1989

The Doctrine of Unconstitutional Conditions and the First Amendment

Edward J. Fuhr

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The doctrine of unconstitutional conditions posits that if the government is prohibited from directly limiting the exercise of constitutional rights in a given situation, the government may not achieve the same result indirectly by offering benefits subject to the condition that the recipients waive their constitutional rights. The doctrine has not been strictly applied, however, because in certain situations a condition is justified even though a direct limit on the exercise of the right would not be.

The author argues that past approaches to determining when a condition is legitimate have not adequately protected constitutional rights, and he proposes a new four-part framework for making such a determination. He sets forth this approach in the specific context of conditions which restrict the exercise of first amendment rights, and then applies it to the conditions which accompany the receipt of Federal Election Campaign Act funds and to conditions attached to public employment.

IN RECENT YEARS the government has increased the number of conditions attached to fiscal appropriations and government employment in an attempt to alter public behavior. With this increase the courts have been more frequently called upon to assess

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The views expressed in this article are solely those of the author and are not necessarily those of the Department of Justice.

the constitutionality of such restrictions. Presidential candidates have challenged the expenditure restrictions attached to federal campaign subsidies,[1] government employees have repeatedly challenged various restrictions on public employment,[2] and groups that advocate the use of abortion have challenged restrictions placed on public grants that would limit their advocacy.[3]

In each of these challenged contexts, the government has indirectly pressured the exercise of the first amendment right to freedom of speech. The extent to which the government may do this is constrained, however, by the doctrine of unconstitutional conditions. This doctrine posits that a condition attached to the grant of a governmental benefit is unconstitutional if it requires the relinquishment of a constitutional right.[4] The doctrine has been used to invalidate conditions affecting interests protected by the first, fourth, fifth, and fourteenth amendments.[5] Indeed, the increased number of conditions limiting employee first and fourth amendment rights have led the courts to an heightened interest in and reliance upon the doctrine.[6] At their core, the many cases now involving unconstitutional conditions raise one fundamental question: Since the government cannot directly limit an individual's constitutional rights absent compelling reasons, why should the

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1. Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 284 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

2. *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983)(upholding dismissal of employee who circulated petition concerning employee morale); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976)(Both *Branti* and *Elrod* were cases reinstating an employee dismissed because of his party affiliation); Pickering v. Board of Educ., 391 U.S. 563 (1968)(disallowing dismissal of school teacher who had written a letter to a local newspaper criticizing the allocation of school funds); McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983)(rejecting claim of CIA agent that censorship scheme violated first amendment).

3. Babbit v. Planned Parenthood, 789 F.2d 1348 (9th Cir. 1986), *aff'd*, 107 S. Ct. 391 (1987).

4. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935). *See also* sources cited *infra* note 8.

5. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968)(first amendment); Garrity v. New Jersey, 385 U.S. 493 (1967)(fourteenth amendment); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956)(fifth amendment); National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987)(fourth amendment).

6. Thomas v. Review Bd., 450 U.S. 707 (1981); Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988); Penny v. Kennedy, 846 F.2d 1563 (6th Cir. 1988); Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987); National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987); Fraternal Order of Police v. City of Philadelphia Police Dept., 812 F.2d 105, 111-12 (3rd Cir. 1987); Adams v. James, 784 F.2d 1077, 1079-80 (11th Cir. 1986); Libertarian Party of Indiana v. Packard, 741 F.2d 981, 988-89 (7th Cir. 1984).

government be allowed to do so indirectly by granting a government benefit only upon the waiver of a constitutional right?

This Article examines this question in the context of the first amendment freedom of speech. Part I briefly surveys the origins and evolutions of the doctrine. Part I also describes modern efforts to develop a test for analyzing the constitutionality of governmental conditions, and then argues that these efforts should be interwoven to create a new four-part test. This test confronts the two central justifications for treating indirect conditions as theoretically distinct from direct prohibitions. Namely, that the condition is closely related to the program to which it is attached, and that participation in the program is voluntary. This test provides the courts with a structured framework for determining whether either of these two justifications are present in a given situation. Part II applies this four-part test to the Federal Election Campaign Act, which conditions a presidential candidate's receipt of federal campaign monies upon the waiver of his first amendment right to expend privately raised funds. Part III uses the test to explore the extent to which the government may extract waivers of first amendment rights from public employees. The implications of the analysis in Parts II and III are of particular significance since Congress is now contemplating substantial revisions in the laws regulating the first amendment interests of political candidates and government employees.[7]

I. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

At first glance, the doctrine of unconstitutional conditions[8]

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7. S. 2, 100th Cong., 1st Sess. § 2, 133 CONG. REC. S109-13 (daily ed. Jan. 6, 1987)(Bill to amend Federal Election Campaign Act); H.R. 3400, 100th Cong., 1st Sess., 133 CONG. REC. H10045-47 (daily ed. Nov. 17, 1987)(Federal Employees' Political Activities Act of 1987, designed to amend the Hatch Act and allow civilian employees the right to participate in the political process. The Bill passed by a vote of 305 to 112 in the House of Representatives.).

8. The doctrine of unconstitutional conditions has been studied by a number of commentators. *See*, French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Hale, *supra* note 4; Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 UCLA L. REV. 751 (1969); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977 (1986); Comment, *New Life for the Doctrine of Un-*

appears to exist in two forms.[9] One version of the doctrine states that the government may *never* grant a privilege subject to the condition that the recipient not exercise a constitutional right.[10] Placing such pressure upon constitutional rights is absolutely prohibited under this version of the doctrine. The other version of the doctrine states that the government may only condition a government benefit on an individual's abstention from exercising a constitutional right when "the state presents compelling state interests"[11] for doing so.[12] The doctrine's historical development helps to explain these different views.

A. History of the Doctrine

1. Pre-doctrine: The Greater Power to Deny a Benefit Implies a Lesser Power to Attach a Condition

The earliest disputes that gave rise to the doctrine of unconstitutional conditions involved conditions imposed by state governments. In the late nineteenth century, state courts broadly construed the state governments' power to pursue their own policies despite apparent conflicts with the U.S. Constitution.[13] One of the most famous of these state court decisions is *McAuliffe v. Mayor of New Bedford*.[14] This case involved a policeman who had been fired for discussing politics, an activity prohibited by police regulations. Writing for the Massachusetts Supreme Judicial Court, Oliver Wendell Holmes responded rhetorically, if not substantively: "The petitioner may have a constitutional right to talk

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constitutional Conditions?, 58 WASH. L. REV. 679 (1983).

9. Westen, *supra* note 8, at 979.

10. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 359 n.13 (1976); Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 510 (1978)("government may not condition the receipt of its benefits upon the nonassertion of constitutional rights even if receipt of such benefits is in all other respects a 'mere privilege' "); Hale, *supra* note 4, at 321 ("a condition attached by a state to a privilege is unconstitutional if it requires the relinquishment of [a] constitutional right"); Comment, *supra* note 8, at 680 ("The doctrine of unconstitutional conditions prevents the government from conditioning the grant of a benefit upon the waiver of a constitutional right.").

11. Westen, *supra* note 8, at 980.

12. *See* Branti v. Finkel, 445 U.S. 507, 515-16 (1980)(The state may condition the privilege on the waiver of a constitutional right if it has "an overriding interest of 'vital importance' in doing so." (citation omitted)).

13. *See, e.g.*, Doyle v. Continental Ins. Co., 94 U.S. 535 (1876); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

14. *McAuliffe*, 155 Mass. at 216, 29 N.E. at 517.

politics, but he has no constitutional right to be a policeman."[15] Underlying his argument was the notion that if the government had the power to completely deny a benefit, it also had the power to place limits upon its availability. This power included the right to grant the benefit only to persons willing to relinquish their first amendment freedoms. What Holmes' argument ignores is the fact that this allows enormous pressure to be placed on the exercise of constitutional rights.[16] Substantial criticism has been levied against this greater-includes-the-lesser argument,[17] but the *McAuliffe* case and its theory still casts its shadow upon the doctrine of unconstitutional conditions. In fact, on occasion, the Supreme Court has continued to fall prey to the rhetorical allure of the greater-includes-the-lesser argument.[18]

2. The Development of the Doctrine

Federal courts first began to develop the doctrine of unconstitutional conditions in order to restrain state attempts to deny certain benefits to out-of-state corporations.[19] Such states relied upon the "greater-includes-the-lesser" theory and argued that because they possessed the "greater" right to exclude foreign corporations, they also possessed the "lesser" right to admit such corporations only upon certain terms.[20] In *Terral v. Burke Construction Co.*,[21] the Supreme Court rejected this theory and held that a state could

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15. *Id.* at 220, 29 N.E. at 517.

16. Under a greater-includes-the-lesser rationale, the government, because it possesses the right to eliminate all welfare programs, could grant benefits subject to the condition that the recipient convert to Catholicism. While all non-Catholics are denied benefits under either approach, there is still enormous pressure being placed on their constitutional right to practice the religious faith of their choice.

17. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). For an extensive criticism of the greater-includes-the-lesser rationale set forth by Holmes in *McAuliffe v. Mayor of New Bedford*, *see* Kreimer, *supra* note 8, at 1304-14.

18. *See, e.g.*, Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (the greater power to ban gambling includes the lesser power to condition a gambling permit on surrender of some first amendment rights); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 765-67 (1982)(Court holds that because the federal government may pre-empt state utilities regulation, it may also impose federal requirements; but Justice O'Connor's dissent branded the greater-includes-the-lesser argument as absurd because it would allow for the dissolution of all constitutional limits on the federal regulation of state action).

19. *See* Comment, *supra* note 8, at 680.

20. *See* Davis v. Massachusetts, 167 U.S. 43, 48 (1897); Doyle v. Continental Ins. Co., 94 U.S. 535, 541 (1876).

21. 257 U.S. 529 (1922).

not condition the presence of out-of-state corporations upon the waiver of their right to litigate in federal court.

A majority of the Supreme Court finally embraced the doctrine of unconstitutional conditions in 1926 in *Frost & Frost Trucking Co. v. Railroad Commission.*[22] Thirty-four years after the Massachusetts Supreme Court decided *McAuliffe*,[23] the United States Supreme Court held that a state, with undisputed power to prohibit the use of its public highways in proper cases, could not require a private trucker to become a common carrier as a condition of using its highways. The Court doubted that the state could indirectly compel a private trucker to become a common carrier given that, under the Constitution, it could not do so directly.[24] Thus, the Court concluded:

> [The state] may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties [sic] embedded in the Constitution of the United States may thus be manipulated out of existence.[25]

As the power of the states to exclude out-of-state corporations was reduced,[26] the doctrine of unconstitutional conditions lost much of its usefulness in restricting state governmental activity.[27] The doctrine was reinvigorated, however, after World War II, as the courts increased their scrutiny of federal restrictions on free speech and other civil rights.[28] Thus, as the doctrine had been used at the turn of the twentieth century to restrain state efforts to condition benefits upon the waiver of constitutional rights, during the 1950's the doctrine was used to check the federal govern-

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22. 271 U.S. 583, 594 (1926).

23. 155 Mass. 216, 29 N.E. 517 (1892). *See supra* notes 13-16 and accompanying text.

24. *Frost*, 271 U.S. at 594.

25. *Id.*

26. *Compare* Ducat v. Chicago, 77 U.S. (10 Wall.) 410 (1871)(Court upheld a discriminatory state tax on the grounds that the state could exclude the corporation outright) *with* Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 667-68 (1981)(states may not freely exclude out-of-state corporations). The state's freedom with regard to its regulation of industry has been sharply reduced with the expansion of the Commerce Clause.

27. Comment, *supra* note 8, at 681-82.

28. *Id.* at 682. The Court's sensitivity to the constitutional questions posed by loyalty oaths was first evidenced in American Communication Ass'n v. Douds, 339 U.S. 382 (1950), where Justice Frankfurter argued that the National Labor Relations Act, which required a loyalty oath from union leaders, was unconstitutional. *Id.* at 419-22.

ment's preoccupation with imposing loyalty oaths and similar first amendment restrictions on public employees and benefits.[29]

3. The Present Status of the Doctrine

Despite the more recent evolution of equal protection analysis, the Supreme Court has "continued to use the doctrine of unconstitutional conditions"[30] as a check on governmental efforts to condition public employment on the waiver of first amendment freedoms.[31] As the Third Circuit has recently noted, "the Supreme Court has repeatedly stated that generally, a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[32] In *Branti v. Finkel*,[33] for example, the Supreme Court disallowed the government's efforts to dismiss an employee because of his political affiliation on the ground that to do so would impose an "unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry v. Sindermann*."[34] In *Perry*,[35] the court held:

> [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. For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly" [quoting *Speiser v. Randall*][36]. Such interference with constitutional rights is impermissible.[37]

These cases illustrate the Court's recognition of the danger in

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29. *See* Willcox, *Invasions of the First Amendment through Conditioned Public Spending*, 41 CORNELL L.Q. 12, 30-44 (1955)(surveying cases where the Supreme Court was called upon to assess the constitutionality of such conditions).

30. Comment, *supra* note 8, at 686 n.43.

31. *See generally*, Rankin v. McPherson, 107 S. Ct. 2891, 2896 (1987)(held that a public employee could not be discharged for exercising her right to free speech under the first amendment); Connick v. Myers, 461 U.S. 138, 142 (1983)(Court states that public employment cannot be conditioned on the waiver of first amendment rights).

32. Fraternal Order of Police v. City of Philadelphia Police Dept., 812 F.2d 105, 112 (3rd Cir. 1987).

33. 445 U.S. 507 (1980).

34. *Id.* at 514.

35. 408 U.S. 593 (1972).

36. 357 U.S. 513, 526 (1958).

37. *Perry*, 408 U.S. at 597.

permitting the government to grant benefits subject to the condition that the recipient give up his first amendment rights. In these cases the conditions were struck down, but not every condition attached to a governmental program is unconstitutional. Because virtually every government activity could be characterized as a benefit and virtually every requirement related to that government offering arguably infringes upon a constitutional right, an absolute rule that all conditions are unconstitutional would mean that even reasonable, properly motivated requirements which are essential to a government program would not be permitted.

The difficulty with the doctrine of unconstitutional conditions to date, therefore, has been the lack of a consistent framework for determining which conditions are permissible and which are not. In the past courts have reached a result by engaging in a balancing of the government and the employee interests.[38] In *Connick v. Myers*,[39] the Supreme Court described its "task" in the same terms it had used in *Pickering v. Board of Education*,[40] that being: To seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[41] Courts continue to use such a balancing analysis today,[42] despite its weaknesses and lack of protection for first amendment rights.[43]

B. Past Approaches to the Doctrine

The tension between the absolute prohibitions of *Frost*[44] and the rhetorical power of the greater-includes-the-lesser argument in *McAuliffe*[45] has produced not only the balancing analysis used by courts, but also numerous efforts by commentators to develop a

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38. *See, e.g.*, Rankin v. McPherson, 107 S. Ct. 2891, 2896 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Fraternal Order of Police v. City of Philadelphia Police Dept., 812 F.2d 105 (3d Cir. 1987)("when a condition of employment impinges on first amendment interests, the [Supreme] Court has undertaken to balance the employee and state interests.").

39. 461 U.S. 138, 142 (1983).

40. 391 U.S. 563 (1968).

41. *Id.* at 568.

42. *See Rankin*, 107 S. Ct. at 2896; *Fraternal Order of Police*, 812 F.2d at 112-20.

43. *See infra* notes 75-95 and accompanying text.

44. 271 U.S. 583 (1926). *See supra* note 25 and accompanying text.

45. 155 Mass. 216, 29 N.E. 517 (1892). *See supra* notes 13-16 and accompanying text.

framework for distinguishing those benefits which are selectively granted and do not infringe constitutional rights from those provisions which lead to a denial of benefits and do infringe constitutional rights. Three of the more significant frameworks are summarized below. Each offers a means by which to make a determination of the condition's validity. The frameworks also provide important insights into the problems raised by conditioning benefits on the waiver of constitutional rights.

1. Germaneness of the Condition

The first framework posits that for the conditional surrender of a constitutional right to be acceptable, there must be a substantial relationship between the forfeiture of the individual's right, as required by the condition, and the asserted governmental interest in imposing the condition. Indeed, in many commentators' analyses of the doctrine, "there is a consistent perception that a condition that is unrelated to the benefit is worse than a condition that is germane."[46] The Supreme Court has also been attracted to the need for germaneness. In *American Communications Association v. Douds*,[47] Justice Frankfurter wrote in his concurrence that "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot . . . exact surrender of freedoms unrelated to the purpose of the facilities."[48]

Underlying this concern with germaneness is the belief that conditions unrelated to the attendant benefit were attached for illegitimate purposes. It certainly remains debatable, however, whether a condition must relate to government policy interests in the affected program or merely relate to some government interest at large.[49] Arguably, the condition is valid if it furthers any legitimate government policy, even if that policy is distinct from the specific government benefit or privilege to which it is attached. The Supreme Court's decision in *Brown v. Glines*[50] supports this

46. Kreimer, *supra* note 8, at 1350.

47. 339 U.S. 382 (1950).

48. *Id.* at 417.

49. It could be argued that if the condition which is germane to some government interest is attached to an unrelated program, then there should be concern that the government is singling out this program to penalize its beneficiaries. This problem may be especially acute where the condition is attached to the program as a legislative rider. In those instances, it is conceivable that the rider enjoys little congressional support and was passed not on its own merits but because of support for the bill to which it was attached.

50. 444 U.S. 348 (1980).

argument. In *Brown*, the Court upheld a regulation which "[furthered] a substantial government interest unrelated to the suppression of free speech."[51] Thus, if the condition is related to some legitimate policy, the government cannot be as easily accused of pursuing an otherwise illegitimate restriction of constitutional freedoms.[52] On the other hand, a condition which furthers no legitimate government policy is much more vulnerable to challenge.

2. Offer/Threat Framework

The second framework seeks to distinguish beneficial offers from threats. Under this framework, the government may not make an offer that, in fact, leaves the recipient of the offer worse off than had the offer not been made. This framework asks whether the condition placed on the benefit is of the "your money or your life" variety.[53] Such an offer does not increase the recipient's utility level, but is more analogous to a threat or coercive offer. In *Thomas v. Review Board*,[54] for example, the Supreme Court found coercion, where the government pressured an employee's free exercise of religion.[55] Similarly, in *Sherbert v. Verner*,[56] the Supreme Court invalidated restrictions on unemployment compensation that denied benefits to an applicant who refused to work for religious reasons on Saturdays. The Court stated that, "[t]he pressure upon her to forego that practice [of religion] is unmistakable."[57]

The rationale underlying the distinction between offers and threats is that an individual cannot complain when he is offered a government benefit, subject to an attached condition, if he is not made worse off by the offer, and he is free to refuse it. If the individual wishes to waive a constitutional right as the price for a government benefit, then she is not in a position to complain be-

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51. *Id.* at 354.

52. Perhaps it could be argued that the requirement of germaneness is aimed at assuring that Congress properly deliberates the issues in a public forum. This argument is premised on concern that there be notice to affected persons. This position is undermined, however, by the fact that legislative riders are generally permissible.

53. Easterbrook, *Insider Trading, Secret Agents, and the Protection of Information*, 1981 SUP. CT. REV. 309, 348.

54. 450 U.S. 707 (1981).

55. *Id.* at 717-18.

56. 374 U.S. 398 (1963).

57. *Id.* at 404.

cause she could have walked away from the deal.[58] She is not suffering an unconstitutional threat, but instead, is receiving a value-enhancing offer. If the individual is not totally free to reject the offer, however, this line of reasoning breaks down. An offer which cannot be freely rejected may be coercive, and the individual may prefer that such an offer never be made.

Like the framework of germaneness, this offer/threat framework is insufficient for determining a condition's constitutionality for at least two reasons. One problem is that it is underinclusive. While it identifies certain conditions which clearly infringe upon constitutional rights, other conditions, that should be struck down as unconstitutional, would survive this framework because they can be characterized as constituting an offer rather than a threat. An example demonstrates this point. Assume that the government decides to make grants of money available to persons who are poor, as defined by a need-based test. Assume further that the government decides to condition the grant on the recipient's waiver of her first amendment right to speak favorably of Republican political candidates. Under the offer/threat framework, this condition would be constitutional since the individual is free to refuse the "offer" and preserve her first amendment rights.

A second problem with the offer/threat framework is that it fails to consider the possibility that at some point an individual's freedom to alienate certain rights should be limited because of the structural benefits of certain freedoms. This analysis is especially important in the context of waivers of first amendment rights because of the systemic benefits or externalities that result from the free flow of information.

3. A Tri-Baseline Analysis

A third and newer framework for analyzing the validity of conditions which affect the exercise of constitutional rights is the tri-baseline analysis developed by Professor Seth Kreimer.[59] This analysis considers how three different categories of societal norms relate to the conditioned benefit.

The first baseline examines the status quo and asks whether the conditioning of the benefit constricts the realm of choices pre-

58. This argument is especially popular with devotees of the law and economics school of thought. *See, e.g.*, Easterbrook, *supra* note 53.

59. Kreimer, *supra* note 8, at 1351-72.

viously available. This concern with a change in the status quo reflects the view that "losing a benefit previously provided seems different from simply never having been provided the benefit in the first place."[60] This baseline can be analogized to legal principles found in the context of administrative law, where courts have held that a change in an administrative agency's policies or practices requires special justifications, unlike those needed when the agency first develops a policy.[61] Changing the legal rules can, just as in *ex post facto* cases, "creat[e] potentially harsh and inequitable defeat of expectations generated by pre-existing law."[62]

This status quo baseline is not without its limitations, as even its founder has acknowledged.[63] The baseline is limited because there may be difficulties in defining the status quo, it affords little protection to individuals when new benefits are encumbered by a condition requiring the waiver of a constitutional right, and the government's ability to change pre-existing programs may be hindered.[64]

The second baseline in Kreimer's analysis is an "equality" baseline which measures the treatment of all individuals in order to find a statistical norm.[65] This statistical norm is then used to determine whether those who are denied benefits are being penalized because they have chosen to exercise their constitutional rights. The more a government "singles out for exclusion from otherwise available benefits those who exercise a particular right, the more that choice appears to penalize that exercise."[66] Likewise, a government program which restricts some but not all groups exercising a particular right is arguably a selective grant of a benefit rather then a penalty for exercising that right.

This insight helps to explain the decision in *Regan v. Taxation with Representation*,[67] in which the Court upheld a statute granting a tax exemption to veterans' organizations that lobby, while denying such an exemption to other non-profit organiza-

60. *Id.* at 1359.

61. *See, e.g.*, Contractors Transp. Corp. v. United States, 537 F.2d 1160 (4th Cir. 1976); Brennan v. Giles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974).

62. S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 421 (2d ed. 1985).

63. Kreimer, *supra* note 8, at 1362-63.

64. *Id.*

65. *Id.* at 1363.

66. *Id.* at 1367.

67. 461 U.S. 540 (1983).

tions. The statute was viewed as conferring a benefit on veterans' organizations rather than as inflicting a penalty on other organizations for exercising their first amendment rights. Once the government's interests are recognized as providing a financial reward to those who have fought for the nation's security, it becomes clear that other lobbying organizations are not being penalized, but rather, the veterans are receiving a deserved benefit.

The equality baseline, however, is not flawless. Statistical norms are inherently imprecise and difficult to calculate. The disparate treatment of minor and major political parties by the Federal Election Campaign Act illustrates this difficulty. The Act provides twenty million dollars to only the two major parties,[68] and thus the question becomes whether the "statistical norm" is to receive funds or not to receive funds. It could be argued that the norm is the denial of public funds, since only the two main parties receive the large subsidy. Thus, the Republican and Democratic parties are being singled out for a bonus. On the other hand, given that the majority of the population belongs to one of the two major parties, it is difficult to view the minor parties as the statistical norm. From this view, the denial of funding to smaller parties assumes the character of a penalty.

The third component in Kreimer's tri-baseline analysis is a "prediction" analysis which questions whether the government would provide the benefit if it could not impose the condition.[69] If the government would provide the benefit even if it could not attach the condition, then it appears more likely that the government is "exploiting the particular need of the recipient rather than advancing a public interest."[70] Thus, a government that would provide the benefit with or without the attached condition, but chooses to attach the condition, can be presumed to have done so not for the purpose of furthering the government's interests in providing the benefit but for the purpose of pressuring the recipient's exercise of his constitutional rights. This analysis is similar to the germaneness analysis[71] in that it seeks to discover conditions with illegitimate purposes behind them by considering the nature of the attached program. This "prediction" analysis goes beyond the ger-

68. 2 U.S.C. § 441a(b)(1)(B) (1986). "Major" political parties are defined in 26 U.S.C. § 9002(6) (1986).

69. Kreimer, *supra* note 8, at 1372.

70. *Id.* at 1373.

71. *See supra* notes 46-52 and accompanying text.

maneness analysis, however, because it also focuses on the extent to which the condition furthers the government interests, how much the government values the condition, and the possibility that the government has alternatives other than imposition of the condition which may be less intrusive upon first amendment interests.

Governmental attempts to pressure the exercise of a constitutional right, even if somewhat germane to a legitimate government interest, are suspect unless the condition is so important that the government would rather not provide the benefit at all than provide it without the attached condition.[72] Given the importance of constitutional rights, the government should not be allowed to pressure the right unless the condition furthers significant interests. One measure of the intensity of the government's interests is whether the government feels strongly enough about the condition that it would eliminate the benefit in its entirety if it could not attach such a condition.

Like the other baselines and frameworks, the "prediction" baseline has its weaknesses.[73] One such weakness is its failure to acknowledge that government programs and benefits differ in their degree of importance. As a result, it may not always be easy to draw inferences from the conclusion that the government would or would not provide the benefit without the attached condition. For example, if it can be predicted that the government would discontinue a very important program rather than provide it without the attached condition, then arguably the condition is necessary and legitimate. If the program is not so significant, however, there is less reason to assume that the condition is especially necessary, and courts should be less concerned by the proposition that the government might abandon the program if it cannot attach the condition.

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72. Kreimer sees this governmental advantage in imposing such conditions in more economic terms:

> This baseline has the happy property of forcing the government to pay fair measure for the forfeiture of rights. It cannot purchase rights by granting benefits that the victim would receive anyhow. One of the dangers of allocative sanctions arises from the fact that, while the government must expend resources to find the victims of penal sanctions, a recipient of benefits seeks out the government. In a case in which the government would offer the benefits in the usual course of events, the additional coercive power implicit in a condition is essentially free.

Kreimer, *supra* note 8, at 1372-73.

73. "[T]his baseline gets the courts into the risky business of predicting what the government would do, and the court's normative vision of the public interest will inevitably intrude." *Id.* at 1373.

On the whole, the tri-baseline framework offers important insights into the problems raised by conditions that require the waiver of a constitutional right. The framework's central weakness is its underinclusiveness. A condition requiring the waiver of a constitutional right, that is attached to a very small, insignificant, new government program, would likely survive the tri-baseline analysis despite furthering no legitimate government interests. Because such a program is new, the status quo baseline would probably not act to prohibit the condition. Also, it is possible that the government may abandon the program if the condition is struck down, especially when it is a small program. This would prevent the condition from being suspected under the "prediction" baseline. Finally, it is conceivable that the few beneficiaries of the program may be characterized as being the recipients of a selective benefit, which would prevent the equality baseline from signaling a problem. Even if that were not the case, however, the baselines point two to one in favor of the condition being constitutional, even though no government interests are served.[74] Thus, it appears that the baselines should be modified to minimize their limitations, increase their precision, and enhance their insights.

C. Towards a New Framework

As the above analysis reveals, each framework has its flaws. While they each identify certain categories of conditions that should be invalidated, no one question or approach consistently resolves the issues raised by conditions requiring the waiver of constitutional rights. Nevertheless, each of them identifies important issues and generates important insights into the doctrine of unconstitutional conditions.

Because of the difficulties in formulating a framework for consistently evaluating the validity of conditions which require the waiver of a constitutional right, a variety of balancing or reasonableness tests have been advocated.[75] Indeed, the Supreme Court has on occasion pursued such an approach.[76]

In *Slochower v. Board of Education*,[77] the Court formulated the following reasonableness test: "To state that a person does not

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74. This example shows that the tri-baseline analysis does not accurately distinguish offers from threats in all cases. *See id.* at 1352-59.

75. *Id.* at 1347-51.

76. *See supra* note 38 and accompanying text.

77. 350 U.S. 551 (1976).

possess a constitutional right to government employment [or other valuable government benefit] is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."[78] An even more general, less restrictive approach can be found in *Watson v. Employers Liability Assurance Corp.*,[79] where Justice Frankfurter argued that the reasonableness of the condition should be judged by applying the test to "all relevant factors."[80] The difficulty with this approach, however, is that a mere balancing of interests affords little protection to individuals from intrusion on their constitutional rights.[81]

This argument against the balancing of interests test is not new. A commentator has stated that "the *Pickering* balancing doctrine . . . [has] inadequately protected public employees' right to free speech [since the courts] have neglected to explicate employees' interests in expression."[82] The voice of criticism has also been heard in the Supreme Court. Justice Douglas made the point vigorously in his dissent in *United States Civil Service Commission v. National Association of Letter Carriers*.[83] In that case a majority of the Court upheld the Hatch Act's wide-ranging limitations on the political activities of government employees by using a balancing analysis.[84] Justice Douglas argued, however, that what an employee does on his own time is beyond the scope of government regulation unless what he does impairs his efficiency or other facets of the merits of his job.[85] Conditions may not be attached that infringe upon the employee's interests in freedom of speech.[86]

The difficulties presented by the use of an ambiguous balancing test were also evident in *Connick v. Myers*.[87] In that case, an employee in a district attorney's office was fired for distributing a

78. *Id.* at 555.

79. 348 U.S. 66 (1954).

80. *Id.* at 82.

81. *See* Barenblatt v. United States, 360 U.S. 109, 137-46 (1959)(Black, J., dissenting) ("I do not agree that law directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process"). *See also* Frantz, *Is the First Amendment Law? — A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

82. Note, *Developments in the Law - Public Employment*, 97 HARV. L. REV. 1611, 1757 (1984).

83. 413 U.S. 548, 595-600 (1973) (Douglas J., dissenting).

84. 413 U.S. at 564-68.

85. *Id.* at 597 (Douglas, J., dissenting).

86. *Id.* (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

87. 461 U.S. 138 (1983).

questionnaire to her fellow assistant district attorneys which sought information concerning office performance and employee morale. The questionnaire also asked "whether the Assistants felt pressured to work in political campaigns on behalf of office-supported candidates."[88] The Court found the dismissal constitutional, despite the fact that there had been no showing of "any evidence to indicate that the [employee's] work performance was adversely affected by her expression,"[89] and even though at least one question posed in the questionnaire was found to "touch upon a matter of public concern."[90] In a sharply critical dissent, Justice Brennan accused the majority of misapplying the *Pickering* balancing test in holding that Myers could be dismissed even though the questionnaire was of public interest.[91] Furthermore, Brennan argued that the majority distorted the balancing analysis by double-counting the government's interest.[92]

Allowing the dismissal of an employee who would provide the public with valuable information about the efficiency and political pressures of a district attorney's office would certainly seem to threaten her first amendment rights. "[T]here is practically universal agreement that a major purpose of that amendment [is] to protect the free discussion of government affairs."[93] This includes the "manner in which government is operated or should be operated."[94] The potential for the chilling of free speech is enormous. As the Court has observed before, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech."[95]

This lack of protection for individuals' constitutional rights can, however, be remedied.[96] What is needed is a framework which recognizes that constitutional rights are not to be cavalierly pressured. Indeed, the factors and issues that must be considered have all been raised by the three frameworks discussed earlier. The major difficulty with each of those frameworks, however, was their underinclusiveness.

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88. Myers v. Connick, 507 F. Supp. 752, 758 (E.D. La. 1981).

89. *Id.* at 759.

90. *Connick*, 461 U.S. at 149.

91. *Id.* at 158 (Brennan, J., dissenting).

92. *Id.* at 157-58.

93. Mills v. Alabama, 384 U.S. 214, 218 (1966).

94. *Id.*

95. Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).

96. For an analysis of how *Connick* would fare under the new framework, see *infra* notes 260-76 and accompanying text.

Before describing the new framework, it is important to emphasize what is at stake in such an analysis. Cases involving unconstitutional conditions raise one fundamental question: Since the government cannot directly limit an individual's first amendment interests, absent compelling reasons, why should the government be allowed to do so indirectly by conditioning a government benefit on the waiver of that constitutional right? If the government could enforce the limitation in its own right, without reference to a government benefit, then attaching it to a benefit does not raise the question of the unconstitutional conditions doctrine. Thus, in cases involving conditions placed upon a government benefit, the first question is whether the government could directly limit the exercise of such rights by individuals not involved with the government program. This Article examines two areas within the context of the first amendment where it is clear that the government cannot directly limit its exercise: presidential candidates may not be prohibited from spending unlimited funds, and citizens cannot be prohibited from contributing to the debate on matters of public interest. The question that arises, then, is whether the government can bring about the same result indirectly by denying public funding or government employment to candidates and employees who refuse to waive their constitutional rights.

There are at least two situations in which the indirect denial of a constitutional right may be acceptable, even though a direct prohibition would be unacceptable.[97] First, the condition may be an important part of the government program to which it is attached, such that it would be difficult to implement the program without it. Second, participation in the program and the acceptance of the waiver condition may be completely voluntary. Such a waiver may indeed be significantly different from a direct prohibition which is compulsory. The role, then, of a framework for analyzing unconstitutional conditions is to explore the relationship between the condition and the program to which it is attached, as well as the extent to which participation in the program is voluntary. If the program is not voluntary, or if the conditions are not sufficiently related to the attached program, then the waiver requirement should be analyzed by the courts no differently than a direct prohibition of the exercise of a constitutional right.

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97. A third reason that has been cited is the greater-includes-the-lesser rationale. This, however, has been shown to be an unprincipled and substantively hollow justification. *See supra* notes 13-25 and accompanying text.

The new framework should examine the presence of these justifications while minimizing the difficulties seen in the earlier frameworks. The framework proposed by this Article is such a framework. It consists of four inquiries, three of which examine the relationship between the condition and the program, and a fourth which considers whether participation in the program is truly voluntary. The first inquiry asks whether the condition is germane to the attached program. If the condition which requires the waiver of a constitutional right is unrelated to the program, then there is no reason why the required waiver of the constitutional right should be constitutional, because it is attached to a government program, when it would be unconstitutional otherwise.

The second inquiry explores whether the government's condition treats people situated similarly, with respect to the government's interests, in a similar fashion. This inquiry foregoes Kreimer's interest in making a quantitative determination of the statistical norm, and instead, focuses upon whether the purpose behind the condition is fulfilled when it is applied to particular individuals. This inquiry essentially asks whether the government interest in conditioning the benefit is tailored as narrowly as possible, so that it affects only those persons which it must affect to fulfill the government interests. If an individual's exercise of his or her first amendment rights does not threaten legitimate government interests, then there is no reason to extract a waiver of those rights from such individuals as a condition to providing the government benefit.

The third inquiry explores the necessity for and the extent of the government interests in attaching the waiver condition to the government benefit. The less significant the need for requiring the waiver of a constitutional right as a condition to the program, the stronger the argument that courts should analyze such a condition in the same fashion as they would analyze a direct prohibition.

The first three inquiries analyze the relationship between the condition and the attached program. The fourth and final inquiry in the framework explores whether participation in the program, which requires the waiver of a constitutional right, is completely voluntary. If there is pressure to participate in the program, and thus pressure to waive constitutional rights, then the waiver condition is not so different from a direct prohibition and it should be analyzed as such. This inquiry is not significant if the first three inquiries show the condition to be unrelated to a legitimate gov-

ernment interest. In that instance, there is no reason why the voluntariness of the waiver should save it from constitutional attack. This inquiry is important when the condition passes the first three inquiries, but participation is then found to be less than completely voluntary.

Under this four-part approach, a condition would be unconstitutional if 1) it was not germane to a legitimate government interest, 2) it treated similarly situated people differently, 3) it was not a significant part of the benefit program, or 4) participation in the program was compelled. A condition should be found unconstitutional in this event, since the individual's constitutional rights have been infringed, and neither of the justifications for permitting such indirect infringement is present.

This new four-part framework provides specific and necessary guidance for the courts when confronted with conditions which require the relinquishment of constitutional rights. Even though the four inquiries may not always yield easy or certain answers, they do assure that the courts are analyzing the relevant issues. Rather than engaging in unstructured balancing, with this framework the courts can analyze the conditions in a systematic and consistent fashion,[98] which will enable them to avoid the difficulties evidenced by *Connick*[99] and to bypass the tempting rhetoric of the greater-includes-the-lesser argument.[100]

D. Applying the Framework

Two interesting situations involving the first amendment will be examined with this new four-part framework.[101] The first situation to be analyzed involves the requirement that presidential candidates waive their first amendment rights as a condition to the receipt of campaign subsidies.[102] This subject is of special interest because it involves the core political values of the first amend-

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98. Kreimer perceived a similar advantage with his tri-baseline framework. Kreimer, *supra* note 8, at 1378.

99. Connick v. Myers, 461 U.S. 138 (1983). *See supra* notes 87-92 and accompanying text.

100. One court has observed that " 'the greater power includes the lesser' is the traditional antagonist of the 'unconstitutional conditions' principle." Serpas v. Schmidt, 827 F.2d 23, 39 (7th Cir. 1987). *See also supra* note 18 and accompanying text.

101. While this framework may well offer important insights into conditions involving the waiver of other constitutional rights, that is a subject beyond the scope of this Article.

102. *See infra* notes 106-202 and accompanying text.

ment. Furthermore, it comes at a time when Congress is considering legislation which would expand the scope of the statute to include candidates for the U.S. Senate, as well as add additional restrictions for candidates already subject to the Act. The second situation to be analyzed involves the conditioning of public employment on the employees' waiver of their first amendment rights, a condition which in the past has resulted in the courts' unstructured balancing tests.[103]

This Article only explores examples of conditions which restrict first amendment rights. There are several reasons for this limited focus. First, the government's motivations for attaching conditions that restrict the flow of speech are often more suspect than those relating to conditions affecting other constitutional rights. Government officials have a strong incentive to reduce the flow of critical speech capable of destroying their political popularity. Furthermore, even those persons in power who are *not* subject to political pressure may prefer an environment in which their policies are not open to regular challenge. Additionally, the first amendment, perhaps more than any other amendment, serves systemic interests beyond those realized by the individual who is exercising the constitutional right. As stated by the Supreme Court, the first amendment's protection of "speech concerning public affairs is more than self-expression; it is the essence of self-government."[104] Thus, an individual's waiver of first amendment rights implicates concerns that may not be protected by the individual who is considering whether to waive them. This fact strenghens the argument for special judicial scrutiny. Also, conditions which require the waiver of first amendment rights may frequently be more difficult for courts to resolve because of the ease with which the government can assert that the condition furthers a legitimate government interest. Indeed, it is in the context of first amendment conditions that the Supreme Court has often struggled in its analysis.[105] Finally, the Court's predilection for a balancing analysis in the case of first amendment conditions is particularly at odds with the traditional strict scrutiny review employed when the government restricts first amendment rights. For these reasons, first amendment conditions are of special concern.

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103. *See supra* notes 38-43 and accompanying text.

104. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). *See also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT, 255-56 (1948).

105. *See, e.g.*, cases cited *supra* note 38.

II. THE FEDERAL ELECTION CAMPAIGN ACT ANALYZED

The Federal Election Campaign Act[106] and its subsequent amendments of 1974[107] provide for the public financing of presidential political campaigns.[108] Before any candidate is allocated money, however, he or she must agree to waive his or her first amendment right to raise and expend unlimited private funds.[109]

Challenges to the constitutionality of various provisions of the Act are nothing new. In the 1976 case of *Buckley v. Valeo*,[110] the Supreme Court held that the Act's campaign expenditure ceilings violated the first amendment. "[R]estrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their expression, and the size of the audience reached."[111] The Court, however, determined that restrictions on the size of individual contributions[112] were constitutional.[113] Despite the expansive nature

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106. Pub. L. No. 92-178, 85 Stat. 562 (1971)(codified as amended at 2 U.S.C. §§ 431-456 (1986)).

107. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

108. Money is allocated to presidential candidates according to the level of support enjoyed by their political party in the previous presidential election. The political parties are then categorized as major, minor, or new parties. Major political parties are those which received more than 25% of the vote in the preceding presidential election. 26 U.S.C. § 9002(b) (1986). They are eligible for subsidies of $20 million, which is adjusted to account for inflation. 2 U.S.C. § 441a(b)(1)(B) (1986); 2 U.S.C. § 441a(c)(1) (1986). In 1984, this adjusted amount was $29.4 million. To receive the funds the major party candidates must forego all private contributions and agree to limit total expenditures to the amount of subsidy. 26 U.S.C. § 9003(b)(1) (1986). Minor parties are those which received more than 5% but less than 25% of the vote in the preceding presidential election. 26 U.S.C. § 9001(7) (1986). They are entitled to subsidies proportional to their share of the vote in the preceding or current election, whichever was higher. 26 U.S.C. § 9004(a)(2)(A) (1986). Finally, there are the "new" parties which constitute all parties which received less than 5% of the vote in the current election. 26 U.S.C. § 9004(a)(3) (1986). They are eligible for subsidies only if they receive more than 5% of the vote in the current election. Candidates of minor or new parties who accept subsidies are permitted to supplement the public funds with private contributions, as long as their total expenditures do not exceed the amount of the major party subsidy.

109. The statute states:

> In order to be eligible to receive any payments . . . the candidates . . . shall certify to the [Federal Election] Commission under penalty of perjury, that (1) [they] will not incur qualified campaign expenses in excess of the aggregate payments . . . and (2) no contributions to defray qualified campaign expenses have been or will be accepted . . . .

26 U.S.C. § 9003(b) (1986).

110. 424 U.S. 1 (1976).

111. *Id.* at 19.

112. 2 U.S.C. § 441a(a)(1)(A) (1986) limits individual contributions to $1,000.

113. *Buckley*, 424 U.S. at 41.

of the per curiam opinion,[114] the Court devoted only a footnote[115] to the issues raised by the requirement that candidates waive their right to unlimited expenditures as a condition to the receipt of funds under the Act.

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.[116]

The doctrine of unconstitutional conditions was not mentioned by the Court nor was it argued by the parties. The reason for this was not that the doctrine was dead,[117] but that the limitation on spending by presidential candidates which was at issue applied to all candidates, whether or not they received federal money. Thus, in *Buckley* the Court was asked to assess the constitutionality of the absolute expenditure limit which applied to all candidates, not the limit imposed as a condition on the recipients of public financing.[118]

Four years later, in 1980, a federal district court dealt more directly with the constitutional questions raised by the requirement that recipients of public funds waive a first amendment right.[119] Rather than dismiss the challenge to the condition's constitutionality by citing *Buckley*[120] as controlling precedent, the court engaged in an analysis that tracked various aspects of the

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114. The per curiam opinion totaled just under 300 pages.

115. *Buckley*, 424 U.S. at 57 n.65.

116. *Id.* Examination of the analogy drawn in this footnote, between a candidate who voluntarily restricts contributions to $100 and a candidate who accepts public financing and its attendant conditions, demonstrates the invalidity of the implied legal conclusion. A candidate who voluntarily limits the size of contributions he will accept or the amount he will spend receives no benefits, suffers no harm, and is otherwise unaffected by the government when making that decision. With FECA, however, it cannot be so readily asserted that the individual's decision with regard to his first amendment rights is unaffected by government policy. *See infra* notes 163-78 and accompanying text.

117. Easterbrook, *supra* note 53, at 348.

118. Even if the Supreme Court had fully analyzed the issues, raised by the condition, in 1976, it is not clear what result the Court would have reached. Subsequent experience with FECA and recent analyses of election financing reflect significant changes in prevailing attitudes toward the role of money in political campaigns. *See infra* notes 133-49 and accompanying text.

119. Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

120. Buckley v. Valeo, 424 U.S. 1 (1976).

doctrine of unconstitutional conditions.[121] Unfortunately, the court's resolution of the issues was flawed in several respects.[122] Nevertheless, even if the court's conclusions were questionable, the court did recognize the importance of analyzing voluntariness and of analyzing the condition's relevance to the financing program. On appeal to the Supreme Court, the case was affirmed summarily without opinion.[123]

It is conceivable that during a presidential election a candidate could, by more effectively portraying the coercive nature of the condition, successfully challenge the Act's constitutionality. In 1986, the Supreme Court again indicated that summary affirmances do not render later challenges useless.[124] Indeed, although "summary affirmances obviously are of precedential value, 'they are' . . . not of the same precedential value as would be an opinion of this Court treating the question on the merits."[125] The probability of success in a suit challenging the condition is enhanced by the evolving belief that the candidate with the most money may not have the political advantage once thought.[126] This evolving belief weakens one of the justifications for the spending limitation.

Application of the new four-part framework, developed in Part I for analyzing potentially unconstitutional conditions, suggests that the Act's expenditure limit should be struck down. It also suggests that current congressional efforts to expand the scope of the Act and to increase the number of conditions attached to the acceptance of Act funds are contrary to constitutionally protected liberties. The specific application of the new framework, developed in this Article, to the Federal Election Campaign Act supports this argument.

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121. Indeed, the court cited cases often associated with the doctrine, including Perry v. Sinderman, 408 U.S. 593 (1972), Shapiro v. Thompson, 394 U.S. 618 (1969), and Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926).

122. For specific criticism of the court's analysis, *see infra* notes 155-73 and accompanying text.

123. Republican Nat'l Comm. v. Federal Election Comm'n, 445 U.S. 955 (1980).

124. Bowers v. Hardwick, 478 U.S. 186, 188 (1986).

125. Edelman v. Jordan, 415 U.S. 651, 671 (1974). *See also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981)("summary actions do not have the same authority as do decisions rendered after plenary consideration").

126. G. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980); Fleischman & McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J. L. & POL. 211 (1984); Margolis, *When More Isn't Necessarily Better*, Chicago Tribune, Jan. 13, 1987, §1, at 15, col. 1.

A. Germaneness of the Condition

The Federal Election Campaign Act offers presidential candidates more than twenty million dollars, in 1974 dollars, with which to campaign. This money is not given for free, however, because the candidate must waive his or her first amendment right to raise and expend unlimited private funds in order to receive it. The governmental interests which have been cited as justifications for the Act's existence are: 1) to prevent political candidates from becoming too dependent on the wealthy underwriters of campaigns who may seek to extract political favors in exchange for contributions, 2) to equalize the candidates' respective abilities to campaign, and 3) to assure every candidate a minimally sufficient cache of money with which to campaign.[127] The germaneness component of the four-part framework explores the relationship between the waiver condition and each of these justifications.

1. Eliminating Dependence on Wealthy Financiers

The first asserted interest, eliminating dependence on the wealthy private financiers of election campaigns, does not depend on the exclusion of private contributions from the election process. A sufficiently large public grant should make a candidate, if not indifferent to private contributors, much less subservient to them. Candidates who have received a large grant of public money will be under much less pressure to succumb to the political demands of the big financiers. This argument conforms to basic economic-based intuitions, which assume that a candidate will only accept contributions or spend money to the point that the marginal benefits exceed the marginal costs. A government grant of more than twenty million dollars causes the marginal value of an additional, privately contributed dollar to drop significantly. Because the marginal benefit of contributions has decreased while the cost, in the form of catering to these special interest groups, has remained constant, candidates will be less interested in such private contributions.

The validity of contribution ceilings[128] lends further support to the argument that it is unnecessary to require candidates to

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127. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 29-30.

128. Currently, individuals may contribute only $1,000 to a presidential candidate. 2 U.S.C. § 441a(a)(1)(A) (1986).

waive their constitutional right to raise and expend unlimited private funds in order to prevent them from being dependent on wealthy financiers. The *Buckley*[129] Court's approval of such ceilings renders the fear of candidates being "bought" largely unfounded. Indeed, Congress' efforts to place ceilings on the contributions of Political Action Committees (PACs) are evidence that Congress recognizes that the imposition of contribution limits is an effective way to solve the problem of candidate dependence on wealthy financiers.

With contribution ceilings in place, it is unlikely that a presidential candidate will feel beholden to an individual who is only permitted to contribute $1,000, given that the candidate will have already received more than twenty million dollars from the government.[130] The reason PACs have the influence they do is because the size of their contributions is not currently so limited. The effect of the large government subsidy on the candidate's marginal benefit in accepting private contributions and the constitutionality of contribution ceilings, make it difficult to accept that the waiver by candidates of their constitutional rights significantly furthers the government's interest in preventing undue dependence on private financiers. Thus, there does not appear to be a substantial relation between this first government interest in preventing dependence or wealthy financiers and the condition restricting the constitutional right to expend unlimited private funds.

2. Equalizing Political Opportunities

The second governmental interest which the Act seeks to further is the equalization of the candidates' abilities to communicate with the public and thus their chances for victory.[131] Assuming this to be a legitimate governmental interest, it is not clear why "limiting candidates expenditures [is] more constitutionally palatable as a condition than as a ban."[132]

The apparent justification for the condition is that if the government could not restrict campaign expenditures when it granted campaign subsidies, the congressional objective of equalizing elec-

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129. Buckley v. Valeo, 424 U.S. 1 (1976).

130. In 1984, the public subsidy was $29.4 million. It is estimated that in 1988 the public subsidy will amount to $45 million per candidate. N.Y. Times, Mar. 4, 1987, at B5, col. 1.

131. *See* Polsby, *supra* note 127, at 30.

132. *Id.*

tion results by breaking the link between the candidate with the most money and victory would be frustrated. Otherwise, candidates would still raise private funds, knowing that the candidate who had the most money enjoyed a higher probability of being elected. This argument, however, rests upon premises that are unproven.

The key premise in such a position is the "drown-out" theory.[133] This theory posits that the spending disparity between candidates is a vital factor in determining election winners, regardless of the aggregate level of spending achieved by each candidate.[134] Evidence now available, however, strongly refutes this proposition.[135] Representative of this growing recognition is the view of Professor Jacobson: "The problem is not equalizing the amount between candidates but rather simply getting money to challengers so that they can mount competitive races."[136] Actually, the campaign finance variable most significantly related to election results was the absolute amount of money raised by the challenger rather than the relative spread between the spending of the two candidates. In short, what mattered was not how much money a candidate had relative to his or her opponent, but whether each candidate had enough.[137]

The most dramatic evidence of the absence of a "drown-out" effect can be seen in some of the recent presidential primary campaigns in which the FECA provided a matching grant floor of public subsidization.[138] In 1976, unknown challenger Jimmy

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133. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 640 (1982) ("Excessive and unequal spending by one side interferes with the other's communication and, if the inequality is great enough, can effectively and completely drown out the other's message to the voters.").

134. *Id.*

135. *See* G. JACOBSON, *supra* note 126, at 218 (citing *Public Financing of Federal Elections: Hearings Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Admin.*, 93rd Cong., 1st Sess. 151 (1973)(statement of Rep. Frenzel)); Margolis, *supra* note 126.

136. G. JACOBSON, *supra* note 126, at 218.

137. *Id.* at 218 ("It is the absolute rather than the relative amount spent by challengers that matters."). *See also*, Margolis, *supra* note 126,

> In politics, as in life, money is important. In politics, as in life, its importance can be overstated, and often is . . . . The real truth about money in politics is that a candidate does not need more than his opponent as long as he or she has enough to run a campaign - to hire a staff, rent office space, pay the phone bills and buy enough TV time to convey the desired message.

Id. at 15, col. 1.

138. After a candidate has raised at least $5,000 in each of 20 states, counting only

Carter was certainly not drowned out by the much larger campaign bankroll that most of his fellow Democrats enjoyed. Similarly, in 1980, John Connally was unable to drown out the voices of his opponents, despite the fact that he began the primary season with over two million dollars, which was more than the combined amount of all other Republican candidates. Like Carter, the other Republican contenders in 1980 were able to raise enough money to secure matching funds and thus gained an adequate floor of resources to counter Connally during the primary season.

These examples reflect the central point that elections are lost not because a candidate has been outspent, but rather, because he or she has not been able to raise and spend the minimum amount necessary to wage an effective campaign. Given this finding, it becomes difficult to argue that the equality purpose behind campaign subsidies is subverted by allowing private contributions and expenditures beyond the amount publicly granted. Indeed, no substantial relation can be found between the equalization of candidates' respective campaign prospects and the forfeiture by the candidates of their first amendment rights.

3. Providing Candidates a Minimum Amount of Money

A third public purpose behind public financing may be to assure that presidential candidates have a minimum amount of money available with which to campaign. This purpose, however, is consistent with allowing candidates to raise and spend additional private funds. The reasons for providing candidates with a floor or base amount of money with which to campaign do not support placing a ceiling on candidate expenditures. If the reasons for such a floor are related in any way to the issue of who wins elections, and included in that issue would be the related question of who runs for president, the imposition of ceilings has no effect, since as long as a candidate has enough money he or she can compete effectively.[139]

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the first $250 from each person contributing to the candidate, a subsidy is provided according to a matching formula: each qualified candidate is entitled to a sum equal to the total private contributions received, disregarding contributions from a person to the extent that total contributions to the candidate by that person exceed $250. 26 U.S.C. § 9033(b)(3) (1986); 26 U.S.C. § 9034(a) (1986). Payments to any candidate may not exceed 50% of the overall expenditures. 26 U.S.C. § 9034(b) (1986).

139. Similarly, if the grant is designed to encourage the belief that an individual need not be wealthy to run for President, restrictive conditions seem to be unnecessary.

4. Direction of the First Part: Conditions Not Germane

The analysis of the first component of the new framework suggests that there is no good reason for the Court to allow a restraint on expenditures as a condition to public financing. Such limits do not serve or promote Congress' asserted purposes for enacting the campaign finance laws. Indeed, allowing candidates to freely exercise their first amendment right to unlimited campaign expenditures is logically consistent with the government's interests in public financing. In fact, such restraints are not only unnecessary but also counter-productive. Candidates who are permitted to spend additional funds are more likely to have a sufficient amount with which to campaign than if they are denied the opportunity to do so. Furthermore, if a candidate is denied public financing because she refuses to waive her first amendment rights, then she will be pressured to make promises to contributors to secure funds. Thus, under this first variable in the framework, the condition appears substantially unrelated and not germane to the government's three reasons for providing public financing and may even be counterproductive.

B. Applying the Condition: Similarly Situated Parties?

The second part of the new framework seeks to determine whether the government programs confer a benefit upon a selective group, or instead impose a penalty on those who exercise a particular constitutional right. Thus, it is necessary to determine whether a candidate who complies with the condition and receives the benefit is situated, with respect to the Act's purposes, similarly to one who does not. "To deprive a citizen of a benefit available to those who are similarly situated because of her exercise of constitutional rights is to impinge on protected liberties."[140]

As noted earlier, three general purposes underlie the public financing of presidential election campaigns: 1) to prevent candidates from becoming too dependent on wealthy contributors, 2) to equalize the candidates' respective opportunities, and 3) to assure every candidate a minimum cache of money.[141] It is by reference to these purposes that it must be determined whether a candidate who agrees to waive the first amendment right to make unlimited expenditures is similarly situated to the candidate who does not. If

140. Kreimer, *supra* note 8, at 1365.

141. *See supra* note 127 and accompanying text.

they are similarly situated with respect to the asserted governmental purposes, then it appears that rather than conferring a selective benefit, the government is making a benefit generally available to all persons so situated and denying it to particular candidates because they chose to retain their first amendment rights.

With respect to the first governmental purpose, the candidates are arguably similarly situated, since it does not appear that giving money to candidates, regardless of whether or not they waived their first amendment right to raise and spend additional private money, would cause them to become reliant on wealthy financiers. Restricting campaign expenditures is, at best, an indirect way to further this first interest. The more direct approach is to limit the amount that a candidate may accept from any contributor.[142] Also, mandatory disclosure of all significant contributors[143] directly and significantly furthers the government's interest in reducing a candidate's reliance on contributors who would seek to influence the elected official. Furthermore, the best way to minimize a candidate's need to solicit large sums of money necessary for the campaign would be for the government itself to provide such funds. The more money provided by the government, the less that a candidate must generate privately. The less a candidate needs to raise privately, the less pressure there will be on a candidate to make implicit promises of future favors to secure private funds. Thus, the denial of funds to a candidate who refuses to waive his or her first amendment right undermines the government's first purpose for establishing the program. With respect to the first interest, the candidates are similarly situated.

The second governmental interest, equalizing the candidates' opportunities, also does not seem to warrant a distinction between candidates who do and do not waive their first amendment rights. Recent elections demonstrate that the financial key to winning an election is not spending more money than the opposition but spending enough.[144] Thus, assuming that it is a legitimate function of the government to equalize the election prospects of the various candidates, it does not seem that requiring candidates to waive their first amendment rights is necessary to achieve that ob-

142. The size of contributions to a candidate and his authorized political committee are already limited to $1,000. 2 U.S.C. § 441a(a)(1)(A) (1986).

143. 2 U.S.C. §§ 431, 432, 434 (1986).

144. *See supra* notes 133-38 and accompanying text.

jective because the additional amount spent will not be the key to winning the election. More significantly, the Supreme Court has rejected the equalization principle as a permissible justification for expenditure restrictions.[145] "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."[146] For these reasons, candidates who do and candidates who do not waive their first amendment rights are similarly situated with regard to furthering the government interest in equalizing election prospects.

The third governmental interest, providing a minimum cache of money to the candidates, does not justify treating a candidate differently because of his or her exercise of the first amendment right to raise and spend private funds. A candidate's need for such a minimum sum is not dependent on the decision to reserve the first amendment right. Furthermore, there is no suggestion to be found that the denial of funds to candidates who refuse to waive their rights represents a judgment that the candidates do not need the money. Thus, with respect to the need for a minimum cache of money, the candidates are similarly situated. In fact, to deny the funds to a candidate who reserves his or her first amendment rights undermines this third governmental purpose.

This analysis indicates that the FECA and its condition requiring recipients of funds to waive their first amendment right to raise and spend private funds does not justifiably distinguish between complying and noncomplying candidates. With respect to the three identifiable purposes of public financing, the candidate who reserves his right and the candidate who does not are similarly situated. Thus, the campaign subsidy and its attendant condition more accurately constitute a generally available benefit that is denied to those who reserve their first amendment right than a selectively available benefit offered to those who fulfill the Act's purposes. In this light, it is clear that candidates are being penalized for exercising their constitutional rights.

C. Significance of the Government's Interests

The third inquiry of the framework explores the significance of the government's interests as evidenced by what the govern-

145. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).
146. *Id.*

ment would do if it could not impose the condition. Thus, it is necessary to determine whether the government would continue to provide campaign financing in the event that it could not attach the condition to the subsidy.

In the context of the Federal Election Campaign Act, it is unlikely that Congress would abandon the financing program if courts severed the waiver condition. In fact, it is especially difficult to see why funding should be stopped, given that the waiver condition is not germane to the achievement of the subsidies' purposes,[147] candidates who comply with the condition do not further governmental interests any more than candidates who do not comply,[148] and in some instances the condition actually undercuts the program's effectiveness.[149] Thus, if the government remains committed to the interests underlying the program's existence, it can be confidently predicted that Congress would continue the program. If the government's purpose for the program is to enable it to do indirectly that which could not be done directly—establish restrictions on the amount of money spent in a campaign—then Congress may well abandon the program. It should be noted, however, that such a purpose is clearly unconstitutional.[150]

Additionally, as a matter of pure politics, it is especially unlikely that a Congress filled with Republicans and Democrats would vote to discontinue the program if the waiver condition was disallowed. Contemplation of such a cut-off would likely bring howls of protest from presidential aspirants who are likely to possess significant influence on Capitol Hill. Furthermore, the major parties would certainly be loathe to discontinue the program since the provision of more than twenty million dollars is only available to the two major parties and, therefore, strongly reinforces the status quo.[151] Thus, the condition itself appears to be of little sig-

147. *See supra* notes 127-39 and accompanying text.

148. *See supra* notes 140-46 and accompanying text.

149. For instance, if the purpose of providing a minimum cache of funds to all candidates is defeated, the denial of funds to candidates who reserve their constitutional rights increases their need to pander to financiers, and the imposition of an expenditure ceiling to achieve equality of opportunity seems unnecessary and clearly in conflict with *Buckley's* rejection of that notion.

150. *Buckley*, 424 U.S. at 19. *See supra* note 110 and accompanying text.

151. See *supra* note 108 for the Act's definition of major and minor parties. In *Buckley*, the Court held these protectionist aspects of the FECA to be not constitutionally infirm, because the historical lack of minor or independent party strength ratified Congress' refusal to fund any presently popular candidate who had not demonstrated strength in a past election. Given this structure, it is clear that the FECA strongly reinforces the politi-

nificance, given its failure to further the purposes for which it was attached and the strong prediction that the program would remain even if the condition was severed.

D. Coerciveness of the Program

The fourth inquiry in the four-part framework explores the "voluntariness" justification for allowing indirect pressure to be placed upon constitutional rights. More specifically, this analysis seeks to determine whether presidential candidates are faced with a coercive threat to waive their constitutional rights or whether they are given a value-enhancing financing alternative. Furthermore, even if the subsidy program and its attendant restrictions pass the "voluntariness" test and are found to constitute a noncoercive offer, there may be systemic reasons why a court should refuse to enforce the waiver. In this analysis, then, there are two core issues: 1) the nature of the "offer," and 2) the possiblity that regardless of the voluntariness of the waiver, it should not be enforced by a court.

1. Nature of the Offer

The argument that the condition involved in the Federal Election Campaign Act is merely an offer of an additional financing alternative is centered on the theory that a candidate has no right to complain about the expenditure limits that accompany the receipt of public financing. The argument in defense of the condition can be categorized as follows: a) because public campaign financing enhances a candidate's ability to speak, the candidate cannot complain about the accompanying expenditure limits, and b) because of the FECA, the candidate now has a choice between two sources of funds where before he had only one. These arguments leave room for substantial response.

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cal status quo. Republicans and Democrats will constantly be eligible for full public financing while small or new parties will be forced to spend much of their time and resources fund-raising rather than campaigning, thus making it even more unlikely that these smaller parties will ever be able to compete with the two major parties. This situation creates strong financial incentives for a candidate to associate with a major party. In effect, then, the Act appears to penalize candidates for exercising their constitutionally protected right to associate with a minor party. Indeed, it would seem that "the fact that there have been few drastic realignments in our basic two-party structure in 200 years is no constitutional justification for freezing the status quo of the present major parties at the expense of such future political movements." *Buckley*, 424 U.S. at 251 (Burger, C.J., dissenting).

a. Candidate Benefits on the Whole

The first argument, that the Act increases the candidate's ability to speak, reveals a startling insensitivity to first amendment guarantees. Of course the provision for public financing enhances speech, but the expenditure limits also restrict speech. The fact that public financing serves a useful function is wholly irrelevant to the issues raised by the suppression of political communication. That government does good with one hand in no way justifies its doing harm with the other. It is now clear that the recipient of a government benefit need not accept "the bitter with the sweet."[152]

This first argument suffers further from its sheer breadth, as an example demonstrates. Oregon law provides that the state must publish pamphlets describing the candidates for certain offices.[153] Under the first argument, this enhancement of a candidate's communication with the public could be conditioned upon the candidate's waiver of his right to mail additional literature to voters. Likewise, free television time which enhances a candidate's ability to communicate with the voters, could be conditioned on the surrender of other first amendment rights, such as the right to give political speeches on public street corners. The natural temptation is to respond to these examples by arguing that the conditions imposed in them are not particularly germane to the provision which enhances speech; but neither is the condition imposed by the Federal Election Campaign Act. The rejection of the "bitter with the sweet" argument[154] and the overbreadth of the first justification suggest that candidates do retain their right to complain about conditions attached to a benefit.

b. FECA Expands Financing Options

The second argument, that the Act constitutes a value-enhancing offer, is more substantial. In fact, a federal district court held in 1980, in a decision summarily affirmed by the Supreme Court, that it had "no difficulty"[155] concluding that the imposition

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152. In Vitek v. Jones, 445 U.S. 480, 490 n.6 (1979), the Supreme Court rejected Rehnquist's plurality opinion in Arnett v. Kennedy, 416 U.S. 134, 153-54 (1973), where it had been stated that welfare claimants must "take the bitter with the sweet," by accepting whatever due process limitations are found in the statute conferring the benefit.

153. OR. REV. STAT., §§ 251.005-.175 (1986).

154. *See supra* note 152 and accompanying text.

155. Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 284 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

of conditions on the receipt of federal subsidies was within Congress' power "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public spending . . . ."[156] As long as the FECA gave the candidate this option, it would not violate the first amendment rights of the candidate.[157] If a candidate's decision to accept federal campaign financing and its attendant restrictions on political communication is not voluntary, however, then the existence of the option is meaningless and the financial grant must be viewed as an effort by the government to induce the candidate to surrender his or her constitutional rights. As such, it is no different from direct criminal or legal sanctions.[158]

A crucially important factor in assessing the Act's constitutionality, then, is the element of voluntariness. The first question that arises is what is meant by involuntariness. Certainly, involuntariness requires less than a threat of "your life or your constitutional right". For example, a statute prohibiting the exercise of a constitutional right is not rendered valid simply because the fine or penalty is small.[159] Similarly, the college professor in *Perry v. Sindermann*[160] had a valid claim that he was being unconstitutionally penalized for the exercise of a first amendment right when he was fired, despite the fact that presumably numerous other related employment opportunities were available. So too, the welfare recipients in *Shapiro v. Thompson*[161] did not have to prove imminent starvation as a motive for accepting welfare benefits when they argued that their constitutional right to travel was being penalized by a state law requiring immigrants to be residents of such

156. *Id.*

157. *Id.*

158. The Supreme Court recognized this argument in Speiser v. Randall, 357 U.S. 513, 518 (1958)("To deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for this speech. Its deterrent effect is the same as if the State were to fine them for this speech."). *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972)("[I]f 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."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("Governmental imposition of such a choice [denying unemployment benefits to those who exercise their freedom of religion] puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

159. A statute which imposes a fine upon persons who write articles criticizing the government is no more constitutional because the fine is small than it is when the fine is large.

160. 408 U.S. 593 (1972).

161. 394 U.S. 618 (1969).

state for one year before being eligible for welfare. All that must be shown, therefore, is that some sort of penalty is being levied on the exercise of a constitutional right which will pressure an individual's decision to exercise that right.[162] What matters is not the size of the penalty but its existence.

In the present case, the requisite level of involuntariness might be provable. That public financing may be an attractive option to some presidential candidates is undisputable. With the imposition of $1,000 contribution limits in 1974,[163] the ability of candidates to raise funds has been significantly reduced. For some candidates, then, the availablity of $29.4 million is a benefit, even with its attendant restriction, because without such a program they could not hope to raise that amount privately.[164] For these candidates the decision is voluntary in the sense that there is no risk of loss in choosing the public financing option. For other candidates, however, the decision is more difficult. This difficulty arises in large part from the fact that the decision to reject federal campaign financing must be made under circumstances of imperfect knowledge. To justify the funding of a campaign through private contributions, a candidate would need to raise: a) the amount which would be available through public finacing; b) an additional 20 percent to cover the costs of private fundraising; and c) a further amount sufficient to fund significant additional campaign activities and to offset the fact that public financing is immediately available in a lump sum whereas private money is raised over the course of the full campaign.[165] Obviously, the decision by a particular candidate to rely on private financing in a particular cam-

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162. Sherbert v. Verner, 374 U.S. 398 (1963).

> [H]ere not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404.

163. *See supra* notes 112 & 142 and accompanying text.

164. Even candidates in this category can argue powerfully that the government should not be able to harm them with one hand while helping with the other. Strong support for this argument can be found in Vitek v. Jones, 445 U.S. 480, 490 n.6 (1979). *See supra* note 152 and accompanying text.

165. Joint Findings of Fact at 21, Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280 (S.D.N.Y.) (No. 79-1373), *aff'd*, 445 U.S. 955 (1980).

paign carries a tremendous amount of risk, unless the candidate were allowed to attempt it and, if unsuccessful, allowed to request public financing. The FECA, however, requires that a candidate applying for public financing certify that no contributions have been accepted.[166] Furthermore, the application and certification must be filed within fourteen days of the candidate's nomination.[167] As a result, the presidential candidate must choose between the certainty of public financing and the uncertainties and risks of the private route. Regardless of the consequences, the decision to accept private funds is irrevocable.

It should be emphasized again that this approach to the issue of voluntariness turns not on what a candidate might accomplish through private campaign financing, but on whether a candidate will perceive a substantial risk in making that choice. It is certainly conceivable that there are candidates who are risk-averse and will opt for public financing, although, in fact, they would have been able to raise and spend more than that allowed under the FECA. Thus, there is a chilling effect on political candidates' free exercise of speech and upon their right to spend unlimited amounts of money.

The district court in *Republican National Committee v. Federal Election Commission*[168] sought to escape the conclusion of involuntariness suggested by the above argument by attacking the premise that there is a significant amount of risk present in the decision to choose private financing. The amount of money that could be raised privately, the court argued, could be predicted with reasonable accuracy on the basis of the candidate's ability to raise money during the primary season.[169] This argument does not merit support. This is evidenced by the same court's response when it was confronted by the Reagan campaign officials' claim that in light of their difficulties raising funds during the primary season they would have had no choice in 1976 but to choose public financing if Reagan had secured the nomination.[170] The court asserted that using Reagan's ability to raise money during the primaries as a basis for predicting his later fundraising capacity

166. 26 U.S.C. § 9003(b)(2) (1986).

167. 11 C.F.R. § 9003.2(d) (1987).

168. 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

169. *Id.* at 300 ("The risk of taking private funding only to discover that an amount exceeding the public grant cannot be raised is a great one, but it is a risk that can be measured on the basis of the candidate's fund-raising experience during the primaries.").

170. *Id.* at 299-300.

would be nonsensical, since he was then challenging an incumbent President for his party's nomination.[171] The Court never recognized that this point undermines its earlier proposition that such a period offered a sufficiently reliable basis from which to make a risk-free prediction of future fundraising abilities.

This example highlights several additional problems with the court's proposition. First, while the court's reasoning may be valid when the party's nominee faces no opposition in the primaries, it disregards the effect that the presence of other candidates in the primaries have on raising money. If there are other candidates battling for a given party's nomination, it is difficult for the ultimate nominee to predict how much his or her fundraising ability will be enhanced by the lack of intra-party competition for money. Second, if a candidate wanted to predict his ability to raise money during the election, then a candidate would surely want to know not only his own record during the primaries, but also the strength and viability of the opposition candidate. The stronger the opposition, and hence the less likely "Candidate X" will win, the less likely it is that "X" will be able to raise much money.[172] Professor Joel Fleischman, who has done extensive research in the area of campaign financing, has written: "The amount of money a candidate can raise for an election is . . . a reflection of potential support. It is a direct function of perceived political promise. Likely winners can raise more money than likely losers."[173] At the time "Candidate X" has to choose between public and private financing, he may not have sufficient data to determine whether he is a "likely winner" or a "likely loser."

The court's argument may be further criticized on a third ground. In presidential elections the GOP and Democratic party nominations are not made on the same date. Thus, the FECA's requirement that the decision to choose public financing be made and certified within fourteen days of the candidate's nomination leads to the absurd result that "Candidate X," if nominated first,

171. *Id.* at 300.

172. The relationship between the likelihood of ultimate victory, which necessitates knowing the strengths of the opposition, is probably not linear. It seems that a candidate engaged in a very intense struggle might well be able to solicit additional money. Nevertheless, it does appear likely that a candidate who is perceived to have a more remote chance of being elected will be less likely to attract large sums of money than a candidate with a more promising chance of victory.

173. Fleischman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Campaign Act of 1971*, 51 N.C.L. REV. 389, 459 (1973).

will have to decide whether to accept public funding without yet knowing the identity of his opponent. Without such knowledge, "X" cannot predict accurately his future fundraising abilities. Yet "X" is asked to make that very prediction, without the information necessary to make it accurately, and to then base a decision involving his first amendment right to unlimited expenditures on the figure so derived.

In effect, the candidate first nominated is placed in the classic prisoner's dilemma. "Candidate X" may pursue private fundraising, in which case the amount "X" is able to raise will depend upon the strength of the opposition. If the opposition is a strong candidate, "X" may only raise ten million dollars, but if the opponent is a weak candidate, "X" may raise thirty million dollars. The other option for "Candidate X" is to accept public financing, in which case "X" receives twenty million dollars regardless of the strength of the opposition. Assuming it is equally likely for the opposition candidate to be weak or strong, "Candidate X" may be compelled to accept public financing and its attendant restrictions, despite the fact that if "X" could wait until after the nomination of his opposition it is likely that "X" would forego public funding if a weak candidate were nominated. An additional unfairness in this situation is that the candidate nominated last is able to make his or her decision regarding public financing without facing this dilemma.

In addition to the above arguments, there is another argument that has been advanced to show that the waiver of a constitutional right in financing schemes such as that found in the FECA is involuntary. This argument posits that the government is, in effect, bribing candidates to forego their constitutional rights.[174] By encouraging an individual not to exercise his or her constitutional rights through the offer of large sums of money, the goverment is said to be wrongfully pressuring the exercise of that right. In essence, the offer is too good to refuse. This is the principal argument advanced by the Republican National Committee in its suit against the Federal Election Commission.[175] In fact, it was in responding to this argument that the court became confused. When the Reagan officials claimed, that based on their primary experience, they believed they could not raise more than twenty

174. Plaintiff's Brief at 31, Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280 (S.D.N.Y.)(No. 79-3073), *aff'd*, 445 U.S. 955 (1980).

175. *Id.* at 33.

million dollars, the court did not respond by asking them why they were complaining if the program had increased their ability to campaign. Instead, the court made the point that the Republican National Committee should have made; which was that the primary period is not a sound basis for predicting future fundraising abilities.[176]

Nevertheless, it would seem that the Republican National Committee should have argued not the undisputable attractiveness of public financing to some candidates,[177] but that there are instances where public financing is not attractive but must nevertheless be accepted because of the previously discussed risks.[178] They should also have argued that even if the candidates are in a better position because of public financing, they should not be compelled to accept the "bitter with the sweet." Thus, the coercive nature of the FECA offer, as well as the decline of "the bitter with the sweet" approach, buttress the constitutional doubts raised in part one of the framework.[179]

2. Waivability of First Amendment Rights

An additional question which must be considered is whether

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176. Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 300 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980) ("The ability of nominated presidential candidates as opposed to primary candidates would be more relevant to the issue [of fundraising ability].")

177. The danger with the irresistible attractiveness argument is that it muddies the distinction between the pressuring or penalizing of constitutional rights, which is suspect, and the right of the government to encourage alternative behavior.

178. *See supra* notes 165-73 and accompanying text.

179. A third possible argument that can be marshalled in favor of the argument that participation in the program is not completely voluntary is that even if the structure of the Act itself does not pressure candidates to choose public financing, there does exist political pressure to choose public financing. The extent of this effect needs further documentation before it can be accepted, but there are signs that political pressure is a factor in choosing public financing. For example, President Reagan was concerned in 1984 about generating negative publicity if he opted for private funding. The fear was that opportunistic opposition candidates would characterize his decision as evidence that he wanted to buy the election or was the wealthy man's candidate. In a closely contested election, such a characterization could be fatal. The point here is not the truthfulness of the characterization but that the existence of public financing and its attendant restrictions provide an opportunity for candidates to drive each other to waive their constitutional right to raise money privately and to be free of spending limits. Given the FECA's rationale of eliminating undue reliance on wealthy financiers, it may well be arguable that the Act implicitly stigmatizes those who opt for private financing. It is not clear that government should be managing a program that places such stigmas and political pressures on candidates who seek to exercise their constitutional rights.

a candidate should ever be allowed to waive his or her constitutional right to spend unlimited private funds. At first look, an affirmative answer appears justified. If a candidate or any individual believes it is beneficial to sell his or her constitutional rights, it would seem that his decision should be respected. It would also seem that "if the constitutional right involved is designed to secure an area of autonomy for the citizen against the state, then the exercise or nonexercise within that area should be left to the citizen."[180] To deny the citizen the right to waive a right may limit rather than expand the citizen's valuation of the right.[181]

Despite the above argument, there are particular rights that the state will not allow an individual to waive, even if done voluntarily.[182] The reason for this is that some constitutional guarantees not only protect or preserve individual rights, but also further other goals.[183] In these situations, it is sensible not to allow the individual to decide the value of the right in question. The argument in support of the power to restrict the waiver of constitutional rights seems most powerful, then, in the context of rights that define the structure of the government or the structure of a decent society.[184] Examples of such rights include the rights preserved by the eighth and thirteenth amendments, which were designed to help structure a more decent society by prohibiting cruel and unusual punishment and the practice of slavery.[185]

Judge Frank Easterbrook has been sharply critical of this view that some or perhaps all constitutional rights should not be waivable.[186] It is undeniable, as Easterbrook argues, that constitutional rights are in fact waived every day, many of them related to the first amendment.[187] There may, however, still be grounds for

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180. Kreimer, *supra* note 8, at 1383.

181. Easterbrook, *supra* note 53, at 347 ("A right that cannot be sold is worth less than an otherwise identical right that may be sold.").

182. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219, 242 (1911)(thirteenth amendment rights prohibiting involuntary servitude cannot be waived).

183. This notion that rights which serve societal goals cannot be waived is evidenced by the refusal of the courts to recognize a litigant's waiver of subject matter jurisdiction, whereas personal jurisdiction which "recognize[s] and protects an individual liberty interest" can be waived. *See, e.g.*, Insurance Corp. of Ireland v. Companie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982).

184. Kreimer, *supra* note 8, at 1387-89.

185. *See supra* note 182. *See also* Hutto v. Finney, 437 U.S. 678 (1978)(limiting, on eighth amendment grounds, the amount of time a prisoner could spend in an Arkansas unreconstructed prison farm).

186. Easterbrook, *supra* note 53, at 346.

187. *Id.*

concern. Though Easterbrook may argue that "there is nothing special about the First Amendment"[188] to justify restricting its waivability, that view is not shared by everyone.[189]

As was noted above, the argument for a restriction of the power to waive a right is most powerful when the right affected defines the structure of society and government.[190] Therefore, perhaps certain categories of speech that affect the structure of government should not be waivable. Support for such an approach can be found in the views of Justice Cardozo, who believed that free speech was "the matrix, the indispensable condition of nearly every other freedom."[191] It has also been said that if this is true of speech in general, "free political speech is its crown and guarantor."[192] Indeed, Alexander Meiklejohn has urged that "First Amendment rights constitute the quintessence of a democratic self-government and that the people have reserved to themselves absolute freedom in their exercise and have forbidden their government to intrude in any way on that free exercise."[193] Free speech represents the means by which individuals singly and collectively shape, influence, and check their government. It is the means by which truth may be determined. Clearly, the benefits of free speech are much greater than self-autonomy and fulfillment. For example, a debate between presidential candidates affords benefits beyond the candidate's feeling of self-autonomy and fulfillment. Listeners also benefit. If the only benefits of the first amendment were those secured by the speaker, then the concern over the waiver of such rights would be less warranted. But that is not the case. Depending upon the nature of the speech involved, the externalities to society of an individual's exercise of his or her right to speak freely may range from the minimal to the highly significant. Political speech generated during a presidential campaign is surely of the type that yields important systemic benefits. For that is how society determines who its leaders will be and the type of government it desires. It is for that reason that the Supreme Court has stated that the "First Amendment has its fullest

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188. *Id.*

189. *See* R. DWORKIN, A MATTER OF PRINCIPLE 395-97 (1985)(first amendment rights should not be waivable since doing so would infringe upon the rights of listeners).

190. *See supra* notes 182-85 and accompanying text.

191. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

192. Fleischman, *supra* note 173, at 409.

193. A. MEIKLEJOHN, FREE SPEECH & ITS RELATION TO SELF-GOVERNMENT 255-56 (1948).

and most urgent application precisely to the conduct of campaigns for public office."[194]

To call for a ruling from the Supreme Court that the right to speak freely cannot ever be waived, however, is unlikely to be fruitful. A major flaw in the argument for such a rule is its overbreadth. In some situations, the government must be allowed to extract a waiver of first amendment rights. For example, in the public employment context it is sometimes necessary for the government to extract from its employees a waiver of the right to disseminate certain information acquired on the job.[195] In this situation, the employees' exercise of their rights would be costly for the government. Thus, if the government could not extract such a waiver, it is conceivable that the government would choose not to hire the applicant. The argument that first amendment rights should always be waivable, however, is also overbroad. At some point, there must be alarm at the ability of a government to purchase silence.[196]

Even Judge Easterbrook countenances that difficulties and inefficiencies arise when one of the parties to the waiver, such as the government, holds monopoly power, or when externalities are generated by the exercise of the right.[197] In cases where there are monopolies and externalities, private deals may lead to suboptimal social results. This fundamental notion applies not only to the waiver of certain constitutional rights, but to other transactions as well.[198] A case may be built, then, for restricting the waiver of free speech on just these grounds. The case is strongest where the monopoly position is most imposing and the externalities are largest as in the case of wholesale restrictions of political speech by

194. Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971).

195. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980)(per curiam)(Snepp, a former CIA official, was not allowed to publish the book *Decent Interval* without prior clearance. The book was critical of the CIA's activities during the Vietnam War.).

196. The extent to which the government may extract waivers of first amendment rights from government employees is explored in Part III of this article.

197. Easterbrook, *supra* note 53, at 349. For other arguments in favor of limiting the government's ability to extract waivers when it holds a monopoly position with respect to the activity or service involved, *see* Smolla, *The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 116 (1982); Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861, 901-03 (1982).

198. Pollution regulations and permit requirements, for example, may be seen as an attempt to make polluters internalize the cost of the harms caused by their pollution. A. FREEMAN, R. HAVEMANN, & A. KNEASE, THE ECONOMICS OF ENVIRONMENTAL QUALITY (1983).

the government.

In the case of the FECA, however, it is not so clear how much the public loses because of the restriction of campaign expenditures beyond the $20 million-plus amount. Certainly there is some loss. On the other hand, the government has not purchased total silence because more than $20 million is still being spent on political speech, which is not an insignificant amount. Furthermore, the government is not an absolute monopolist since there are many other sources of money available to the candidates. As more and more restrictions are placed on the legal size of campaign contributions, however, the amount of money that may be raised in the private sector is becoming more limited and the monopoly power of the government is increasing.

3. Direction of the Fourth Factor: Involuntariness and Waivability

This fourth part in the four-part framework obviously raises strong questions about FECA's constitutionality, as did the three previous components of the framework. The argument that the public financing program is not nearly so voluntary as it first appears is a powerful one. Indeed, the elements of risk, political pressure, and timing place some candidates in a prisoner's dilemma where they may be compelled to accept public financing and its restrictions on free speech. If the waiver should be found voluntary, however, it is not clear that a court would invalidate the waiver on the ground that the systemic benefits in political speech which flow from the exercise of that constitutional right cause it to be a right which cannot be waived.

4. Proposed Congressional Amendments

Before concluding this analysis of the constitutionality of the Federal Election Campaign Act, it is worth noting that Congress is currently contemplating various measures which would greatly expand its scope. The most significant bill in the 100th Congress was, undoubtedly, the so-called Boren proposal.[199] Initially, the bill featured public funding for Senate general election candidates who agreed to spending limits on their primary and general election campaigns. In an effort to reduce the cost of the proposal,

199. S.2, 100th Cong., 1st Sess., § 2, 133 CONG. REC. S109-13 (daily ed. Jan. 6, 1987).

however, the bill was amended to provide public funding only to a candidate whose opponent exceeds spending limits.[200]

If the original version of the FECA raised substantial constitutional questions, the current version of the Boren proposal, which would amend the FECA, sends off constitutional alarms that are deafening. It is evident that Congress is pursuing an end explicitly rejected in *Buckley*, that of limiting the expenditures of political candidates. For example, under the current version of the Boren proposal, a candidate who does not participate in the public financing program would be ineligible for preferential postal and broadcast rates which are significantly lower than the current rates. Also, such candidates must place a disclaimer on political advertisements, stating that they do not abide by expenditure limits.[201] The purpose of the disclaimer is clearly to increase the political pressure on candidates to participate in the program. The disclaimer should be reworded, however, to read: This candidate has refused to yield to unconstitutional congressional pressure and has not abandoned her first amendment rights.

If the defenders of the FECA provisions analyzed previously could attempt to argue that the government was not seeking to penalize candidates for exercising their first amendment rights, such an argument would be futile under these amendments. Candidates who refuse to abide by expenditure limits are penalized by being denied public funds, losing cost-reducing benefits, and having to place disclaimers on their advertisements. Such substantial penalties would certainly coerce all future candidates into participating in the program that requires the waiver of their first amendment rights, without advancing the alleged purposes behind the FECA any more than the original Act did. A coerced waiver appears to be exactly what Congress intends, and this is an unconstitutional purpose.

E. Conclusion on the FECA's Constitutionality

The four-part framework for analyzing the doctrine of unconstitutional conditions indicates that the FECA requirement that candidates waive their first amendment right to raise and spend an unlimited amount of private funds is unconstitutional. First, the condition is not germane to the three governmental interests

200. *Id.*
201. *Id.*

underlying the provision of funds. Indeed, the condition does not further any legitimate governmental interest. Second, the candidates who do and those who do not agree to comply with the condition are similarly situated with respect to the alleged purposes for the condition. Third, the government could be predicted to continue the program even if the waiver condition was invalidated, unless an unconstitutional motivation such as a desire to accomplish indirectly what cannot be accomplished directly underlies the program's existence. At the same time, participation in the FECA program is not entirely voluntary, and it pressures the candidates' first amendment rights as they are coerced into participating in a program which requires that those rights be relinquished. Those who resist the program and the waiver are penalized.[202] Finally, the waiver condition not only fails to further any legitimate governmental interests, but it actually appears to undermine certain governmental interests, and all at the price of the candidate's first amendment rights.

III. Conditioning Public Employment

Application of the doctrine of unconstitutional conditions to the waivers often attached to public employment is nothing new.[203] The conditioning of public employment is an issue which confronts every administration upon assuming office, but it has become a subject of increasing importance in light of the Reagan Administration's pronounced efforts to condition public employment on the waiver of first amendment rights.[204] Part A of this section explores the Reagan Administration's attempt to make widespread use of prepublication review programs and secrecy agreements. The focus in Part B is on other types of public employment conditions.

A. Prepublication Review

After taking office, the Reagan Administration sharply curtailed the first amendment rights of government employees. In 1981, the "Administration apparently broadened the categories of

202. The only variable of the framework that does not strongly indicate that the condition is unconstitutional is the status quo analysis. As noted earlier, however, this will always be the case when a condition is attached to a new benefit. *See supra* notes 63-64 and accompanying text.

203. *See, e.g.*, cases cited *supra* notes 31-38.

204. *See infra* notes 205-14 and accompanying text.

employees to whom a lifelong censorship requirement applied."[205] By 1983, twelve government agencies, including the Department of Education, the Tennessee Valley Authority, and the Peace Corps, all required prepublication review of all employees' speech regardless of whether they had access to classified information.[206] In 1984, President Reagan issued National Security Decision Directive 84 (NSDD-84)[207] which "found unlawful disclosures of properly classified information" to be a "matter of grave concern."[208] The directive[209] sought to require nondisclosure agreements from all employees with access to classified information, and the agreement provided for widespread prepublication review.[210] Specifically, NSDD-84 required that all employees agree, as consideration for being employed by the government, to submit for review all written materials, including fiction, which touched or purported to touch upon classified information. This obligation would continue for life, unless a release was issued.[211] If NSDD-84 had been fully implemented, it would have affected approximately 2.5 million government and 1.5 million contractor employees.[212] Because of widespread criticism, however, the Administration suspended, but did not revoke, NSDD-84.[213] Since the suspension of NSDD-84, however, the Reagan Admistration has promulgated "Classified Information Nondisclosure Form 189,"

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205. Comment, *The Constitutionality of Expanding Prepublication Review of Government Employee's Speech*, 72 CALIF. L. REV. 962 (1984).

206. *Id.*

207. *National Security Decision Directive 84 - Safeguarding National Security Information: Hearings Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 85-86 (1984), *reprinted in* 9 Media L. Rep. (BNA) 1759-60 (1983)[hereinafter *Senate Hearings*].

208. *Senate Hearings, supra* note 207, at 85, *reprinted in* 9 Media L. Rep. (BNA) at 1759.

209. For a thorough summary of the Directive and a wide-ranging critique, *see* Comment, *supra* note 205.

210. *Senate Hearings, supra* note 207, at 85, *reprinted in* 9 Media L. Rep. (BNA) at 1759 ("All persons with authorized access to Sensitive Compartmented Information (SCI) shall be required to sign a non-disclosure agreement . . . . All such agreements must include a provision for prepublication review to assure deletion of SCI and other classified information.").

211. *Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 98th Cong., 1st Sess. 4 (1984) [hereinafter *House Hearings*] (Statement of Kenneth J. Coffey, Associate Director, U.S. GAO).

212. *Whistleblower Might Lose Security Clearance*, Chicago Tribune, July 4, 1987, §1, at 20.

213. *See Retreat from Secrecy Madness*, N.Y. Times, Feb. 16, 1984, at A26, col. 1.

and more than 1.5 million federal employees have had to sign it.[214]

Although the prepublication review program and other similar requirements have been criticized on a variety of different grounds,[215] it has been observed that "they may also be attacked as an unconstitutional condition on employment."[216] Thus, the following section of this Article applies the four-part framework developed in Part I to the issues raised by government prepublication reviews. This is done not only to test the constitutionality of this specific program, but also to provide insight into the permissible scope of further government efforts to restrict the speech of government employees.

1. Germaneness of Condition

For an employment condition to be constitutional, it must protect an important government interest unrelated to the suppression of free speech.[217] The germaneness analysis explores this very requirement. Two legitimate government interests may explain the government's interest in a prepublication or nondisclosure program. The first interest is national security, and the second encompasses traditional employer-related interests.

There can be no argument that national security is a substantial government interest. The assertion of that interest alone is not enough, however, to justify restricting an employee's first amendment rights. As one court has observed, "[t]he line between information threatening to foreign policy and matters of legitimate public concern is often very fine."[218] Thus, there must be a deter-

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214. Comment, *supra* note 205, at 970-71.

215. *See* Cheh, *Symposium: National Security and Civil Liberties: Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690 (1984); Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558 (1985); Comment, *supra* note 205.

216. Comment, *supra* note 205, at 999.

217. Brown v. Glines, 444 U.S. 348, 354 (1980) (Regulations which prohibited the circulation of petitions challenging Air Force grooming standards were found to protect a substantial government interest unrelated to the suppression of free expression, and were thus upheld.). *See also* Procunier v. Martinez, 416 U.S. 396, 413 (1974) (Department of Corrections regulations authorizing the screening of inmate mail declared invalid because they did not further an important governmental interest unrelated to the suppression of expression.).

218. McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

mination that there is a national security problem to be remedied, followed by a determination that the condition involved promotes such a remedy. One problem with this analysis is that the extent to which such prepublication review is needed is not immediately clear. As one commentator has noted,[219] the unauthorized disclosure of classified information already constitutes a violation of various criminal provisions of the U.S. Code.[220]

Assuming that there is a national security problem, although this has been disputed,[221] it does not appear that such nondisclosure and prepublication programs will prevent unauthorized disclosures. In fact, the programs are most ineffective where they are most needed, that being when classified information is intentionally disclosed. "Prepublication review, as with any prior restraint, can only be directed at 'innocent' or 'inadvertent' disclosures."[222] Thus, the condition is most effective where the risk of substantial harm is the slightest, that being when confidential information is inadvertently disclosed. It is virtually inconceivable that a government employee with access to classified information would inadvertently make such a grievous disclosure, given the screening and training such employees undergo before receiving security clearance. Nevertheless, every employee having access to classified information would have to seek preclearance review before publishing any material relating to the government. In some departments where there is no access to classified information, employees are still required to submit to preclearance review. This seems particularly suspect given the strong statement in *McGehee v. Casey* that "[t]he government has no legitimate interest in censoring unclassified materials."[223]

Despite the serious problems regarding the programs' inefficiency, it is difficult to argue that a preclearance program of any sort is not germane at all to the pursuit of national security. Given the ease of characterizing any government program that reduces the free flow of speech as aimed at improving national security, however, it would seem that it is especially necessary to scrutinize

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219. Comment, *supra* note 205, at 967.

220. *See, e.g.*, Espionage Act of 1917, 18 U.S.C. §§ 793, 794, 798 (1986).

221. In 1983, the GAO reported to Congress that in the previous five years there were only 21 unauthorized disclosures made in writings or speeches of current or former employees, of which two would have been covered by the proposed review program. Comment, *supra* note 205, at 966.

222. *Id.* at 984.

223. McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983).

the means-end fit. The looser the fit, the more concern there should be that the infringement of the free speech of government employees is motivated by other non-security factors. Indeed, the notion that the goal of prepublication review is aimed at something not so benign as national security has already been suggested.[224] Some critics of Nondisclosure Form 189 have maintained that it is designed to have a chilling effect on whistleblowers who reveal spending excesses and cost overruns.[225] This concern is bolstered by evidence that the Reagan Administration has developed a "carefully conceived and comprehensive plan to censor virtually all types of government information."[226] A few of the specific acts of the Administration that are said to constitute such a plan include the denial of visas to controversial foreign speakers, a restriction of the information that may be acquired under the Freedom of Information Act, the revision of classification procedures to expand the amount of information that may be classified, and restriction of the screening of films that cover controversial issues.[227]

The apparent inability of the preclearance program to significantly further national security interests suggests that the condition is not particularly germane to the interest in national security. This concern is reinforced by the perception that the Administration has deliberately and systematically attempted to reduce the flow of all types of general information. The air of secrecy that has characterized the Reagan Adminstration's tenure could well be seen as having been sought for domestic political reasons rather than for the preservation or enhancement of the nation's security.

As was noted at the outset of this discussion, however, there is a second explanation that may justify the program. This explanation concerns the government's interests as an employer and the government's desire to avoid a situation in which individual em-

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224. *See* Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, §6 (Magazine), at 22. Also, the Reporters Committee for Freedom of the Press produced a list of 30 acts of the Reagan Administration that indicated the existence of a systematic effort to curtail the flow of information, *see House Hearings*, *supra* note 211, at 467-69 (prepared statement of Jack Landau, Executive Director of Reporters Committee for Freedom of the Press).

225. *Whistleblower Might Lose Security Clearance*, Chicago Tribune, July 4, 1987, § 1, at 20.

226. *House Hearings*, *supra* note 211, at 455 (prepared statement of Jack Landau, Executive Director of Reporters Committee for Freedom of the Press).

227. *Id.* at 467-69.

ployees have the ability to sabotage proposed programs by prematurely releasing them for public debate.

That the government has some legitimate interests as an employer is clear.[228] For example, the government as an employer has a legitimate interest in assuring the maintenance of its regular operations and the staffing of its positions with employees who properly perform their regular duties.[229] This cannot, however, be used as a basis for silencing employee criticisms. The Supreme Court supported this position when it ruled that a teacher could not be dismissed for writing letters to a newspaper critical of a school board's true motives for raising additional revenues, because such statements, although erroneous, did not "interfere with the regular operation of the schools . . . ."[230]

Furthermore, even if this second justification for the program is correct, it is difficult, if not impossible, to understand why employees need to be bound by a preclearance program after they have left the government. This highlights the importance of determining the actual motivation behind the program. If the purpose is national security, as apparently was the case in in *Snepp v. United States*,[231] then the need to maintain a preclearance program even after the employee has left the CIA is significantly stronger than if the purpose were to promote efficient government operations. To require the CIA to pursue traditional tortious or criminal remedies after Snepp publishes information "would subject the CIA and its officals to probing discovery into the Agency's highly confidential affairs. Rarely would the Government run this risk."[232]

These concerns would appear to carry much less weight, however, when the programs limiting speech are allegedly justified by the need for promoting efficient government operations. In fact, employee speech on government policies and operations which does not relate to national security would seem to be deserving of special first amendment protection. "The public interest in having free and unhindered debate on matters of public importance—the

228. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)(There must be a balance between the teacher's interests, as a citizen and "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.").

229. *Id.* at 572-73.

230. *Id.* at 573.

231. 444 U.S. 507 (1980).

232. *Id.* at 514-15.

core value of the Free Speech Clause of the First Amendment [is a great one] . . . ."[233] This is not to say, however, that employees who engage in policymaking or who speak on behalf of the government do not need to maintain a certain uniformity with government policies, particularly with regard to the release of information which could sabotage a proposed program.[234] It remains important to note, however, that a preclearance program which chills or infringes speech that is unrelated to national security concerns or the government's interest as an employer is not germane.[235]

That the Reagan Administration's primary motive for proposing the program may not have been its interests as an employer can be inferred from the fact that the program applied primarily to those who have access to classified information.[236] More critically, to the extent the Administration was attempting to stifle dissent, debate, and the flow of information on matters beyond those where the government's legitimate need for uniformity among its employees is present, it represented an infringement upon democratic values and the imposition of an employment condition not germane to legitimate government interests.

2. Applying the Condition: Similarly Situated Parties?

This second inquiry of the four-part framework explores the extent to which individuals who do and do not comply with the government's requirement are situated similarly. This is accomplished by focusing on the purposes of the prepublication program. As was noted earlier,[237] two general purposes underlie the estab-

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233. Pickering v. Board of Educ., 391 U.S. 563, 573 (1968).

234. Branti v. Finkel, 445 U.S. 507 (1980); Coven, *The First Amendment Rights of Policy Making Public Employees*, 12 HARV. C.R.-C.L. L. REV. 559, 568 (1977).

235. These restrictions will deter or chill the speech of employees who would leak, for attribution, politically embarassing information or material which is critical of a supervisor. Employees who leak information on a "not for attribution," basis, however, are unlikely to feel constrained by non-disclosure agreements and pre-publication requirements. Such chilling is justifiable only to the extent it affects the two previously identified legitimate government interests: 1) national security, and 2) traditional government as an employer in assuring the efficiency of the office.

236. Twelve agencies, however, developed preclearance requirements even though they do not handle national security-related information. Such agencies include the Tennessee Valley Authority, the Department of Education, and the Federal Reserve Department. These review requirements result from each agency's internal policies and apply only for the employer's term of employment. Comment, *supra* note 205.

237. *See supra* text accompanying note 217.

lishment of a prepublication review program: 1) concern for national security, and 2) employer concerns that traditional government functions not be disrupted and that government employees be able to perform their duties properly.

With respect to the government interest in national security, there does seem to be a significant difference between the situations of those who do and do not comply with the requirement. Extracting waivers of first amendment rights from employees involved with national security matters is not likely to be done out of a desire to penalize such workers for exercising their constitutional right to free speech. Employees who are willing to agree not to disclose confidential matters affecting national security are obviously situated very differently from individuals who reserve the right to disclose such matters. Denying jobs that deal with national security to those who may compromise that security furthers legitimate government interests. Thus, the granting of jobs to those who will abide by the requirements can be seen as a selective benefit conferred upon those willing to make the sacrifice.

On the other hand, with respect to the government's interests in national security, individuals who do not have access to classified information and do waive their first amendment rights are not situated differently from such individuals who refuse to waive their first amendment rights. Thus, the thousands of government employees who are currently required to submit to prepublication reviews despite having no access to classified information would appear to be the victims of a government penalty for preserving their first amendment rights.[238] Restricting their free speech does not further any interest in national security.

Also, the earlier analysis under the germaneness of the condition variable suggests that the national security justifications asserted by the government should be viewed somewhat skeptically, given: a) the evidence of an apparent Administration plan to reduce the flow of such critical and controversial information, b) the inefficiency of prepublication reviews with respect to enhancing security, and c) the availability of other government remedies to deal with disclosures of classified information.[239] If the national security interests alleged by the government are merely pretext, then the prepublication review program would appear to be a penalty on all employees for exercising their constitutionally-pro-

238. *See supra* note 236.

239. *See supra* text accompanying notes 220-27.

tected freedom of speech.

When the various prepublication review programs are compared with the government's interests as an employer, there is additional evidence of individuals being penalized for exercising their constitutional rights. For instance, there would seem to be no need to continue to apply such a requirement to individuals who no longer work for the government. In fact, under this governmental interest, there would be no reason that the government should treat former government employees any differently than individuals who never worked for the government. To do otherwise would be to penalize such former employees without furthering the government's interests as an employer.

Regarding current employees, it is difficult to understand the need for a preclearance program, especially one that affects more than one million employees. It is not at all clear that, with respect to the government's interest in its regular operations not being undermined and in its employees being able to perform their daily duties, an employee who agrees to submit to prepublication review is situated differently than one who does not. This is reinforced by the fact that an employee may always be discharged if he makes comments that interfere with the employer's regular operation of the government or impede the individual's proper performance of his job.[240]

3. Significance of the Government's Interests

The government's interest in conditioning public employment on prepublication or secrecy agreements does not appear very significant, especially with respect to employees not intimately involved with matters of national security. Indeed, the requirement of prepublication review, even if germane, does not significantly further legitimate government interests in national security. Alternatives exist which would more directly further the government's legitimate interest, while not trampling so indiscriminately on first amendment interests.

Thus, the likely government reaction to the Court's striking down of prepublication reviews and expansive secrecy agreements would be to increase penalties and prosecutions of individuals who make disclosures of classified information. This result would have a number of advantages. First, it would affect only a handful of

240. Pickering v. Board of Educ., 391 U.S. 563, 573 (1968).

employees, those who had actually disclosed protected information. Second, the likelihood of government harassment of employees who voice critical views would be substantially lessened. Third, to the extent that unauthorized disclosures are a serious problem, it is likely that the government would sharply reduce the number of people who have access to classified information. The existence of these workable alternatives lessens significantly the government's need for and reliance upon this prepublication review program.

The need to focus on the extent of the government's interest in conditioning employment is especially evident where it is conceivable that the employment conditions, at least in certain circumstances, are in fact germane to the government's interests in national security. Rather than focus on the government's purposes for imposing the condition, this inquiry focuses on the federal employment scheme as well as on the extent to which the first amendment waiver condition furthers the government's interests. Because the condition does not contribute significantly to legitimate interests and because it can be predicted that the government will continue to employ people in its absence, it is clear that despite the appeal of the greater-includes-the-lesser theory, the condition does constitute an expansion of the government's intrusiveness.[241]

4. Voluntariness of the Waiver

The fourth inquiry seeks to determine whether the government has made a value-enhancing offer with its imposition of a condition on a government benefit. In the context of conditions imposed on current employees, however, this inquiry does not prompt the detailed analysis it did when applied to a new government benefit provided with limiting conditions.

To the extent that the proposed preclearance requirement or current nondisclosure agreement is enforceable against current employees, the program cannot be considered an offer. The government's contention that agreement to the terms of the program constitutes consideration for the opportunity to work in particular positions of trust is flawed. These employees have already contracted to do the work. The government's subsequent effort to extract additional consideration then bears a resemblance to tradi-

241. Kreimer, *supra* note 8, at 1374-75.

tional contractual notions of duress where one party threatens to breach a contract unless it is modified.[242] Though the analogy to the law of contracts is not perfect,[243] it does help suggest that the imposition of such a program would not expand an employee's range of employment options. In fact, the requirement of preclearance operates as a threat to current employees—comply or else.

The offer/threat analysis is more helpful in the context of new job applicants.[244] The argument here is that the new employee voluntarily waived his or her first amendment rights, and that the decision should be respected. This notion appears to lie at the heart of the *Snepp* opinion. The Court noted that Snepp had "explicitly recognized that he was entering a trust relationship" which "imposed the obligation not to publish . . . without submitting the information for clearance."[245] However, there are problems with this argument. First, it allows the government to extract outrageous concessions, as long as the employee agrees. Arguably, the government could ask its employees to waive their right to vote for the candidate of their choice or to freely practice the religion of their faith. The Supreme Court long ago recognized, however, that the Bill of Rights protects employees from such requests. Thus, the Court accepted the argument that Congress "may not 'enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' "[246] "None would deny such limitations on congressional power."[247] Nevertheless, as long as the employee agreed, the waiver argument would appear to tolerate the employee's right to make that choice.

A second problem with the waiver argument is that special concerns may be raised when the government extracts waivers of the right of free speech. Systemic interests could be greatly af-

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242. Austin Instrument Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 272 N.E.2d 533, 535, 324 N.Y.S.2d 22, 25 (1971).

243. It is not clear that irreparable injury will result if the employees did not agree to the government's terms. Furthermore, many government employees do not have term employment contracts.

244. This argument could be expanded if one viewed current government employees as terminable at will. If this is the case, then current employees could be seen as being in the same position with respect to their rights as a new job applicant.

245. Snepp v. United States, 444 U.S. 507, 510-11 (1980).

246. United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1946).

247. *Id.*

fected if the government can extract such waivers.[248] It is clear that the shape and control of government is greatly influenced and checked by the unfettered exchange of speech.[249] To allow the government to extract waivers from millions of individuals who are in a position to know the most about the government's operations, would be to allow a significant distortion of public debate. While expression of views favorable to current policies or personnel may be overlooked by those charged with maintaining the agreements, those voicing critical views may not be treated so kindly. In the analogous situation found in *Pickering*,[250] the Supreme Court recognized the importance of allowing teachers to speak out on school issues.

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[251]

The "checking value" provides additional support for this argument. "Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about—namely, government employees—would seem to deserve special protection."[252]

A third argument against the validity of a waiver is that the courts may not be willing to treat a condition that is explicitly provided as a term in an employment contract differently from a condition that is embodied in a general rule. In *McGehee*,[253] the Court observed that "it makes no difference to our analysis whether the government seeks to restrict the speech rights of its employees by individual contract or by a broad rule applicable to a class of employees. Either way, the government may not impose unconstitutional conditions on government employment."[254] Although the condition was struck down, the Court's language may

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248. It is unlikely that individual employees would value very highly their first amendment rights, though in the aggregate, the effect of such waivers could be immense.

249. *See supra* notes 190-94 and accompanying text.

250. Pickering v. Board of Educ., 391 U.S. 563 (1968).

251. *Id.* at 572.

252. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 634.

253. McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).

254. *Id.* at 1141.

lead future courts to decide that broad, conditional rules produce voluntary waivers.

A fourth problem with the waiver argument is that an agreement between two parties may not be optimal if one party possesses monoply power. This may well describe the government's position. If the preclearance program affects virtually all public employees, as contrasted with the more limited program at issue in *Snepp*,[255] then such conditions "might be cause for substantial concern" since "the government dominates a larger fraction of all [employment] opportunities."[256] In such situations, the conditions should "be treated as if they were coercive."[257]

The proposed prepublication review and nondisclosure agreements are especially troublesome because they undeniably restrict the status quo for the 1.5 million employees affected. Any condition that is unilaterally imposed on current employees certainly upsets expectations and restricts the range of the employee's free expression. The similarity between the required relinquishment of first amendment rights by current government employees and the quintessential restriction of the status quo example is striking.[258] The benchmark example of restriction concerns the recharacterization of a public forum into a more limited one, since "the limitation reduces the range of freedom of speech and assembly in comparison to the freedom available before."[259] Likewise, the imposition of first amendment restrictions on government employees reduces the individual's range of speech in comparison to the freedom available before. At the same time, the government's power is expanded. For the employee who is forced to accept the condition after her employment, the situation is particularly acute because she is being required to forego without compensation a right she previously enjoyed.

5. Conditioning Public Employment: Constitutional Restraints

The four-part framework for analyzing questions of unconstitutional conditions offers important insights into government efforts to restrict the first amendment rights of its employees. The imposition of such conditions undeniably leaves the employees

255. Snepp v. United States, 444 U.S. 507 (1980).
256. Easterbrook, *supra* note 53, at 349.
257. *Id.*
258. Kreimer, *supra* note 8, at 1359-60.
259. *Id.* at 1360.

worse off with respect to their constitutional rights, and because there is no significant justification for the government to do so, it is difficult to understand why such restraints on the first amendment should be constitutional when they can not be directly imposed on the general citizenry.

While the Reagan Administration proposals appear to clearly violate the doctrine of unconstitutional conditions, that is not to say that all efforts to impose prepublication reviews on government employees would fail a similar analysis. The Reagan proposals were constitutionally suspect primarily because of their sweep. As has been seen, many government employees were subject to the restraints despite the fact that including them did not significantly further either of the government's two asserted interests in national security and traditional employer interests. Future administrations would be well advised to be more circumspect in their imposition of constitutional conditions on government employees. Indeed, no employee should be asked to waive his or her constitutional rights if it is not necessary to further significant legitimate government interests. This would suggest that the doctrine of unconstitutional conditions would not find unconstitutional a program that requires nondisclosure of information vital to national security. It would also appear that the doctrine requires the government to pursue its interests with the means least intrusive on first amendment rights. With respect to the government's interests as an employer, it is not clear that preclearance is ever needed, with a possible exception for individuals who speak on behalf of the government. Employees who do undermine the government's interests as an employer can already be dismissed. Finally, the availability of less intrusive means heightens the suspicion that the government is seeking to penalize individuals who exercise their first amendment rights. That is, it appears that the government is trying to do indirectly what it could not do directly. Government conditions on employment that are overbroad and which fail to promote government interests to some extent should, therefore, be invalidated as unconstitutional conditions.

B. Other Employment Conditions

Many cases involving the conditioning of a government benefit or employment on the waiver of a constitutional right will not be so clearly suspect as the requirements seen in the FECA and the prepublication review program. To demonstrate how the four inquiries interact, as well as how such a framework affects current

law, a few examples involving public employment conditions will be scrutinized.

The first example analyzes how a case such as *Connick v. Myers*[260] would have fared if the Court had used the four-part framework. In that case, an Assistant District Attorney, Myers, distributed a questionnaire to co-workers that solicited their views on employee morale and on the existence of pressure to participate in political campaigns. As a result of this action, Myers was dismissed. After a federal district court and the Fifth Circuit Court had agreed that Myers should be reinstated, the Supreme Court reversed.

With respect to the questions concerning poor employee morale, the Supreme Court avoided rigorous scrutiny of the government's interests by concluding that such questions were not of public import.[261] In such instances, "absent the most unusual circumstances" a federal court should not review the wisdom of the firing decision.[262] The majority argued that to presume every criticism directed at a public official is of public concern would mean that vitually every remark "would plant the seed of a constitutional case."[263] In his dissent, Brennan was sharply critical of this conception of what information is of public interest. "The First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness."[264] Rather than constrict the scope of information protected by the first amendment, the Court should "require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to that end."[265]

With respect to the question concerning pressure to participate in political campaigns, the majority conceded that the question raised a question of public interest.[266] Nevertheless, the Court held that the dismissal was constitutional.[267] The majority argued that such a questionnaire interfered with working relationships, and that the manner, time, and place in which the questionnaire

260. 461 U.S. 138 (1983).
261. *Id.* at 148.
262. *Id.* at 147.
263. *Id.* at 149.
264. *Id.* at 165 (Brennan, J., dissenting).
265. *Id.*
266. *Connick*, 461 U.S. at 148.
267. *Id.* at 154.

was distributed dictated that the questionnaire not be allowed. More particularly, the majority noted that Myers exercised her rights at the office, and that she distributed the questionnaire for reasons not "of purely academic interest."[268]

Rather than redefining what information is of public interest or providing "a wide degree of deference to the employer's judgement"[269] when "close working relationships are essential to fulfilling public responsibilities,"[270] the courts should pursue a less deferential, more neutral analysis, particularly in cases where an employee has criticized her employer. The first three inquiries of the four-part framework provide guidance to the courts in undertaking such an analysis.

The first inquiry explores the germaneness of the condition. That is, does the firing of an employee who distributes such a questionnaire further any legitimate government interest. One legitimate interest that may be threatened by such employee behavior is the rule that employees are to be engaging in government work during work hours, not pursuing personal interests. A second governmental interest, related to the first, is that the office operate efficiently and that its employees be able to efficiently execute their responsibilities. In certain circumstances, the maintenance of close working relationships is important. It is not obvious, however, that a questionnaire soliciting the views of others would disrupt employee relationships. The views actually elicited or expounded may poison relationships, but it is unclear that the solicitation process itself causes such problems. Thus, denying the distribution of a questionnaire clearly appears germane to certain employer interests, but not so clearly to others.

The second inquiry focuses on how this condition applies to Myers. The factual findings of the District Court are helpful here. With respect to Myers' ability to perform her responsibilities, the District Court found, and the Supreme Court agreed, that there was not "any evidence" that the questionnaire impeded Myers' execution of her responsiblities.[271] Also, because the questionnaire was distributed during lunchtime, Myers' work effort was not affected. Indeed, Myers violated no office policy.[272] Finally, the Dis-

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268. *Id.* at 153.

269. *Id.* at 152.

270. *Id.* at 151.

271. *Id.*

272. Myers v. Connick, 507 F. Supp. 752, 758-59 (1980), *rev'd*, 461 U.S. 138 (1983).

trict Court found that Myers' questionnaire did not have an adverse effect on Myers' relationship with her superiors.[273] The Court's majority, however, ignored these findings and deferred to the employer, whom the employee had criticized, for his description of the working relationship. Even then, the employer could only state that he feared a subsequent disruption of the relationship. At the time of the dismissal there was no evidence of an ineffective relationship.[274] Still further, there was no showing that the effectiveness or efficiency of the office had been in any way impeded by Myers' speech.

The third inquiry explores the significance of the government's interests in denying such speech. The interests in disallowing the circulation of Myers' questionnaire do not appear significant.[275] Also, the likelihood that the government's motives for censoring the speech are illegitimate may be inferred from the contents of the questionnaire. In particular, an employer would have strong reasons to prevent the flow of information to the public regarding the political pressure put on employees to participate in campaigns or the poor morale of employees under the elected district attorney. Indeed, the internal operations of that district attorney's office had often been the subject of extensive critical media coverage.[276]

Because no attempt was made to justify the condition as an element of a voluntary agreement entered into by the employer and the employee, the fourth inquiry is not needed. Even if such a justification were offered, it would carry little weight. Employees should not have to bargain away constitutional rights when it does not significantly further the government's legitimate interests. Furthermore, unlike a situation where government officials working for the CIA are asked to waive their right to speak about matters of national security, the situation here is much more generalized, and can be applied to all government employees. Thus, the government's monopoly position as employer is much stronger, and the argument that the employee is enjoying a special benefit as a reward for waiving the first amendment right is weaker.

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273. *Id.* at 759

274. Brennan notes in his dissent that the Court has held previously that "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Connick*, 461 U.S. at 169 (Brennan, J., dissenting).

275. *See supra* notes 271-74 and accompanying text.

276. *See Connick*, 461 U.S. at 160 n.2.

A second example worth analyzing under the four-part test proposed by this Article is a situation where an employee is fired for making certain statements, but the four-part framework would find the condition to be constitutional. An example might be the dismissal of a school teacher who has made statements to the effect that black students are less intelligent than white students. While it is clear that the government could not directly prohibit such speech by citizens at large, the four-part framework would indicate that a teacher who has voiced such views could be stripped of his employment. The justification for this lies in the relationship between the speech and the benefit withdrawn.

The first inquiry explores the germaneness of the requirement that school teachers not express views which are critical of the intelligence of a certain group of students. It is clear that such a requirement furthers legitimate government interests. Teachers who express such views certainly impede their functioning in the classroom. Government has a legitimate interest in its teachers not espousing views that demean a class of citizens, as these are views that other government agents seek to combat. Furthermore, students who are black would likely resent being taught by such a teacher, which would impede the educational process further.

There can be little question that the statements by the teacher are the type of speech the school board would want to prohibit. A requirement that teachers not hold or express views which undermine their effectiveness in the classroom is germane. Applying that requirement to the teacher who has made the racially derogatory remarks is legitimate. Such remarks undermine the teacher's effectiveness. This situation should be contrasted with that in *Pickering*,[277] in which the teacher criticized the school board. In that situation, there was no evidence that the teacher's performance in the classroom was jeopardized.[278]

The third inquiry's focus on the significance of the government's interests also supports the dismissal of the teacher. The government's interests in education and staffing the schools with people who can teach effectively is certainly significant. Requiring teachers to not make statements that would jeopardize their effectiveness is similarly significant. Finally, it does not seem likely that the teacher could complain that he or she was coerced into the teaching profession.

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277. Pickering v. Board of Educ., 391 U.S. 563 (1968).
278. *Id.* at 569-70.

A final case worth scrutinizing is one recently before the Supreme Court, *Rankin v. McPherson.*[279] In this case, a deputy constable had been fired from her position when she told a co-worker after the attempted assassination of President Reagan on March 30, 1981: "[I]f they go for him again, I hope they get him."[280] After the district court upheld the dismissal, the Fifth Circuit unanimously reversed. The Supreme Court granted certiorari and affirmed but with only four votes for the Court's opinion. In making its analysis, the Court did not question the district court's conclusion that McPherson actually hoped that the President would be assassinated. The government did not attempt to justify the dismissal as being the result of evidence that future efficiency or morale of the office was threatened. Rather, the goverment asserted that it should not have to employ anyone who "rides with the cops and cheers for the robbers."[281]

The first inquiry of the four-part framework explores the germaneness of this requirement. It does seem that such a condition, that employees in a constable's office not "cheer for the robbers,"[282] is germane to legitimate government interests and the agency should be entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency. Furthermore, it cannot be seriously questioned that such an interest is significant — an important finding as seen in the third inquiry.

The problem with the government's action, however, was application of the condition to McPherson, who was a routine clerk/typist and possessed no law enforcement power. The second inquiry of the four-part framework makes clear that even if a condition is generally germane, it must be germane as applied. Here, there was no evidence that McPherson's speech in any way impeded her ability to perform her responsibilities. Nor was there any evidence that the office's functionings were jeopardized by the speech.

Thus, McPherson's statement, though disturbing, was not a justifiable basis for stripping her of her government employment. Given that the government could not directly punish a citizen for expressing views comparable to McPherson's, there is no justifica-

279. Rankin v. McPherson, 107 S. Ct. 2891 (1987).
280. *Id.* at 2895.
281. McPherson v. Rankin, 786 F.2d 1233, 1238 (5th Cir. 1986).
282. *Id.*

tion for finding a different result when the government indirectly seeks such an end, absent a showing that such a condition is a significant part of the program or employment.

While the courts have struggled in determining the constitutionality of restrictions on government employees' first amendment rights, Congress is now considering legislation that would restore to public employees the right to participate in the political process by repealing the Hatch Act.[283] The Supreme Court upheld the constitutionality of the Hatch Act in *United States Civil Service Commission v. National Association of Letter Carriers*, stating that the government's interests as an employer outweighed employee first amendment rights to participate in the political process.[284] While there may be legitimate concern that some employers will pressure their employees into making financial contributions or helping political candidates of the employer's choice, those concerns should be addressed with narrowly-tailored remedies penalizing political coercion.

A Bill recently passed the House of Representatives, by a vote of 305-112, which would allow civil servants to run for office, manage campaigns, participate in the political process, and solicit contributions on their own time.[285] If enacted, this bill would do what the Supreme Court's balancing analysis could not, that being "to restore to Federal civilian employees their right to participate voluntarily, as private citizens, in the political processes of the Nation, [and] protect such employees from improper political solications."[286] The four-part framework of the doctrine of unconstitutional conditions instructs that employees should be allowed to exercise their first amendment rights unless such exercise impairs the efficiency of the workplace or the employee's ability to perform his or her job. Wholesale prophylactic restrictions on first amendment rights, whether they take the form of prepublication review orders or the Hatch Act, are unduly intrusive upon the constitutional rights of government employees.

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283. H.R. 3400, 100th Cong., 1st Sess., 133 CONG. REC. H10045-47 (daily ed. Nov. 17, 1987). *See supra* note 7.

284. 413 U.S. 548 (1973).

285. H.R. 3400, 100th Cong., 1st Sess., 133 CONG. REC. H10045-47 (daily ed. Nov. 17, 1987).

286. *Id.* at 10045.

CONCLUSION

The extent to which the government may condition benefits upon the waiver of constitutional rights has proven to be a vexing question for the courts. Part of the problem has arisen because of the inability of some courts to recognize that allocational sanctions can pressure and infringe constitutional rights just as surely as direct criminal pressures.[287] Most of the problem, however, has been the failure of courts and commentators to develop a consistent framework for analyzing such questions.

This Article has argued that the courts should abandon any predilections for haphazard balancing or greater-includes-the-lesser arguments in favor of a new, four-part framework that explores the central issues raised by potentially unconstitutional conditions. Such a framework explores the two justifications for treating indirect infringements of constitutional rights differently than direct prohibitions. This new framework would help focus the courts' attention on the condition's relationship to the government program as well as on the amount of pressure on individuals to participate in the program. This is especially important in the context of First Amendment rights where large systemic benefits flow from the exercise of the right, benefits that may not be accounted for by the individual when deciding whether to "sell" the right.

When the framework is applied to the requirement that presidential candidates waive their first amendment right to raise and spend unlimited private funds as a condition to public financing, it appears clear that the condition is unconstitutional. The condition does not further, and in fact may undermine, legitimate government interests. It penalizes constitutionally protected expression, and allows the government to discriminate between similarly situated candidates. Furthermore, it can be confidently predicted that the government would continue to provide public financing even without the requirement that candidates waive their first amendment rights.

When the framework is applied to the various proposals and efforts that require millions of government employees to waive their first amendment rights, the framework shows them also to be largely unconstitutional. In particular, the government violates the doctrine of unconstitutional conditions when it requires its employees to submit to prepublication reviews, especially when the

287. Kreimer, *supra* note 8, at 1296-1297.

employees do not have access to classified information. The paucity of evidence that there is a significant problem of unauthorized disclosures, the inability of prepublication reviews and nondisclosure agreements to remedy such a problem should it exist, the degree to which such programs deter free speech, and the ease with which they could be used to silence criticisms and politically unpopular views, all show the program to be an unconstitutional penalty on employees' first amendment rights.

The political speech involved in these two examples represents the core of first amendment values. Such speech is important not only for the self-fulfillment and autonomy its exercise confers upon the speaker, but also because of its impact on the structure of government and society. To allow the government to infringe upon these rights by conditioning employment and federal subsidies upon their waiver is to shift the constitutionally created balance of power from the people to the government. The value of constitutionally protected liberties is seriously endangered if the government may condition its many benefits and jobs upon the waiver of those liberties.