenge brought against the Hatch Act's ban on federal employees taking an active part in political campaigns, it was necessary to "balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."[66] The statute would be evaluated, therefore, on whether the benefit of the speech restriction outweighed the burden, not on whether the restriction was a necessary means to a non-First Amendment end.[67] By jettisoning the germaneness inquiry of earlier unconstitutional conditions cases, *Mitchell* charted a new path for public employee speech cases.

As deployed in *Mitchell*, the balancing test was deferential to Congress. The majority maintained that the legislature had the primary responsibility for determining how much to regulate the political conduct of federal employees,[68] and found no reason to second guess Congress's judgment that the Hatch Act was necessary to maintain the integrity and competency of the federal workforce.[69] Concerns as to the statute's breadth were dismissed as "matters of detail for Congress."[70] *Mitchell* relegated the courts to ensuring that regulations of public employees' political conduct did not "pass[] beyond the general existing conception of governmental power."[71] The majority

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66 United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 95-96 (1947). Petitioners in *Mitchell* were federal employees. The justices followed the doctrinal trend and declined to invoke the privilege doctrine. The majority acknowledged instead that the Bill of Rights protects government employees. *Id.* at 94-95 (stating that the Hatch Act interfered "with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments"); *id.* at 100 (providing that Congress may not "enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work"). Although *Mitchell* sustained the Hatch Act, the decision "was not put upon the ground that government employment is a privilege to be conferred or withheld at will." *Douds*, 339 U.S. at 405.

67 *Mitchell*, 330 U.S. at 95-96.

68 *Id.* at 102.

69 *Id.* at 103.

70 *Id.* at 102.

71 *Id.*

defined that phrase—it does not appear in prior state or federal case law—as the product of "practice, history, and changing education, social and economic conditions,"[72] suggesting that when engaging in balancing, judges should defer to societal and economic trends as well as longstanding political arrangements.[73]

Three years later, the Court in *Douds* addressed the anti-Communist affidavit requirement in the Taft-Hartley Act. The provision excluded from the benefits of the National Labor Relations Act (NLRA) unions led by officers who refused to renounce Communism.[74] Confronted with another unconstitutional conditions problem, the Court turned again to the balancing test. This time, however, the Court went further than it had in *Mitchell* and adopted interest balancing as the correct framework for resolving constitutional challenges to conditions on government privileges. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech," Chief Justice Vinson wrote for the majority, "the duty of the court is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[75] As in *Mitchell*, the Court was not inclined to question Congress's judgment that the challenged provision addressed a substantial harm, or to quibble with the chosen means.[76] Once again, the scales tipped in Congress's favor.

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72 *Id.*

73 As evidence that the Hatch Act was within the "general existing conception of government power," *Mitchell* asserted that the prohibition on political activity "has the approval of long practice by the [United States Civil Service] Commission, court decisions upon similar problems and a large body of informed public opinion." *Id*. at 102-03.

74 *Douds*, 339 U.S. at 385-86.

75 *Id*. at 399.

76 The stated purpose of the provision was to end the practice of "political strikes," the term given to describe the phenomena of labor stoppages called by Communist union leaders for the sole purpose of disrupting commerce. *Id*. at 388-89 (describing the "great mass of material" submitted to Congress demonstrating the problem of political strikes). The Court concluded that considerable reasons were offered in support of the provision, and, in any event, that it was "in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress." *Id*. at 400-01. As for the burden on speech, the majority found that the requirement targeted a small cadre of labor leaders "with occupancy of a position of great power over the economy of the country." *Id*. at 404.

Finally, the Court in *Dennis* upheld the conviction of twelve members of the Central Committee of the Communist Party for advocating and organizing the violent overthrow of the United States government in violation of the Smith Act.[77] The decision did not produce a majority opinion. A plurality of four, led by Chief Justice Vinson, relied on the clear and present danger test, as restated by Judge Learned Hand in the appeals court opinion below.[78] In a solo concurrence, Justice Frankfurter contended that the convictions failed the clear and present danger test.[79] Until *Dennis*, he asserted, the Court's speech decisions lent constitutional support to "uncritical libertarian generalities."[80] What troubled Frankfurter even more, however, was the perceived absence of judicial restraint in the Court's free speech jurisprudence.[81] "The demands of free speech in a democratic society as well as the interest in national security," he wrote, "are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for non-Euclidian problems to be solved."[82] In line with the majority opinions in *Mitchell* and *Douds*, he thought the legislature held the principal responsibility of weighing the

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77 Dennis v. United States, 341 U.S. 494 (1951).

78 Under the Hand-Vinson formula, courts must ask in each case "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510. Under the original formulation of the clear and present danger standard, the question was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919).

79 *Dennis*, 341 U.S. at 527.

80 *Id.*

81 Justice Frankfurter faulted the justices for deviating from their "normal duty in sitting in judgment on legislation" in cases implicating the First Amendment. *Id.* at 526-7. He cited the famous footnote 4 of *Carolene Products* among other examples of the Court's disregard for its traditional, limited role in reviewing legislation. "It has been suggested, with the casualness of a footnote," he complained, that legislation restricting the freedom of expression "is not presumptively valid." *Id.* (citing United States v. Carolene Products Co., 304 U.S. 144, 153, n.4 (1938)).

82 *Id.* at 524-25.

interests,[83] and insisted that courts should overrule lawmakers only in extreme cases.[84]

Although Frankfurter did not attract the votes of the other justices in *Dennis*, his pragmatic, anti-absolutist view of the First Amendment characterized the Court's jurisprudence over the following decade. During this period, the Court routinely used the balance of interest test in speech cases.[85]

C. The Balancing Critics

Balancing elicited fierce opposition from Justice Black. In a string of dissents, Black described the legal doctrine as a "justification for tyranny,"[86] "a doctrine of governmental absolutism,"[87] "freedom-destroying,"[88] and a device for turning "our 'Government of the people, by the people and for the people' into a government over the people."[89] As a First Amendment textualist, Black summarized his view in a sentence: "I read 'no law abridging' to mean no law abridging."[90] That text, he argued, permanently fixed the First Amendment's scales on the side of free speech by putting this right "wholly beyond the reach of federal power to abridge."[91] The framers of the amendment, Black wrote in another opinion, already "made a

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83 *Id*. at 525.

84 *Compare id*. at 539-40 (stating that laws "outside of the pale of fair judgment" should be overturned) *with* United Pub. Workers of Am. (CIO) v. Mitchell, 330 U.S. 75, 102 (1947) (maintaining that laws that "pass[] beyond the general existing conception of governmental power" will not be sustained).

85 The Court invoked the balancing of interests test in the following cases: Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 90-91 (1961); Uphaus v. Wyman, 360 U.S. 72, 78 (1959) (concerning mandatory public disclosure); Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958) (discussing *Douds* and further concerning mandatory public disclosure); Barenblatt v. United States, 360 U.S. 109, 134 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959) (concerning government interrogations); *In re* Anastaplo, 366 U.S. 82, 89-90 (1961), Konigsberg v. State Bar of Cal., 366 U.S. 36, 52 (1961) (concerning bar membership and citing additional balancing cases).

86 Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. at 165.

87 *In re* Anastaplo, 366 U.S. at 111.

88 Scales v. United States, 367 U.S. 203, 261 (1961).

89 Konigsberg v. State Bar of Cal., 366 U.S. at 67-68.

90 Smith v. California, 361 U.S. 147, 157 (1959).

91 *Id.* at 157-58.

choice of values."[92] According to Black, balancing invited judges to abridge the freedom of speech whenever the values "they most highly cherish outweigh the values most highly cherished by the Founders."[93] Black thus objected to what he understood as an effort to replace the protections offered under the text of the First Amendment with highly subjective judicial evaluations.

Justice Black dissented from the balancing trilogy and was joined in dissent by Justice Douglas in two of the cases.[94] The anti-balancing camp grew with the addition to the Court of Chief Justice Warren and Justice Brennan. In 1961, these four justices agreed that the Court:

> should not permit governmental action that plainly abridges constitutionally protected rights of the People merely because a majority believes that on "balance" it is better, or "wiser" to abridge those rights than to leave them free. The inherent vice of the "balancing test" is that it purports to do just that.[95]

A diverse collection of academics also took aim at the doctrine. First Amendment scholar Alexander Meiklejohn argued that balancing undermined the First Amendment's commitment to a system of self-government by allowing public officials to regulate speech whenever they deemed the restrictions as necessary to serve the greater good.[96] Yale Law School Professor Thomas Emerson wrote that the doctrine left the First Amendment without any meaning.[97] If legislatures may enact "reasonable" abridgments of free speech, the amendment provided no protection that was not already afforded under the due process clause.[98] Professor Emerson further contended that the doctrine left judges in an untenable position. Either they acceded to the legislature's weighing of the relevant issues or they assumed the function of a legislature and reweighed the interests themselves.[99] Harvard Law School Professor Charles Fried echoed Professor

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92 Time, Inc. v. Hill, 385 U.S. 374, 399 (1967).

93 Konigsberg v. State Bar of Cal., 366 U.S. at 75.

94 Douglas took no part in the consideration of *Douds*. Am. Communications Ass'n. v. Douds, 339 U.S. 382, 415 (1950).

95 *In re* Anastaplo, 366 U.S. 82, 111 (1961).

96 ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM, 109-14 (1960).

97 Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 913 (1963).

98 *Id*.

99 *Id*.

Emerson's sentiment that *ad hoc* balancing was incompatible with the role of the judiciary.[100] Professor Fried argued that courts should instead draw "clean lines" to protect the free speech rights of the individual.[101]

IV. *PICKERING V. BOARD OF EDUCATION*

It is widely maintained that the 1968 case of *Pickering v. Board of Education* marked the arrival of the balance of interests test in cases involving public employee free speech claims.[102] This contention is problematic for two reasons. As already discussed, the balancing test did not originate with *Pickering*. More than twenty years earlier, in *Mitchell*, the Court applied balancing to resolve a First Amendment challenge to the Hatch Act brought by public employees. Second, *Pickering* itself did not rely on the balance of interests test. To recognize the reemergence of the unconstitutional conditions doctrine, it is essential to understand *Pickering*'s actual holding.

A. Pickering's Letter

The suit followed a series of school funding maneuvers that led to the dismissal of a teacher, Marvin L. Pickering. In 1961, the school board for district 205 in Will County, Illinois, submitted a pair of bond proposals for the erection of two high schools.[103] The voters rejected the first proposal, but approved the second, authorizing $5.5 million for the school project.[104] The schools were built with the proceeds of the bond sales.[105] Three years later, the school board presented voters with two measures that would have raised additional revenues for the school district.[106] After the first measure failed, a group of teachers and the superintendent of schools published newspaper articles in

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100 Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 773 (1963) (critiquing use of "particularistic" balancing in the adjudication of constitutionally protected individual liberties).

101 *Id*. at 778.

102 *See* Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968).

103 *Id*. at 565-66.

104 *Id*.

105 *Id*.

106 *Id*. at 566.

support of increased revenues for school expenditures. Unmoved, the voters again thwarted the tax increase.[107]

Two days after the defeat of the second tax proposal, Pickering published a 900-word manifesto in the letters section of a local newspaper.[108] He blamed the school board for the defeat of the tax measure, claiming that taxpayers lost faith in the board because it spent lavishly on athletics at the expense of investing in the classroom.[109] Pickering dismissed the articles in favor of the tax measure published by the teacher group as reflective of the views of only a handful of his colleagues.[110] "Did you know," he wrote, "that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers live in at the high school, and your children go to school in."[111] The school board fired Pickering two weeks after his letter was published.[112]

Pickering demanded a bill of particulars and a hearing before the board.[113] The board charged that he had falsely impugned the "motives, honesty, integrity, truthfulness, responsibility and competence of both the school board and the school administration," and that his letter threatened to disrupt faculty discipline and incite "controversy, conflict, and dissention" in the school system and the community.[114] At the hearing, however, no evidence was presented related to the reputations of the board members or superintendent,[115] nor were any facts proven concerning the disruption of faculty discipline or harm elsewhere due to Pickering's letter.[116] The hearing focused instead on the truth or falsity of Pickering's statements.[117] The

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107 *Id*.

108 *Id*. at 566, 575-78.

109 *Id* at 575-76.

110 *Id*. at 577.

111 *Id*. at 577-78.

112 *Id*. at 566; Brief of Plaintiff-Appellant, Pickering v. Bd. of Educ. of Tp. High School Dist., 1967 WL 113867 at *13.

113 Brief of Plaintiff-Appellant, 1967 WL 113867 at *8.

114 Pickering, 391 U.S. at 566-67.

115 *Id*. at 567.

116 *Id*.

117 *Id*.

board determined that the statements were false and upheld the dismissal.[118] The state courts affirmed.[119]

B. Justice Marshall's Opinion

The Supreme Court's opinion in *Pickering* addresses three issues: whether public employees forfeit their First Amendment rights by virtue of their employment, whether a false statement can be grounds for dismissal, and whether other special circumstances justify the dismissal of a public employee for speaking out on a matter of public concern.

The first issue was straightforward. The Court had long ago rejected the privilege doctrine and had recognized public employee speech rights (weighed albeit against the government's competing interest) in several cases beginning with *Mitchell*.[120] The lower court in *Pickering* appeared nevertheless to veer into forbidden territory. It noted that Pickering was "not a mere member of the public" since he had opted to teach in public schools, and determined that he was therefore bound to refrain from conduct that he otherwise "would have an undoubted right to engage in."[121] Writing for the majority, Justice Marshall "unequivocally rejected" the suggestion that public employee free speech cases could be regarded as involving no more than a condition on a governmental privilege.[122]

The second issue prompted the Court to jettison the balancing test and make a threshold germaneness determination. In response to the school board's argument that it was justified in dismissing Pickering for making false statements, Pickering argued that the board could not sanction him unless it satisfied the *New York Times* rule.[123] In *New York Times Co. v. Sullivan*, the Supreme Court held that a public official needed to show "actual malice" in order to recover in a libel suit.[124] The Court later applied the *New York Times* rule to criminal defamation actions, requiring a showing of actual malice for the state

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118 *Id*.

119 *Id*.

120 United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1947).

121 Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 36 Ill. 2d 568, 577 (1967).

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

123 Brief of Plaintiff-Appellant, 1967 WL 113867 at *11, *22-*38.

124 New York Times v. Sullivan, 376 U.S. 254 (1964).

to impose sanctions for defaming public officials.[125] Pickering contended that the same rule should cover the dismissal of public employees premised on false statements.[126]

Pickering asked, in essence, for a return to the unconstitutional conditions standard that applied before the Court in *Stephenson* introduced the germaneness requirement.[127] He argued that the rule in *New York Times* should apply to a condition on a government privilege—his job—in the same way that the rule applied in prosecutions of defamation seeking money damages.[128] In other words, if the *New York Times* rule could not be undone directly, it also could not be undone indirectly by conditioning public employment on the forfeiture of the protections afforded by the rule.

Marshall's response to Pickering's argument signaled the end, or at least the beginning of the end, of the balancing test. At the highpoint of interest balancing, the Court held that in scenarios such as Pickering's, where the state's action "results in an indirect, conditional, partial abridgment of speech," the role of the Court was to weigh the conflicting interests to determine which demanded the greater protection.[129] Marshall declined to go down this path. *Pickering* may well be remembered for Marshall's dictum about the need for balancing.[130] In actuality, however, the case was not decided on the basis of balancing. Presented with a speech condition on public employment, Marshall engaged in a germaneness inquiry to determine the correct level of scrutiny. The discussion of balancing is pure dicta.

Marshall resolved the threshold question by considering whether Pickering's job made it necessary for him to surrender the First Amendment protections afforded under the *New York Times* rule.[131] The content of the letter showed that it was not.[132] The statements that Pickering made, Marshall asserted, were not "directed towards any person with whom [Pickering] would normally be in contact in the

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125 Garrison v. State of Louisiana, 379 U.S. 64 (1964).

126 Brief of Plaintiff-Appellant, 1967 WL 113867 at *11.

127 Stephenson v. Binford, 287 U.S. 251 (1932).

128 Brief of Plaintiff-Appellant, 1967 WL 113867 at *16, *19-*20.

129 Am. Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950).

130 Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 568 (1968).

131 *Id.* at 567.

132 *Id.* at 569.

course of his daily work as a teacher," and thus there was "no question of maintaining either discipline by immediate superiors or harmony among coworkers."[133] Marshall further recognized that Pickering wrote the letter about the board members, with whom Pickering lacked "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."[134] Pickering's statements about athletic funding, moreover, did not concern "matters so closely related to the day-to-day operations of the schools."[135] Had Pickering disclosed sensitive information, Marshall suggested that a less protective speech rule would have been appropriate given that the school would have found it difficult to rebut the statements "because of the teacher's presumed greater access to real facts."[136] Nothing in the letter, however, convinced Marshall that denial of the *New York Times* rule was appropriate in light of Pickering's employment.

Pickering prevailed on the threshold question. "[I]n a case such as the present one," Marshall concluded, "in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public that he seeks to be."[137] The *New York Times* rule thus controlled. The threshold determination was all but dispositive. Because the board presented no evidence that Pickering had made any of the objectionable statements with actual malice, an essential element under the controlling rule, the Court found no grounds for his dismissal and reversed the ruling below.[138]

Courts and commentators, of course, have read *Pickering* as establishing a balancing test.[139] This interpretation, however, neglects

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133 *Id.* at 569-70.

134 *Id*. at 570.

135 *Id*. at 572.

136 *Id*.

137 *Id*. at 574.

138 *Id*.

139 For the courts' reception of *Pickering*, *see, e.g.*, Bernasconi v. Tempe Elementary Sch. Dist. No. 3, 548 F.2d 857, 862 (9th Cir. 1977) (concluding that under *Pickering* the court "must strike the balance" between competing interests); Sprague v. Fitzpatrick, 546 F.2d 560, 565 (3d Cir. 1976) (considering whether public employee's comments on matters of public concern "tilt[ed] the *Pickering* balance in favor of first amendment protection"); Paulos v. Breier,

the decision's actual holding, which Justice Marshall reiterated at the end of the opinion: "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[140] Thomas Emerson pointed out that the *Pickering* opinion "ultimately seems to rest upon those considerations relevant to the question whether the publication of Pickering's letter was incompatible with his commitments as an employee in the school system."[141] Emerson was right—a conclusion bolstered by the fact that Justice Black, a balancing Geiger counter, did not object to any claimed use of balancing in the majority opinion.[142] Outside of the public employment context, the Supreme Court has referred to *Pickering* as an unconstitutional conditions case.[143]

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507 F.2d 1383, 1385 (7th Cir. 1974) (citing *Pickering* for the proposition that a "balance must be struck between the First Amendment interests of a state employee and the interests of the state in promoting the efficiency of the public services that it performs through its employees"); Jannetta v. Cole, 493 F.2d 1334, 1336 (4th Cir. 1974) (providing that *Pickering* "necessitates a weighing of interest[s]"); Moore v. Winfield City Bd. of Educ., 452 F.2d 726, 728 (5th Cir. 1971) (maintaining that under *Pickering*, a public employee's speech rights "must be balanced against the need for orderly" public administration). For the scholarly treatment of the case, *see, e.g.*, Schoen, *supra* note 9, at 8 (summarizing *Pickering* as holding that public employee speech claims must be resolved by interest balancing); Solomon, *supra* note 11, at 453 (stating that *Pickering* announced a balancing test to evaluate public employee speech claims); Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365, 367-68 (1977) (same).

140 *Pickering*, 391 U.S. at 574.

141 THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 581 (1970).

142 In *Pickering*, Black joined a brief concurrence filed by Justice Douglas. These justices wrote separately to restate their view that the *New York Times* rule was not sufficiently protective of free speech. *Pickering*, 391 at U.S. 563. The concurrence did not mention the majority's invocation of a balancing test. *See id.* Black concurred separately in cases in which the justices sustained a free speech claim on the basis of balancing, s*ee e.g.*, Smith v. California, 361 U.S. 147, 156-57 (1959), suggesting that he did not view balancing as the standard applied in *Pickering*.

143 Dolan v. City of Tigard , 512 U.S. 374, 385 (1994) (citing *Pickering* as an example of the "well-settled" unconstitutional conditions doctrine).

V. THE RETURN OF UNCONSTITUTIONAL CONDITIONS ANALYSIS

Before *Pickering*, the public employee free speech cases that reached the Supreme Court revolved around the liberties and duties of dissenters in Cold War America. Loyalty oaths, anti-Communist affidavits, and conscientious objectors were recurring themes in these cases.[144] *Pickering*, by contrast, could hardly have concerned a set of facts farther removed from an Arthur Miller drama, and was more in line with the ordinary, everyday controversies of politics and public life—school funding, athletic facilities, a bond issue, and the allocation of taxpayer dollars by government administrators.[145] If *Pickering* did not produce a genuine doctrinal change, the case did very much signal the mainstreaming of the First Amendment.

Part V of this Article examines four categories of public employee speech cases that have reached the Supreme Court since *Pickering*: political patronage and activity cases, publishing and public speaking cases, public-sector union dues cases, and insubordinate employee cases. If these cases, like *Pickering*, do not raise the type of existential questions that fueled the sharp fissures between "Frankfurtean" pragmatists and "Blackean" absolutists on the Cold War Court, they demonstrate the wide array of public employee speech problems that the mainstreaming of the First Amendment has brought. Notwithstanding this diversity, the modern Court has relied consistently on the unconstitutional conditions doctrine to resolve public employee speech cases.

A. Political Affiliation and Activity

After *Pickering*, the Court decided a line of cases involving government workers and contactors who argued that patronage practices were an infringement on their right to free speech. The first of these cases, *Elrod v. Burns*, arose from the home of a long tradition of machine politics—Cook County, Illinois.[146] In 1970, the voters of Cook County elected a new sheriff, Richard J. Elrod, who promptly

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144 HARRY KALVEN, JR., A WORTHY TRADITION 301-391 (1988) (discussing the anti-Communist cases).

145 *See generally Pickering*, 391 U.S. at 565-68.

146 Elrod v. Burns, 427 U.S. 347 (1976); for background on Cook County politics, *see generally* MIKE ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO (1971) (describing Cook County under the leadership of Chicago mayor and Cook County Democratic Party chairman Richard J. Daley).

dismissed, or threatened to dismiss, employees who refused to join or support the Democratic Party.[147] Three former employees and one current employee facing discharge brought a First Amendment challenge.[148]

The Court ruled in favor of the employees but split on the rationale. Justice Brennan's plurality opinion maintained that a condition on public employment that infringes on free speech must be the least restrictive means to a vital government purpose and "the benefit gained must outweigh the loss of constitutionally protected rights."[149] Justice Stewart's concurrence, joined by Justice Blackmun, stated that the sole question presented in the case was whether a non-policymaking government employee may be discharged "from a job that he is satisfactorily performing upon the sole ground of his political beliefs."[150]

Four years later, in *Branti v. Finkel*,[151] the Court reaffirmed *Elrod* but clarified that germaneness is the dispositive factor. The suit was brought by two Republican public defenders after the newly installed Democratic county public defender discharged them to make room for Democratic appointees.[152] The majority opinion by Justice Stevens explained that the standard for determining the constitutionality of patronage discharges "is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[153] The *Branti* Court found no reason for restricting appointments to the public defender's office to members of the "in-party."[154] A public defender, Stevens maintained, discharges his or her public duties by serving the undivided interests of individual clients.[155] Interposing a party-affiliation requirement, thus, undermines the public defender's ability to do his or her job effectively.[156]

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147 *Elrod*, 427 U.S. at 350-51.

148 *Id.* at 349-50.

149 *Id*. at 363.

150 *Id*. at 375.

151 Branti v. Finkel, 445 U.S. 507 (1980).

152 *Id*. at 509.

153 *Id*. at 518.

154 *See id.* at 519-20.

155 *Id*. at 519.

156 *Id*. at 519-20.

The *Branti* standard remains controlling. In 1996, the Court extended the protection against adverse action on the basis of political affiliation to government contractors.[157] The majority opinion in that case began by quoting the language from the *Branti* holding that political affiliation must be an "appropriate" requirement.[158] The Court further held that the government must base its contracting decisions on legitimate, performance-based criteria, and not on the political beliefs of the contractors.[159]

The constitutionality of conditions *preventing* partisan activities by government employees is the flip side of the patronage decisions. In 1973, the Court in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* reaffirmed its decision in *Mitchell*, discussed in the previous section, and upheld the Hatch Act.[160] *Letter Carriers* does not provide a clear answer as to whether the Court viewed a balancing of interests test or unconstitutional conditions analysis as the appropriate method for reaching a decision. Justice White's majority opinion sustaining the prohibition largely followed precedent rather than either of these approaches.[161] To the extent that *Letter Carriers* subjected the Hatch Act to a fresh review, however, the opinion relied on the unconstitutional conditions doctrine.[162] As in the patronage cases, the Court framed the issue in terms of the means-end fit between the speech restriction and the purported government interest.[163] In the patronage cases, the Court concluded that political affiliation is not an appropriate criterion for

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157 O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).

158 *Id*. at 719.

159 *Id*. at 725-26.

160 U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

161 White began his discussion of the merits by remarking that the "judgment of history" favored restricting the partisan activities of public servants. *Id*. at 557. He proceeded to cite examples of governmental policies prohibiting such activities stretching back to the Jefferson Administration. *Id*. at 557-59. The majority opinion further noted that the Supreme Court had twice before upheld restrictions on the political activities of federal employees, including an earlier challenge to the Hatch Act in *Mitchell*. *Id*. at 554-55 (discussing *Mitchell* and *Ex parte* Curtis, 106 U.S. 371 (1882)). Given the opportunity to revisit *Mitchell*, the majority decided to reaffirm it "unhesitatingly." *Id*. at 556.

162 *See id.* at 564.

163 *Id.*

many government jobs.[164] In *Letter Carriers*, the Court ruled that prohibiting partisan activity by government workers, on the other hand, is "essential" to "this great end of Government—the impartial execution of the laws."[165] The Court explained that the restriction stunted the growth of political machines inside public bureaucracies, and excused public employees from having to curry political favor with their superiors.[166] A necessary part of the effective operation of government, the majority further asserted, is maintaining the *appearance* of impartially.[167] The prohibition was thus germane to government employment because government employees who campaigned for elected officials gave the impression of partiality.

B. Publishing and Public Speaking

In *Snepp v. United States*, the Court affirmed the validity of the CIA's prepublication review process for intelligence-related materials.[168] The case revolved around the book, "Decent Interval," which Frank Snepp wrote about his tenure as an intelligence officer in Vietnam.[169] In violation of his employment contract, Snepp submitted the book manuscript for publication without submitting it to the CIA for prior review and approval.[170] He argued that the prepublication clearance process was an unconstitutional prior restraint on speech. [171] The Supreme Court disagreed and upheld the process for two reasons, both of which pertained to germaneness. The Court declared that the provision was necessary to prevent unauthorized disclosure and to

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164 *See* Branti v. Finkel, 445 U.S. 507 (1980); *see also* O'Hare Truck Services, Inc. v. City of Northlake, 518 U.S. 712 (1996).

165 *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564-55.

166 *Id*. at 566-67.

167 *Id*. at 565.

168 Snepp v. United States, 444 U.S. 507 (1980) (per curiam).

169 *Id*. at 507-08, 516-17 (Stevens, J., dissenting).

170 *Id.* at 507.

171 The district court and appellate courts rejected this argument, but disagreed as to the remedy for Snepp's breach. The district court imposed a constructive trust on Snepp's profits for the benefit of the CIA. United States v. Snepp, 456 F. Supp. 176, 181-82 (E.D. Va. 1978). The court of appeals struck this remedy, but held that the CIA was entitled to seek punitive damages. United States v. Snepp, 595 F.2d 926, 936-37 (4th Cir. 1979). The Supreme Court agreed with the district court and remanded the case for the reinstatement of the constructive trust. Snepp v. United States, 444 U.S. 507, 515.

maintain the "appearance of confidentiality," which was essential to the continued availability of foreign sources of information.[172] The restriction was thus closely related to the CIA's operational effectiveness.[173]

Other government workers fared better with respect to a federal law that prohibited them from receiving honoraria for appearances, speeches, and articles.[174] In *United States v. Nat'l Treasury Employees Union*, unlike in *Snepp*, the Court found no relationship between the speech restriction and the government's ability to operate effectively.[175] There was no cognizable link between the honorarium ban and the need to maintain employee discipline or morale.[176] Nor was the restriction related to the government's interest in avoiding the appearance of impropriety. In the case of a single event, speech, or article, the law applied even if the subject matter was unrelated to the government worker's official duties or status.[177] There is "scant harm," Justice Stevens concluded for the majority, "or appearance of harm, resulting from [a government worker]'s accepting pay to lecture on the Quaker religion or to write dance reviews."[178] Stevens further

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172 *Snepp*, 444 U.S. at 509 n. 3. As the district judge explained: "It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this nation in an atmosphere of mutual trust unless they can be assured that their confidence will be kept." *Snepp*, 456 F. Supp. at 181.

173 Three justices dissented from the Court's decision to impose a constructive trust as a remedy for the contract breach. *See Snepp*,444 U.S. at 516-26 (Stevens, J., dissenting). The dissenters acknowledged, however, that the prepublication clearance may be constitutional in view of "the national interest in maintaining an effective intelligence service," but chided the majority for resolving this question summarily, without the benefit of full briefing and oral argument. *Snepp*, 444 U.S. at 526 n. 17 (Stevens J., dissenting).

174 *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995).

175 *See id* at 477.

176 *Id*. at 470-71.

177 *See id*. at 459-60. The law contained an exception, which permitted the receipt of honoraria for a *series* of appearances, speeches, and articles, provided that there was no nexus between the subject matter of the series and the public employee's official duties or status. *Id*. (quoting statute). The exception negated the government's argument that the honoraria ban was justified to save the costs of conducting a case by case nexus analysis because that same analysis was necessary to determine if a government employee who gave a series of speeches could accept an honorarium. *Id*. at 474.

178 *Id*. at 473.

suggested that the statute might have passed muster if the ban applied only to subject matter related to a government employee's job,[179] but he declined to rewrite the statute from the bench. The ban failed, in sum, for the same reason that the CIA's prepublication clearance regime survived—germaneness.

C. Public-Sector Union Dues

The Court's consideration of the constitutionality of mandatory public-sector union dues began with a balance that was already struck. As in *Letter Carriers*, which addressed a renewed challenge to the Hatch Act, the Court was not writing on a blank slate. Before *Pickering*, the justices decided *Railway Employees' Department v. Hanson*[180] and *Machinists v. Street*,[181] a pair of cases that addressed mandatory private-sector union dues. When the Court first entertained a challenge to mandatory *public*-sector union dues in 1977, in *Abood v. Detroit Board of Education*, a majority of the justices described *Hanson* and *Street* as "go[ing] far to resolve the issue."[182]

In these earlier cases, the Court affirmed the use of mandatory union dues for the limited purpose of collective bargaining. Both cases concerned the Railway Labor Act (RLA)'s union-shop provision, which authorized carriers and unions to require union membership as a condition of employment.[183] A private agreement between workers and management typically does not create the necessary conditions for a First Amendment injury.[184] The RLA, however, implicated Congress because the statute expressly preempted state "right-to-work" laws that otherwise would have protected the right of workers to refuse to join a union.[185] In *Hanson*, employees from a "right-to-work" state challenged a private union shop arrangement. [186] They argued that the First Amendment excused them from paying union dues to support

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[179] *See id*. at 474 (referring to the "undesirable nexus between the speaker's official duties and either the subject matter of the speaker's expression or the identity of the payor").

[180] Railway Employees' Dep't. v. Hanson, 351 U.S. 225 (1956).

[181] Int'l Assoc. of Machinists v. Street, 367 U.S. 740 (1961).

[182] Abood v. Detroit Bd. of Educ. 431 U.S. 209, 217 (1977).

[183] *Hanson*, 351 U.S. at 228-29; *Street*, 367 U.S. at 742.

[184] *See Hanson*, 351 U.S. at 227-28.

[185] *Id.* at 228-29 (quoting statute's preemption language).

[186] *Id.* at 227-28.

political and ideological causes that they opposed. The Court upheld the union shop arrangement but cautioned that its holding was limited to dues attributable to the union's collective-bargaining work.[187] In *Street*, the employees proved that the union exceeded this narrow authorization and used employee dues for political causes.[188] The Court, however, did not reach the First Amendment issue. It held instead that the RLA prohibited the use of dues for political purposes, and therefore, the employer's actions were illegal under the statute.[189]

The *Abood* Court read *Hanson* and *Street* to hold that mandatory union dues were "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[190] The Court explained that the central element in the RLA was the system of exclusive union representation that it established.[191] Under this system, employees designate a single collective-bargaining representative, which, the Court asserted, streamlines labor-management negotiations. The Court further noted that the collective-bargaining agent is obligated to represent every member of a bargaining unit equally, union member or not.[192] Requiring every member of a bargaining unit to defray the costs of collective-bargaining, the Court explained, "has been thought to distribute fairly the costs" among those who benefit from collective-bargaining, thereby avoiding the problem of free-ridership.[193]

Turning to the case in question, the *Abood* Court noted that the State of Michigan adopted an essentially identical structure for labor-management relations as that which existed under the RLA.[194] State law provided for exclusive representation, a duty of fair representation, and authorized collective-bargaining agents to collect agency fees

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187 The Court suggested that it would not have upheld the use of union dues for political purposes but that the employees submitted no evidence that the union devoted dues to this end. *Id*. at 238.

188 *Street*, 367 U.S. at 744.

189 *Id*. at 770.

190 *Abood*, 431 U.S. at 222.

191 *Id*. 220-21.

192 *Id*. at 221.

193 *Id*. at 221-22.

194 *Id*. at 223 (Douglas, J. concurring).

from members of a bargaining unit.[195] The Court found that the governmental interests which justified the imposition of agency fees under the RLA were equally relevant in the public sector,[196] and that public-sector workers did not have a stronger First Amendment right than their private-sector counterparts to avoid these fees.[197]

Abood was not contested until 2014, in *Harris v. Quinn*.[198] The challengers were personal assistants who provided in-home care to persons suffering from disabilities.[199] The State of Illinois paid the personal assistants through two state programs subsidized by Medicaid.[200] Under the same basic arrangement that existed in the RLA cases and *Abood*, an exclusive agent represented the personal assistants in collective-bargaining negotiations with the state, and extracted fees from all personal assistants, including the challengers, to defray the agency costs related to these negotiations.[201] The challengers asserted that the mandatory assessments were unconstitutional under the First Amendment.[202]

Justice Alito's majority opinion viewed *Abood* as upholding mandatory agency fees because they were related to the state's authority to negotiate the employment terms of state employees with a single representative who bargains for all similarly-situated public employees.[203] Under this theory, the mandatory agency fees are no more than the union's costs of complying with the state's mandate:[204] the state has decided that it desires to execute and administer employment contracts with public employees through a single representative and the employee's representative will be compensated in this manner.

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195 *Id*. at 223-24.

196 *Id*. at 224.

197 *Id*. at 230-31.

198 Harris v. Quinn, 134 S. Ct. 2618 (2014).

199 *Id*. at 2626 and n.3.

200 *Id*. at 2624.

201 *Id*. at 2626.

202 *Id*. at 2627.

203 *See id*. at 2631.

204 *See id*. at 2636 (citing Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) for the proposition that "what justifies the agency fees . . . is the fact that the State compels the union to promote and protect the interest of nonmembers").

In *Harris*, however, Justice Alito determined that the situation was quite different. The mandatory dues were not germane to the state's desire to negotiate employment terms through a single source because the state afforded the union virtually nothing to negotiate with regard to the employment terms of the personal assistants.[205] The personal assistants were paid a uniform hourly wage set by statute, and were ineligible to receive statutory retirement and health insurance benefits as well as a host of other benefits available to state employees.[206] Subject to minimal baseline requirements, individual clients had complete discretion to hire the personal assistant of their choosing.[207] The duties of the personal assistants were established in a plan that needed the approval of a client and the client's physician, but not the state.[208] Personal assistants worked at the pleasure of their clients, who could terminate the employment relationship without permission from the state.[209] And in the event that a personal assistant wished to protest the terms and conditions set by a client, there was no grievance procedure involving the union.[210] There was, in short, no necessary link between the agency fees and the union's collective bargaining work.

As in *Stephenson* and *Pickering*, the germaneness inquiry in *Harris* determined the level of scrutiny. Once Justice Alito determined that the agency fees were not connected to the state's authority over the conduct of collective bargaining in the public sector, he subjected the fee arrangement to First Amendment scrutiny and ruled it unconstitutional.[211]

Harris did not reach the larger issue of whether a system of genuine collective bargaining in the public sector is germane to the effective operation of government. In other words, the majority did not resolve the case of the public employee who argues that the union may not collect agency fees because mandatory collective bargaining, like most patronage practices, serves no real governmental purpose. *Abood* still controls there. The majority in *Harris* suggested, however, that

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205 *See id.* at 2642-43.

206 *Id*. at 2634-36.

207 *Id*. at 2634.

208 *Id*.

209 *Id*.

210 *Id*. at 2637.

211 *Id*. at 2640-41.

Abood was too hasty in adopting the industrial peace rationale from two railway cases decided more than sixty years ago, and that mandatory public-sector unionism, unlike its private-sector counterpart, has been principally responsible for the "mushroom[ing]" of employee wages and benefits paid for by taxpayers.[212]

D. Insubordinate Employees

The government occasionally takes adverse action against employees based on something that they have said. Consistent with the doctrinal trend discussed thus far, the Supreme Court has shown little enthusiasm in these cases for weighing the competing interests and determining whether the speech is protected when applying the balancing test. The Court has gone so far as devising a threshold requirement—the public-concern test—that must be satisfied before *Pickering*'s putative balancing test is triggered.

The Court articulated the public-concern test in *Connick v. Myers*, a 1983 case concerning an assistant district attorney, Sheila Myers, who was fired after she protested an impending transfer by circulating a questionnaire among employees.[213] Among other things, the questionnaire queried views on the office's transfer policy, morale, and whether the line prosecutors had confidence in their superiors, who were listed by name.[214]

In a 5-4 ruling, *Connick* held that the First Amendment is not implicated every time a public employer takes an adverse employment action against an employee based on the employee's speech.[215] Public employees, the Court maintained, had no free speech claim where the expression at issue did not concern "any matter of political, social, or other concern to the community."[216] *Connick* further provided that whether an expression touched on a public concern depended on the "content, form, and context" of the expression.[217]

Turning to the statements at issue, the Court held that all but one of the items on Myers's survey failed the public-concern test. Only the Myers's query as to whether employees had felt pressured to campaign

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212 *Id*. at 2630-32.

213 Connick v. Myers, 461 U.S. 138, 140-41 (1983).

214 *Id*. at 140, app. A.

215 *Id*. at 154.

216 *Id*. at 146.

217 *Id*. at 147.

for candidates supported by the district attorney's office touched on an issue of public concern.[218] Even though the Court reasoned that this lone statement gave Myers a viable First Amendment interest, the strength of that interest was greatly diminished by the Court's conclusion that the questionnaire essentially concerned a private matter, an intramural personnel dispute prompted by an employee's dissatisfaction with her pending transfer. [219] "Government offices," the Court warned, "could not function if every employment decision became a constitutional matter."[220] Myers's limited First Amendment right was not sufficiently compelling to require the district attorney to stand by while Myers distributed a survey that reasonably threatened the efficient operations of the prosecutor's office, the Court concluded.[221]

Connick's public-concern test is problematic for two reasons. First, as Justice Brennan pointed out in dissent, the Court rejected the public-concern test less than a decade prior in another First Amendment context.[222] In *New York Times*, as earlier discussed, the Court held that the First Amendment required public officials to show actual malice to prevail in defamation actions.[223] Later, the Court extended the *New York Times* rule to public figures.[224] Then, in *Rosenbloom v. Metromedia, Inc.*, a plurality of the Court would have extended the protections of the *New York Times* rule to any expression about an issue of public concern.[225] Three years later, however, the Court in *Gertz v. Robert Welch, Inc.* rejected the public-concern test as a tool for determining the applicability of the *New York Times* rule in state libel suits.[226] *Connick* did not explain why the public-concern test was appropriate in light of *Gertz*.

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218 *Id.* at 149.

219 *Id.* at 148 (describing Myers's questionnaire as a "mere extension" of her dissatisfaction with the transfer, and as an effort to "gather ammunition for another round of controversy with her superiors").

220 *Id.* at 143.

221 *Id.* at 154.

222 *Id.* at 163-64 (noting rejection of the public-concern test in *Myers*, just as Justice Brennan had held in his landmark decision in *Gertz v. Robert Welch, Inc.*).

223 New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

224 Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

225 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

226 Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

Second, the test is self-contradictory. The distinction between issues of public and private concern is rooted in the notion that speech related to public concerns is essential to self-government and therefore deserving of heighted protection. The public-concern test, however, undermines self-government by allowing courts to function as the ultimate arbiters of what constitutes an issue of public concern. In the words of Justice Marshall's dissent in *Rosenbloom*, later quoted by the majority in *Gertz*, the test requires courts "to somehow pass on the legitimacy of interest in a particular event or subject" and to determine "what information is relevant to self-government."[227] As Professor Robert Post concluded, the public-concern test "displaces the very democratic processes it seeks to facilitate."[228]

The Court in *Connick*, moreover, had other means available for preventing the over-constitutionalization of public employment disputes. Using the unconstitutional conditions doctrine, the Court could have ruled that Myers's survey was incompatible with her duties as a public prosecutor. Employment in the public sector entails forgoing the right to respond to management's personnel decisions by creating a "mini-insurrection," as Myers apparently did, within the office.[229] The *Connick* Court could have relied on the unconstitutional conditions reasoning in *Pickering*. The Court concluded that the teacher was entitled to First Amendment protection because there was "no question of maintaining either discipline by immediate superiors or harmony among coworkers."[230] The school district's reprisal against his letter, in other words, was not germane to the state's legitimate interest in the efficient and effective provision of the benefit of public education. In *Connick*, by contrast, there was, at least arguably, a nexus between Myers's termination and the state's non-speech related interest in the efficient operation of a public service. The use of the unconstitutional conditions doctrine would have removed the need for the court to assign itself the authority of determining what expressions are of public importance.

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227 *Rosenbloom*, 403 U.S. at 79; *Gertz*, 418 U.S. at 339, 346 (quoting Justice Marshall's dissent in *Rosenbloom*).

228 Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 672 (1990).

229 Connick v. Myers, 461 U.S. 138, 141, 151, & n.11.

230 Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 569-70 (1968).

The cases that followed *Connick* lend credence to Professor Post's claim that there is no "principled method" for applying the public-concern test.[231] In *Rankin v. McPherson*, the Court held that a deputy constable addressed a matter of public concern when she remarked, after hearing of the attempted assassination on President Reagan, "If they go for him again, I hope they get him."[232] In *City of San Diego v. Roe*, the public-concern determination went the other way where a police officer was fired for marketing sexually explicit videos on the Internet.[233] *Roe* defined a matter of public concern as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[234] It is difficult to see how an employee's expressed approval of the president's assassination could be of any greater "value" to the public than the sexually explicit videos made by the police officer in *Roe*. Both would seem to be of no value to democratic self-government.

The outcomes in *Rankin* and *Roe* are better grounded under the unconstitutional conditions doctrine. In *Rankin*, the Court reasoned that a speech restriction on a private expression is unlikely to be germane to certain public jobs.[235] Where "an employee serves no confidential, policymaking, or public contact role," the Court explained, "the danger to the agency's successful functioning from that employee's private speech is minimal."[236] The deputy constable's sole responsibility was entering information into a computer.[237] She was not in contact with the public during working hours and did not wear a uniform or carry a gun.[238] Since the comment regarding the assassination of President Reagan was made privately,[239] the Court could have reasonably concluded that it was not incompatible with the deputy constable's purely clerical duties. By this line of reasoning, the

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231 Post, *supra* note 228, at 673.

232 Rankin v. McPherson, 483 U.S. 378, 381 (1987).

233 City of San Diego, v. Roe, 543 U.S. 77 (2004) (per curiam).

234 *Id*. at 83-84.

235 *Id.* at 389-91.

236 *Id*. at 390-91.

237 *Id*. at 380-81, 392 (Powell, J., concurring).

238 *Id.* at 380.

239 *Id*. at 389.

public employer's reprisal for the remark amounted to an unconstitutional burden on her employment.

In *Roe*, by contrast, the Court found that the sexually explicit videos were made widely available and depicted the officer in a police uniform performing indecent acts in the course of official duties. [240] In this way, the public employee's speech brought the professionalism of the department's officers into "serious disrepute," and "was detrimental to the mission and functions of the employer."[241] Thus, the sanction for distributing the lewd videos was germane to the city's legitimate non-speech interest in maintaining the reputation and image of its police department.

The Court's tendency to obscure the application of the unconstitutional conditions doctrine was apparent once again in *Garcetti v. Ceballos*. [242] The Court held here that the First Amendment did not protect public employees from adverse employment action based on speech made pursuant to their public duties.[243] The case arose from a disagreement between Richard Ceballos and his supervisors over a pending prosecution.[244] Ceballos, a deputy prosecutor, wrote two memos recommending the dismissal of a case based on his review of the evidence and conversations with the affiant for a critical search warrant.[245] The supervisors rejected the recommendation.[246] Ceballos then testified for the defense in a hearing on its motion to quash the search warrant.[247] The judge ruled in favor of the prosecution on the motion, and Ceballos was later transferred and denied a promotion.[248]

Without weighing the value of Ceballos's speech, the Court declared that it was entitled to no First Amendment protection.[249] The "controlling factor" was that Ceballos made the statements as part of his job.[250] Commentators widely criticized the holding as marking a

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240 City of San Diego v. Roe, 543 U.S. 77, 78-79 (2004) (per curiam).

241 *Id*. at 81, 84.

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

243 *Id*. at 421.

244 *Id*. at 413-15.

245 *Id*. at 413-14.

246 *Id*. at 414.

247 *Id*. at 414-15.

248 *Id*. at 415.

249 *Id*. at 421.

250 *Id*.

new departure from *Pickering*'s putative balancing standard.[251] The outcome in *Ceballos* is explicable, however, under the now familiar unconstitutional conditions principles. Unlike in *Pickering*, *Rankin*, and *Roe*, the speech in question in *Ceballos* owed its existence to the government.[252] The government created the position of calendar deputy, and was free, therefore, under the constitutional conditions doctrine to impose any conditions on calendar deputies that were germane to the effective performance of the position. The relevant condition in the case required Ceballos, as calendar deputy, to accept the work-related feedback given by his supervisors. This condition is commonplace in all forms of employment. It is germane to the employer's purpose in providing the job in the first place. Supervisory control over work-related tasks reasonably ensures that the requested work is done professionally, in accordance with the standards set by the employer. Imagine if a judge could not discipline a law clerk who repeatedly turned in work products that disagreed with the judge's interpretation of the law. Indeed, government employers need not be required to engage in "guerilla war" with subordinates over the discharge of public duties.[253]

VI. CONCLUSION

Public employee speech problems have been called a "first amendment nightmare."[254] Realistically assessing the controlling standard is a helpful first step in addressing the array of First Amendment questions that continue to arise in the government employment context. This Article has argued that there has long been a gap between what the Supreme Court says and what it does in public employee speech cases. The Court invokes the language of balancing but follows the logic of the unconstitutional conditions doctrine. The proper way to understand the Court's public employee speech jurisprudence is as a series of cases that determine the conditions

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[251] *See, e.g.*, Cooper, *supra*, note 60 at 90-91 (critiquing the Court for not applying *Pickering* balancing and characterizing the speaker-as-citizen requirement as unprecedented).

[252] Ceballos, 547 U.S at 421-22.

[253] Rosenthal, 77 Fordham L. Rev. at 50.

[254] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1768 (1987).

under which the First Amendment will apply. When the guarantees of the First Amendment control, a public employee has a relatively easy time in prevailing. It is getting to the First Amendment that is the tricky part, perhaps as it should be.