
The (Neglected) Importance of Being *Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs

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[T]he privacy and dignity of our citizens [are] being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen — a society in which government may intrude into the secret regions of a [person's] life at will.¹

INTRODUCTION

John Roe,² until recently, was a police officer for the city of San Diego; that is, until his supervising sergeant discovered that in his free time John enjoyed stripping off a police uniform, masturbating in front of a video camera, and selling the resulting pornography on eBay.³ Not surprisingly, the San Diego Police Department (“SDPD”) demanded that John cease and desist in producing or distributing any materials of a sexually explicit nature, believing that such off-duty conduct not only violated a number of internal police regulations but also adversely impacted the SDPD’s mission and functions.⁴ The SDPD fired John when he did not completely cease his explicit extracurricular activities as ordered.⁵ In a per curiam decision from the October 2004 term, the United States Supreme Court held that the SDPD did not deny John Roe’s right to free expression under the First Amendment, as he was not expressing himself on a “matter of public concern.”⁶

Putting aside the lurid nature of this case of the pornographic policeman, *John Roe* raises significant constitutional questions regarding the extent to which the government may condition public employment on which activities employees decide to undertake in their private and personal lives.⁷ Traditionally, under the doctrine of

¹ *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting).

² “John Roe” is a fictitious name given to the plaintiff in the case of *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004) (per curiam). So that the reader does not confuse *San Diego v. Roe* with the more well-known case of *Roe v. Wade*, 410 U.S. 113 (1973), this paper refers to the former as *John Roe*.

³ See *John Roe*, 543 U.S. at 78.

⁴ *Id.* at 78-79, 84.

⁵ *Id.* at 79.

⁶ *Id.* at 84-85.

⁷ The fact that the federal constitutional issues raised herein apply directly only to public employment should in no way diminish the significance of these legal issues. There are over 21 million federal, state, and local government employees in the United States, who make up roughly 16.5% of the nation’s workforce. See JOSEPH R. GRODIN, JUNE M. WEISBERGER & MARTIN H. MALIN, PUBLIC SECTOR EMPLOYMENT: CASES AND

unconstitutional conditions, the Supreme Court limits the government's ability to condition governmental benefits, including public employment, on the basis of individuals forfeiting their constitutional rights.⁸ Indeed, the Supreme Court most often applies the doctrine of unconstitutional conditions to scrutinize employment terminations of, or other adverse employment actions taken against, public employees for exercising their First Amendment free speech rights.⁹

In the First Amendment context, the Court developed the well-honed, if not entirely satisfactory, *Connick/Pickering* doctrinal analysis. Taken together, *Connick v. Myers* and *Pickering v. Board of Education* forbid public employers from taking adverse employment actions against employees for speaking out on "matters of public concern" unless, under a constitutional balancing test, the governmental interest in efficiency outweighs the employee's First Amendment rights.¹⁰ Indeed, the Supreme Court dismissed John Roe's case against the SDPD under this First Amendment analysis.¹¹

MATERIALS 1 (2004); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005 298, tbl.453 (2005) (listing figures for 2002).

⁸ See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 2-3 (2001).

⁹ See *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972). Since *Perry*, the Supreme Court decided a number of these First Amendment public employment cases. See, e.g., *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Rankin v. McPherson*, 483 U.S. 378 (1987) (applying unconstitutional conditions doctrine to uphold adverse employment actions taken against deputy district attorney for engaging in unsanctioned official-capacity speech); *Connick v. Myers*, 461 U.S. 138 (1983) (applying doctrine in upholding termination of assistant district attorney who distributed unsanctioned inter-office questionnaire); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (applying doctrine to hold that public employee may express her views in private to employer and still be protected by First Amendment); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (applying doctrine to teacher who engaged in protected First Amendment activity, but finding that teacher could still be validly fired for reasons unrelated to that protected activity).

¹⁰ See *Connick*, 461 U.S. at 143 (establishing, as threshold matter, that public employee speech must involve "matter of public concern" in order to come under protection of First Amendment); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (balancing "interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

¹¹ See *John Roe*, 543 U.S. at 83-85. Of course, in *John Roe*, the Supreme Court did not need to engage in a constitutional balancing act, as John's conduct did not meet the threshold public concern test. See *id.*

Nevertheless, the recent Supreme Court decision in *Lawrence v. Texas*,¹² which struck down a Texas anti-sodomy statute, recognizes a more robust “liberty interest”¹³ in forming one’s identity through meaningful human relationships in one’s personal and private life. Indeed, *Lawrence* drastically alters the constitutional landscape as to when the doctrine of unconstitutional conditions should come into play in the public employment context. This is because, in *Lawrence*, the Supreme Court construed an individual’s liberty interest in decisional non-interference in private affairs¹⁴ as a preferred interest that is due a heightened form of rational basis review.¹⁵ Consequently, a previously neglected aspect of *Lawrence* is that it almost certainly trumpets the beginning of a new era of greater privacy protection for public employees by no longer permitting government employers to terminate an employee merely because that employee does not live up

¹² 539 U.S. 558 (2003).

¹³ The focus on “liberty interests” rather than “privacy rights” is consistent with the fact that Justice Kennedy utilizes the word “liberty” much more in his opinion for the court than the more amorphous “privacy” language. My guess is that his choice in this regard was purposeful as he sought to anchor this newly minted interest in the concrete liberty language of the substantive component of the Due Process Clause. Accord Randy E. Barnett, Correspondence, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1589 (2005) (“The fact that Justice Kennedy does not [announce a fundamental right to privacy] — that this doctrinal dog does not bark — makes *Lawrence* in my view a ‘potentially revolutionary’ liberty-protecting case.”); Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 233 (2005) (“Both *Casey* and *Lawrence* self-consciously shift the focus of substantive due process away from privacy and back toward its textual anchor, liberty. This avoids the principal objection to the Court’s post-*Griswold* privacy jurisprudence — that it lacks textual support.”); see also Note, *Unfixing Lawrence*, 118 HARV. L. REV. 2858, 2868 (2005) (arguing that there “is a . . . strategic equivocation between privacy and liberty” in *Lawrence* to advance, “whether knowingly or not, a strategically powerful complex. The two terms of the complex sustain and limit one another”).

¹⁴ See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 491 (2006) (“*Decisional interference* involves the government’s incursion into the data subject’s decisions regarding her private affairs.”) (emphasis added); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (finding one form of privacy consisting of “interest in independence in making certain kinds of important decisions”).

¹⁵ *Lawrence*, 539 U.S. at 578-79. Although not every jurist and commentator agrees that *Lawrence* applies more than a traditional rational basis review to rights of decisional non-interference in private affairs, the vast majority do. See William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1012 (2005) (“[F]ew constitutional scholars think the narrowest or the broadest reading of *Lawrence* is correct. Its charged reasoning cannot be limited to the sodomy context alone, but neither does it entail same-sex marriage.”).

to the employer's conception of morality in how she lives her private and personal life (especially in matters pertaining to sex).¹⁶

This paper argues that *Lawrence* signals the fulfillment of a certain constitutional tradition initiated by Justice Louis Brandeis in his eloquent dissent in *Olmstead v. United States*,¹⁷ most recently revived in the joint opinion of three Justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁸ and, for the first time, adopted by a majority of the Court in *Lawrence*.¹⁹ As a result, the current *Connick/Pickering* First Amendment framework, which focuses on the nature of the speech or expression engaged in by the employee, must be recast to be more readily applicable to the *Lawrence* substantive due process context. This article therefore proposes a restructured constitutional balancing analysis, the "modified *Pickering* analysis," to more appropriately weigh the interests at stake in such cases: the public employee's interest in decisional non-interference in private affairs and the employer's interest in running an efficient governmental service.²⁰

In order to concretely demonstrate how the modified *Pickering* analysis will apply to the liberty interests announced in *Lawrence*, this article revisits the Supreme Court's decision in *City of San Diego v. Roe*. In this regard, this paper concludes that *John Roe* would most likely have been decided in the same manner under this modified analysis because of heightened governmental efficiency concerns and John Roe's relatively minimal substantive due process rights under the circumstances.²¹ Nevertheless, and as highlighted by a number of hypotheticals discussed below, the constitutional balancing of relevant

¹⁶ *Lawrence*, 539 U.S. at 572 (observing "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); *State v. Limon*, 122 P.3d 22, 34-35 (Kan. 2005) (finding, based on *Lawrence*, that moral disapproval of group cannot be legitimate government interest).

¹⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion).

¹⁹ *Lawrence*, 539 U.S. at 578-79.

²⁰ To be clear, although this new test is denominated the "modified *Pickering* analysis," this test is not meant to apply to First Amendment public employee disputes. For those cases, the *Connick/Pickering* line still applies. This modified analysis is only for weighing public employees' substantive due process rights post-*Lawrence* against an employers' legitimate efficiency concerns. It is because of the fact that *Pickering* first established the constitutional balancing of interests in this context that this new test has been so named.

²¹ See *infra* Part IV.A.2.

interests in future substantive due process cases will certainly lead to public employees having greater legal protection from arbitrary interference by government employers into their private affairs.²²

This article presents the emergence of these post-*Lawrence* public employee interests in decisional non-interference in private affairs, and the concomitant modified *Pickering* test, in five parts. Part I will discuss the historical foundations of the Supreme Court's maddening doctrine of unconstitutional conditions and, in particular, the unique character of those unconstitutional conditions cases in which the government acts in its capacity as an employer. Part II will then review the development of substantive due process jurisprudence in the privacy context over the last century and describe how *Lawrence* represents the fulfillment of an expansive view of these constitutional rights in the form of the interest in decisional non-interference in private affairs. Based on this new constitutional development, Part III will propose a modified version of the *Pickering* test, which simultaneously discards the *Connick* public concern test and more appropriately, from the start, weighs public employees' interests in decisional non-interference in private affairs against government employers' efficiency concerns. Finally, in an attempt to discern the analytical strengths and weaknesses of this new test, Part IV will apply the modified *Pickering* analysis to the *John Roe* case and some real world public employee cases and hypothetical scenarios.

I. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN PUBLIC EMPLOYMENT

To begin to understand the inadequacy of the existing unconstitutional conditions doctrine in public employment regarding public employees' substantive due process rights post-*Lawrence*, it is first necessary to explore the legal boundaries of the current doctrine. The following three sections undertake a brief analysis of the historical foundations of the unconstitutional conditions doctrine, analyze the *Connick/Pickering* line of public employee free speech cases, and finally highlight the peculiar lack of unconstitutional conditions in employment cases outside of the First Amendment.

A. *A Brief Introduction to the Historical Foundations of the Doctrine*

Historically, the doctrine of unconstitutional conditions first enjoyed widespread use in the early part of the 20th century when the

²² See *infra* Part IV.B.

Lochner Court²³ developed economic substantive due process.²⁴ Under economic substantive due process, the *Lochner* Court emphasized property rights and the freedom to contract.²⁵ During the zenith of this period, the Court held that states could not condition corporate privileges upon the forfeiture of economic substantive due process rights.²⁶ This limitation on the government's ability to use its various powers to limit individual's constitutional rights was, in hindsight, the first incarnation of the doctrine of unconstitutional conditions.

With the "switch in time that saved nine"²⁷ and the ascendancy of President Roosevelt's New Deal Court in the late 1930s and early 1940s, however, the *Lochner* era came to an abrupt halt.²⁸ In the ensuing period, a new Supreme Court abolished much of the *Lochner* Court's economic substantive due process jurisprudence and, as a

²³ See *Lochner v. New York*, 198 U.S. 45, 56 (1905) (utilizing substantive due process analysis to strike down maximum hour laws for bakers because of its "arbitrary interference with the right of the individual to his personal liberty"), *overruled in part by Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 425 (1952).

²⁴ The *Lochner* Court constitutionalized property rights and the liberty to contract under a theory of economic substantive due process as a means to strike down much social welfare legislation during the first part of the 20th century. See, e.g., *Adair v. United States*, 208 U.S. 161, 171, 180 (1908) (invalidating federal law prohibiting interstate carriers from terminating workers for union membership), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941). See generally Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004) (providing comprehensive analysis of various meanings ascribed to *Lochner* Era).

²⁵ See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 561-62 (1923) (striking down minimum wage law for women); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down Kansas statute that prohibited employers from conditioning employment on employee's agreement to refrain from joining labor organization); *Adair*, 208 U.S. at 171, 180 (invalidating federal law prohibiting interstate carriers from terminating workers for union membership).

²⁶ Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 n.7 (1988) ("[Unconstitutional conditions first] appear[] in Justice Bradley's dissent in *Doyle v. Continental Insurance Co.*, 94 U.S. 535, 543 (1876): 'Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.'").

²⁷ See William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 593-94 (2004) (quoting FRED R. SHAPIRO, *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 393 (1933)).

²⁸ Indeed, *Lochner* itself was eventually "implicitly rejected." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

result, the doctrine of unconstitutional conditions itself went through a substantial period of disuse.²⁹ Shortly thereafter, however, the Warren Court of the 1950s and 1960s rescued the doctrine from the dustbin of legal history and began to apply it to a number of cases involving civil rights and civil liberties.³⁰

Many of the more recent unconstitutional conditions cases involve the government acting in its role as a sovereign,³¹ seeking to induce certain preferred outcomes through use of government subsidies and tax exemptions.³² In these “government subsidy” cases, the government seeks to utilize its Spending Clause power³³ to award government largesse to individuals in return for their agreeing to significant burdens on their “preferred rights,” especially their First Amendment rights to speech, expression, and association.³⁴

So from whence does this rejuvenated version of the doctrine of unconstitutional conditions derive? While not anchored in any single

²⁹ See Kathleen A. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989).

³⁰ See *id.*

³¹ As will be discussed in detail below, government can act either in its sovereign or employer capacity. See *infra* Part I.B.1.

³² But see *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) (overturning regulation which would have conditioned government funding based on legal services attorneys agreeing not to challenge the validity of existing welfare laws for constitutional or statutory reasons); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (overturning § 399 of Corporation for Public Broadcasting Act, which conditioned public broadcasting subsidies based on non-commercial educational broadcasters agreeing not to editorialize); *Speiser v. Randall*, 357 U.S. 513, 527-29 (1958) (overturning California law which sought to have all veterans seeking certain tax exemption sign declaration that they did not advocate overthrow of United States by force or violence or other unlawful means).

³³ The Spending Clause of the United States Constitution states: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .” U.S. CONST. art. I, § 8, cl. 1. Congress is allowed to provide incentives under its Spending Clause powers, but it may not coerce federal funding recipients through this power. See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (“[Congress may not induce the recipient of federal funding] to engage in activities that would themselves be unconstitutional.”).

³⁴ A considerable amount of dissonance exists between two different groups of Justices, and indeed there are two different schools of jurisprudential thought concerning the application of the unconstitutional conditions doctrine in these so-called “government subsidy” cases. See Sullivan, *supra* note 29, at 1415-16 (noting doctrine of unconstitutional conditions is “a minefield to be traversed gingerly” and “riven with inconsistencies”). Fortunately, this debate does not arise in employment cases and, therefore, is beyond the scope of this article. For an in-depth discussion of these cases, see generally Sullivan, *supra* note 29 and Berman, *supra* note 8.

clause of the Federal Constitution, the doctrine of unconstitutional conditions has been called a “creature of judicial implication.”³⁵ In its simplest terms, the modern form of the doctrine prohibits the government from conditioning a governmental benefit based on an individual’s forfeiting a constitutional right under certain circumstances.³⁶ Although what the unconstitutional conditions doctrine holds is generally uncontested, specifying the “certain circumstances” under which the doctrine is thought to apply is a completely different story.³⁷

For instance, Dean Kathleen Sullivan attempts to limit the doctrine to incursions into “preferred rights.”³⁸ Professor Mitchell Berman, for his part, believes that this is an unhelpful distinction because there is generally much disagreement over what should and should not be a preferred right.³⁹ This paper follows Sullivan’s “conventional formulation” regarding the scope of the unconstitutional conditions doctrine. Indeed, a cursory survey of the different types of cases in which the doctrine has been applied over the years appears to track mostly instances involving arguably “preferred” rights.⁴⁰ For instance,

³⁵ See Epstein, *supra* note 26, at 10.

³⁶ See Berman, *supra* note 8, at 3 (“[I]t is now universally recognized that [governmental] conditional offers are sometimes constitutionally permissible and sometimes not. Indeed, correctly understood, that is all the famed and contentious unconstitutional conditions doctrine holds.”); see also Sullivan, *supra* note 29, at 1421-22 (“Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”).

³⁷ See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984) (observing that unconstitutional conditions decisions “manifest[] an inconsistency so marked as to make a legal realist of almost any reader”).

³⁸ See Sullivan, *supra* note 29, at 1421-22. For Sullivan, “preferred constitutional rights” refer to rights normally protected by strict judicial review. *Id.* at 1427.

³⁹ See Berman, *supra* note 8, at 9-10 (“[U]nder Dean Sullivan’s formulation — the conventional formulation — the question of whether this liberty interest rises to a constitutional right (or, as she puts it, a ‘preferred’ constitutional right) determines not only whether the condition is unconstitutional, but whether the law even presents an unconstitutional conditions problem. This is unfortunate, for whether a preferred right is involved may prove controversial or uncertain ‘[P]referred rights’ . . . do not come to our attention predefined.”).

⁴⁰ It is true that Sullivan limits her theory “normally” to rights which receive strict scrutiny. See Sullivan, *supra* note 29, at 1427. But there does not appear to be any sound reason to differentiate between different forms of heightened scrutiny in the unconstitutional conditions context. This is not to say there are not meaningful distinctions between “mere liberty interests” protected by rational basis review and “constitutional rights” protected by some form of heightened scrutiny, or even perhaps between “non-preferred rights” that get some form of heightened review and

courts applied the doctrine to First Amendment cases involving tax exemptions,⁴¹ users of public facilities,⁴² recipients of government subsidies,⁴³ and government employees,⁴⁴ and to Fifth and Fourteenth Amendment cases involving property takings and just compensation.⁴⁵

All that being said, public employment is the legal context in which the doctrine of unconstitutional conditions is most often applied. As Professor Jason Mazzone aptly points out, “[p]ublic employment . . . represents a constant opportunity for the government to persuade individuals to give up certain First Amendment protections in exchange for a regular paycheck.”⁴⁶ It is thus to a more detailed discussion of the unconstitutional conditions doctrine in public employment that this paper now turns.

B. *Unconstitutional Conditions in Public Employment and the First Amendment*

As an initial matter, in unconstitutional conditions in employment cases, the government retains much more leeway in interfering with individual rights than it does when acting in the government subsidy context described in the previous section.⁴⁷ As a result, individuals in these employment cases generally possess fewer speech and expression

“preferred rights” which are due strict judicial review. Rather, assuming one accepts that the constitutional right involved is due some form of heightened review, it is unimportant for the sake of the unconstitutional conditions analysis whether that right is subject to “rational review with bite,” intermediate scrutiny, or strict scrutiny. See Paul M. Secunda, *Lawrence’s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 133-36 (2005). That is, the relevant inquiry is whether the particular liberty interest is sufficiently important to the individual as to place on the government a demand for heightened justification before it interferes with that interest. *Accord* *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (“[The liberty of the Due Process Clause] . . . recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”).

⁴¹ See *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

⁴² See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 384 (1993); *Healy v. James*, 408 U.S. 169, 169 (1972).

⁴³ See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 366 (1984).

⁴⁴ See *Rankin v. McPherson*, 483 U.S. 378, 378 (1987); *Connick v. Myers*, 461 U.S. 138, 138 (1983).

⁴⁵ See *Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 825 (1987).

⁴⁶ Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 810 (2003).

⁴⁷ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1069 (2d ed. 2002).

protections under the First Amendment.⁴⁸ To more fully understand why this state of affairs exists in the context, this section proceeds by first discussing the government's unique status when it acts in an employer capacity. This section next considers the Supreme Court's traditional recognition of this unique status through the *Connick/Pickering* First Amendment analysis.

1. The Unique Status of Government as Employer

Although most jurists once believed that government benefits, including public employment, were mere privileges that could be withheld or limited on any condition,⁴⁹ the Supreme Court now emphatically rejects "the greater includes the lesser" premise.⁵⁰ In the landmark public employment case, *Keyishian v. Board of Regents*, the Supreme Court stated: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."⁵¹ In other words, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech."⁵² This is because if the government could deny a benefit like public employment based on a person's exercise of a constitutional right, there is little doubt that the exercise of that right would be inhibited; indeed, perhaps to the same

⁴⁸ See Eugene Volokh, *Intermediate Questions of Religious Exemptions — A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 635 (1999) ("Under free speech law, the government acting as employer has far more authority to restrict people's speech than does the government acting as sovereign.").

⁴⁹ While a judge on the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes once famously said that, in the employment context, a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

⁵⁰ See Mazzone, *supra* note 46, at 806 ("The doctrine of unconstitutional conditions rejects the notion that the government's power to grant a benefit includes the lesser power to attach any conditions at all to receiving that benefit.").

⁵¹ 385 U.S. 589, 605-06 (1967) (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)); see also *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

⁵² See *Sindermann*, 408 U.S. at 597.

extent as if the government directly commanded the person not to engage in that constitutionally protected conduct in the first place.⁵³

Yet even though the government employer does not possess unfettered discretion when it comes to impinging upon the exercise of its employees' constitutional rights, it retains substantial latitude when setting the terms and conditions of its employees' employment, a discretion which is not available in its dealing with the same individuals as citizens.⁵⁴ In this regard, Justice Marshall famously stated in *Pickering v. Board of Education*: “[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the speech of the citizenry in general.”⁵⁵ Although Justice Marshall in *Pickering* did not expressly support his assertion, the Supreme Court on numerous occasions since reaffirmed that government possesses significantly more authority over individuals when acting in its employment capacity.⁵⁶

⁵³ *Id.* (“For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited [And it would] ‘produce a result which (it) could not command directly.’”) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

⁵⁴ See, e.g., *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) (concluding that public employee official capacity speech not protected by First Amendment in light of increased disciplinary needs of government employer); *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (discussing disciplinary and efficiency needs of government employer as reason for broader discretion when government acts in this capacity); *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994) (plurality opinion) (explaining why government as employer has broader powers with regard to its citizen than when acting in its sovereign capacity).

⁵⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added); see also *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (“The restrictions that the Constitution places upon the government in its capacity as lawmaker, i.e., as the regulator of private conduct, are not the same as the restrictions it places upon the government in its capacity as employer.”).

⁵⁶ See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring) (“We have . . . no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on.”); *Waters*, 511 U.S. at 671-72 (plurality opinion) (“We have never explicitly answered this question [about the government’s dual roles], though we have always assumed that its premise is correct — that the government as employer indeed has far broader powers than does the government as sovereign.”) (citing *Pickering*, 391 U.S. at 568); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564 (1973).

For example, in *Board of County Commissioners v. Umbehr*,⁵⁷ Justice O'Connor explained that the government employer retains significant discretion in terminating or sanctioning an employee given its interests in running an efficient, efficacious, responsive, and non-corrupt public service.⁵⁸ Similarly, Justice Powell explained in his concurring opinion in *Arnett v. Kennedy* that the government in its role as an employer must be given a wide berth in administering internal personnel policies in order to be able to maintain an efficient and disciplined workplace.⁵⁹ Finally, in *Waters v. Churchill*, Justice O'Connor further distinguished the two differing roles that government undertakes. For instance, she explained that based on the government's needs in its employer capacity, certain First Amendment doctrines are not reasonably applicable to government employees'

⁵⁷ 518 U.S. 668 (1996).

⁵⁸ *Id.* at 674 ("The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption."); see also *Waters*, 511 U.S. at 674-75 (plurality opinion) ("[T]he extra power the government has [as employer] . . . comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1250 (1999) ("The government has instrumental or programmatic goals within the domain of management. When acting there, it may restrict individual autonomy in the service of its programmatic goals.") (citing C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 16-21 (1998)). Indeed, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate employees and contractors on an at-will basis, for good reason, bad reason, or no reason at all. See *Umbehr*, 518 U.S. at 674.

⁵⁹ 416 U.S. 134, 168 (1974) (Powell, J., concurring) ("[T]he Government's interest . . . is the maintenance of employee efficiency and discipline. . . . To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."). If it were otherwise, Justice Powell explains, the government employer would not be able to remove inefficient and unsatisfactory workers quickly, and the government's substantial interest in so doing would be frustrated without adequate justification. *Id.*

speech,⁶⁰ and that less stringent procedural requirements appertain to restrictions on such employees' speech.⁶¹

Nevertheless, while it is generally agreed that the government holds more power to interfere with individuals' constitutional rights in its employment capacity,⁶² it is difficult to determine the exact amount of disruption employee speech or conduct must cause before the government employer can intervene.⁶³ The next section turns to this difficult question.

2. The First Amendment Speech and Expression Rights of Public Employees: The *Connick/Pickering* Analysis

To determine whether the government employer is acting in a "reasonable" manner and consistent with other constitutional contexts involving "reasonableness" tests,⁶⁴ the Supreme Court engages in a constitutional balancing act.⁶⁵ Justice Marshall set forth the applicable balancing in *Pickering*: "The problem in any case 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."⁶⁶ Important considerations in carrying out this balance include whether the employee's statements will impair discipline by superiors, harmony

⁶⁰ See *Waters*, 511 U.S. at 672 (reviewing number of First Amendment doctrines that do not apply with same force in government as employer context, including instances in which employer "may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work") (citing *Cohen v. California*, 403 U.S. 15, 24-25 (1971)).

⁶¹ *Id.* at 673.

⁶² See, e.g., *id.* (observing that Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large").

⁶³ See *Connick v. Myers*, 461 U.S. 138, 150 (1983) (noting difficulty associated with *Pickering* balance).

⁶⁴ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985) (balancing test utilized to show reasonableness in Fourth Amendment government search of public school student's purse); see also *infra* Part III.B.2 (discussing in detail Fourth Amendment reasonableness test as applied to government employees).

⁶⁵ See *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996).

⁶⁶ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Moreover, this framework applies regardless of the public employee's contractual or other claims to a job. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In this sense, First Amendment claims based on the doctrine of unconstitutional conditions are distinct from procedural due process claims which depend on whether the public employee is thought to have a liberty or property interest in his or her employment. See *id.* at 599.

among coworkers, close working relationships for which personal loyalty and confidence are necessary, the performance of the employee's duties, or the enterprise's regular operation.⁶⁷

In *Pickering*, the Court applied this constitutional framework for public employee First Amendment rights to a case involving a public school teacher terminated after criticizing in a local newspaper editorial a school district proposal to increase taxes, which the school board and superintendent endorsed.⁶⁸ Based on these circumstances, the Court found that the balancing of interests came out in the teacher's favor because the statement concerned a matter of public concern (i.e., whether the school system required additional funds) and there was no evidence that the statement disrupted the teacher's relationship with coworkers, his own job duties, or the school's operation in general.⁶⁹ In such an instance, the Court found that "it is necessary to regard the [public school teacher] as the member of the general public he seeks to be."⁷⁰

The 1983 case of *Connick v. Myers*, however, gave the *Pickering* balancing test an important, and ambiguous, gloss.⁷¹ Although the Court's formulation in *Pickering* included the phrasing "a matter of public concern,"⁷² *Connick* elaborated upon what counts as "a matter of public concern."⁷³ In *Connick*, an assistant district attorney circulated to coworkers a questionnaire concerning internal office affairs in order to discover whether a general job satisfaction problem existed in the New Orleans District Attorney's office.⁷⁴ Emphasizing "the common sense realization that government offices could not function if every employment decision became a constitutional matter,"⁷⁵ the Court ruled that even before a *Pickering* balance could

⁶⁷ Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73).

⁶⁸ *Pickering*, 391 U.S. at 564.

⁶⁹ *Id.* at 571-73. The Court also noted the import of allowing public employees to speak out on matters of public concern because they are many times in the best position to have "informed and definite opinions." *See id.* at 572.

⁷⁰ *See id.* at 574. Of course, regarding the public employee "as the member of the general public he seeks to be" does not mean that government employees qualify for the more stringent protections that apply to citizens when the government acts in its sovereign capacity. *See supra* Part I.B.1.

⁷¹ *Connick v. Myers*, 461 U.S. 138, 150 (1983).

⁷² *See supra* note 70 and accompanying text.

⁷³ *See* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 *IND. L.J.* 43, 47-50 (1988).

⁷⁴ *Connick*, 461 U.S. at 140-41.

⁷⁵ *Id.* at 143.

occur, a court had to consider as a threshold matter whether the public employee was speaking on a “matter of public concern.”⁷⁶ In other words, the Court made the public concern test the center of this crucial inquiry based on its belief that all previous unconstitutional conditions in employment cases centered on “the rights of public employees to participate in public affairs.”⁷⁷ Because the Court concluded that most of the questionnaire circulated by Myers concerned matters of private interest, rather than of public concern,⁷⁸ it dismissed most of the plaintiff’s First Amendment claim at this threshold level.⁷⁹

While *Connick* explained the centrality of the public concern test to the public employee free speech analysis, it provided little guidance as to how to draw the lines between what is “a matter of public concern” and what is a “matter of private interest.”⁸⁰ All that *Connick* stated in this regard was that “[w]hether an employee’s speech addresses a

⁷⁶ *Id.* at 146 (“*Pickering*, its antecedents and progeny, lead us to conclude that if [the] questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”).

⁷⁷ *Id.* at 144-45. Justice White explained for the majority that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Id.* at 146.

⁷⁸ *Id.* at 154. The Court went out of its way to emphasize that public employee speech on private matters does not constitute unprotected speech such as obscenity or fighting words. *See id.* at 147. Nevertheless, “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.” *Id.*

⁷⁹ *Id.* at 154. As for the one question on the questionnaire that could be characterized as a matter of public concern, the Court found that because of the disruptive effect of this question on the workplace, the *Pickering* balance came out in favor of the government. *Id.* As Randy Kozel has aptly commented, this disruption theory of public employee speech is unsettling because “[s]uch a test is inconsistent with the notion of robust exchange of divergent ideas, as it leaves vulnerable the speech that is most likely to have a strong effect.” *See* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1018 (2005).

⁸⁰ One issue that has been decided about the public concern test since *Connick*, however, is that a statement made by a public employee in a private conversation criticizing a political official may still be considered speech on a matter of “public” concern. *See Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987); *see also Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (holding that public employee may express her views in private to employer and still be protected by First Amendment).

matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”⁸¹ Consequently, *Connick* leaves much to be desired and demands further clarification.⁸²

Nevertheless, the substantial legal hurdles *Connick* imposed on public employees become much more manageable in one subset of cases and irrelevant in another. The first subset of cases involve instances in which the employee speech is completely unrelated to his or her public employment and is spoken on the employee’s own time, but still qualifies as a matter of public concern.⁸³ This type of case is exemplified by *United States v. National Treasury Employees Union* (“NTEU”),⁸⁴ in which the federal government passed a law prohibiting federal employees from receiving honoraria for making speeches or writing articles.⁸⁵ Significantly, the prohibition applied even though the subject of the article did not have any connection to the government employee’s employment.⁸⁶

⁸¹ *Connick*, 461 U.S. at 147-48.

⁸² It is therefore not surprising that a veritable cottage industry of academic literature has attempted to make sense of this amorphous, unsatisfying test. See, e.g., Allred, *supra* note 73, at 75-81 (describing conflict and confusion surrounding public concern test and proposing alternative standard); Kozel, *supra* note 79, at 1044-51 (putting forth internal/external model of public employee speech to replace current *Connick/Pickering* approach); Paul Cerkvenik, Note, *Who Your Friends Are Could Get You Fired! The Connick “Public Concern” Test Unjustifiably Restricts Public Employees’ Associational Rights*, 79 MINN. L. REV. 425, 445 (1994) (discussing confusion surrounding whether public concern test applies to public employee freedom of association cases); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 996 (1997) (stating that *Connick* Court failed to supply clear definition of public concern and that test is flawed); Kermit Roosevelt, Note, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1241 (1997) (criticizing vagueness of public concern test); D. Gordon Smith, Comment, *Beyond “Public Concern”: New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 255-64 (1990) (contending that problems surrounding public concern test have led to undue restriction on public employees’ free speech rights).

⁸³ Indeed, as early as *Connick*, the Court recognized that different factors might be at play when the public employee speech involves off-duty, non-work related activities. See *Connick*, 461 U.S. at 153 n.13 (citing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974)).

⁸⁴ 513 U.S. 454 (1995).

⁸⁵ *Id.* at 457, 459.

⁸⁶ *Id.* Examples of the plaintiffs’ speeches in this case include a mail handler who wanted to give lectures on the Quaker religion, an aerospace engineer who lectured on black history, and a microbiologist who wrote articles on dance performances. See *id.* at 461-62. Importantly, the Court noted that these federal employees sought compensation for their expressive activities in their capacity as citizens, not as

Finding that the federal employees' expressive activities fell within the category of comment on matters of public concern,⁸⁷ the Court easily concluded under *Pickering* that the employees' interests outweighed those of the government.⁸⁸ More interestingly, the Court appears to be saying that even when speech is completely unrelated to a public employee's job, the public concern test is still the appropriate test to apply.⁸⁹ In other words, even when a public employee is acting in her capacity as a citizen, under the First Amendment analysis, that employee is still treated as a government employee if the speech restriction is predicated upon the individual's public employment.⁹⁰

government employees, and these activities did not have any adverse impact on the efficiency of the offices in which they worked. *Id.* at 465 ("Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.").

⁸⁷ See *id.* at 466 ("Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace. The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."). Interestingly, the dichotomy seemingly set up by the Court in *NTEU* does not contemplate whether a government employer can fire an employee for engaging in conduct outside of work not addressed to a public audience and not on matters of public concern, such as the situation where a public employee is fired for writing poetry on her own time. A literal reading of *Connick* and *NTEU* would suggest that the poetry-writing employee would have no constitutional protection, a seemingly absurd result. Such an employee might be protected, however, under the proposed modified *Pickering* test for post-*Lawrence* substantive due process rights. See *infra* Parts IV.B, V.B. The author particularly wishes to thank Professor Mitch Berman for his insights on the issues discussed in this footnote.

⁸⁸ Furthermore, when Congress seeks to deter in a wholesale fashion a broad category of expression, the burden on the government will be especially heavy. See *NTEU*, 513 U.S. at 467; see also *id.* at 468 ("The widespread impact of the honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision."). The Court also found that a prohibition on compensation for speech, rather than on the speech itself, could cause just as much of a burden on an employee's expressive activity. See *id.* at 468.

⁸⁹ Accord Kozel, *supra* note 79, at 1051 (observing that when employee speech in question includes "indicia of the speaker's employment, the proper analytical rubric [is] the familiar *Connick/Pickering* two-step"); see also *NTEU*, 513 U.S. at 480 (O'Connor, J., concurring) ("The time-tested *Pickering* balance . . . provides the governing framework for analysis of all manner of restrictions on speech by the government as employer.").

⁹⁰ A possible alternative view would have permitted the employee, when speaking as a citizen, to take advantage of the more stringent protections of the traditional First Amendment analysis. See *Connick*, 461 U.S. at 157 (Brennan, J., dissenting) ("When public employees engage in expression unrelated to their employment while away

In addition to this category of easily manageable public concern cases represented by *NTEU*, the Supreme Court much more recently determined that there is a second, perhaps even larger, subset of public employee speech cases where one does not even need to grapple with *Connick's* public concern test. In *Garcetti v. Ceballos*,⁹¹ the Court discussed what constitutional protections, if any, are due to a public employee when that employee speaks out publicly on matters which are part of his job description.⁹² In *Ceballos*, a deputy district attorney for Los Angeles County claimed that his public employer retaliated against him by assigning him to less desirable work as a result of his writing a memo criticizing the issuing of a warrant in a criminal case.⁹³

The Court found that since the deputy district attorney was not speaking *as a citizen* on a matter of public concern, but rather *as an employee* of the government, *Connick's* public concern test and the constitutional balancing of interests under *Pickering* did not even need to be reached.⁹⁴ In this vein, writing for the Court, Justice Kennedy found that were it otherwise, state and federal courts would be constantly intruding into the realm of communications between and among government employees and their superiors.⁹⁵ Consequently, "official capacity speech" after *Ceballos* is another category of public employee free speech that is not subject to the vagaries of the *Connick* public concern test. Unlike the cases represented by *NTEU*, however, this subset of cases has the effect of lessening the First Amendment protections for public employees.

The fact that public employee free speech rights have taken such a substantial blow as a result of the *Ceballos* decision makes it all the more important to identify other public employee constitutional rights recognized by the Court in the past. But as the next section illustrates, the Court has been reluctant, without apparent sufficient reason, to

from the work place, their First Amendment rights are, of course, no different from those of the general public.").

⁹¹ 126 S. Ct. 1951 (2006).

⁹² *Id.* at 1955 ("The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.").

⁹³ *Id.* at 1955-56.

⁹⁴ *Id.* at 1960 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

⁹⁵ *Id.* at 1961.

apply the doctrine of unconstitutional conditions in employment outside the First Amendment context.

C. *The Peculiar Lack of Unconstitutional Conditions in Employment Cases Outside of the First Amendment*

As can be gathered from the intricate legal analysis described in the previous section, the Supreme Court continues to spend a substantial amount of time working out the contours of the First Amendment speech rights of public employees. The same cannot be said of the parameters of public employees' constitutional rights outside of the First Amendment. Although such cases do exist (most at the lower federal court level with one exception),⁹⁶ the Court applies mostly the government-as-employer analysis in the First Amendment context.⁹⁷

Of the few cases that do exist, some are highlighted by Justice Scalia's dissent in *Rutan v. Republican Party of Illinois*, a political affiliation case.⁹⁸ For instance, in the Fourth Amendment context, Justice Scalia noted that private citizens are not subjected to governmental searches and seizures of their property without a warrant supported by probable cause. In contrast, in many

⁹⁶ See *Kelley v. Johnson*, 425 U.S. 238, 245 (1976) (upholding hair length regulations for police officers under substantive due process, noting, "If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."). Many more of these cases have percolated through the lower federal courts throughout the years, without much success for public employee plaintiffs. See, e.g., *Akers v. McGinnis*, 352 F.3d 1030, 1040-41 (6th Cir. 2003) (holding that anti-fraternization rule not allowing prison employees to associate with offenders off-duty did not violate employee's freedom of intimate association); *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (rehearing en banc) (upholding discharge of staff attorney of Georgia Department of Law who was fired when employer learned of planned homosexual marriage ceremony); *Rathert v. Vill. of Peotone*, 903 F.2d 510, 515-16 (7th Cir. 1990) (finding that prohibiting police officers from wearing earrings off-duty rationally related to permissible purpose); see also Steve Hartsoe, *ACLU Challenges N.C. Cohabitation Law*, WASH. POST, May 10, 2005, at A06 (describing ACLU lawsuit filed against Pender County, North Carolina for forcing sheriff dispatcher to quit her job for violating state's "adultery and fornication" law).

⁹⁷ See *Mazzone*, *supra* note 46, at 810 (noting that "[t]he doctrine of unconstitutional conditions has been most vigorously applied in First Amendment cases").

⁹⁸ See 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (citing *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (upholding hair grooming regulation for police under substantive due process after finding clear, rational connection between regulation and promotion of safety of persons and property)).

circumstances government employees may have their property searched without violating the Fourth Amendment.⁹⁹ Additionally, governmental entities may more easily conduct drug testing of public employees who are engaged in safety sensitive or confidential positions.¹⁰⁰ This is because “in certain limited circumstances, the Government’s need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.”¹⁰¹

Scalia also notes in his *Rutan* dissent that in the Fifth Amendment context the government cannot force private citizens to provide information that incriminates them. Government employees, however, can be dismissed from employment when the incriminating information in question is related to their job performance.¹⁰² Finally, in the substantive due process area pre-*Lawrence*, public employers historically could regulate such things as their police officers’ grooming practices.¹⁰³ Consequently, pre-*Lawrence* and outside of the First Amendment, there was little protection for the constitutional rights for public employees.¹⁰⁴ Indeed, even looking beyond Supreme Court cases to lower court decisions, there appears to be little

⁹⁹ See *id.* (citing plurality opinion in *O’Connor v. Ortega*, 480 U.S. 709, 723 (1987)).

¹⁰⁰ See, e.g., *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664 (1989) (permitting drug testing of federal custom agents who interdict drugs or carry weapons); *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998) (upholding policy of suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to “safety sensitive” positions within school system, including teaching positions).

¹⁰¹ *Von Raab*, 489 U.S. at 668.

¹⁰² See *Rutan*, 497 U.S. at 94-95 (citing *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968)).

¹⁰³ See *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

¹⁰⁴ Although *Kelley v. Johnson* did involve the application of substantive due process to an unconstitutional condition in public employment case, it only applied a pre-*Lawrence*, traditional rational basis review analysis. See *Kelley*, 425 U.S. at 247-48. In fact, the Supreme Court failed to grant certiorari in two cases concerning the right to decisional non-interference in private affairs in the early 1980s. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1011 (1985) (Brennan, J., dissenting from denial of certiorari) (describing case upholding firing of public high school teacher who was terminated for mere fact of being bisexual); *Whisenhunt v. Spradlin*, 464 U.S. 965, 965 (1983) (Brennan, J., dissenting from denial of certiorari) (discussing case upholding firing of male police sergeant and female patrol officer for engaging in romantic relationship together).

protection for non-First Amendment rights, like substantive due process rights.¹⁰⁵

The lack of unconstitutional conditions in employment cases outside of the First Amendment is puzzling. There does not seem to be any good analytical reason why this is so, except for the most obvious reason that this is the context where most public employee cases arise. Perhaps, however, this current state of affairs will become an anachronism with the additional emphasis being placed on interests in employee decisional autonomy in light of *Lawrence v. Texas*.¹⁰⁶

Consistent with this line of thought, the next section argues that recent developments in substantive due process law, ushered in by the Supreme Court's decision in *Lawrence*, should lead to a reinvigoration of the doctrine of unconstitutional conditions in employment outside of the First Amendment in cases involving public employees' interests in decisional non-interference in private affairs. Before discussing the fundamental changes brought about by *Lawrence*, however, it is first necessary to place *Lawrence* in historical context. This chronological approach will provide further insight into how *Lawrence* represents the adoption of a particular view of the liberty interest contained within the federal Constitution's due process clause. It is to that task that this paper now turns.

II. LAWRENCE AND THE RIGHT TO DECISIONAL NON-INTERFERENCE IN PRIVATE AFFAIRS

A. *The Various Incomplete Incarnations of the Right to Decisional Non-Interference Prior to Lawrence v. Texas*

Since Brandeis and Warren wrote their famous article in 1890 about privacy rights,¹⁰⁷ the only thing that commentators seem to agree on concerning the right to privacy is that there is very little agreement about its contours.¹⁰⁸ It is not my goal here to suggest a theory or taxonomy of privacy.¹⁰⁹ Rather, this section discusses an individual's

¹⁰⁵ See *supra* discussion accompanying note 97.

¹⁰⁶ 539 U.S. 558 (2003).

¹⁰⁷ See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁰⁸ See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1099-1124 (2002) (cataloging different conceptions of privacy that various courts and commentators have championed).

¹⁰⁹ For a recent attempt at a pragmatic theory of privacy, see, for example, *id.* at

interest in decisional non-interference in private affairs, and the various labels and methods which courts have utilized to protect these decisional autonomy interests prior to *Lawrence*.¹¹⁰ Specifically, this section categorizes the various approaches to decisional non-interference as part of the jurisprudences of: (1) the right to be let alone; (2) the right to personhood; and (3) the right to intimacy or intimate association.

1. The Right to Be Let Alone

The place to start this discussion, as always, must be with the seminal Brandeis and Warren article.¹¹¹ Prior to this time, the Court only recognized constitutional privacy rights stemming directly from concrete and explicit constitutional provisions addressing privacy concerns in particular contexts, and then only rarely.¹¹² Brandeis and Warren talked of privacy generally as “a right to be let alone” by the government.¹¹³ To them, and to us today no less, a sphere of personal autonomy or “personality” exists upon which the government should

1090-91 (developing theory of privacy based on Wittgenstein’s notion of “family resemblance”).

¹¹⁰ Here, I rely upon Solove’s taxonomy for privacy for the different types of decisional non-interference. See *id.* at 1092; see also Solove, *supra* note 14, at 557 (offering that under this more recent contextual taxonomy, violation of these types of “privacy rights” would be referred to as “decisional interference in private affairs”). Each of these categories, however, is not mutually exclusive and relies upon one another to varying degree under different conceptions of privacy. See Solove, *supra* note 108, at 1116.

¹¹¹ See Warren & Brandeis, *supra* note 107, at 193.

¹¹² Such individual constitutional provisions recognized prior to 1890 included the right to be free from unreasonable searches and seizures under the Fourth Amendment, and the right not to be forced to incriminate oneself under the Fifth Amendment. See, e.g., *Boyd v. United States*, 116 U.S. 616, 633 (1886) (“For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the [F]ifth [A]mendment; and compelling a man ‘in a criminal case to be a witness against himself,’ which is condemned in the [F]ifth [A]mendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the meaning of the Fourth Amendment.”)

¹¹³ See Warren & Brandeis, *supra* note 107, at 193. The Supreme Court utilized this definition of privacy a number of times shortly after the article was published. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning right to bodily integrity with regard to compulsory vaccination law); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (stating that person had right to be let alone where issue was whether plaintiff could be forced to undergo surgical examination). Even so, the references to a “right to be let alone” in Supreme Court jurisprudence were relatively rare until after World War II.

not be able to tread arbitrarily.¹¹⁴ Of course, this very idea of the unencumbered individual sprang directly from more generic forms of classical liberalism.¹¹⁵ In turn, classical liberalism finds its root in John Stuart Mill's *On Liberty*¹¹⁶ and its most vivid expression in Justice Brandeis' dissent in *Olmstead v. United States*:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.¹¹⁷

All that being said, the right to be let alone did not gain substantial traction in constitutional thought until after World War II.¹¹⁸ Indeed, earlier cases had been generally abysmal with regard to individual autonomy and dignity, as is no better demonstrated than by Justice Holmes's infamous 1927 opinion in *Buck v. Bell* regarding the necessary sterilization of "imbeciles."¹¹⁹

¹¹⁴ See Eskridge, *supra* note 15, at 1052 (contending that American life is animated by presumptive libertarian mentality: "Libertarian is the presumption that the state leaves us alone to choose our own path to happiness"); Warren & Brandeis, *supra* note 107, at 205-06 (noting that privacy was based on principle "of inviolate personality" and that there is "a general right to privacy for thoughts, emotions, and sensations"); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that individuals have "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy").

¹¹⁵ By classical liberalism, I simply mean a political philosophy that endorses a conception of liberty as the absence of interference. See Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERALISM AND ITS CRITICS* 15, 16 (Michael Sandel ed., 1984).

¹¹⁶ See Secunda, *supra* note 40, at 118, 118 n.2 (discussing John Stuart Mill's *On Liberty*).

¹¹⁷ 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹¹⁸ As one indicia of its increasing presence, the "right to be let alone" language was utilized only three times prior to 1946, but 42 times since according to a recent Westlaw query. See online search, www.westlaw.com, Supreme Court database (SCT), "da (before 1946) & 'right to be let alone'" (Oct. 6, 2006); online search, www.westlaw.com, Supreme Court database (SCT), "da (after 1945) & 'right to be let alone'" (Oct. 6, 2006).

¹¹⁹ 274 U.S. 200, 207 (1927) (upholding compulsory sterilization legislation as constitutional and stating that "[t]hree generations of imbeciles are enough").

Despite some fits and starts, the crucial break in the constitutional levee came in the 1965 landmark case of *Griswold v. Connecticut*.¹²⁰ In *Griswold*, the Court located a constitutional right to privacy within the penumbras of the Bill of Rights.¹²¹ Suffice it to say that this case's recognition of constitutionally recognized zones of privacy, unhinged from any one constitutional anchor, dramatically changed the Court's orientation concerning individual rights to be free from arbitrary government interference.¹²² Although *Griswold* itself only struck down anti-contraception laws for married couples,¹²³ its greater import derived from its rooting the right to be let alone within the very structure and fiber of the Federal Constitution.¹²⁴

Consequently, it could not be considered surprising when, thereafter, the right recognized in *Griswold* was extended to some non-married individuals in *Eisenstadt v. Baird*¹²⁵ and to additional individuals under the age of sixteen in *Carey v. Population Services International*.¹²⁶ And not only was this zone of privacy found to exist in the sacred quarters of the marital bedroom,¹²⁷ it was also decisively extended to more transcendental spheres with the recognition of a woman's right to choose whether to terminate her pregnancy in *Roe v.*

¹²⁰ 381 U.S. 479, 479 (1965).

¹²¹ *Griswold*, 381 U.S. at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."); see also *id.* at 486, 488 (Goldberg, J., concurring) (locating right to privacy in Ninth Amendment's reservation of certain fundamental rights to people); *id.* at 500 (Harlan, J., concurring) (finding privacy right as "implicit in the concept of ordered liberty") (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). But see *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting) (maintaining no general right to privacy in Constitution).

¹²² See Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1, 25-26 (1999) (discussing impact of *Griswold* decision on constitutional privacy law).

¹²³ *Griswold*, 381 U.S. at 485-86.

¹²⁴ *Id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

¹²⁵ 405 U.S. 438, 453-54 (1972).

¹²⁶ 431 U.S. 678, 687 (1977).

¹²⁷ For a discussion of the importance of the conception of the home to historical constitutional privacy jurisprudence pre-*Lawrence*, see discussion *infra* note 170 and accompanying text. See also Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491, 535 (2005) (maintaining that based on its rulings from 1965 to 1973, "the [United States Supreme] Court's vision of sexual citizenship was not libertarian or egalitarian . . . [but] was based on a doctrine that privileged adult, heterosexual, monogamous, marital, familial, domestic, private, and procreative forms of sexual expression.").

Wade.¹²⁸ Indeed, *Roe* decisively located these rights within the liberty interest contained in the substantive component of the Due Process Clause of the Fifth and Fourteenth Amendments.¹²⁹ In this sense, *Roe v. Wade* signaled the culmination of a vision of privacy as a right to be let alone (now phrased as the “right to choose”) first discussed in Brandeis and Warren’s *Harvard Law Review* piece from 1890.

2. The Right to Personhood: Individuality, Dignity, and Autonomy

The Court has not only sought to describe an individual’s right to be free from arbitrary government interference by merely relying upon Justice Brandeis’s vivid language in *Olmstead* concerning the “right to be let alone.” It has also done so in those substantive due process cases which see the essence of the privacy right revolving around personhood, or more specifically, as involving themes of individuality, dignity, and autonomy.¹³⁰ As Professor Solove explains, basing privacy on conceptions of personhood differs from other conceptions of privacy because personhood conceptions focus on the normative good “of the protection of the integrity of the personality.”¹³¹

Griswold, *Eisenstadt*, *Carey*, and *Roe* all have at their core this conception of privacy as well.¹³² More importantly for purposes of this

¹²⁸ 410 U.S. 113, 152 (1973) (“[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”).

¹²⁹ See *Roe*, 410 U.S. at 153. In line with locating these rights within the substantive component of the Due Process Clause, Justice Harlan famously wrote in another case:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (internal citations omitted).

¹³⁰ See Solove, *supra* note 108, at 1116-19.

¹³¹ *Id.* at 1116.

¹³² *Id.* at 1117 (“[T]hese cases involved decisions relating to marriage, procreation, contraception, family relationships, and child rearing.”). Indeed, this line of

paper and its focus on decisional autonomy, however, is the case of *Whalen v. Roe*. In *Whalen*, the Court tied this conception of privacy as personhood to an individual's right to be free from arbitrary governmental interference with regard to an individual's freedom in making certain fundamental life decisions.¹³³

More recently, this idea of privacy found its most "elegant encapsulation"¹³⁴ in Justices O'Connor, Souter, and Kennedy's joint opinion in the pivotal 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹³⁵ In the now famous "sweet-mystery-of-life" passage, derided by Justice Scalia and other commentators,¹³⁶ these three Justices found that:

These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.¹³⁷

substantive due process cases pre-dates even the *Olmstead* dissent. See, e.g., *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (finding interest of parents in being able to send their children to private school to inhere within substantive due process); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that Constitution's protection of liberty encompasses interest of parents in having their children learn German).

¹³³ See *Whalen v. Roe*, 429 U.S. 589, 599-600; see also Solove, *supra* note 108, at 1117 ("[T]he Court has conceptualized the protection of privacy as the state's non-interference in certain decisions that are essential in defining personhood.").

¹³⁴ See Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 655-56 (2005) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

¹³⁵ 505 U.S. 833 (1992).

¹³⁶ For examples of Justice Scalia's and other commentators' distaste of this phrasing, see *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting); Dwight G. Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL'Y 543, 558-59 (2004); James E. Fleming, *Lawrence's Republic*, 39 TULSA L. REV. 563, 574-75 (2004). See also Toone, *supra* note 134, at 655-56 (remarking that Justice Scalia's derision notwithstanding, many have found "right to define one's own concept of existence" formulation to be valuable).

¹³⁷ *Casey*, 505 U.S. at 851 (joint opinion of Justices O'Connor, Kennedy, and Souter) (emphasis added). It is significant to note that the *Casey* joint opinion did not receive majority support in placing this type of all-encompassing liberty squarely within the substantive component of the Due Process Clauses. Indeed, this conception based on individual autonomy and dignity remained a minority view of the Court until *Lawrence*. See *Secunda*, *supra* note 40, at 135 n.84.

Nevertheless, prior to *Lawrence*, the scope of the personhood rights recognized by the joint opinion in *Casey* appeared to be largely limited by the “history and tradition” test of *Washington v. Glucksberg*, a case dealing with the right to physician-assisted suicide.¹³⁸ There, the Court appeared to draw back from the broad conception of individual liberty from governmental interference set forth by the *Casey* plurality. In *Glucksberg*, the Court found that the State of Washington’s ban on assisted suicide did not violate individuals’ due process rights because such laws were rationally related to a legitimate government purpose.¹³⁹ In denying that such laws interfered with the fundamental rights of individuals, the Court employed a substantive due process analysis which considered whether there was a careful description of an asserted right that was one of “those fundamental rights and liberties which are, objectively, deeply rooted in the Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”¹⁴⁰ Finding that our nation’s history did not enshrine such a right to physician-assisted suicide, the Court found there was no fundamental right to assisted suicide under due process and upheld the Washington ban of physician-assisted suicide under rational basis review.¹⁴¹ Consequently, as late as 1997, far from embracing the comprehensive notion of individual liberty to be free from governmental interference in making important life decisions embodied by *Whalen* and the joint opinion in *Casey*, the Supreme Court in *Glucksberg* appeared to be in the process of substantially narrowing the scope of its substantive due process jurisprudence.¹⁴² Similarly, in the realm of intimate association rights, and as described in the next subsection, an analogous limiting of the right to decisional non-interference in private affairs was also underway.

¹³⁸ 521 U.S. 702 (1997).

¹³⁹ *Id.* at 735.

¹⁴⁰ *Id.* at 720-21 (internal citations omitted).

¹⁴¹ *Id.* at 728. As I have argued in a previous article, this stultifying view of the contours of substantive due process has been criticized by Supreme Court Justices and commentators as inconsistent with a broader and more appropriate view of freedom from governmental interference. See Secunda, *supra* note 40, at 129 n.52.

¹⁴² Accord Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2798 (2005) (“*Glucksberg*’s ‘careful description’ test reflected the Court’s tendency, evinced in prior cases, toward narrow definition of the right in question as a means of checking the expansion of the Court’s substantive due process jurisprudence.”).

3. The Right to Intimacy and Intimate Association

Closely connected to the right of personhood is the right to intimacy or intimate association. The plurality in *Casey*'s "sweet-mystery-of-life" passage utilized the word "intimate" to help define the constitutional interests at stake.¹⁴³ Further, almost a decade earlier in *Roberts v. United States Jaycees*,¹⁴⁴ the Court recognized an important distinction between First Amendment rights of expressive association¹⁴⁵ and rights of intimate association under the Fourteenth Amendment's Due Process Clause.¹⁴⁶ The latter rights recognize "that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."¹⁴⁷ The *Roberts* Court defined a central aspect of an individual's freedom from decisional non-interference in private, intimate association as the ability to form and maintain human bonds unmolested by the State. The Court concluded that, "[p]rotecting these [intimate] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty."¹⁴⁸

Despite *Roberts*'s seemingly strong endorsement of a right to intimate association and the concomitant freedom from unwarranted state interference, prior to *Lawrence* at least one significant Supreme Court case, *Bowers v. Hardwick*,¹⁴⁹ discounted the importance of such human relationships. *Bowers* held, of course, that there is no

¹⁴³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter).

¹⁴⁴ 468 U.S. 609 (1984).

¹⁴⁵ See generally Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001) (discussing in comprehensive detail right to expressive association under First Amendment).

¹⁴⁶ See *Roberts*, 468 U.S. at 617-18.

¹⁴⁷ See *id.* at 618 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *id.* at 619 ("Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others."). The citation to these older cases clearly places the freedom of intimate association within substantive due process jurisprudence, rather than the First Amendment.

¹⁴⁸ *Id.* at 619. Indeed, as Solove has explained, the important distinction between the liberty of personhood versus the liberty of intimacy is the difference between self-creation and autonomy on the one hand, and the importance of human relationships to all individuals on the other. See Solove, *supra* note 108, at 1121.

¹⁴⁹ 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

constitutional right to engage in homosexual sodomy.¹⁵⁰ Through Justice White's narrow conception of the individual interest involved in *Bowers* as pure sexual gratification through the act of anal or oral intercourse in a homosexual relationship, the Court limited the scope of the liberty interest found in the Due Process Clause.¹⁵¹ That is, the Court failed to recognize that meaningful personal relationships are necessarily made up of both sexual and non-sexual dimensions, all for the larger individual pursuit of happiness.¹⁵²

Consequently, prior to June 2003, no comprehensive conception of decisional autonomy in private affairs existed which recognized an individual's right to self-definition, as well as his or her right to engage in the process of self-definition through development of personal relationships with others. To the extent that such a right to decisional non-interference in private affairs was recognized, as it was in the 1977 case of *Whalen v. Roe*,¹⁵³ it did not seem to be afforded any type of heightened protection from governmental incursions. Finally, although past Supreme Court decisions recognized this type of liberty interest to some degree, the Court continued to struggle to define the more esoteric and non-material aspects of these liberty interests. In sum, the existing contours of the jurisprudential privacy terrain when the Court decided *Lawrence* in June 2003 in no way predicted the seismic shift in this area of privacy law that *Lawrence* wrought.

B. *Lawrence v. Texas and the Fulfillment of Olmstead's Legacy*

Lawrence,¹⁵⁴ a criminal case from the state of Texas involving the application of that state's sodomy statute to the private sexual activities of two consenting adult homosexuals, changed everything. The Supreme Court's opinion in *Lawrence* greatly altered the substantive due process constitutional landscape by striking down the Texas anti-sodomy statute and reemphasizing the importance of providing a haven from state interference to individuals when such individuals seek to make private and personal decisions pertaining to

¹⁵⁰ *Id.* at 190-91.

¹⁵¹ See Eskridge, *supra* note 15, at 1032 (denominating Justice White's opinion for Court as "brusque" and "limit[ing] the Court's previous privacy precedents to situations unique to heterosexual couples (marriage, procreation, family)").

¹⁵² See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.").

¹⁵³ 429 U.S. 589, 598-600 (1977).

¹⁵⁴ 539 U.S. 558 (2003).

sex. Importantly, *Lawrence* expands notions of the individual right to decisional non-interference in private affairs just when cases such as *Bowers* and *Glucksberg* were substantially limiting such notions.

Lawrence's central holding is that the Texas sodomy statute at issue furthered no legitimate state interest which could justify its intrusion into the personal and private lives of the homosexual individuals criminally sanctioned under that law.¹⁵⁵ The decision is the first time a majority of the Supreme Court unabashedly accepted in one case a conception of privacy that included an individual's rights to be let alone, to personhood, and to intimacy.¹⁵⁶ In particular, by expressly overruling *Bowers*¹⁵⁷ and, to a lesser extent, by failing to even mention *Glucksberg* as binding precedent,¹⁵⁸ the Supreme Court put forward a novel type of substantive due process analysis.¹⁵⁹ Even though *Lawrence* clearly relied on *Griswold*, *Roe*, and *Casey* in coming to its conclusion,¹⁶⁰ the key additional step taken by Justice Kennedy's opinion is to recognize a transcendental, non-material aspect to these types of liberty interests, consistent with the *Olmstead* and *Poe* dissents of bygone days.¹⁶¹

¹⁵⁵ *Id.* at 578. See also Eskridge, *supra* note 15, at 1056 (reading underlying message of *Lawrence* and *Romer* as: "The state cannot create a pariah class of useful, productive citizens and deny them a broad range of legal rights and protections simply because their presumed private activities are disgusting to other citizens").

¹⁵⁶ Although a similar conception of decisional autonomy in private affairs was considered in *Casey*, it was not adopted by a majority of the court. See *supra* note 137 and accompanying text.

¹⁵⁷ See *Lawrence*, 539 U.S. at 578.

¹⁵⁸ See Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (maintaining that "the [*Lawrence*] Court gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating 'fundamental rights' as though they were a historically given set of data points on a two-dimensional grid").

¹⁵⁹ Accord Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003) ("Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine.").

¹⁶⁰ *Lawrence*, 539 U.S. at 564-66. See also Eskridge, *supra* note 15, at 1012 ("One cannot interpret or apply *Lawrence* without situating it in history.").

¹⁶¹ See *Lawrence*, 539 U.S. at 562 ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."); see also *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

My purpose here, however, is not to undertake an extensive analysis of what *Lawrence* does and does not hold. I already weighed in on that debate,¹⁶² and it will no doubt continue to percolate, at least until the Supreme Court takes another case discussing the scope of its *Lawrence* holding.¹⁶³ Rather, my enterprise here is much more modest. I merely wish to emphasize a point on which most commentators on all sides of the debate seem to agree; that is, *Lawrence* attaches some form of heightened review when the government seeks to interfere with the private and personal lives of individuals.¹⁶⁴ Although it is true that various forms of heightened scrutiny, including strict scrutiny, have been applied in the past with regard to specific rights within the context of the rights to be let alone, to personhood, and to intimate association, this article makes the

¹⁶² *Accord* State v. Limon, 122 P.3d 22, 30, 34 (Kan. 2005) (finding that *Lawrence* majority, by discussing equal protection analysis in *Romer* and by discussing inevitably linked nature of equal protection and due process analysis in cases such as these, “at least implied that the rational basis test is the appropriate standard”); see Secunda, *supra* note 40, at 125-36 (maintaining that *Lawrence* Court applied “rational review with bite” scrutiny in overturning Texas sodomy statute).

¹⁶³ See Secunda, *supra* note 40, at 162.

¹⁶⁴ See, e.g., Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 29-32 (2004) (arguing that *Lawrence* is an “elegant discourse on individual autonomy and liberty” and that some form of heightened review is involved); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1116-17 (2004) (reading *Lawrence* to extend meaningful constitutional protection to liberty interests without denominating them fundamental rights); Victor C. Romero, *An “Other” Christian Perspective on Lawrence*, 45 J. CATH. LEG. STUDS. (forthcoming 2006) (manuscript at n.29, on file with author) (finding that *Lawrence* Court’s use of “rational basis” refers to “rational basis with bite” because evidence in case suggests irrational discrimination or animus) (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-24 (1972)); Tribe, *supra* note 158, at 1899 (arguing that Court in *Lawrence* “implicitly reject[ed] the notion that its task was simply to name the specific activities textually or historically treated as protected,” and treated doctrine of substantive due process as reflecting “a deeper pattern involving the allocation of decisionmaking roles”); Martin A. Schwartz, *Constitutional Basis of Lawrence v. Texas*, N.Y.L.J., Oct. 14, 2003, at 3 (concluding that *Lawrence* Court relied on “important low-level scrutiny”); see also Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1251 (11th Cir. 2004) (Barkett, J., dissenting) (arguing that *Lawrence* denominated fundamental right to sexual privacy); State v. Limon, 122 P.3d 22, 24, 29 (Kan. 2005) (applying *Lawrence* and reading it as applying heightened form of rational basis review, rather than strict scrutiny analysis reserved for fundamental rights or suspect classifications, in case involving Kansas’s criminal Romeo and Juliet statute, which contained different penalties for heterosexual and homosexual statutory rape); Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1155 (2004) (interpreting *Lawrence* to hold that right to private, intimate association is fundamental right).

crucial point that *Lawrence* represents the first time a majority of the Court recognized a comprehensive preferred interest in decisional non-interference in private affairs due heightened scrutiny.¹⁶⁵ And as a preferred liberty interest, governmental infringements of an individual's interests in decisional non-interference in private affairs must involve the balancing of governmental efficiency concerns against an individual's interest in being free from governmental interference in her personal and private life.¹⁶⁶ Indeed, this is the very same balancing test that the Court already utilized throughout its unconstitutional conditions in employment cases discussed in section I above.¹⁶⁷

Therefore, until disavowed by a subsequent Supreme Court decision, *Lawrence* stands, at the very least, for an analytical approach that requires a heightened form of judicial scrutiny whenever the government seeks to interfere with the private and personal decisions of adult individuals.¹⁶⁸ In other words, *Lawrence* "presumes an autonomy of self,"¹⁶⁹ with the government's having to put forward a legitimate and substantial interest to interfere with the personal and private decisional conduct of individuals.¹⁷⁰ As a result, the right to

¹⁶⁵ See *Lawrence*, 539 U.S. at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'") (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)); see also Stein, *supra* note 127, at 536 ("[I]n *Lawrence* the Court struck down state sodomy laws, reinterpreting *Griswold*, *Eisenstadt*, and *Roe* in ways that reject . . . the earlier Court's view that there is no right to engage in sex outside of marriage.").

¹⁶⁶ See *Secunda*, *supra* note 40, at 136-38.

¹⁶⁷ See *supra* Part I.B.2.

¹⁶⁸ At the same time, *Lawrence* is equally clear concerning what it does not touch upon:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. Thus, cases involving kids, prostitution, and drugs are generally not covered by the rights described in *Lawrence*. But see *Limon*, 122 P.3d at 24, 29 (finding that Kansas's criminal Romeo and Juliet statute, which contained different penalties for heterosexual and homosexual statutory rape, lacked rational basis under guidance of *Lawrence*).

¹⁶⁹ *Lawrence*, 539 U.S. at 562.

¹⁷⁰ Unlike some other commentators, I do not believe the right described by *Lawrence* is limited to private conduct that takes place in the sanctity of the home. See

decisional non-interference in private affairs may now take its rightful place next to other “preferred” constitutional interests, and, when infringed in relation to the granting of government benefits, must be analyzed under the doctrine of unconstitutional conditions.

The next section contends that this monumental constitutional development in the area of substantive due process requires nothing less than a reformulation of the appropriate unconstitutional conditions test to protect these emerging constitutional interests.

III. THE IMPACT OF *LAWRENCE V. TEXAS* ON THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN PUBLIC EMPLOYMENT

As previously illustrated, First Amendment considerations by and large limited the unconstitutional conditions doctrine.¹⁷¹ Now, after *Lawrence*, there is a new type of constitutional liberty interest: the interest in decisional non-interference in private affairs, which is subject to some form of heightened judicial review. As a result, public employers should show legitimate and substantial interests before interfering with the personal and private lives of their employees. The next two sections elaborate on the inadequacy of the current First Amendment *Connick/Pickering* analysis for vindicating these public employee interests in decisional non-interference. In its stead, they propose a modified *Pickering* test, which is consistent with other

Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400-01 (2004) (arguing that *Lawrence* relies on narrow version of liberty that is both “geographized and domesticated”). *Lawrence* derives from cases where home and sex play a large role. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“Moreover, in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home — that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”). *Lawrence*, however, is more in the tradition of *Olmstead* and the joint opinion in *Casey* in describing a liberty interest which is transcendental and non-material in its dimensions. See *Lawrence*, 539 U.S. at 562 (“The instant case involves liberty of the person both in its *spatial and in its more transcendent dimensions.*”) (emphasis added); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The [founding fathers] knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”).

¹⁷¹ See *supra* Part I.C.

“reasonableness” tests utilized to protect public employees’ constitutional interests.

A. *The Incongruence Between the Interest in Decisional Non-Interference in Private Affairs and the Connick/Pickering Analysis*

Quite simply put, the current First Amendment model for public employee speech rights is inadequate to vindicate individuals’ interests in decisional non-interference in private affairs because of the public concern test. As set out above, the current *Connick/Pickering* analysis requires at the threshold, in most cases,¹⁷² that a court consider whether the public employee is speaking out on a matter of public concern.¹⁷³ Needless to say, these same concerns normally do not justify a public concern test in the post-*Lawrence* substantive due process rights context. Here, the issue is not the ability of the public employees to speak out or express themselves on pressing social, political, or communal issues,¹⁷⁴ but, quite to the contrary, the ability to retain a modicum of autonomy and personal space without jeopardizing one’s public employment. In this regard, a case in which a public employer seeks to make a female employee marry her live-in boyfriend or else face discharge from her job does not implicate any real First Amendment rights. Consequently, the test for post-*Lawrence* substantive due process rights envisioned here does not include the public concern test.¹⁷⁵

¹⁷² *But see* *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961-62 (2006) (holding that public employee official capacity speech not protected by First Amendment regardless of whether speech involves matter of public concern). In light of *Ceballos*, there appears to be even more reason to develop an alternative constitutional test to protect these newly emergent substantive due process rights.

¹⁷³ *See supra* Part I.B.2.

¹⁷⁴ *See* *Connick v. Myers*, 461 U.S. 138, 146 (1983) (“When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in name of First Amendment.”).

¹⁷⁵ Some may argue that something like a threshold test for *Lawrence* right cases is needed to properly take into account the increased leeway that government has in its employer capacity. Nonetheless, not all constitutional balancing tests have a threshold test like the public concern test. Indeed, the privacy interests of public employees under the Fourth Amendment have been subjected to a balancing test without the use of any gate-keeping or threshold test. *See, e.g., Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (applying balancing test in deciding whether drug testing of custom agents was constitutional under Fourth Amendment); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616-18 (1989)

This is not to say that there might not be the infrequent case in which a public employee will be able to call upon both her First Amendment expression rights and Fourteenth Amendment substantive due process rights. This is because there could be instances where an employee is both seeking to express herself on a matter of public concern, while at the same time seeking a measure of personal space for her private conduct.¹⁷⁶ For an example of one of these rare cases, consider *Melzer v. Board of Education (NAMBLA)*,¹⁷⁷ which concerned the rights of a public school teacher pedophile to advocate on his free time for the legalization of man-boy sexual relationships.¹⁷⁸ Not only were his First Amendment free speech rights at issue under *Connick/Pickering*,¹⁷⁹ but one could argue that his interest in decisional non-interference in private affairs might have also been at stake, as long as he was not seeking to commit the criminal act of child molestation.¹⁸⁰ On the other hand, there appear

(applying balancing test to determine whether drug testing of railroad employees recently involved in accidents is constitutional under Fourth Amendment); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998) (applying balancing test to determine whether public high school teachers could be tested for drugs consistent with Fourth Amendment).

¹⁷⁶ It appears that if one had the choice of frameworks, one might choose the *Connick/Pickering* line of cases because these cases recognize that political speech is at the heart of the First Amendment. See *Connick*, 461 U.S. at 145 (“The explanation for the Constitution’s special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)). On the other hand, although this article maintains that there is a heightened interest surrounding the right to decisional non-interference in private affairs after *Lawrence*, the relative importance of these rights on the constitutional spectrum still remains to be determined and, thus, is almost certainly not at the level of political speech rights.

¹⁷⁷ See 336 F.3d 185, 188-89 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004). NAMBLA refers to the “North American Man/Boy Love Association.”

¹⁷⁸ See *id.*

¹⁷⁹ Indeed, the NAMBLA member, Melzer, lost his case under the *Connick/Pickering* analysis. See *id.* at 200.

¹⁸⁰ To be clear, this analysis assumes, as the Court did, that Melzer did not base his claim on the right to engage in criminal pedophilia. See *id.* at 189 (“[T]he record before us reveals no evidence that plaintiff engaged in any illegal or inappropriate conduct at [his public school]. Plaintiff’s outlet as a pedophile is his participation in NAMBLA, which he joined in 1979 or 1980 to discuss with others his long-standing attraction to young boys.”). If Melzer had engaged in such criminal conduct away from work, his actions would not be saved by his heightened substantive due process under *Lawrence*. See *Lawrence v. Texas*, 539 U.S. 577, 578 (2003) (“The present case does not involve minors. It does not involve persons who might be injured or coerced

to be abundant factual scenarios under which interests in decisional non-interference in private affairs will be the only way to vindicate a public employee's constitutional rights.¹⁸¹

In short, the point of this brief section is merely to make evident what may already be obvious to many. An employee's interest in decisional non-interference by her employer may infrequently be synonymous with that employee's First Amendment rights. Nevertheless, there is a substantially larger category of cases in which the employee can only depend on an interest in decisional non-interference in private affairs. It is these cases which require a reconstructed doctrinal model to vindicate these post-*Lawrence* substantive due process rights.

B. A New Model: The Modified Pickering Analysis

1. The Basics

Even without the public concern test of *Connick*, the *Pickering* balancing test must be altered to meet the decisional autonomy concerns of public employees. As presently stated, the test balances the interests of the employee as citizen in speaking out on matters of public concern and the state's interest as an employer in running an efficient government service.¹⁸² The state's interests in this regard generally remain the same¹⁸³ and, more specifically, include the government's interest in having loyal subordinates, in having co-workers who can work together, in maintaining a favorable public image in the community, and in fulfilling its public mission.¹⁸⁴

or who are situated in relationships where consent might not easily be refused.”).

¹⁸¹ Some common examples would include instances in which public employees were terminated from their jobs for having a live-in boyfriend, being gay, for seeking an abortion, or for using contraception. Other examples might include instances in which a public employee is fired for visiting a gay bar, participating in an adult Internet chat room, or for engaging in even more risqué off-duty conduct. See *infra* Part III.B.

¹⁸² See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁸³ See Solove, *supra* note 14, at 2 (observing that governmental interests in such balancing tests “are often much more readily articulated”).

¹⁸⁴ See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73). As Kozel has perceptively argued, *Pickering* is really about an employee not engaging in speech or conduct which causes a substantial disruption to the employer. See Kozel, *supra* note 79, at 1019 (“The *Pickering/Connick* doctrine collapses into little more than the constitutionalization of a heckler's veto.”); see also *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969) (also relying upon

On the other side of the ledger, the employee's interests need to be substantially redefined. The emphasis is no longer on the ability of the employee-citizens to speak out or express themselves on matters of public concern. Instead, the issue is being free from unwanted governmental intrusions with respect to decisions relating to matters concerning one's private and personal life, especially in matters pertaining to sex.¹⁸⁵ Specifically, a government employee should be able "to be free, except in very limited circumstances, from unwanted governmental intrusions into [his or her] privacy."¹⁸⁶ Moreover, there should be a "zone of autonomy, of *presumptive immunity to governmental regulation*."¹⁸⁷ As such, anytime the government as employer seeks to justify an intrusion into an employee's sacrosanct zone of decisional non-interference, a legitimate and substantial justification must be set forth.¹⁸⁸

Thus, the modified *Pickering* balancing test for public employees' substantive due process rights should balance the employee's interest as citizen in being free from unwanted and unjustified governmental intrusions into the employee's personal and private life against the government's interest as employer in running an efficient governmental service for the public's benefit.¹⁸⁹ At times, this balance will obviously be strongly in favor of either the government or the employee, depending on whether the employee's off-duty actions have any impact on the employer. If there is no impact, analogizing to the Court's conclusion in *NTEU*,¹⁹⁰ the employee's interests will normally prevail.¹⁹¹ Also, easy cases will involve instances in which the

"substantial disruption of or material interference with school activities" in regulating political speech of students in school).

¹⁸⁵ See Solove, *supra* note 14, at 555-62.

¹⁸⁶ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (discussing privacy rights in First Amendment context).

¹⁸⁷ See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974) (emphasis added).

¹⁸⁸ See *supra* note 16.

¹⁸⁹ To reiterate, even though the *Pickering* case analogy is utilized to label this test, the modified *Pickering* analysis would only apply to constitutional balancing of employees' substantive due process rights and government employers' efficiency concerns, not to First Amendment cases concerning freedom of speech, expression, or association. See *supra* note 20.

¹⁹⁰ See *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 465 (1995) (finding that employee speech had no adverse impact on government employment, and, thus, government had no legitimate interest in regulating employee speech).

¹⁹¹ See *id.* ("Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the

employee is engaging in a certain line of private conduct explicitly not protected by *Lawrence*, such as cases involving minors or commercial conduct like prostitution.¹⁹²

The more numerous and difficult cases will fall somewhere in between these antipodes. For these more intricate cases, it is helpful to consider the “nexus test” used for employee discharges by labor arbitrators in the union environment. As described elsewhere,¹⁹³ the general principle is that an employer should not be able to interfere with an employee’s life outside of work unless there is more than a de minimis adverse impact on the employer’s work place.¹⁹⁴ This impact can be measured based on the detriment to the employer’s public image, the inability of the worker to interact with her co-employees, or the employee’s simple inability to carry out the essential functions of her position as a result of her private conduct.¹⁹⁵ But outside of these types of legitimate and substantial justifications for interference in an employee’s private life, a government employer should be constrained by the liberty interest contained in the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments from interfering with their employees’ personal and private lives.

2. The Coherency Between the Modified *Pickering* Test and Other Constitutional Protections Afforded Public Employees

In establishing this modified *Pickering* analysis to protect the interests of public employees in decisional non-interference in private affairs, this article by no means draws upon a blank slate. Instead, it

kind of audiences they address have any relevance to their employment.”).

¹⁹² See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁹³ See Paul M. Secunda, *Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education*, 55 SYRACUSE L. REV. 55, 68-73 (2004).

¹⁹⁴ See *id.* at 69; see also Kozel, *supra* note 79, at 1051 (noting that Supreme Court has made distinction in public employee speech cases based on whether speech or expression in question included any indicia of speaker’s employment).

¹⁹⁵ See Secunda, *supra* note 193, at 70 (citing *W.E. Caldwell Co.*, 28 Lab. Arb. Rep. (BNA) 434, 436-37 (1957) (Kesselman, Arb.)). Compare *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (“The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption.”), with *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (“[T]he Government’s interest . . . is the maintenance of employee efficiency and discipline. . . . To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”).

takes its cues directly from other areas of constitutional law in which the constitutional rights of public employees are also at stake.

In this regard, one needs look no further for an apt analogy than cases concerning the permissibility of drug testing public employees.¹⁹⁶ Although these cases involve a Fourth Amendment analysis regarding the reasonableness of the search and seizure involved,¹⁹⁷ many of the same concerns animating the discussion in this paper are also apparent in the Fourth Amendment context.

For example, in *National Treasury Employees Union v. Von Raab*, the question presented was whether federal custom agents could be subjected to drug urinalysis testing as a condition of their being promoted or transferred.¹⁹⁸ Using the administrative search criterion and the “special needs” test under the Fourth Amendment,¹⁹⁹ the court engaged in a constitutional balancing test based on a reasonableness standard.²⁰⁰ The court noted that the immediacy of the government’s

¹⁹⁶ See, e.g., *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (permitting suspicionless drug search of Federal Customs agents); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 633 (1989) (upholding federal regulations requiring employees of private railroads to produce urine samples for drug testing upon occurrence of accident); *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998) (permitting drug testing of public school teachers), *cert. denied*, 528 U.S. 812 (1999). *But cf.* *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (striking down drug testing requirements for candidates for high public office in Georgia).

¹⁹⁷ See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”). The Supreme Court has already settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer. See *O’Connor v. Ortega*, 480 U.S. 709, 714-15 (1987) (plurality opinion).

¹⁹⁸ 489 U.S. at 659.

¹⁹⁹ A government search must normally be supported by a warrant issued upon probable cause. See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). However, neither a warrant nor probable cause, nor any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. See *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543, 506-61 (1976). In administrative searches, for instance, the government is able to proceed without a search warrant when the “special needs” of the search so require. See, e.g., *Ortega*, 480 U.S. at 722 (need of employer to enter employee’s office, desk, or files comprises “special need” and no warrant is required); *T.L.O.*, 469 U.S. at 341 (finding warrant requirement unsuited to school context because it unduly interferes with maintenance of swift and informal disciplinary procedures).

²⁰⁰ *Von Raab*, 489 U.S. at 665-66 (“Where a Fourth Amendment intrusion serves

concern and the minimal nature of the intrusion outweighed the individual's privacy interest and permitted the government to drug test custom agents.²⁰¹ The importance in ensuring that these federal employees were drug free was paramount because these custom officers carried guns and interdicted drugs.²⁰²

Similarly, in the context of substantive due process rights under the Fourteenth Amendment, a comparable, finely attuned balancing of interests test could be applied. As in *Von Raab*, the context of the employee's job should be given substantial weight in determining the justification of an intrusion.²⁰³ For instance, police officers and other public officials who deal with guns and other sensitive information could be subjected to more intrusive searches than, say, your average civilian clerk for a municipality.²⁰⁴ On the other hand, especially after *Lawrence*, just because an employee is employed by law enforcement does not mean that the employer should dictate every aspect of how that employee chooses to live her private life.²⁰⁵ In fact, *Lawrence* itself makes clear that the morality of one's employer will generally not be sufficient to outweigh an employee's substantial interests in making important life decisions unrestricted by governmental interference.²⁰⁶

special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”).

²⁰¹ *Id.* at 677 (“In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.”).

²⁰² *See id.* at 672 (“We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test.”).

²⁰³ *See id.* at 671 (“[I]t is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches.”).

²⁰⁴ *Accord id.* at 671 (“Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.”).

²⁰⁵ *See Hartsoe, supra* note 96, at A06 (describing actions of North Carolina sheriff in forcing dispatcher to choose between her job and living together with her boyfriend).

²⁰⁶ *See Lawrence*, 539 U.S. at 577-78 (upholding Justice Stevens's view in his *Bowers* dissent that “the fact that the governing majority in a State has traditionally

In short, current Fourth Amendment jurisprudence surrounding drug testing of public employees lends support to the modified *Pickering* analysis articulated in this paper.

IV. APPLYING THE MODIFIED *PICKERING* TEST: OF PORNOGRAPHIC POLICEMEN, SWINGING SCHOOL TEACHERS, AND SALACIOUS SHERIFF DISPATCHERS

How will the modified *Pickering* balance actually work in practice? In order to see how this new analysis will play out in a real world case, one only has to look at the case of the pornographic policeman. Therefore, the first section of this Part asks whether this new test would have made any difference in the outcome of *City of San Diego v. Roe*. Concluding that the outcome of this case would most likely have been the same, the second section predicts that the ascendancy of public employees' interests in decisional non-interference in private affairs post-*Lawrence* will greatly increase their protection from illegitimate and arbitrary interference into their private and personal lives by their government employers.

A. *Of Pornographic Policemen*

1. Applying the *Connick/Pickering* First Amendment Analysis

To jog the reader's memory, the case of the pornographic policeman in *San Diego v. Roe*²⁰⁷ involved whether John Roe could engage in pornographic activities outside of his police work.²⁰⁸ The Supreme Court carried out a straightforward First Amendment *Connick/Pickering* analysis.²⁰⁹ More specifically, the Court concluded that John Roe's conduct did not deserve First Amendment protection

viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice").

²⁰⁷ 543 U.S. 77 (2004) (per curiam).

²⁰⁸ See *supra* notes 2-6 and accompanying text.

²⁰⁹ In applying the *Connick/Pickering* analysis to this case, the Court found that the *NTEU* case does not stand for the proposition that "off-the-job, non-employment-related speech should generally merit strong protection under the *Pickering* balancing test." See Kozel, *supra* note 79, at 1050. Instead, the *John Roe* Court foreclosed the idea that *NTEU* created a presumption in favor of protecting off-duty speech or expression by refusing to apply *NTEU* to the facts of *John Roe*. See *John Roe*, 543 U.S. at 81-82. The important distinction between the two cases is that *NTEU* involved speech on matters of public concern while *John Roe* clearly did not. See *id.*

under either the *NTEU* or *Connick/Pickering* line of cases.²¹⁰

Under *NTEU*, involving the honoraria ban for federal employees, the Court observed that even if one concedes that John Roe was speaking on a matter of public concern, which he was not, *NTEU* is not the appropriate precedent.²¹¹ That is because the speech and expression of the federal employees in *NTEU* had absolutely nothing to do with their federal employment.²¹² Of course, it goes without saying that under such circumstances, the balance between government interests and employee interests swings wildly in the employee's favor. On the other hand, John Roe unstintingly attempted to take advantage of his status as a law enforcement officer to pad his own pocket through pornographic activities. For instance, not only was John Roe selling old San Diego police uniforms on eBay,²¹³ but he listed in his personal profile online that he was "employed in the field of law enforcement."²¹⁴ Also, and quite damningly, the pornographic tape that he unwittingly sold to an undercover detective depicted him in a non-affiliated police uniform engaging in police activities and sex acts at the same time.²¹⁵ Finally, even though John Roe used a fake AOL account name and did not disclose his name on eBay (going so far as to set up a private mailbox for his pornographic business in northern California),²¹⁶ he was readily identifiable by individuals who worked with him (including the sergeant who reported him).²¹⁷

Moreover, and as the *John Roe* Court actually held, John Roe's conduct clearly did not "qualify as a matter of public concern under any view of the public concern test."²¹⁸ Thus, under both *NTEU* and *Connick/Pickering*, the per curiam decision is rightly decided under the First Amendment.

²¹⁰ See *id.*

²¹¹ See *id.* ("The present case falls outside the protection afforded in *NTEU*.").

²¹² See *id.* at 81 ("The Court [in *NTEU*] . . . observed that none of the speech at issue 'even arguably [had] any adverse impact' on the employer.") (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995)).

²¹³ See *id.* at 78.

²¹⁴ *Id.*

²¹⁵ See *id.* at 79. In particular, the video in question showed John Roe, initially in police uniform, issuing a traffic ticket, only to revoke it after stripping and masturbating in front of the ticketed driver. See *id.*

²¹⁶ See *id.* at 78; Brief in Opposition to Petition for Certiorari at *2, *6, *City of San Diego v. Roe*, 543 U.S. 77 (2004) (No. 03-1669), 2004 WL 1877785.

²¹⁷ See *John Roe*, 543 U.S. at 78.

²¹⁸ See *id.* at 84.

2. Applying the Modified *Pickering* Test to John Roe's Substantive Due Process Rights

What if the Court considered John Roe's interest in decisional non-interference in private affairs?²¹⁹ Would the case have had a different outcome? Most likely not. Although there would have been some obvious differences in the analysis,²²⁰ the problem with the *John Roe* case under the modified *Pickering* analysis is similar to those endemic to any type of constitutional balancing test: the more unpopular or disruptive the public employee's off-duty conduct to the employer's workplace, the more likely that the *Pickering* balance will favor the employer's efficiency interests.²²¹ The knowledge of John Roe's off-duty pornographic conduct would have caused a significant disruption in the San Diego police department. Thus, it is likely that any interest in decisional non-interference in private affairs that John Roe had would have been outweighed by his employer's legitimate and substantial efficiency interests.²²²

Perhaps even more importantly, the *John Roe* facts differ from the substantive due process rights upheld in *Lawrence* in at least four important ways. First, the conduct in question did not occur in the privacy of John Roe's home.²²³ The Supreme Court appears most comfortable upholding liberty interests under substantive due process when the privacy of the home is involved.²²⁴ Second, producing the

²¹⁹ John Roe filed his complaint in the Southern District of California on September 28, 2001. See Appellate Petition, Motion and Filing in Support of Petition for a Writ of Certiorari at *4, *City of San Diego v. Roe*, 543 U.S. 77 (2004) (No. 03-1669), 2004 WL 1378662. Consequently, John Roe's attorney did not have *Lawrence*-based arguments at his disposal initially and would have been foreclosed from bringing up any such new legal theories of recovery for the first time on appeal.

²²⁰ Most obviously, John Roe would not have been thrown out of court on the relatively easy ground that his conduct was not within the traditional realm of public concern. Moreover, rather than focusing on speech rights under the First Amendment, the Court under the proposed test would have had to instead focus on John Roe's rights to decisional non-interference in private affairs.

²²¹ See Kozel, *supra* note 79, at 1018-19.

²²² Roe is an even less sympathetic plaintiff because he transparently attempted to use the fact of his police department employment to his private advantage and to his employer's detriment. See *John Roe*, 543 U.S. at 84.

²²³ As discussed above, the Supreme Court has placed significant emphasis on whether conduct was engaged in by individuals in the privacy of their home. See *supra* note 170 and accompanying text.

²²⁴ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); see also *Paris Adult Theatre I v. Slaton*, 413

type of pornography that John Roe produced does not involve engaging in an intimate, sexual relationship as part of forging a meaningful human relationship as *Lawrence* did.²²⁵ Third, law enforcement officers, because of the nature of their responsibilities, are given far less leeway in their off-duty conduct than other types of government workers.²²⁶ Finally, John Roe's conduct in producing and distributing the pornographic videotapes was both public and commercial at the same time and, therefore, unlikely even to be covered by the interests recognized in *Lawrence*.²²⁷

In short, John Roe would have most likely lost his case even if his interest in decisional non-interference in private affairs had been taken into account under a modified *Pickering* test. This is because, as demonstrated above, the government's efficiency concerns would remain at a high level, and, if anything, John Roe's interest in decisional non-interference in private affairs would be minimal given the facts of the case.

B. *Of Swinging School Teachers and Salacious Sheriff Dispatchers*

Just because our pornographic policeman does not benefit from the doctrinal innovation introduced in this paper, it does not mean that other public employees will not gain important, additional constitutional protections which they currently do not have under the First Amendment *Connick/Pickering* analysis. In order to discern the impact that the modified *Pickering* analysis and these interests in decisional non-interference in private affairs will have on public employees' substantive due process rights under the Fifth and Fourteenth Amendments, it is necessary to turn to a consideration of a number of real world and hypothetical cases to flesh out the contours of this analysis.

U.S. 49, 65 (1973) (finding that constitutional "privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing"); Stein, *supra* note 127, at 535.

²²⁵ In pre-*Lawrence* terminology, the right to intimacy is lacking since Roe's conduct did not include the forging of the bonds of a personal relationship. See *supra* Part II.A.3.

²²⁶ See *Kelley v. Johnson*, 425 U.S. 238, 245-46 (1976) ("[The law enforcement] employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large.").

²²⁷ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case does not involve . . . public conduct or prostitution.").

1. The Easier Cases Under the Modified *Pickering* Analysis: The Sheriff Dispatcher

The easier cases under the modified *Pickering* analysis will involve well-established privacy rights that public employees had pre-*Lawrence*. For instance, an employer would run afoul of an employee's interest in decisional non-interference in private affairs if the employer discharged the employee for using contraception or for having an abortion.²²⁸ Now, post-*Lawrence*, easier cases should also include those in which someone is fired for being homosexual or, for that matter, having any private relationships between consenting adults that do not adversely impact the participants' employment.²²⁹

The North Carolina cohabitation case currently being litigated by the ACLU is another prime example.²³⁰ There, a female sheriff dispatcher, who lived with her boyfriend, claimed that she was forced to quit her job by the sheriff when she would not either marry her boyfriend or move out of the house.²³¹ In support of his position, the sheriff relied upon an 1805 "adultery and fornication" statute which prohibited cohabitation of unmarried persons.²³² The pending lawsuit

²²⁸ These would be relatively straightforward unconstitutional conditions cases because the government as employer would be seeking to prevent conduct indirectly, i.e., the use of contraception or abortion, which it could not prevent directly through the conditioning of a government benefit, i.e., government employment. See Sullivan, *supra* note 29, at 1422 ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

²²⁹ Recall again the case in which a female attorney in the employ of the infamous Bowers was fired for being a lesbian. See *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997). In 1997, the Eleventh Circuit upheld the discharge of that attorney under a very deferential rational basis review analysis following the *Bowers* precedent. See *id.* at 1109-11. Post-*Lawrence*, a court's consideration of a public employee's right to decisional non-interference in private affairs should make firing for being gay or lesbian an illegitimate and arbitrary factor upon which to base a discharge, and, in such cases, the modified *Pickering* balance would come out in favor of the employee. Accord Eskridge, *supra* note 15, at 1056 (arguing that, after *Lawrence*, state cannot tell gay people "that they are presumptive outlaws who can for that reason be denied civil service employment, licenses, and various state benefits. Nor can the state tell gay people that the price of citizenship for them is to remain in the closet"); *id.* at 1058 ("[M]ost of the state and local discriminations explicitly targeting lesbian and gay citizens ought to be suspect after *Romer* and *Lawrence*.").

²³⁰ See Hartsoe, *supra* note 96, at A06.

²³¹ See *id.*

²³² See *id.* The North Carolina "fornication and adultery" statute states: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor . . .

challenges the continuing validity of such cohabitation statutes post-*Lawrence*.²³³

Because *Lawrence* itself deals with consensual sex between two individuals in the privacy of their home,²³⁴ and because there are potential criminal sanctions at stake for violating the cohabitation statute in question,²³⁵ there can be little doubt that this case will be directly controlled by reference to the substantive due process rights discussed in *Lawrence*. In this vein, and in the language of the modified *Pickering* test, the government employer cannot condition the benefit of public employment on an employee's sacrificing her right to engage in a private relationship, especially when that relationship has no nexus to the employee's work duties.²³⁶ Notice this would be true whether that relationship involved a heterosexual or homosexual relationship, or for that matter, a married or unmarried couple. Thus, under the modified *Pickering* analysis, because the government's interest in interfering with its employee's interest in decisional non-interference in private affairs is not supported by a legitimate or substantial justification outside of the state's own moral proclivities concerning unmarried men and women living together,²³⁷ the government's efficiency interests would be clearly outweighed by the individual's interest in decisional non-interference in private affairs.

2. The More Difficult Cases Under the Modified *Pickering* Analysis: The Swinging School Teacher

Unfortunately, many of the future cases involving interests in decisional non-interference will not involve the easier type of scenarios described in the previous section. Instead, the majority of

.” N.C. GEN. STAT. § 14-184 (2005).

²³³ See Hartsoe, *supra* note 96, at A06.

²³⁴ See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (observing “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

²³⁵ § 14-184.

²³⁶ See *supra* notes 193-94 and accompanying text.

²³⁷ *Lawrence* makes clear that the promotion of a majoritarian morality is not a sufficient government interest to outweigh an individual's right to freely exercise her rights to decisional non-interference in private affairs. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (adopting Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 215-20 (1986)); see also Eskridge, *supra* note 15, at 1045 (observing that Court in *Lawrence* found that popular disgust of homosexual sodomy could not supply rational basis under Due Process Clause for criminalizing homosexual sodomy).

these cases will likely require a careful analysis of both the governmental interests in efficiency and freedom from disruption on the one hand, and the strength of the employee's post-*Lawrence* substantive due process rights on the other. A few examples will suffice to establish some of the analytical intricacies that will no doubt occur in these complicated cases.

For instance, consider the difficulties with any activity that a public employee engages in on his private or personal time that brings great notoriety to his employer. In these cases, it is more likely that the employee would lose any subsequent constitutional balancing, as the disruption entailed by the employee's private conduct would likely overshadow any interest in decisional non-interference that an employee might have.²³⁸ In this regard, consider a police officer who in his spare time is a porn star. Regardless of the nature of the employee interests involved, the need to maintain the credibility of its police officers and its own reputation will probably permit the employer to take constitutionally permissible, adverse employment actions against that employee.²³⁹ Likewise, the same outcome would result in a case involving a public elementary school teacher who is exposed publicly as engaging in a swinger lifestyle outside of school. Because of the sensitive nature of the public school teacher's position and the importance for these individuals to model appropriate behavior for children,²⁴⁰ the efficiency concerns of the public employer will most likely outweigh the teacher's decisional autonomy interests in these circumstances as well.

Consider another difficult set of facts. John Doe is still a police officer, and thus more highly regulated, but, unlike John Roe, he does not engage in pornographic activities. Instead, he films himself and his wife engaging in consensual sexual intercourse for their private use, but unfortunately the videotape is stolen by an acquaintance and ends up being distributed widely on the Internet. When the police department learns of the tape and the adverse reaction the tape is

²³⁸ See *supra* note 184 and accompanying text.

²³⁹ See *City of San Diego v. Roe*, 543 U.S. 77, 84-85 (2004) (per curiam) (stressing importance of impact of public employee's private conduct on "mission and functions" of public employer in this type of unconstitutional conditions analysis); *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 465 (1995) (observing that none of speech at issue "even arguably [had] any adverse impact on the [employer]").

²⁴⁰ See *Good News Club v. Milford Cent. Schs.*, 533 U.S. 98, 116 (2001) (observing "that students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models") (citing *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)).

causing in the community, the police officer is fired. Under a modified *Pickering* analysis, can this police officer be constitutionally discharged?

On the one hand, the carrying out of a personal relationship, especially in the marital bedroom,²⁴¹ is due much freedom from governmental incursions.²⁴² Moreover, the police officer did not wish for this tape to become public and the tape became public through no efforts of his own. On the other hand, regardless of the police officer's desire not to have this videotape placed on the Internet, the fact of the matter is that it now exists in cyberspace, and the officer's credibility and that of his department are on the line. If the police department can show substantial disruptions to its operations and that a public safety issue has now arisen as a result of the distractions caused by the scandal, the department will most likely be able to discharge the officer. Nonetheless, this type of case will no doubt require a careful balancing by the court and may turn on such case-sensitive factors as the size of the municipality, the extent of the public's knowledge of the tape, and the type of sexual conduct displayed on the videotape.

Similarly, more difficult issues arise when a public employee acts as the public face of the employer. This is because of the potential message the employer is sending to the public by keeping the employee in employment after the employee engages in the controversial conduct.²⁴³ For instance, what if the police chief is caught engaging in an extramarital affair off-duty and this conduct is made public. Does the employer, for efficiency reasons, have more latitude to terminate the chief, even though the chief would appear to have post-*Lawrence* substantive due process rights to engage in consensual sexual relations with another person on his own time?²⁴⁴ Does it depend on the geographic location in which the scenario occurs and that community's mores? Perhaps a police chief in a small, conservative town would be discharged, while a police chief in a large,

²⁴¹ See *supra* note 170.

²⁴² See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); see also *supra* note 224 and accompanying text.

²⁴³ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) ("The Boy Scouts has a First Amendment right to choose to send one message but not the other."). It is anything but clear if government institutions are expressive associations, but even if they are not, the modified *Pickering* analysis would still give credence to government efficiency concerns, which would include the government employer's right to maintain a certain image or reputation within a community.

²⁴⁴ This scenario assumes there are no applicable statutory or common law prohibitions against engaging in extra-marital relationships.

liberal metropolitan city would face no adverse employment action. Should the constitutional interests in decisional non-interference in private affairs differ in different parts of the country?²⁴⁵ These are all very difficult questions which lower courts will have to weigh in deciding these complex cases.

In short, there may sometimes be no clear-cut answers to the complex questions posed by these post-*Lawrence* cases. Nevertheless, public employees are no doubt better off as a whole as a result of *Lawrence* and its elevation of the right to decisional non-interference in private affairs to a preferred constitutional liberty interest. To what extent public employees are better off will depend to a large extent on how the lower federal courts interpret the scope of these interests in the coming years. But at the very least, *Lawrence*, with the aid of the modified *Pickering* test, should provide much greater protection to public employees against arbitrary and meddlesome government overreaching that unnecessarily treads into the secret regions of their lives.

CONCLUSION

This paper argues that whatever debates continue to stew regarding the “true” meaning of *Lawrence v. Texas*, at the very least, *Lawrence* represents the recognition of an individual’s heightened interest in decisional non-interference in private affairs.²⁴⁶ This is an important constitutional development since a problem under the doctrine of unconstitutional conditions only arises when the government offers a benefit, like government employment, conditioned on the waiver of a preferred constitutional right. Thus, post-*Lawrence*, the doctrine of unconstitutional conditions should prohibit a government employer from firing a government employee who exercises her interests in decisional non-interference in private affairs.

The current protections for public employee speech rights under the *Connick/Pickering* analysis, however, do not adequately safeguard

²⁴⁵ Such an outcome would place these cases in a category similar to First Amendment obscenity cases in which courts utilize, in part, a contemporary community standards test. See *Miller v. California*, 413 U.S. 15, 24 (1973) (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.”).

²⁴⁶ Eskridge, *supra* note 15, at 1012 (“[F]ew constitutional scholars think the narrowest or the broadest reading of *Lawrence* is correct. Its charged reasoning cannot be limited to the sodomy context alone, but neither does it entail same-sex marriage.”).

these emerging interests in decisional non-interference. The proposed modified *Pickering* test discards the unnecessary “public concern test” for these post-*Lawrence* substantive due process cases and, in the first instance, balances the employee’s interest in decisional non-interference in private affairs against the government’s interest in operating an efficient governmental service for the public. The upshot, and a much neglected impact of *Lawrence*, is that over twenty-one million federal, state, and local United States’ employees should be the beneficiaries in coming years of a significant expansion of their interests in being free from arbitrary and capricious interference by their employers in their personal and private lives.