

**THE (NEGLECTED) IMPORTANCE OF BEING *LAWRENCE*:
THE CONSTITUTIONALIZATION OF PUBLIC EMPLOYEE RIGHTS
TO DECISIONAL NON-INTERFERENCE IN PRIVATE AFFAIRS**

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TABLE OF CONTENTS

I.	Introduction.....	2
II.	The Doctrine Of Unconstitutional Conditions In Public Employment.....	7
	A. A Brief Introduction to the Historical Foundations of the Doctrine	7
	B. Unconstitutional Conditions in Public Employment and the First Amendment.....	12
	1. The Unique Status of Government as Employer	12
	2. The First Amendment Speech and Expression Rights of Public Employees: The <i>Connick/Pickering</i> Analysis	15
	C. The Peculiar Lack of Unconstitutional Conditions In Employment Cases Outside of the First Amendment	21
III.	<i>Lawrence</i> And The Right To Decisional Non-Interference In Private Affairs	24
	A. The Various Incomplete Incarnations of the Right to Decisional Non-Interference Prior to <i>Lawrence v. Texas</i>	24
	1. The Right to Be Let Alone	24
	2. The Right to Personhood: Individuality, Dignity, and Autonomy	28
	3. The Right to Intimacy and Intimate Association.....	31
	B. <i>Lawrence v. Texas</i> and the Fulfillment of <i>Olmstead</i> 's Legacy.....	32
IV.	The Impact Of <i>Lawrence v. Texas</i> On The Doctrine Of Unconstitutional Conditions In Public Employment	37
	A. The Incongruence Between the Interest in Decisional Non-	

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Interference in Private Affairs and the Connick/Pickering Analysis.....	37
B. A New Model: The Modified Pickering Analysis	40
1. The Basics	40
2. The Coherency Between the Modified <i>Pickering</i> Test and Other Constitutional Protections Afforded Public Employees.....	42
V. Applying The Modified <i>Pickering</i> Test: Of Pornographic Policeman, Swinging School Teachers, and Salacious Sheriff Dispatchers.....	45
A. Of Pornographic Policemen.....	45
1. Applying the <i>Connick/Pickering</i> First Amendment Analysis	45
2. Applying the Modified <i>Pickering</i> Test to John Roe's Substantive Due Process Rights	47
B. Of Swinging School Teachers and Salacious Sheriff Dispatchers.....	49
1. The Easier Cases Under the Modified <i>Pickering</i> Analysis: The Sheriff Dispatcher.....	49
2. The More Difficult Cases Under the Modified <i>Pickering</i> Analysis: The Swinging School Teacher	51
Conclusion	54

[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

I. 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

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*, 125 S. Ct. 521, 522 (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*, 125 S.Ct. at 522.

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 When John did not completely cease his explicit extracurricular activities as ordered, he was fired.⁵ In a per curiam decision from the October 2004 term, the United States Supreme Court held that John Roe was not denied his rights to free expression under the First Amendment by the SDPD's actions, 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 unconstitutional conditions, the Supreme Court has limited 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 has most often applied the doctrine of unconstitutional conditions to scrutinize employment terminations of public employees for exercising their First Amendment free speech rights.⁹

⁴ *Id.* at 522-523, 526.

⁵ *Id.* at 523.

⁶ *Id.* at 523-24.

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* U.S. DEPT. OF COMMERCE, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 298 (2004-2005) (Table No. 453) (figure from 2002); JOSEPH R. GRODIN, JUNE M. WEISBERGER & MARTIN H. MALIN, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 1 (2004).

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 has decided a number of these First Amendment public employment cases. *See* *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979); *and* *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

In the First Amendment context, the Court has developed the well-honed, if not entirely satisfactory, *Connick/Pickering* doctrinal analysis. Taken together, *Connick* and *Pickering* 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, it was under this First Amendment analysis that the Supreme Court dismissed John Roe's case against the SDPD.¹¹

Nevertheless, the Supreme Court's recent decision in *Lawrence v. Texas*,¹² with its recognition of a more robust "liberty interest"¹³ in forming one's identity through meaningful human relationships in one's personal and private life, has drastically altered the constitutional landscape as concerns when the doctrine of unconstitutional conditions comes into play in the public employment context. This is because, in *Lawrence*, the Supreme

¹⁰ See generally *Connick*, 461 U.S. at 143; and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹¹ See *San Diego v. Roe*, 125 S. Ct. 521, 526 (2004) (per curiam). 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.*

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."); and 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.").

Court construed an individual's liberty interest in decisional non-interference in private affairs¹⁴ as a heightened one due a more searching 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, as adverse employment actions taken against them on the basis of their decisions about their private affairs will be subject to a more searching scrutiny.

This paper therefore argues that *Lawrence* signals the fulfillment of a certain constitutional tradition initiated by Justice Brandeis in his eloquent dissent in *Olmstead v. United States*,¹⁶ most recently revived in the joint opinion of three Justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁷ and, for the first time, adopted by a majority of the Court in *Lawrence*.¹⁸ In short, post-*Lawrence*, the government employer can no longer terminate an employee merely because that employee does not live up to the employer's conception of morality in how she lives her private and personal life (especially in matters pertaining to sex).¹⁹

Because the current *Connick/Pickering* framework has been molded to apply to the First Amendment framework, which focuses on the nature of

¹⁴ See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. (forthcoming) (“*Decisional interference* involves the government’s incursion into people’s decisions regarding their private affairs.”) (emphasis in original) (on file with author); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (finding one form of privacy consisting of the “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 does. See William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1032 (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.”).

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

¹⁷ 505 U.S. 833, 851 (1992) (joint opinion).

¹⁸ 539 U.S. 558, 578-79 (2003).

¹⁹ *Id.* at 572 (observing the “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 a group cannot be a legitimate government interest).

the speech or expression engaged in by the employee, it cannot readily be applied to the *Lawrence* substantive due process context and needs reworking to protect these new constitutional interests. Consequently, this article proposes an original constitutional balancing analysis, the modified *Pickering* analysis, to more appropriately weigh a public employee's interest in decisional non-interference in private affairs against 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 paper revisits the Supreme Court's decision in *City of San Diego v. Roe*. While this paper concludes that the outcome of *John Roe* would most likely have been decided in the same manner under this modified analysis because of heightened governmental efficiency concerns and the relatively minimal substantive due process rights of John Roe under the circumstances;²¹ nevertheless, the more important point is that the appropriate form of constitutional balancing of relevant 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 II 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 III will then review the development of substantive due process jurisprudence in the privacy context over the last century and describe how *Lawrence v. Texas* 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 IV will next propose a modified version of the *Pickering* test, which simultaneously discards the *Connick* public

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' efficiency concerns. It is because of the constitutional balancing analysis set up in *Pickering* that this new test has been so named.

²¹ See *infra* Part V.A.2.

²² See *infra* Part V.B.

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 V will apply the modified *Pickering* analysis to the *John Roe* case and some real world public employee cases and hypothetical scenarios.

II. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN PUBLIC EMPLOYMENT

To begin to understand the inadequacy of the existing unconstitutional conditions doctrine in public employment with regard to the substantive due process rights of public employees 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, then 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 *Lochner* Court²³ developed economic substantive due process.²⁴ Under economic substantive due process, the *Lochner* Court emphasized property

²³ See *Lochner v. New York*, 198 U.S. 45, 56 (1905) (utilizing a substantive due process analysis to strike down maximum hour laws for bakers because of its "arbitrary interference with the right of the individual to personal liberty."), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 706 (1963), *and* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (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 (1908) (invalidating a federal law prohibiting interstate carriers from terminating workers for union membership), *overruled in part by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). For a comprehensive analysis of the various meanings ascribed to the *Lochner* Era, see generally Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004).

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 really in hindsight the first incarnation of the doctrine of unconstitutional conditions.

But with the "switch in time that saved nine"²⁷ and the ascendancy of President Roosevelt's New Deal Court in the late 1930's and early 1940's, 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 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

²⁵ See, e.g., *Adair*, 208 U.S. 161 (invalidating a federal law prohibiting interstate carriers from terminating workers for union membership); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down a Kansas statute that prohibited employers from conditioning employment on the employee's agreement to refrain from joining a labor organization); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down a minimum wage law for women).

²⁶ Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 104 n.7 (1988) ("[Unconstitutional conditions first] appear in Justice Bradley's dissent in *Doyle v. Continental Insurance Co.*, 94 U.S. 535 (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.' Id. at 543 (Bradley, J., dissenting).").

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 (1993)).

²⁸ Indeed, *Lochner* itself was eventually "implicitly rejected." See *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.").

²⁹ See Kathleen A. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989).

³⁰ See Epstein, *supra* note 26, at 104.

Many of these more recent unconstitutional conditions cases have involved 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 rights to speech, expression, and association under the First Amendment.³⁴

The Supreme Court has responded to this aggressive use of Congress' Spending Clause Power by reinvigorating the doctrine of unconstitutional conditions. While not anchored in any single 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

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

³² *See, e.g.,* *Maier v. Roe*, 432 U.S. 464 (1977); *Shelton v. Tucker*, 364 U.S. 479 (1960); *and Speiser v. Randall*, 357 U.S. 513 (1958).

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 the 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 is, therefore, 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.

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

³⁶ *See Berman, supra* note 8, at 3 ("[I]t is now universally recognized

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 Sullivan attempts to limit the doctrine to incursions into "preferred rights."³⁸ Professor 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 Regardless, 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, the doctrine has been applied to First Amendment

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."). According to Berman, another way of understating the doctrine is to recognize that the government's power to withhold a benefit entirely does not always permit it to offer the benefit conditionally. *See* Berman, *supra* note 8, at 18-19.

³⁷ *See* Seth 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.") (parentheses and quotations in original).

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

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, the legal context in which the doctrine of unconstitutional conditions has been applied the most often is public employment. As Jason Mazzone has aptly pointed 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.

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 "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," *see* Paul M. Secunda, Lawrence's *Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 133-136 (2005), intermediate scrutiny, or strict scrutiny. 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, e.g.,* *Speiser v. Randall*, 357 U.S. 513 (1958).

⁴² *E.g.* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *and* *Healy v. James*, 408 U.S. 169 (1972).

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

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

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

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

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

As an initial matter, in unconstitutional conditions in employment cases, the government has much more leeway in interfering with individual rights than it does when acting in the subsidy context described in the previous section.⁴⁷ As a result, individuals in these employment cases generally have lesser speech and expression protections under the First Amendment.⁴⁸ To more fully understand why this state of affairs exists in the constitutional public employment context, this Section proceeds by first discussing the unique status of the government when it acts in its employer capacity and then next considers how this unique status has been traditionally recognized by the Supreme Court through the development and implementation of its *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 has now emphatically rejected "the greater includes the lesser" premise.⁵⁰ For instance, in the landmark public employment case of *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

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

⁴⁸ See Eugene Volokh, Symposium, *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.").

unreasonable, has been uniformly rejected."⁵¹ Thus, 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 As the Court in *Perry v. Sindermann* aptly explained: "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,"⁵³ and "'produce a result which (it) could not command directly."⁵⁴

Nevertheless, the public employer has been found to have more latitude when setting the terms and conditions of its employees' employment, a discretion which would not be available in its dealing with the same individuals as citizens. In this regard, Justice Marshall famously stated in *Pickering v. Bd. 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 has since re-affirmed that government has significantly more authority over individuals when wearing acting in its employment capacity.⁵⁶

⁵¹ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-06 (1967) (quoting *Keyishian v. Board 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."); *and* *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.

⁵³ *Id.*

⁵⁴ *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

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 Waters v. Churchill*, 511 U.S. 661, 671-72 (1994) (plurality opinion) ("We have never explicitly answered this question [about the

For example, in her opinion for the Court in *Board of County Commissioners v. Umbehr*,⁵⁷ Justice O'Connor explained that, "[t]he 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."⁵⁸ In a similar vein, Justice Powell explained in his concurring opinion in *Arnett v. Kennedy* that, "the 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."⁵⁹ Finally, in *Waters*

government's dual roles,] though we have always assumed that its premise is correct -- that the government as employer indeed has far broader powers that does the government as sovereign.") (citing *Pickering*, 391 U.S. at 568; *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973); *Connick v. Myers*, 461 U.S. 138, 147 (1983); and *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v Grumet*, 512 US 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.")).

⁵⁷ 518 U.S. 668 (1996).

⁵⁸ *Id.* at 674; 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 the 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."). See also 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 *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring). If it were otherwise, Justice Powell explains, the government employer would not be able to remove inefficient and unsatisfactory workers quickly,

v. Churchill, Justice O'Connor further distinguished the two differing roles that government undertakes by explaining that not only can certain First Amendment doctrines not reasonably be applied to the speech of government employees,⁶⁰ but also by pointing to the fact that less stringent procedural requirements appertain to restrictions on government employees' speech.⁶¹

Nevertheless, while it is generally agreed that the government has more power to interfere with individuals' constitutional rights in its employment capacity,⁶² it has been difficult to give dimension to 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 has engaged in a

and the government's substantial interest in so doing would be frustrated without adequate justification. *Id.*

⁶⁰ See *Waters*, 511 U.S. at 672 (plurality opinion) (reviewing a number of First Amendment doctrines that do not apply with the same force in the government as employer context, including instances in which the 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 See *id.* at 673 (observing that although speech restrictions on private citizens must precisely define the speech they target, a government employer is permitted to prohibit its employees from acting "rude to customers," even though this restriction would be void for vagueness under traditional First Amendment jurisprudence); see also *Volokh*, *supra* note 48, at 635.

⁶² See *Waters*, 511 U.S. at 673 (observing that the 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 the difficulty associated with the *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

constitutional balancing act.⁶⁵ In this regard, Justice Marshall set forth the applicable test in *Pickering*: "The problem in any case is to arrive at a balance between the interests of the [public employee], as citizen, in commenting upon matters of public concern and interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁶⁶ This principle applies regardless of the public employee's contractual or other claims to a job.⁶⁷

Important considerations in carrying out this balance include whether the employee's statements would impair discipline by superiors, harmony among co-workers, close working relationships for which personal loyalty and confidence are necessary, the performance of the employee's duties, or the regular operation of the enterprise.⁶⁸ In *Pickering*, for instance, the balancing came out in favor of the public school teacher since 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 employee's relationship with co-workers, his own job duties, or with the operation of the school in general.⁶⁹ In such instances, the Court found that, "it is necessary to regard the [public employee] as the member of the general public he seeks to be."⁷⁰

The *Pickering* balancing test, however, was given an important, and

IV.B.2 (discussing in detail the 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).

⁶⁷ 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.

⁶⁸ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73).

⁶⁹ *Pickering*, 391 U.S. at 571-72. The Court also noted the import of allowing public employees to speak out on matters of public concern since 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 II.B.1.

ambiguous, gloss in 1983 in the case of *Connick v. Myers*.⁷¹ Although the phrasing, "a matter of public concern" was included in the Court's formulation in *Pickering*,⁷² *Connick* elaborated upon what counts as "a matter of public concern."⁷³ In *Connick*, an assistant district attorney had circulated to co-workers a questionnaire concerning internal office affairs in order to discover whether there was a general job satisfaction problem 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 occur, a court had to consider as a threshold matter whether the public employee was speaking on a "matter of public concern."⁷⁶ 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 concerned matters of "private interest," rather than "public concern,"⁷⁸ it dismissed most of the plaintiff's First Amendment claim at

⁷¹ 461 U.S. 138 (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.

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, "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *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.*

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 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* has left us with "tenuous determinations about which matters are of public concern and ad hoc, case-by case balancing of governmental efficiency interests against employee speech interests."⁸²

⁷⁹ *Id.* at 154. As for the one question on the questionnaire which 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, 386-7 (1987); see also *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (holding that a public employee may express her views in private to an employer and still be protected by the First Amendment).

⁸¹ *Connick*, 461 U.S. at 147-48.

⁸² Kozel, *supra* note 79, at 1017. 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., *id.* at 1044-51 (putting forth an internal/external model of public employee speech to replace current *Connick/Pickering* approach); Allred, *supra* note 73, at 75-81 (describing the conflict and confusion surrounding the public concern test and proposing an alternative standard); Paul Cerkvėnik, 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 the public concern test applies to public employee freedom of association cases); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better*

Nevertheless, it appears that the substantial legal hurdles imposed by *Connick* become much more manageable for public employees in a sub-set of cases 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 In *United States v. National Treasury Employees Union (NTEU)*,⁸⁴ 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

Definition of the Pickering/Connick Threshold Test, 50 VAND. L. REV. 993, 996 (1997) (stating that the *Connick* Court failed to supply a clear definition of public concern and that the test is flawed); Kermit Roosevelt III, Note, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1241 (1997) (criticizing the vagueness of the public concern test); and 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 the public concern test have led to undue restriction of the free speech rights of public employees). Additionally, the Supreme Court has slated for argument yet another case for the October 2005 Term dealing with this enigmatic issue. See *Garcetti v. Ceballos*, 361 F.3d 1168 (9th Cir. 2004), cert. granted, 125 S. Ct. 1395 (Feb. 25, 2005) (posing the question of whether a public employee's purely job-related speech should be cloaked with First Amendment protection if it touches upon a matter of public concern).

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.

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 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

Finding that the federal employees' expressive activities fell within the category of comment on matters of public concern,⁸⁷ the Court was able to conclude easily 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

their expression on their official duties, nor the kind of audiences they address have 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 their 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* discussion Parts IV.B, V.B. (The author particularly wishes to thank 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 id.* 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 1050-51 (observing that when the 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 in the judgment) ("The time-tested *Pickering* balance . . . provides the governing framework for analysis of all manner of restrictions on speech by the government as employer.").

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

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 above, the Supreme Court has spent 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),⁹¹ the Court continues to

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

⁹¹ *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 the 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 (7th Cir. 1990) (finding that prohibiting police officers from wearing earring 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 a sheriff

apply mostly the government-as-employer analysis in the First Amendment context.⁹²

Of the few cases that do exist, some have been highlighted by Justice Scalia in his dissent in *Rutan v. Republican Party of Ill.*, a political affiliation case.⁹³ For instance, in the Fourth Amendment context, Justice Scalia noted that although private citizens were not subjected to governmental searches and seizures of their property without a warrant supported by probable cause, government employees, in many circumstances, may have their property searched without violating the Fourth Amendment.⁹⁴ Additionally, governmental entities may more easily conduct drug testing of public employees who are engaged in safety sensitive or confidential positions.⁹⁵ 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."⁹⁶ Scalia also noted in his *Rutan* dissent that, in the Fifth Amendment context, private citizens cannot be forced to provide the government with information that incriminates them, but government employees can be dismissed from employment when the incriminating information in question is related to the performance of

dispatcher to quit her job for violating state's "adultery and fornication" law).

⁹² See Mazzone, *supra* note 46, at 810 (noting that, "[t]he doctrine of unconstitutional conditions has been most vigorously applied in First Amendment cases.").

⁹³ See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (citing *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (upholding a hair grooming regulation for police under substantive due process finding a clear rational connection between the regulation and the promotion of safety of persons and property)).

⁹⁴ See *id.* (citing *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987) (plurality opinion)).

⁹⁵ See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-668 (1989) (permitting drug testing of federal custom agents who interdict drugs or carry weapons); and *Knox County Educ. Ass'n. v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998) (upholding a policy of suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to, "safety sensitive" positions within a school system, including teaching positions).

⁹⁶ *Von Raab*, 489 U.S. at 668.

their jobs.⁹⁷ Finally, in the substantive due process area pre-*Lawrence*, public employers historically could regulate such things as their police officers' grooming practices.⁹⁸

Although some public employment cases involving interests under the substantive due process clause have been argued at the lower federal court level,⁹⁹ mostly absent from Supreme Court jurisprudence is any mention of the relationship between public employment and interests under substantive due process.¹⁰⁰ The lack of unconstitutional conditions in employment cases outside of the First Amendment is puzzling, but will perhaps become an anachronism with the additional emphasis being placed on interests in decisional autonomy in light of *Lawrence v. Texas*.¹⁰¹

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 new approach to unconstitutional conditions cases involving the interests of public employees in decisional non-interference in private affairs. It is to that task that this paper now turns.

⁹⁷ See *Rutan*, 497 U.S. at 94-95 (citing *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968)).

⁹⁸ See *Kelley*, 425 U.S. at 247.

⁹⁹ See *supra* note 91.

¹⁰⁰ Although *Kelley v. Johnson* did involve the application of substantive due process to an unconstitutional condition in public employment case, *see supra* note 20, 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.*, Montgomery County, Ohio, 470 U.S. 1009, 1011 (1985) (Brennan, J., dissenting from denial of certiorari) (describing case upholding the firing of a public high school teacher who was fired for the mere fact of being bisexual); *and Whisenhunt v. Spradlin*, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting from denial of certiorari) (discussing case upholding the firing of male police sergeant and female patrol officer for engaging together in a romantic relationship).

¹⁰¹ 539 U.S. 558 (2003).

III. 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,¹⁰² the only thing that commentators seem to agree on concerning the right to privacy is that there is very little agreement about its contours.¹⁰³ It is not my goal here to suggest a theory or taxonomy of privacy.¹⁰⁴ Rather, this section discusses the interest in decisional non-interference in private affairs, and the various labels and methods which courts have utilized to protect these decisional autonomy rights prior to *Lawrence*.¹⁰⁵ 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,¹⁰⁶ for prior to this time the Court only recognized constitutional privacy rights stemming directly from concrete and explicit constitutional provisions that addressed privacy concerns in

¹⁰² See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁰³ See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1099-1124 (2002) (cataloging the different conceptions of privacy that various courts and commentators have championed).

¹⁰⁴ For a recent attempt at a pragmatic theory of privacy, see, e.g., *id.* at 1090-1091 (developing a theory of privacy based on Wittgenstein's notion of "family resemblance").

¹⁰⁵ 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 54-57 (under this more recent contextual taxonomy offered by Solove, a violation of these type 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 difference conceptions of privacy. See Solove, *supra* note 103, at 1116.

¹⁰⁶ See Warren & Brandeis, *supra* note 102.

particular contexts,¹⁰⁷ and then only rarely. Brandeis and Warren talked of privacy generally as "a right to be let alone" by the government.¹⁰⁸ To them, and to us today no less, there was a sphere of personal autonomy or "personality" upon which the government should not be able to tread arbitrarily.¹⁰⁹ Of course, this very idea of the unencumbered individual sprang directly from more generic forms of classical liberalism.¹¹⁰ In turn,

¹⁰⁷ Such individual constitutional provisions recognized prior to 1890 included the right to be free from unreasonable search 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 fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment.

¹⁰⁸ *See Warren & Brandeis, supra* note 102, at 193. Although the Supreme Court utilized this definition of privacy a number of times shortly after the article, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning the right to bodily integrity with regard to a compulsory vaccination law); *and Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (stating that a person had the right to be let alone where the issue was whether a plaintiff could be forced to undergo a surgical examination), the references to a "right to be let alone" in Supreme Court jurisprudence were relatively rare until after the Second World War.

¹⁰⁹ *See Warren & Brandeis, supra* note 106, at 205-206 (noting that privacy was based on the principle "of inviolate personality" and that there is "a general right to privacy for thoughts, emotions, and sensations"); *and Eskridge, supra* note 15, at 1052 (contending that American life is animated by a presumptive libertarian mentality: "Libertarian is the presumption that the state leaves us alone to choose our own path to happiness."). *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that individuals have the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

¹¹⁰ By classical liberalism, I simply mean a political philosophy which endorses a conception of liberty as the absence of interference. *See Isaiah Berlin, Inaugural Address Before the University of Oxford* (Oct. 31, 1958), in ISIAH BERLIN, TWO CONCEPTS OF LIBERTY, IN LIBERALISM AND ITS

classical liberalism finds its root in John Stuart Mill's *On Liberty*¹¹¹ 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.¹¹²

All that being said, the right to be let alone did not gain substantial traction in constitutional thought until after World War II.¹¹³ Indeed, earlier cases had been generally abysmal with regard to individual autonomy and dignity, as can be no better demonstrated than by Justice Holmes' infamous 1927 opinion in *Buck v. Bell* regarding the necessary sterilization of "imbeciles."¹¹⁴

Although there were some fits and starts, the crucial break in the constitutional levee came in the landmark case of *Griswold v. Connecticut*.¹¹⁵ In *Griswold*, the Court located a constitutional right to privacy within the penumbras of the Bill of Rights.¹¹⁶ Suffice it to say that

CRITICS 118, 131 (1969).

¹¹¹ See Secunda, *supra* note 40, at 118 and n.2 (discussing JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., Norton Critical Editions 1975) (1859)).

¹¹² *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹¹³ As one indicia of its increasing presence, the "right to be let alone" language was utilized only three times prior to 1946, but forty-three times since according to a recent Westlaw query.

¹¹⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization legislation as constitutional, stating that, "[t]hree generations of imbeciles are enough").

¹¹⁵ 381 U.S. 479 (1965).

¹¹⁶ *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 (Goldberg, J., concurring) (locating the right to privacy

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.¹¹⁷ Although *Griswold* itself only struck down anti-contraception laws for married couples,¹¹⁸ its greater import derived from its rooting the right to be let alone within the very structure and fiber of the Federal Constitution.¹¹⁹

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*¹²⁰ and to additional individuals under the age of 16 in *Carey v. Population Services International*.¹²¹ And not only was this zone of privacy found to exist in the sacred quarters of the marital bedroom,¹²² 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. Wade*.¹²³ Indeed, *Roe* decisively located these rights

in the Ninth Amendment's reservation of certain fundamental rights to the people); *and id.* at 500 (Harlan, J., concurring) (finding the 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 that there is no general right to privacy in the United States Constitution).

¹¹⁷ See Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1, 25-26 (1999) (discussing the impact of the *Griswold* decision on constitutional privacy law).

¹¹⁸ *Griswold*, 381 U.S. at 485-86.

¹¹⁹ *Id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

¹²⁰ 405 U.S. 438 (1972).

¹²¹ 431 U.S. 678 (1977).

¹²² For a discussion of the importance of the conception of the home to historical constitutional privacy jurisprudence pre-*Lawrence*, see discussion *infra* note 165 and accompanying text. See also Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HISTORY 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.").

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

within the liberty interest contained in the substantive component of the Due Process Clause of the 5th and 14th Amendments.¹²⁴

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

But 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' 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 this right revolving around personhood, or more specifically, as involving themes of individuality, dignity, and autonomy.¹²⁵ As Solove has explained, 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."¹²⁶ *Griswold*, *Eisenstadt*, *Carey*, and *Roe* all have at their core this conception of privacy.¹²⁷ In a similar vein, in *Whalen v. Roe*, the Court emphatically

Constitution.").

¹²⁴ 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 picked 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).

¹²⁵ See Solove, *supra* note 103, at 1116-1119.

¹²⁶ *Id.* at 1116.

¹²⁷ *Id.* at 1117 ("[T]hese cases involved decisions relating to marriage, procreation, contraception, family relationships, and child rearing."). Indeed, this line of substantive due process cases pre-dates even the *Olmstead* dissent. See *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (finding that the interest of parents in

stated that the government is not free to interfere with an individual's fundamental life decisions without sufficient justification.¹²⁸

Perhaps the most "elegant encapsulation"¹²⁹ of this view of privacy as personhood was captured by the joint opinion of Justices O'Connor, Souter, and Kennedy in the pivotal 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹³⁰ In the now famous "sweet-mystery-of-life" passage, derided by Justice Scalia and other commentators,¹³¹ 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.¹³²

being able to send their children to private school to inhere within substantive due process); *and* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Constitution's protection of liberty encompasses the interest of parents in having their children learn German).

¹²⁸ See *Whalen*, 429 U.S. at 599-600; see also Solove, *supra* note 103, 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.").

¹²⁹ See Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 655-656 (2005) (citing *Casey*, 505 U.S. at 851).

¹³⁰ 505 U.S. 833 (1992).

¹³¹ For examples of Justice Scalia's and other commentators distaste of this phrasing, see, e.g., *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 (2004); James E. Fleming, *Lawrence's Republic*, 39 TULSA L. REV. 563 (2004); see also Toone, *supra* note 129, at 655-656 (remarking that Justice Scalia's derision notwithstanding, many have found the 'right to define one's own concept of existence' formulation to be valuable).

¹³² *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

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.¹³³ 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 the due process rights of individuals because such laws were rationally related to a legitimate government purpose.¹³⁴ 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."¹³⁵ Finding that such a right to physician-assisted suicide was not so enshrined in our nation's history, 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.¹³⁶ Consequently, as late as 1997, far from embracing the comprehensive notion of individual liberty to be free from governmental interference embodied by *Casey*, the Supreme Court in *Glucksberg* appeared to be in the process of substantially narrowing the scope of its substantive due process jurisprudence.¹³⁷

Secunda, *supra* note 40, at 135 n.84.

¹³³ 521 U.S. 702 (1997).

¹³⁴ *Id.* at 733.

¹³⁵ *Id.* at 720-21 (internal citations omitted).

¹³⁶ *Id.* at 721. As I have argued in a previous article, this stultifying view of the contours of substantive due process has been criticized by 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.

¹³⁷ 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. Not only did the plurality in the "sweet-mystery-of-life" passage of *Casey* utilize the word "intimate" to assist in defining the constitutional interests at stake,¹³⁸ but almost a decade earlier in *Roberts v. U.S. Jaycees*,¹³⁹ the Court recognized an important distinction between First Amendment rights of expressive association¹⁴⁰ and rights of intimate association under the Fourteenth Amendment's Due Process Clause.¹⁴¹ 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."¹⁴² 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, concluding 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."¹⁴³

Despite *Roberts'* strong endorsement of a right to intimate association,

¹³⁸ See *Casey*, 505 U.S. at 851 (Joint Opinion of Justices O'Connor, Kennedy, and Souter).

¹³⁹ 468 U.S. 609 (1984).

¹⁴⁰ For a discussion of the relationship between expressive association and right to decisional non-interference in private affairs, see *infra* notes 229-230 and accompanying text. See also generally Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001).

¹⁴¹ See *id.* at 618.

¹⁴² See *Roberts*, 468 U.S. at 618 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); and *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 to intimate association within substantive due process jurisprudence, rather than the First Amendment.

¹⁴³ *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 103, at 1121.

prior to *Lawrence*, at least one significant Supreme Court case, *Bowers v. Hardwick*,¹⁴⁴ appeared to discount the importance of such human relationships. *Bowers* held, of course, that there is no constitutional right to engage in homosexual sodomy.¹⁴⁵ 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;¹⁴⁶ that is, it 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.¹⁴⁷

Consequently, prior to June 2003, there was no comprehensive conception of decisional autonomy in private affairs 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 the development of personal relationships with others. And 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*,¹⁴⁸ it did not seem to be afforded any type of heightened protection from governmental incursions. Finally, although this type of liberty interest has been recognized to some degree in past Supreme Court cases, the Court continued to struggle to define the more esoteric and non-material aspects of these liberty interests.

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

The Supreme Court's opinion in *Lawrence v. Texas*¹⁴⁹ greatly changed the substantive due process jurisprudential landscape. *Lawrence's* central holding, that the Texas sodomy statute at issue furthered no legitimate state interest which could justify its intrusion into the personal and private lives

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

¹⁴⁵ *Id.* at 190-91.

¹⁴⁶ See Eskridge, *supra* note 15, at 1032 (denominating Justice White's opinion for the Court "brusque" and "limit[ing] the Court's previous privacy precedents to situations unique to heterosexual couples (marriage, procreation, family)").

¹⁴⁷ 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.").

¹⁴⁸ 429 U.S. 589, 599-600 (1977).

¹⁴⁹ 539 U.S. 558 (2003).

of the individuals therein,¹⁵⁰ was the first time a majority of the Supreme Court unabashedly accepted in one case a conception of liberty that included an individual's rights to be let alone, to personhood, and to intimacy.¹⁵¹ In particular, by expressly overruling *Bowers*¹⁵² and, to a lesser extent, by failing to even mention *Glucksberg* as binding precedent,¹⁵³ the Supreme Court put forward a novel type of substantive due process analysis.¹⁵⁴ Even though *Lawrence* clearly relied on *Griswold*, *Roe*, and *Casey*, in coming to its conclusion,¹⁵⁵ the key additional step taken by Justice Kennedy's opinion in *Lawrence* was to recognize a transcendental, non-material aspect to these types of liberty interests, consistent with the *Olmstead* and *Poe* dissents of bygone days.¹⁵⁶

¹⁵⁰ *Id.* at 578. See also Eskridge, *supra* note 15, at 1056 (reading the 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.").

¹⁵¹ 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 136 and accompanying text.

¹⁵² See *Lawrence*, 539 U.S. at 578.

¹⁵³ 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.").

¹⁵⁴ Accord Robert C. Post, *The Supreme Court 2002 Term, 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.").

¹⁵⁵ *Lawrence*, 539 U.S. at 564-66. See also Eskridge, *supra* note 15, at 1012 ("Once cannot interpret or apply *Lawrence* without situating it in history.").

¹⁵⁶ See *id.* 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.,

My purpose here, however, is not to undertake an extensive analysis of what *Lawrence* does and does not hold. I have already weighed in on that debate,¹⁵⁷ and it will no doubt continue to percolate, at least until the Supreme Court takes another case discussing the scope of its *Lawrence* holding.¹⁵⁸ Rather, my enterprise in this section 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.¹⁵⁹ Although it is true that various forms

dissenting).

¹⁵⁷ See Secunda, *supra* note 40, at 125-136 (maintaining that *Lawrence* court applied a rational review with bite scrutiny in overturning the Texas sodomy statute); accord *State v. Limon*, 122 P.3d 22, 30, 34 (Kan. 2005) (finding that the *Lawrence* majority, by discussing the equal protection analysis in *Romer* and by discussing the 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.”).

¹⁵⁸ See Secunda, *supra* note 40, at 162.

¹⁵⁹ See, e.g., Victor C. Romero, *An "Other" Christian Perspective on Lawrence*, 45 J. CATH. LEG. STUDS. (forthcoming 2006) (on file with author) (finding that the *Lawrence* Court’s use of “rational basis” refers to “rational basis with bite” because the evidence in the 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)); 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, Symposium: Gay Rights After *Lawrence v. Texas*, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1104 (2004) (reading *Lawrence* to extend meaningful constitutional protection to liberty interests without denominating them fundamental rights); Martin A. Schwartz, *Constitutional Basis of "Lawrence v. Texas,"* 10/14/2003 N.Y.L.J. 3 (col. 1) (concluding that the *Lawrence* Court relied on “important low-level scrutiny”); *id.* (describing Professor Dorf’s argument that Justice Kennedy’s reliance on decisions like *Griswold* and *Roe*, may imply that the court intended some form of heightened scrutiny); and Tribe, *supra* note 153, at 1899 (arguing that the 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 the doctrine of substantive due process as reflecting “a deeper pattern involving

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 crucial point that *Lawrence* represents the first time a majority of the Court has recognized a comprehensive preferred interest in decisional non-interference in private affairs.¹⁶⁰ And as a preferred 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.¹⁶¹ Indeed, this is the very same balancing test that the Court has already utilized throughout its unconstitutional conditions in employment cases.¹⁶²

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.¹⁶³ In

the allocation of decisionmaking roles."); *See also* Dale Carpenter, Symposium: Gay Rights After *Lawrence v. Texas*, *Is Lawrence Libertarian*, 88 MINN. L. REV. 1140, 1155 (2004) (interpreting *Lawrence* to hold that the right to private, intimate association is a fundamental right); *and* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1251 (11th Cir. 2004) (Barkett, J., dissenting) (arguing that *Lawrence* denominated a fundamental right to sexual privacy); *and* State v. Limon, 122 P.3d 22, 24, 29 (Kan. 2005) (applying *Lawrence* and reading it as applying a heightened form of rational basis review, rather than a strict scrutiny analysis reserved for fundamental rights or suspect classifications, in a case involving Kansas' criminal Romeo and Juliet statute, which contained differential penalties for heterosexual and homosexual statutory rape).

¹⁶⁰ *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 *Casey*, 505 U.S. at 847). *See also* Stein, *supra* note 122, 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.").

¹⁶¹ *See* Secunda, *supra* note 40, at 136-138.

¹⁶² *See supra* Part II.B.2.

¹⁶³ 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

other words, *Lawrence* "presumes an autonomy of self,"¹⁶⁴ with the government's having to put forward a legitimate and substantial interest to interfere with the personal and private decisional conduct of individuals.¹⁶⁵

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* State v. Limon, 122 P.3d 22, 24, 29 (Kan. 2005) (finding that Kansas' criminal Romeo and Juliet statute, which contained differential penalties for heterosexual and homosexual statutory rape, lacked a rational basis under the guidance of *Lawrence*).

¹⁶⁴ *Lawrence*, 539 U.S. at 562.

¹⁶⁵ 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* 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"). Although *Lawrence* derives from cases where home and sex play a large role, *see* 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?"); and 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."), *Lawrence* 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 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.").

As a result, the right to 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 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.

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

As previously illustrated, the unconstitutional conditions doctrine had been limited by and large to First Amendment considerations.¹⁶⁶ 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 have to 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 and, in its stead, propose a modified *Pickering* test, which is consistent with other constitutional tests utilized to protect the constitutional interests of public employees.

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 the interests of individuals 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 that a court consider whether the public employee is speaking out on a matter of public concern.¹⁶⁷ 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,¹⁶⁸ but, quite to the

¹⁶⁶ See *supra* Part II.C.

¹⁶⁷ See *supra* Part II.B.2.

¹⁶⁸ See *Connick*, 461 U.S. 138, 146 (1983) ("When employee expression

contrary, it is 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.¹⁶⁹

This is not to say that there might not be the rare 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.¹⁷⁰ For an

cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

¹⁶⁹ 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); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-618 (1989); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998).

¹⁷⁰ It would appear that if one had the choice of frameworks, one might choose the *Connick/Pickering* line of cases since 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); and *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.

example of one of these rare cases, consider the *NAMBLA* case,¹⁷¹ which concerned the rights of a public school teacher pedophile to advocate on his free time for the legalization of man-boy sexual relationships.¹⁷² Not only were his First Amendment free speech rights at issue under *Connick/Pickering*,¹⁷³ 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.¹⁷⁴ On the other hand, there would appear 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.¹⁷⁵

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 will only be able to depend on an interest in decisional non-interference in private affairs. It is these

¹⁷¹ See *Melzer v. Bd. of Educ.*, 336 F.3d 185 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004). *NAMBLA* refers to the "North American Man/Boy Love Association."

¹⁷² See *id.* at 189.

¹⁷³ Indeed, the *NAMBLA* member, Mr. Melzer, lost his case under the *Connick/Pickering* analysis. See *id.* at 199.

¹⁷⁴ To be clear, this analysis assumes, as the court did, that Mr. 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 Mr. 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*, 539 U.S. at 578 ("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.").

¹⁷⁵ 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* discussion Part V.B.

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 interest of the state as employer in running an efficient government service.¹⁷⁶ The state's interests in this regard generally remain the same¹⁷⁷ 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.¹⁷⁸

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.¹⁷⁹ Specifically, a government employee should be able "to be free, except in very limited circumstances, from unwanted governmental intrusions into [his or her] privacy."¹⁸⁰ Moreover, there should be a "zone of autonomy, of presumptive immunity to governmental

¹⁷⁶ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁷⁷ See Solove, *supra* note 14, at 2 (observing that the governmental interests in such balancing tests "are often much more readily articulated.").

¹⁷⁸ 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 "substantial disruption of or material interference with school activities" in regulating the political speech of students in school).

¹⁷⁹ See Solove, *supra* note 14, at 55.

¹⁸⁰ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (discussing privacy rights in the First Amendment context).

regulation."¹⁸¹ 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.¹⁸²

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 in the employee's personal and private life against the government's interest as employer in running an efficient governmental service for the benefit of the public.¹⁸³ 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*,¹⁸⁴ the employee's interests will normally prevail.¹⁸⁵ Also, easy cases will involve instances in which the employee is engaging in a certain line of private conduct explicitly not protected by *Lawrence*, such as cases involving minors or commercial conduct such as prostitution.¹⁸⁶

But 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,¹⁸⁷ 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

¹⁸¹ See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974).

¹⁸² See *supra* note 26.

¹⁸³ 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 19.

¹⁸⁴ See *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454 (1995).

¹⁸⁵ See *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 have any relevance to their employment.").

¹⁸⁶ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁸⁷ 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).

the employer's work place.¹⁸⁸ 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 simple inability of the employee to carry out the essential functions of her position as a result of her private conduct.¹⁸⁹ 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 Clause of the Fifth and Fourteenth Amendments from interfering with the personal and private lives of their employees.

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 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.¹⁹⁰ Although

¹⁸⁸ See *id.* at 69; see also Kozel, *supra* note 79, at 1051 (noting that the Supreme Court has made a distinction in public employee speech cases based on whether the speech or expression in question included any indicia of the speaker's employment).

¹⁸⁹ See *id.* 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."); and *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.").

¹⁹⁰ See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (permitting suspicionless drug search of federal Custom agents); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-618 (1989) (upholding federal regulations requiring employees of private railroads to produce urine samples for drug testing upon the occurrence of an accident); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th

these cases involve a Fourth Amendment analysis regarding the reasonableness of the search and seizure involved,¹⁹¹ many of the same concerns which have animated 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.¹⁹² Using the administrative search criterion and the "special needs" test under the Fourth Amendment,¹⁹³ the court engaged in a constitutional balancing test based on a standard of reasonableness,¹⁹⁴

Cir. 1998) (permitting the drug testing of public school teachers), *cert. denied*, 528 U.S. 812 (1999). *But cf.* *Chandler v. Miller*, 520 U.S. 305 (1997) (striking down drug testing requirements for candidates for high public office in Georgia).

¹⁹¹ 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, 715 (1987) (plurality opinion).

¹⁹² *Von Raab*, 489 U.S. at 659.

¹⁹³ Although a government search must normally be supported by a warrant issued upon probable cause, *see, e.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), 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, 556-561 (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 (the need of an employer to enter an employee's office, desk, or files comprises "special need" and no warrant is required); *T.L.O.*, 469 U.S. at 340-41 (finding warrant requirement unsuited to school context because it unduly interferes with the maintenance of swift and informal disciplinary procedures).

¹⁹⁴ "Where a Fourth Amendment intrusion serves 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

noting that the immediacy of the government's concern and the minimal nature of the intrusion outweighed the individual's interest in privacy and permitted the government to undertake drug testing of the custom agents.¹⁹⁵ The importance in ensuring that these federal employees were drug free was paramount because these custom officers carried guns and interdicted drugs.¹⁹⁶

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.¹⁹⁷ For instance, police officers and other public officials that deal with guns and other sensitive information could be subjected to more intrusive searches than, say, your average civilian clerk for a municipality.¹⁹⁸ On the other hand, just because an employee is employed by law enforcement, does not mean that the employer, especially after *Lawrence*, should dictate every aspect of how that employee chooses to live her private life.¹⁹⁹ In fact, *Lawrence* itself makes clear that the morality of

level of individualized suspicion in the particular context." *Skinner*, 489 U.S. at 619-20.

¹⁹⁵ *Von Raab*, 489 U.S. 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.").

¹⁹⁶ *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.").

¹⁹⁷ *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.").

¹⁹⁸ *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.").

¹⁹⁹ *See Hartsoe, supra* note 91, at A06 (describing actions of North Carolina sheriff in forcing a dispatcher to choose between her job and living together with her boyfriend).

one's employer will generally not be sufficient to outweigh the substantial interests an employee has in making important life decisions unrestricted by governmental interference.²⁰⁰

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

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

So how will this modified *Pickering* balance actually work in practice? In order to see how this new analysis would 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 nevertheless 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 memory of the reader, the case of the pornographic policeman in *San Diego v. Roe*²⁰¹ involved whether John Roe could engage in pornographic activities outside of his police work.²⁰² The Supreme Court carried out a straightforward First Amendment *Connick/Pickering* analysis.²⁰³ More specifically, the Court came to the conclusion that John

²⁰⁰ See *Lawrence*, 539 U.S. at 577-578 (upholding Justice Steven's view in his *Bowers* dissent that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.").

²⁰¹ 125 S. Ct. 521 (2004) (per curiam).

²⁰² See *supra* notes 2-6 and accompanying text.

²⁰³ 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

Roe's conduct did not deserve First Amendment protection under either the *NTEU* or *Connick/Pickering* line of cases.²⁰⁴

Under *NTEU*, involving the honoraria ban for federal employees, the Court observed that even if one were to concede that John Roe was speaking on a matter of public concern, which he was not, *NTEU* was not the appropriate precedent.²⁰⁵ That is because the speech and expression of the federal employees in *NTEU* had absolutely nothing to do with their federal employment.²⁰⁶ Of course, it goes without saying that under such circumstances, the balance between government interests and employee interests swings wildly in favor of the employee. 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,²⁰⁷ but he listed in his personal profile online that he was "employed in the field of law enforcement."²⁰⁸ 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.²⁰⁹ Finally, even though John Roe used a fake AOL account name and did not disclose his name on eBay (going so far to set up a private mailbox for his pornographic business in northern California),²¹⁰ nevertheless, he was readily identifiable by individuals who

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*, 125 S. Ct. at 524. 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.*

²⁰⁴ See *id.* at 523-24.

²⁰⁵ See *id.* at 524 ("The present case falls outside the protection afforded in *NTEU*.").

²⁰⁶ See *id.* ("The Court [in *NTEU*] . . . observed that none of the speech at issue 'even arguably [had] any adverse impact' on the employer.") (quoting *NTEU*, 513 U.S. at 465).

²⁰⁷ See *id.* at 523.

²⁰⁸ *Id.*

²⁰⁹ See *id.* In particular, the video in question showed 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.*

²¹⁰ See *John Roe*, 125 S. Ct. at 522; *San Diego v. Roe*, NO. 03-1669, 2004 WL 1877785, at *2 (U.S. Aug. 17, 2004) (Brief in Opposition to Petition for Certiorari).

worked with him (including the sergeant who reported him).²¹¹

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."²¹² Thus, under both *NTEU* and *Connick/Pickering*, the per curiam decision was rightly decided under the First Amendment.

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

What if the Court had considered John Roe's interest in decisional non-interference in private affairs?²¹³ Would the case have had a different outcome? Most likely not. Although there would have been some obvious differences in the analysis,²¹⁴ 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.²¹⁵ Because the knowledge of John Roe's off-duty pornographic conduct would have caused a significant disruption in the San Diego police department, it is likely that any interest in decisional non-interference in private affairs that John Roe had would have been outweighed by the legitimate and substantial efficiency interests of his employer.²¹⁶

²¹¹ *See Roe*, 125 S. Ct. at 523.

²¹² *See id.* at 526.

²¹³ John Roe filed his complaint in the Southern District of California on September 28, 2001. *See San Diego v. Roe*, NO. 03-1669, 2004 WL 1378662, at *4 (U.S. Jun. 17, 2004) (Appellate Petition, Motion and Filing in support of Petition for a Writ of Certiorari). 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.

²¹⁴ 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.

²¹⁵ *See Kozel, supra* note 79, at 1018-1019.

²¹⁶ John Roe is even a 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*, 125

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.²¹⁷ The Supreme Court appears to be most comfortable upholding liberty interests under substantive due process when the privacy of the home is involved.²¹⁸ Second, producing the 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 the *Lawrence* case did.²¹⁹ 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.²²⁰ 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*.²²¹

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

S. Ct. at 526.

²¹⁷ As discussed above, the United States Supreme Court has placed significant emphasis on whether conduct was engaged in by individuals in the privacy of their home. *See supra* note 165 and accompanying text.

²¹⁸ *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 v. Slaton*, 413 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."). *See also* Stein, *supra* note 122, at 535.

²¹⁹ In pre-*Lawrence* terminology, the right to intimacy is lacking since John Roe's conduct did not include the forging of the bonds of a personal relationship. *See supra* discussion Part III.A.3.

²²⁰ *See* *Kelley v. Johnson*, 425 U.S. 238, 245 (1976) ("[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.").

²²¹ *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case does not involve . . . public conduct or prostitution.).

affairs would be minimal given the facts of the case.

B. Of Swinging School Teachers and Salacious Sheriff Dispatchers

Nevertheless, 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 these interests in decisional non-interference in private affairs, and the modified *Pickering* analysis, 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.

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 employee discharged the employee for using contraception or for having an abortion.²²² 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.²²³ The North Carolina cohabitation case currently being

²²² These would be relatively straightforward unconstitutional conditions cases because the government as employer would be seeking to prevent 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 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.").

²²³ Recall again the case in which a female attorney in the employ of the infamous Mr. Bowers was fired for being a lesbian. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). In 1997, the Eleventh Circuit was able to uphold the discharge of that attorney under a very deferential rational basis review analysis following the *Bowers* precedent. See *id.* at 1110-1111.

litigated by the ACLU is another prime example.²²⁴ 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.²²⁵ In support of his position, the Sheriff relied upon an 1805 "adultery and fornication" statute which prohibited cohabitation of unmarried persons.²²⁶ The pending lawsuit challenges the continuing validity of such cohabitation statutes post-*Lawrence*.²²⁷

Because *Lawrence* itself deals with consensual sex between two individuals in the privacy of their home,²²⁸ and because there are potential criminal sanctions at stake for violating the cohabitation statute in question,²²⁹ 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.²³⁰ Notice this would be true whether that relationship involved a

Post-*Lawrence*, a court's consideration of a public employee's rights to decisional non-interference in private affairs in future cases should make firing for being homosexual 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*, a 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."); and *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*.").

²²⁴ See Hartsoe, *supra* note 91, at A06.

²²⁵ See *id.*

²²⁶ See *id.* The North Carolina "adultery and fornication" 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." N.C. GEN. STAT. § 14-184 (2005).

²²⁷ See Hartsoe, *supra* note 91, at A06.

²²⁸ See *Lawrence*, 539 U.S. at 572 (observing the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

²²⁹ See N.C. GEN. STAT. § 14-184.

²³⁰ See *supra* note 187 and accompanying text.

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,²³¹ 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 these interests in decisional non-interference will not involve the easier type of scenarios described in the previous section. Instead, the majority of 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 which a public employee engages in on his private or personal time which 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 will likely overshadow any interest in decisional non-interference that an employee might have.²³² 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.²³³

²³¹ *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 their rights to decisional non-interference in private affairs. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (adopting Justice Steven's dissent in *Bowers v. Hardwick*). See also Eskridge, *supra* note 15, at 1045 (observing that the Court in *Lawrence* found that popular disgust of homosexual sodomy could not supply the rational basis under the Due Process Clause for making homosexual sodomy a crime).

²³² See *supra* note 178 and accompanying text.

²³³ See *City of San Diego v. Roe*, 125 S. Ct. 521, 526 (2004) (per

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,²³⁴ the efficiency concerns of the public employer will most likely outweigh the decisional autonomy interests of the teacher in these circumstances as well.

Consider another difficult set of facts. John Doe is still an employee who is 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 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,²³⁵ is due much freedom from governmental incursions.²³⁶ 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

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

²³⁴ *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)).

²³⁵ *See supra* note 165.

²³⁶ *See* *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 65 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). *See also* discussion *supra* note 222 and accompanying text.

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.²³⁷ 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?²³⁸ 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, liberal metropolitan city would face no adverse employment action. Should the constitutional interests in decisional non-interference in private affairs be different in different parts of the country?²³⁹ These are all very difficult questions which will have to be weighed by the lower courts 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

²³⁷ See *Boy Scouts of America 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.

²³⁸ This scenario assumes there are no applicable statutory or common law prohibitions against engaging in extra-marital relationships.

²³⁹ 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.").

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.²⁴⁰ 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, a government employer, post-*Lawrence*, should be prohibited under the doctrine of unconstitutional conditions from firing a government employee who exercises her interests in decisional non-interference in private affairs.

However, the current protections for public employee speech rights under the *Connick/Pickering* analysis do not adequately safeguard 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 the *Lawrence* decision, 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.

²⁴⁰ 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.").