FIRST AMENDMENT ENFORCEMENT IN GOVERNMENT INSTITUTIONS AND PROGRAMS

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Courts typically apply their own, skeptical judgment to review free speech claims. But when the government is understood to be managing its own institutions (like schools, prisons, or the military) or its own programs (such as those providing abortion counseling or distributing arts grants), courts regularly abandon ordinary principles of First Amendment jurisprudence and defer to the judgments of other government decisionmakers. As they did recently in Morse v. Frederick *and* Garcetti v. Ceballos*, courts frequently review challenged speech restrictions only for their reasonableness, or hold that restricted speech falls outside the scope of First Amendment protection. This Article begins by exploring the basis for the courts' minimal review. Clarifying current case law and commentary, the Article identifies two distinct accounts: a weak norms theory positing that free speech principles have very limited significance within government institutions and programs, and a judicial underenforcement theory contending that the principles are important in those contexts, but that courts are declining to assume primary responsibility for interpreting or enforcing them. Maintaining that the weak norms theory is exaggerated and thus alone provides insufficient justification for the courts' minimal review, this Article argues that the underenforcement theory, in combination with elements of the weak norms theory, provides a persuasive normative account for why courts ought sometimes to resist applying traditional heightened review of speech restrictions within government institutions and programs.*

Though the combined theories provide a forceful account against traditional heightened review, they do not validate the courts' practice of applying no more than reasonableness review. Because First Amendment principles remain important inside government institutions and programs, this Article contends that the courts' current approach is flawed, and proposes an alternative model for courts to follow. In other contexts when the judiciary has declined primary interpretive

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and enforcement authority of legal or constitutional norms, courts have generally either refrained from influencing or directing other government decisionmakers' judgments on those norms, or conditioned their deference to those judgments on the nature of the others' decisionmaking processes. The former approach makes sense, the Article maintains, when courts have some confidence that other parties or processes will implement or protect the legal or constitutional norm at stake. When the interest to be protected involves individual rights, and in particular the rights of expressive minorities, as the First Amendment serves in significant part to protect, there is less reason for such confidence, and conditioning deference on the decisionmaking process is more appropriate. Advocating a "free speech conditional deference model," the Article maintains that courts ought not to apply only reasonableness review or hold speech to be unprotected unless the restriction adheres to a formal speech policy. Because formal speech policies serve as an alternative means to judicial review for encouraging fidelity to First Amendment principles—policies encourage public deliberation on free speech concerns, promote equal treatment of speech by eliminating ad hoc decisionmaking, and help to check governmental abuses by facilitating accountability for speech restrictions—the Article argues that a policy requirement is an appropriate precondition for judicial deference.

INTRODUCTION

Two Terms ago, in *Morse v. Frederick*,[1] the U.S. Supreme Court held that school officials could, consistent with the First Amendment, punish a student for displaying a banner stating "BONG HiTS 4 JESUS" at a school-sponsored event, in large part because it was "reasonable" for the officials to do so.[2] In the Term before, the Supreme Court in *Garcetti v. Ceballos*[3] dismissed a deputy district attorney's First Amendment claim alleging retaliation for reporting purported governmental misconduct in a work memorandum, on the ground that speech made pursuant to an employee's work responsibilities does not receive First Amendment protection.[4] *Morse* and *Garcetti* are examples of a broad set of cases in which courts have abandoned ordinary principles of First Amendment jurisprudence and declined to apply their typically skeptical review of official speech restrictions. In these cases, where the government is understood to be managing its own institutions (like schools, prisons, or the military) or its own programs (such as those providing abortion counseling or distributing arts grants), the courts regularly review challenged speech restrictions only for their reasonableness, or hold that the restricted speech receives no First Amendment protection. This Article argues that this approach is flawed, and proposes an alternative model for courts to follow when adjudicating these free speech claims.

Courts and commentators have debated vigorously whether courts ought to review speech restrictions within government institutions and programs more stringently than they do now.[5] Yet, in doing so, the commentary has

1. 127 S. Ct. 2618 (2007).
2. *Id.* at 2629.
3. 547 U.S. 410 (2006).
4. *Id.* at 418.
5. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); Alan Brownstein, *The Nonforum as a First Amendment Category: Bring Order Out of the Chaos of Free Speech Cases Involving School Sponsored Activities*, 42 U.C. DAVIS L. REV. 717 (2009); C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other*

failed sufficiently to analyze the divergent reasons accounting for the courts' minimal review. This shortcoming is significant, I maintain, because the appropriate degree of judicial scrutiny depends on the rationale for eschewing traditional First Amendment review. In this Article, I identify two principal justifications underlying the courts' current approach. One justification, which I call the "weak norms theory," is that free speech principles have only limited significance within government institutions or programs. Because free speech principles apply only weakly or narrowly in these contexts, courts avoid applying traditional First Amendment scrutiny and instead apply no more than reasonableness review. On this view, the courts' current approach fully enforces the applicable free speech norms. Another justification, which I label the "judicial underenforcement theory," is that courts are declining to assume primary responsibility for interpreting or enforcing the relevant First Amendment principles. On this second view, the courts' current approach reflects not the limited application of free speech norms, but the deliberate exercise of judicial restraint.

This Article maintains that the judicial underenforcement theory, in combination with elements of the weak norms theory, provides a persuasive normative account for why courts ought sometimes to resist applying traditional heightened First Amendment review. The weak norms theory alone does not adequately account for the courts' departure from traditional review. Though the theory is correct in its core insight that free speech norms apply differently and often less forcefully within government institutions and programs, its conception of those norms as generally weak or anemic is overstated. Speech within those contexts plays a valuable role in facilitating the search for truth, promoting self-government, checking governmental misconduct, and enabling self-realization. While the government clearly has heightened interests in restricting speech in order to carry out its democratically agreed-upon objectives, those interests are not so sweeping or overwhelming as to justify affording speech no, or hardly any, First Amendment

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"Special Contexts," 56 U. CIN. L. REV. 779, 783–84 (1988); Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685; Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008) [hereinafter Horwitz, *Three Faces*]; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007) [hereinafter Horwitz, *Universities*]; Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990); Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) [hereinafter Post, *Public Forum*]; Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 196–201.

protection. Indeed, fidelity to democratic priorities sometimes requires greater, rather than less, solicitude for free speech norms in institutional contexts. The judicial underenforcement theory, by contrast, does not dismiss the relevance of First Amendment norms. Instead, it focuses on the courts' inferior expertise and democratic status relative to the initial government decisionmakers', and the substantial risk that aggressive judicial oversight will undermine the initial decisionmakers' institutional authority and overwhelm the courts. Together with the view that First Amendment norms are less robust (though not anemic) in government institutions and programs, the judicial underenforcement theory offers a convincing account for why courts ought sometimes to decline applying traditional heightened scrutiny.

That the combined theories provide a forceful account against traditional heightened review does not validate the courts' practice of applying no more than reasonableness review. Taking seriously the idea that First Amendment principles are important within government institutions and programs, this Article argues that the courts' current approach is constitutionally incomplete. In other legal contexts, courts have followed two principal models when declining to assume primary responsibility for interpreting and enforcing legal or constitutional norms. Under what I call the "hands-off model," exemplified by the political question doctrine in constitutional law, courts generally refrain from influencing or directing other governmental decisionmakers' interpretation or enforcement of legal norms. Under what I call the "conditional deference model," embodied in the courts' treatment of agency interpretations of law, courts engage in limited review, but only if the government decisionmakers with primary enforcement responsibility reach their decisions in a manner considered worthy of deference. On that approach, a reasonable interpretation and the decisionmakers' conformity with heightened procedural requirements, for instance, serve as sufficient conditions for deferential review of the agency's substantive determination.

This Article argues that a "free speech conditional deference model" provides the appropriate framework for courts declining to apply heightened review of speech restrictions within government institutions and programs. The hands-off approach makes sense when courts have some confidence that alternative parties or processes will implement or protect the legal or constitutional norms at issue. As others have argued with respect to the political question doctrine, a hands-off approach is appropriate for certain structural disputes, such as those involving federalism and congressional-executive questions, in which there is reason to believe that the political process will

respect or safeguard constitutional concerns.[6] By contrast, when the interest to be protected involves individual rights, and in particular the rights of expressive minorities, as the First Amendment serves in significant part to protect, a hands-off approach is unsuitable. A central premise of the free speech guarantee is its heightened skepticism of governmental policies and practices that limit expression, and in light of that skepticism, courts ought to interrogate more deeply the ways in which other governmental decisionmakers undertake their responsibilities to interpret and enforce free speech norms. By conditioning minimal review on conformity with procedural requirements, courts can leave to others the responsibility of interpreting and enforcing the substantive content of First Amendment norms while nonetheless guarding against simple self-interested power grabs by government decisionmakers.

To be clear, this Article argues for applying the conditional deference model in the broad set of cases in which courts exercise no more than reasonableness review of speech restrictions within government institutions or programs. It does not advocate the model for all cases involving speech restrictions within government institutions and programs. There are many such cases in which courts apply, or ought to apply, more searching review, and this Article does not maintain that the conditional deference approach eliminates the need for heightened scrutiny. This Article recognizes that cases involving speech restrictions within government institutions and programs regularly involve government interests of a different order than in other First Amendment cases, but does not assume that that category of cases constitutes a clearly delineated domain in which heightened review is inappropriate. This Article contends that, insofar as courts decline to apply heightened review to speech restrictions within government institutions or programs, they ought, at a minimum, to follow the conditional deference model. The free speech conditional deference model thus provides a floor, not a ceiling, for securing First Amendment protections.

Finally, this Article maintains that, in applying the free speech deference model, courts ought to focus on whether the government institution or program in question operates pursuant to, and in conformity with, a formal speech policy. That is, courts ought not to apply only reasonableness review or hold speech to be unprotected unless the speech restriction adheres to a formal speech policy. By formal speech policy, I mean one that results from an open and deliberative process; includes only restrictions that, in the policymakers' good-faith and considered judgment, are necessary to serve an

6. *See* sources cited *infra* notes 177–184.

important government interest; presents clear standards on the scope of permissible speech restrictions; provides reasonable methods for its enforcement; and is written, publicly available, and easily accessible. A policy requirement is an appropriate precondition for judicial deference because it serves as an alternative means to judicial review for encouraging fidelity to free speech principles. Policymaking encourages deliberation, both by governmental actors and the larger political community, about the proper accommodation of free speech and non–free speech values. Policies promote equal treatment of speech by eliminating ad hoc decisionmaking. Policies also check government by facilitating institutions' and programs' accountability for speech restrictions. Though formal free speech policies will undoubtedly sometimes be highly restrictive, they will nonetheless represent the political community's shared understanding of the First Amendment's scope and meaning within particular government institutions and programs. In acknowledging the authority of nonjudicial actors—members of the executive and legislative branches and the polity—to interpret and enforce First Amendment principles, the free speech conditional deference model thus accepts the legitimacy of free speech popular constitutionalism.[7]

This Article proceeds in four parts. Part I discusses the broad variety of cases in which the courts exercise no more than reasonableness review of challenged speech restrictions within government institutions or programs. Part II presents and analyzes the two principal justifications for the courts' approach, the weak norms and judicial underenforcement theories. Part III argues for the free speech conditional deference model, and Part IV sets forth the model's contours. A brief conclusion follows.

I. CURRENT PRACTICES: MINIMAL REVIEW OF FIRST AMENDMENT CLAIMS

Courts play a central role in interpreting and enforcing First Amendment rights.[8] In most cases, courts apply their own, independent judgment to

7. For discussions of forms of "popular constitutionalism," see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11–53 (1999); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 383–89, 404 (1997); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 146–47 (1999); Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005).

8. *See* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 229–30 (1976); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF

distinguish carefully between protected and unprotected speech and, on finding speech to be protected, to evaluate the strength of the asserted government interests and the means chosen to achieve them. Before upholding restrictions, courts must conclude that they are, at a minimum, necessary to serve important government interests.[9] Yet in a broad category of cases, courts often decline to apply such independent review. When the government is understood to be acting as a manager of government institutions and programs, rather than as a sovereign to regulate citizens more generally, the courts often defer to the factual, and legally significant, judgments of other government decisionmakers concerning the permissibility of challenged speech restrictions. The courts do so in three principal ways: they review speech restrictions only for their reasonableness, hold speech to be outside the First Amendment's protection, or accept government officials' judgments, so long as they are reasonable, on whether speech falls within a protected category. This Part describes each of these practices in turn.

A. Reasonableness Review

In many cases involving speech restrictions within government institutions or programs, the courts apply a form of reasonableness review, which often amounts to little more than a rationality check. In cases involving speech regulations within the military, for example, the courts regularly give great deference to the judgment of military authorities and Congress.[10] When the government regulates "reasonably and evenhandedly," the courts refrain from second-guessing its judgments about the relative importance of particular military interests and the means necessary to achieve them.[11] Illustrative of this deferential approach are *Greer v. Spock*[12] and *Brown v. Glines*,[13] in which the Court rejected, *inter alia*, First Amendment challenges to regulations prohibiting the distribution, without prior official approval, of written materials on military reservations and air force bases, respectively.[14] Stressing

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CONSTITUTIONAL REVIEW 105 (1980); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2317 (1998).

9. For an illuminating discussion of the varying ways in which this standard is applied, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

10. *See* Brown v. Glines, 444 U.S. 348, 353–58 (1980); Parker v. Levy, 417 U.S. 733, 756–57 (1974); *see also* Goldman v. Weinberger, 475 U.S. 503, 507–08 (1986) (discussing First Amendment deference to Congress in military affairs more generally); Rostker v. Goldberg, 453 U.S. 57 (1981) (discussing deference to Congress in military matters in a variety of constitutional contexts).

11. *Goldman*, 475 U.S. at 510; *see also* Greer v. Spock, 424 U.S. 828, 839 (1976).

12. 424 U.S. 828.

13. 444 U.S. 348.

14. *Id.* at 358–61; *Greer*, 424 U.S. at 831–40.

the military's need to control speech to ensure "the effectiveness of response to command," the Court stated that, unless the government applied the regulation "irrationally, invidiously, or arbitrarily," there was no First Amendment violation.[15]

Prison speech restrictions receive similar treatment. The Supreme Court has consistently made clear that prison officials deserve "wide-ranging deference" to make the "difficult" and "complex" judgments concerning institutional operations.[16] The relevant inquiry for courts is "whether the actions of prison officials [a]re 'reasonably related to legitimate penological interests.'"[17] In defining this standard, the Court has pointed to several factors: (1) whether the challenged restrictions are "rationally related" to a legitimate and neutral government objective; (2) whether inmates retain alternative means of exercising the right; (3) the impact of accommodating the asserted right on guards and other inmates in the prison; and (4) whether there are obvious, easy, less restrictive alternatives, which might suggest that the restriction is an "exaggerated response."[18] At first glance, these factors, particularly two through four, suggest that the inquiry may be substantial. Yet closer examination reveals that it is not.

Thornburgh v. Abbott,[19] which involved a challenge to prison rules granting the warden broad discretion to disallow prisoners from receiving publications from the outside world, illustrates this point. Instructing that "the right" to be exercised should be viewed "expansively," the Court found factor two satisfied simply because the challenged regulations also "permit[ted] a broad range of publications to be sent, received, and read."[20] Counseling that courts should "defer to the 'informed discretion of corrections officials,'" the Court found factor three met because, in the face of competing order and security concerns, accommodating the speech right would adversely affect the rights of others;[21] as order and security provide the usual justification for prison speech restrictions, factor three would nearly always be satisfied. With respect to factor four, the Court clarified that, to demonstrate that its regulations are not an "exaggerated response," the government need show only that its regulations rest

15. *Glines*, 444 U.S. at 354, 357 n.15 (quoting *Greer*, 424 U.S. at 837–38, 840).

16. Bell v. Wolfish, 441 U.S. 520, 547 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 126 (1977).

17. Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

18. *Id.* at 414–18; *accord* Beard v. Banks, 548 U.S. 521, 529 (2006); *Turner*, 482 U.S. at 89–91.

19. 490 U.S. 401.

20. *Id.* at 417–18 (quoting *Turner*, 482 U.S. at 90).

21. *Id.* at 418 (quoting *Turner*, 482 U.S. at 90).

upon "'reasonably founded' fears" of the harms posed by alternative measures, not that the means chosen are "generally necessary."[22]

The Court has also applied a form of reasonableness review in some student speech cases. Though its analysis in those cases goes substantially beyond mere rationality review, it nonetheless reflects a highly deferential stance to the school officials' judgments about the propriety of challenged speech restrictions. *Bethel School District No. 403 v. Fraser*,[23] which rejected a student's First Amendment challenge to his suspension for giving a sexually suggestive speech in a school election assembly, is relevant here.[24] There, the Court acknowledged the need to balance the student's free speech rights against the school's need to "inculcate the habits and manners of civility."[25] Though the Court did not explicitly articulate the relevant standard of review for student speech restrictions, it applied a very relaxed one. Noting that "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," the Court stated that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[26]

In *Morse v. Frederick*,[27] the "BONG HiTS 4 JESUS" banner case mentioned above, the Court noted the lack of a clear standard in *Fraser*.[28] It emphasized that, whatever the standard's contours, *Fraser*, like another school speech case *Hazelwood School District v. Kuhlmeier*,[29] did not require school officials to justify student speech restrictions on a showing that the speech was materially disruptive.[30] Pointing to the *Fraser* and *Hazelwood* cases for the substantial deference given by the courts to school authorities, *Morse* then upheld the challenged restriction in large part because of the reasonableness of the school official's conclusions about the meaning and impact of the speech.[31] Noting that deterring drug use by schoolchildren was an "'important—indeed, perhaps

22. *Id.* at 418–19 (quoting *Turner*, 482 U.S. at 78; Abbot v. Meese, 824 F.2d 1166, 1174 (1987), *rev'd*, 490 U.S. 401).

23. 478 U.S. 675 (1986).

24. *See id.* at 685–86.

25. *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

26. *Id.* at 683.

27. 127 S. Ct. 2618 (2007).

28. *See id.* at 2627.

29. Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988). This case concerned the deletion of two articles from a school newspaper. *Id.* at 263–64. Some might also characterize this case as a "government speech" case. I discuss such cases below. *See infra* pp. 1713–21.

30. *Morse*, 127 S. Ct. at 2629.

31. *See id.*

compelling' interest,"[32] the Court emphasized that, though the banner might allow for different interpretations, it was "reasonable" for the principal to conclude both that the banner promoted illegal drug use and that failing to act would have adverse consequences.[33]

B. No First Amendment Protection

In other cases, the courts decline to exercise even reasonableness review, holding that the restricted speech receives no First Amendment protection. Some free speech claims brought by public employees fall into this category. In *Pickering v. Board of Education*,[34] which applied a more searching standard of review, a public school teacher alleged that the school board had impermissibly dismissed her because of her letter to a local newspaper critical of the board's handling of revenue matters.[35] The Court instructed there that "[t]he problem in any [First Amendment] case is to arrive at a balance between the interests of the [individual], 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."[36] In a subsequent case, *Connick v. Myers*,[37] the Court clarified the standard, holding that First Amendment balancing is appropriate only if the restricted speech involves a matter of public concern: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[38]

32. *Id.* at 2628 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).
33. *Id.* at 2629.
34. 391 U.S. 563 (1968).
35. *Id.* at 566–67.
36. *Id.* at 568.
37. 461 U.S. 138 (1983).
38. *Id.* at 146. The Court there adopted a narrow conception of a "matter of public concern." It concluded that elements of an assistant district attorney's questionnaire "pertaining to the confidence and trust that [her] coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee" did not constitute matters of public concern, but instead "mere extensions of [her] dispute over her transfer to another section of the criminal court." *Id.* at 147–48. Some subsequent Supreme Court cases have suggested broader conceptions of "matters of public concern." *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995) (concluding that public employees writing for publications in their spare time qualifies as matter of public concern); Rankin v. McPherson, 483 U.S. 378, 386–88 (1987) (concluding that remarks made by a deputy constable regarding her wish that the U.S. President be assassinated constituted a matter of public concern). Many commentators have noted the Court's failure to adopt a consistent approach to the issue. *See, e.g.*, Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 *passim* (1988); Cynthia L.

Garcetti v. Ceballos[39] further narrowed the set of public employment cases that qualify for First Amendment protection.[40] At issue there was whether a deputy district attorney's disposition memorandum alleging misrepresentations in an affidavit used to secure a search warrant, constituted protected speech.[41] Finding that the deputy district attorney wrote the disposition memorandum pursuant to his official job responsibilities, the Court held that the speech was not protected.[42] As the Court stated, "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[43] Taken together, *Connick* and *Garcetti* establish that if the employee's speech either falls within the scope of her official duties, or does not involve a matter of public concern, then the speech will not receive First Amendment protection.

The Supreme Court has reached a similar conclusion with respect to cases involving what is commonly referred to as "government speech."[44] In such cases, if the speech at issue is classified as "government speech," rather than "private speech," then the First Amendment does not apply, and the government has broad discretion to define the speech's form and content, and to compel others to fund the speech.[45] The Court has relied on this concept in a wide variety of cases, including those involving federal funding restrictions on family-planning counseling,[46] arts grants,[47] and legal services lawyering,[48] and mandatory assessments for beef advertisements.[49] In the counseling case, for example, a group of clinics, counselors, and doctors challenged, on viewpoint discrimination grounds, a federal regulation prohibiting family-planning projects from using federal funds to encourage the use of

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Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 44–45 (1990); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1026–27 (2005).

39. 547 U.S. 410 (2006).

40. *See id.* at 421–24.

41. *See id.* at 413–16.

42. *See id.* at 424.

43. *Id.* at 421.

44. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001). For a discussion of this doctrine, see generally Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1041–55 (2005).

45. *See Johanns*, 544 U.S. at 558–59; *Legal Servs. Corp.*, 531 U.S. at 541.

46. Rust v. Sullivan, 500 U.S. 173, 194–200 (1991) (as described by *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

47. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998).

48. *Legal Servs. Corp.*, 531 U.S. at 541–42.

49. *Johanns*, 544 U.S. at 558–59.

abortion as a method of family planning.[50] As the Court explained in a later case, it had rejected the challenge on the ground that the speech at issue was government speech, not the service providers' speech, and hence First Amendment protections were inapplicable.[51] In the legal services case, by contrast, the Court held that federally funded legal services lawyers were speaking on behalf of private litigants, not the government, and hence federal restrictions on the types of claims that could be brought by those lawyers violated the First Amendment's prohibition on content discrimination.[52] These cases make clear that when the Court concludes that the restricted speech is "private speech," it engages in typical heightened First Amendment review; when it concludes that the speech is government speech, it holds that the speech falls outside the amendment's protection.

There are, of course, many other cases in which the Court has classified speech as unprotected by the First Amendment.[53] They involve, for instance, incitement,[54] obscenity,[55] threats,[56] or libel.[57] The cases discussed in this Subpart are distinctive in that the applicability of First Amendment protections turns on the speech's relationship to a government institution or program. Thus, for example, the First Amendment might protect certain speech if uttered on a sidewalk, but not if made in a public school or prison. Likewise, the First Amendment might protect the content of a play presented in a private theater, but not the identical performance in a public theater. Though context regularly affects the level of protection given to forms of speech, it is the speech's role in a government program or institution that is determinative in the cases of interest here. My point is not that courts should treat such government-related speech in the same manner as speech unrelated to government institutions and programs. Rather, it is to highlight that courts regularly decline to recognize First Amendment protections for speech that would otherwise be protected simply because of the speech's relationship to a government program or institution.

50. *Rust*, 500 U.S. at 181.
51. *Id.* at 194 (as described by *Rosenberger*, 515 U.S. at 833).
52. *Legal Servs. Corp.*, 531 U.S. at 542–43.
53. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984).
54. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).
55. *See* Miller v. California, 413 U.S. 15, 23 (1973).
56. *See* Virginia v. Black, 538 U.S. 343, 359 (2003).
57. *See* Beauharnais v. Illinois, 343 U.S. 250, 254–56 (1952).

C. Decreased Boundary Maintenance

The courts diminish the degree of First Amendment scrutiny in cases involving speech restrictions within government institutions and programs in another way. They regularly defer to government officials' judgments on whether, and to what extent, the restricted speech qualifies for First Amendment protection. Consider, again, *Morse*, which addressed whether a school principal could, consistent with the First Amendment, suspend a student for displaying a "BONG HiTS 4 JESUS" banner during a class outing to a local parade.[58] The principal justified the suspension on the ground that the banner promoted illegal drug use, in violation of school policy.[59] The Court's holding in favor of the school rested on at least two conclusions: (1) that the principal could constitutionally restrict speech promoting illegal drug use in a school-sponsored event; and (2) that the restricted speech promoted illegal drug use.

The second question, concerning the proper interpretation of the banner, formed the primary area of disagreement between the majority opinion and the principal dissent.[60] The majority largely deferred to the school official's interpretation "that the banner promoted illegal drug use" because it was "reasonable" for the principal to reach that conclusion.[61] Though the majority stated that it "agreed" with the principal, it repeatedly emphasized the "reasonableness" of the principal's judgment.[62] The dissent sharply criticized the majority's approach.[63] Noting the lack of clarity on whether the Court was applying its own judgment or deferring to the principal's, the dissent stated, "To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility."[64] Judges, the dissent argued, cannot simply privilege the "beliefs of third parties, reasonable or otherwise," but must make an "independent examination of the record" and decide on their own "which messages amount to proscribable advocacy."[65] Insofar as the Court independently found the banner to promote illegal drug use, the dissent added, its conclusion was unsupportable.[66] The

58. Morse v. Frederick, 127 S. Ct. 2618, 2622–23 (2007).
59. *Id.* at 2624–25.
60. *See id.* at 2624–25; *id.* at 2646 (Stevens, J., dissenting).
61. *Id.* at 2629 (majority opinion).
62. *See id.* at 2625, 2629.
63. *See id.* at 2646 (Stevens, J., dissenting).
64. *Id.* at 2647.
65. *Id.* at 2647–48 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)).
66. *Id.* at 2649.

banner was "nonsensical," the dissent argued, and even if the question were close, "when the 'First Amendment is implicated, the tie goes to the speaker.'"[67]

The interpretation of the banner's meaning in *Morse* involves what I refer to as boundary maintenance. When courts define categories of speech as protected or unprotected, or as fully protected versus only partially protected, they set the lines, or boundaries, for varying levels of First Amendment protection. When courts classify contested speech into one of those categories, or, in other words, apply the legal standard to determine whether, or to what extent, the speech falls within one category or another, courts police the boundaries of the First Amendment; they engage in First Amendment boundary maintenance. As the dissent contended in *Morse*, courts usually apply their own judgment to determine whether restricted speech falls into fully protected, partially protected, or unprotected categories.[68] Courts do so, for example, for claims alleging unprotected "incitement"[69] or "true threats,"[70] or lesser protected "commercial speech."[71] In the circumstances where they do not do so, courts defer to the reasonable judgments of the independent factfinders at trial—parties, in other words— who lack an interest in classifying contested speech into lesser protected categories.[72] By contrast, in the cases involving speech restrictions within government institutions and programs, courts show a willingness to defer to the judgments of government officials—the very individuals who are restricting speech—for their classifications of the speech.[73] In those cases, as in *Morse*, courts effectively cede their boundary maintenance authority to those whose powers are supposed to be bounded.

In *Waters v. Churchill*,[74] the Court instructed courts to diminish their boundary-maintenance role in another way. Beyond suggesting, as it did in *Morse*, that courts defer to government officials' classifications of speech into the variously protected categories, the Court in *Waters* held that, when the underlying facts of what was actually said are in dispute, courts ought to defer to officials' reasonable and good-faith accounts of the facts to determine the

67. *Id.* at 2649–50 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007)).

68. *Id.* at 2647–48.

69. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

70. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003).

71. *See* Bd. of Trs., State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–75 (1989); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 65–69 (1983).

72. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 513 (1991); Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (citing cases).

73. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005).

74. 511 U.S. 661 (1994) (plurality opinion).

appropriate degree of First Amendment protection applicable in a case.[75] Churchill, a nurse in the obstetrics department at a public hospital, alleged that her employer had impermissibly fired her because of her conversation with another nurse about the state of the department.[76] Another coworker, who had overheard the conversation, reported it to Churchill's supervisor, and after some investigation, the supervisor fired Churchill.[77] The supervisor and Churchill disagreed about the nature and content of the overheard conversation, and the question before the Supreme Court concerned what version of the conversation counted for purposes of determining whether the speech involved "a matter of public concern."[78] The appellate court took the view that the public concern inquiry "must turn on what the speech actually was, not on what the employer thought it was."[79] In other words, the extent of First Amendment protection should turn on the trial factfinder's best understanding of what was said. The Supreme Court disagreed.[80] It held that a court must "look to the facts as the employer *reasonably* found them to be."[81] So long as the employer undertook a reasonable investigation into the facts, the employer's good-faith understanding of the speech should prevail.[82] Put another way, courts are to defer to reasonable government views, rather than rely on an independent party's judgment, on the content and form of the restricted speech. In so doing, courts relinquish their boundary-maintenance role and instead ultimately privilege the government's account of the applicability of First Amendment protections.

II. ACCOUNTING FOR MINIMAL REVIEW

The prior Part described the Court's practice of exercising no more than reasonableness review in some First Amendment cases involving speech

75. *See id.* at 675–80. Joined by three justices, Justice O'Connor authored the plurality opinion that took this position. Concurring in the judgment, Justice Scalia, joined by two justices, maintained that, because "a public employer's disciplining of an employee violates the Speech and Press Clause of the First Amendment only if it is in retaliation for the employee's speech on a matter of public concern," courts should accept the facts of what was said as the employer understood them to be. *Id.* at 686–92 (Scalia, J., concurring in the judgment). Dissenting, Justice Stevens argued that courts should accept the facts as determined by neutral factfinders. *See id.* at 695–96 (Stevens, J., dissenting). Because Justice O'Connor's position is the narrowest ground of decision necessary to the judgment, her view constitutes the holding of the Court and provides the governing standards. *Cf.* Marks v. United States, 430 U.S. 188, 193–94 (1977).

76. *See Waters*, 511 U.S. at 664–66 (plurality opinion).

77. *See id.*

78. *Id.* at 680–81.

79. *Id.* at 667.

80. *See id.* at 675.

81. *Id.* at 677.

82. *See id.* at 677–80.

restrictions within government institutions or programs. This Part analyzes the reasons accounting for that practice. The case law and commentary suggest two principal justifications for the Court's current approach. The first, which I call the weak norms theory, posits that First Amendment principles apply only weakly or narrowly within government institutions and programs. Though this theory is correct in its core observation that First Amendment principles have differential and often less force within government institutions and programs, it is overstated, as it underappreciates the important role that First Amendment norms should play there. The second justification, the judicial underenforcement theory, assumes that courts cannot properly enforce the First Amendment rights in those contexts. I argue that this theory, in combination with elements of the weak norms theory, justifies the Court's reluctance to apply heightened scrutiny to many speech restrictions within government institutions and programs. This Part presents and then evaluates each theory in turn.

A. The Weak Norms Theory

The weak norms theory posits that courts avoid applying heightened scrutiny in many free speech cases involving government institutions and programs because the First Amendment applies only weakly, or does not apply at all, to speech in those contexts. On this view, the First Amendment has little or no significance in the challenged contexts, and hence it is appropriate for courts to apply no more than reasonableness review to challenged speech restrictions. In other words, the First Amendment protection afforded by courts is all that that the speech in question deserves. Case law and commentary suggest the weak norms view by stressing two themes: diminished free speech interests within government institutions and programs, and the government's heightened regulatory interests.

1. Diminished Free Speech Interests

First Amendment case law and commentary suggest at least three reasons why free speech interests in government institutions and programs are diminished. First, they rely on notions of waiver and forfeiture: free speech interests are less important in these contexts because the speakers themselves have voluntarily chosen to relinquish any rights that they might have. This perspective was particularly prominent prior to the emergence of modern First Amendment jurisprudence in the 1950s and 1960s. In the public employment context, for example, "'the unchallenged dogma was that a public employee

had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights'" because the employee had freely chosen to work for the government.[83] In making that choice, the argument proceeded, the employee had agreed to the terms of the workplace offered by the government.[84] As then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes tellingly observed in 1892, "'A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'"[85]

A similar perspective accounted for courts' reluctance to recognize First Amendment claims in the prison context. As one oft-quoted court stated:

> [D]uring his term of service in the penitentiary, [a convicted felon] is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.[86]

In other words, in "choosing" to commit a crime, a prisoner effectively waived his right to claim any constitutional protections. "Any rights they had were not the rights shared with other citizens, but those rights which the state chose to extend them."[87] The First Amendment, and other constitutional rights, simply did not apply.

Though ideas about waiver and forfeiture have largely disappeared from the Court's contemporary First Amendment jurisprudence, remnants of them occasionally resurface in the case law and literature.[88] In *Garcetti v. Ceballos*,[89] for instance, the Court stated, "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[90] In the constitutional literature, some scholars' emphasis on federalism principles also reflects notions of choice and waiver.[91] Mark D.

83. Garcetti v. Ceballos, 547 U.S 410, 417 (2006) (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).

84. *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) ("They [persons] may work for the school system upon the reasonable terms laid down by the proper authorities . . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.").

85. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (as quoted in *Connick*, 461 U.S. at 143–44).

86. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

87. Jack E. Call, *The Supreme Court and Prisoner's Rights*, FED. PROBATION, Mar. 1995, at 36, 36.

88. *See generally* Moss, *supra* note 5, at 1645–54.

89. 547 U.S. 410 (2006).

90. *Id.* at 418.

91. *See, e.g.*, Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

Rosen, for example, has suggested that First Amendment doctrine ought to give local, rather than federal, governments "greater leeway to regulate the content of speech," in part because of individuals' broader choices to settle in or exit local communities.[92] Under this logic, when individuals choose to live in particular communities, they effectively waive or forfeit their right to receive the greater protections that might be available in other locales. Though Rosen has not focused on speech rights within government institutions or programs, his reasoning would nonetheless apply in those contexts, particularly with respect to local government entities.

Second, the case law and commentary suggest that free speech interests are diminished within government institutions and programs because individuals often are speaking for the government and not for themselves. As described above, according to the "government speech" doctrine, the restricted speech in some cases is properly understood to be the government's rather than an individual's, and hence the interest in protecting private parties' free speech rights against government censorship is not generally implicated.[93] The government may restrict or regulate the speech in question because the government itself is the speaker and "is entitled to say what it wishes."[94] While private parties may assert First Amendment rights for their own speech, they have no such rights when speaking for, or on behalf of, the government.[95] In explaining its holding in *Garcetti* that speech made by public employees pursuant to their official duties does not receive First Amendment protection, the Court relied in part on this idea that the individual's speech interests were not in question. Restricting official speech there, the Court stated, "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[96]

Third, the case law and commentary suggest that there are limited free speech interests within government institutions and programs because of the lesser value or significance of the speech to public debate. In the public employment context, as discussed above, the Court held in *Connick v. Myers*[97] that First Amendment protections apply only to speech about "matters of public concern,"[98] and, in *Garcetti*, only to speech falling outside one's job responsibilities.[99] In holding that most of the speech restricted in those specific

92. Rosen, *supra* note 91, at 249, 253.
93. *See infra* pp. 1713–21.
94. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).
95. *See id.*
96. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).
97. 461 U.S. 138 (1983).
98. *Id.* at 154.
99. *Garcetti*, 547 U.S. at 420.

cases did not qualify for protection, the Court each time pointed out the speech's minimal value to the public. In *Connick*, the Court characterized the survey distributed by the assistant district attorney as representing "mere extensions of [her] dispute over her transfer."[100] Noting that the assistant "did not seek to inform the public" of malfeasance or incompetence, the Court stated, "Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo."[101] Likewise, taking the view that only speech by "citizens," who make "contributions to the civic discourse," are protected, the Court in *Garcetti* suggested that communications pursuant to one's job responsibilities—speech as an "employee"—do not generally enhance public discussion.[102]

The Court has similarly downplayed the value of speech in some school cases. In *Bethel School District No. 403 v. Fraser*,[103] for instance, in which the Court rejected a student's challenge to his suspension for delivering a sexually suggestive speech, it stressed the unimportance of "vulgar and offensive terms in public discourse."[104] Indeed, it recounted an earlier Court's assessment in a case concerning indecent broadcasting that "'[s]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[105] In *Morse v. Frederick*,[106] involving the "BONG HiTS 4 JESUS" banner, the Court also characterized the speech in question as less worthy of protection. In discussing *Tinker v. Des Moines Independent Community School District*,[107] a student speech case in which the Court applied heightened review, the *Morse* Court stressed that the restricted speech—armbands expressing opposition to the Vietnam War—involved "[p]olitical speech, [which] of course, is at the core of what the First Amendment is designed to protect."[108] By contrast, the banner in

100. *Connick*, 461 U.S. at 148.
101. *Id.*
102. *See Garcetti*, 547 U.S. at 421–23.
103. 478 U.S. 675 (1986).
104. *Id.* at 683. Notably, the Court has recognized the value of vulgar or offensive statements uttered in contexts outside government institutions and programs. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); *see also* Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (mem.); Lewis v. New Orleans, 408 U.S. 913 (1972) (mem.); Brown v. Oklahoma, 408 U.S. 914 (1972) (mem.).
105. *Bethel Sch. Dist. No. 403*, 478 U.S. at 685 (quoting FCC v. Pacifica Found., 438 U.S. 726, 746 (1978)).
106. 127 S. Ct. 2618 (2007).
107. 393 U.S. 503 (1969).
108. *Morse*, 127 S. Ct. at 2625–26 (quoting Virginia v. Black, 538 U.S. 343, 365 (2003)).

Morse, the Court made clear, was "plainly" not "about political debate over the criminalization of drug use or possession."[109]

2. Heightened Government Interests

Beyond suggesting that there are diminished First Amendment interests served by protecting speech within government institutions and programs, case law and commentary also repeatedly stress the heightened need for, or inevitability of, certain types of speech restrictions within government institutions and programs.[110] When the Court has applied only reasonableness review to challenged speech restrictions or held the speech to be unprotected, it has consistently emphasized the government's special interest in tightly controlling speech in order to accomplish its institutional or programmatic objectives. In some cases, the case law and commentary focus on the government's heightened need to restrict speech so that individual speakers will not interfere with or detract from the institution's non-speech-related objectives. Such was the emphasis, for example, in *Thornburgh v. Abbott*,[111] in which the Court upheld prisoner mail restrictions aimed at preserving prison order and safety.[112] Along similar lines, in explaining why First Amendment review of military regulations should be "far more deferential" than review of similar civilian laws or regulations, the Court has stated, "to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps."[113]

In other cases, by contrast, the government's special need arises from the speech's integral relationship to implementing the institutional mission. The idea that the government must be able to restrict or control speech in order to further its own speech interests underlies, for instance, the "government speech" cases discussed above,[114] as well as some school speech

109. *Id.* at 2625.

110. Concerning public employment cases, for example, the Court has stated emphatically that the government has "far broader powers" to regulate public employee speech than other citizen speech because of "the practical realities of government employment, and the many situations in which . . . the government must be able to restrict its employees' speech." Waters v. Churchill, 511 U.S. 661, 671–72 (1994) (plurality opinion).

111. 490 U.S. 401 (1989).

112. *See id.* at 419.

113. Goldman v. Weinberger, 475 U.S. 503, 507 (1986); *see also* Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

114. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); Rust v. Sullivan, 500 U.S. 173 (1991).

cases.[115] In the latter context, when the Court has reviewed challenged speech restrictions only for reasonableness, rather than a more exacting standard, it has focused on the role of public education in "'inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'"[116] Moreover, in explaining why a reasonableness standard applies to challenges to student speech restrictions in school-sponsored expressive activities, the Court has stated that "[e]ducators are entitled to exercise greater control . . . [when affirmatively promoting, as opposed to simply tolerating, student speech, in part] to assure that participants learn whatever lessons the activity is designed to teach, [and] that readers or listeners are not exposed to material that may be inappropriate for their level of maturity."[117] In short, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[118]

In his important discussions of the relationship of free speech and democracy, and his concepts of "managerial domains" versus "public discourse," Robert Post has largely embraced this weak norms view of the First Amendment.[119] There is a realm of "public discourse," Post argues, in which "a perpetual and unruly process" forges public opinion.[120] Because of the critical role an independently formed public opinion (and the public perception thereof) plays in legitimizing democracy, "the significance and force of all potential objectives are taken as a legitimate subject of inquiry."[121] In this realm, he contends, government authority to regulate speech should be very limited, and attaining governmental ends should receive less priority.[122] Within managerial domains, by contrast, the government acts instrumentally, to achieve "objectives that have been democratically agreed upon."[123] Because of this "instrumental orientation,"

115. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–67 (1988).

116. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting BEARD & BEARD, *supra* note 25); *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) ("When [the government] acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people.").

117. *Hazelwood Sch. Dist.*, 484 U.S. at 271.

118. *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

119. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 106, 194–95 (1996).

120. *Id.* at 153.

121. Post, *Public Forum*, *supra* note 5, at 1789.

122. *See id.* at 1788–809; Post, *supra* note 119, at 171.

123. Post, *supra* note 119, at 164.

Post maintains, government decisionmakers must have broad authority to regulate speech.[124] He notes:

> Thus the state can regulate speech within public educational institutions so as to achieve the purposes of education; . . . within the judicial system so as to attain the ends of justice; . . . within the military so as to preserve the national defense; . . . [and] the speech of government employees so as to promote the efficiency of the public services [the government] performs through its employees.[125]

Under Post's view, in other words, it is critical to have robust free speech norms in the realm of public discourse, but far less so in managerial domains. In the latter contexts, free speech norms play a less significant role as the government seeks to implement the consensus emerging from public discourse.[126]

B. Limits of the Weak Norms View

The weak norms theory is correct in assuming that, in many institutional and programmatic contexts, there are diminished free speech interests and heightened government interests. It is certainly true, for instance, that much speech within government institutions and programs ought properly to be understood as involving government, rather than private, expression, and, even when appropriately characterized as private, does not entail matters of public concern. It is also without question that government officials must regularly restrict and direct speech in order to pursue their democratically agreed-upon institutional and programmatic objectives, speech related or otherwise. Yet the weak norms theory is overstated. There are also significant free speech interests in those contexts, and, in some cases, the government interest in carrying out democratic objectives calls for limited, rather than broad, official authority to regulate speech.

First, speech within government institutions and programs has a distinctive and particularly valuable role to play in furthering the First Amendment aims of facilitating the search for truth, promoting self-government, and

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124. Post, *Public Forum*, *supra* note 5, at 1788.

125. Post, *supra* note 119, at 164 (quoting Connick v. Myers, 461 U.S. 138, 142 (1983)) (footnotes omitted).

126. In discussing speech regulation within the public workplace, the Court has echoed Post's analysis:

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion).

checking governmental misconduct. The Court has regularly suggested this point with regard to the public workplace when acknowledging that public employees are "'the members of a community most likely to have informed and definite opinions'" about government operations.[127] Such an observation is also true for other participants within government institutions and programs. Members of the military and prisoners, for instance, know far more about the armed forces and prisons, respectively, than most people outside those institutions, and have particular and sometimes unique perspectives, informed by their own experiences, on the actual and proper functioning of those institutions. They are also more likely than are members of the outside public to have first-hand knowledge of misconduct and abuse by government officials. Their insights are valuable, moreover, regardless of whether they make their views known externally or only internally. That is, even when individuals express their views or report misconduct only to other institutional participants or officials, or only pursuant to their institutional duties, they are raising awareness, informing others, and encouraging discussion, thus ultimately contributing to the ends of truth, self-government, and checking government power.

In light of the importance of that speech, moreover, there is a First Amendment interest in protecting speech within government institutions and programs that is of more limited or negligible value. Traditional First Amendment jurisprudence regularly protects less important speech as a means of protecting more important speech. As the Court famously explained in *Gertz v. Robert Welch, Inc.*,[128] for example, though false statements of fact have no constitutional value, they deserve constitutional protection: "The First Amendment requires that we protect some falsehood in order to protect speech that matters."[129] On this view, for the instrumental reason of furthering speech that is more worthy, even lesser value speech warrants meaningful First Amendment protection. Accordingly, the fact that some speech involves private, rather than public, concerns does not establish that it ought to fall outside the First Amendment's reach.

Second, speech within government institutions and programs also plays an important role in promoting the First Amendment aim of encouraging

127. *See* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (quoting Pickering v. Bd. of Educ. of Twp. High School Dist. 205, 391 U.S. 563, 572 (1978)); *see also* City of San Diego v. Roe, 543 U.S. 77, 82 (2004).

128. 418 U.S. 323 (1974).

129. *Id.* at 341.

autonomy and self-fulfillment.[130] Individuals live much of their lives through institutions, many of them governmental, and their capacity to retain at least some freedom of expression in those contexts has a significant impact on their sense of self and well-being.[131] Students, for example, spend the bulk of their day in schools, and the nature and extent of their First Amendment rights there greatly affects their capacities for personal development and their abilities to foster relationships with others. The same is true for public employees, members of the military, and prisoners. Moreover, there are significant numbers of people in these roles within our society—currently, for instance, more than twenty million individuals are government employees, nearly a million of whom serve in the military.[132] Also, certain subgroups are disproportionately affected. Based on current incarceration rates, for example, about one in three Black males in the United States will go to prison during his lifetime.[133] In light of these numbers, it is clear that the nature and extent of speech rights within government institutions has a widespread, and sometimes severe or disproportionate, impact on the abilities of our nation's communities to pursue autonomy and self-fulfillment.

Some might dismiss the relevance of First Amendment interests in these contexts by relying on the waiver and forfeiture arguments discussed above. While those arguments explain in part why speech may sometimes be limited (*e.g.*, official spokespersons waive their right to express their personal views when speaking on the government's behalf), they do not establish that the government should have authority to deny all speech rights within its institutions and programs. That some individuals might agree to waive or forfeit all their speech rights as a condition of joining or participating in government institutions or programs does not mean that governments ought to have the authority to require such terms in the first place. The First Amendment serves not only individual interests, but also larger structural interests in checking government and enabling self-rule, and government ought not to be able to subvert these latter aims by using its power and resources to

130. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 67–72 (1982); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1226 (1983); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

131. *Cf.* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 *passim* (2003).

132. *See* U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY (2006), *available at* http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_DP3&-ds_name=ACS_2006_EST_G00_&-_lang=en&-redoLog=false.

133. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf.

persuade individuals to contract away their First Amendment rights. Moreover, the waiver or forfeiture arguments suggest that those who voluntarily accept (or commit actions that result in) limitations on their First Amendment rights do not highly value their interests in free expression, and hence it is uncontroversial to deny them their rights. Yet individual decisions to join or partake in government institutions and programs reflect myriad considerations, and sometimes it principally reflects individuals' lack of opportunities or weak bargaining power. For instance, some people join the military because other jobs are unavailable.[134] Some students attend public schools because of the lack of viable alternatives.[135] Those individuals' First Amendment interests ought not to be completely disregarded simply because of their limited socioeconomic power.[136]

Third, the weak norms view is also overstated because it pays insufficient attention to the ways in which limited, rather than broad, authority to regulate speech sometimes is consistent with democratic objectives. As discussed above, Robert Post has argued on democratic grounds that courts ought to recognize the priority of achieving institutional objectives (which are the result of democratic consensus) when evaluating speech restrictions within governmental institutions.[137] Yet Post's view focuses too narrowly on institutional ends, as opposed to the means used to achieve those ends. Citizens also attach importance to the processes by which institutional actors pursue their objectives. This is true even when such concerns are not explicitly stated in the authorizing legislation, given the limits of fully defining (or agreeing to) all the specifics of a government institution or program in advance. In other words, institutions' and programs' approaches to internal speech regulations are also matters of democratic concern.

Consider, again, speech regulation in the schools. A state board of education, elected or appointed by elected officials, might define in advance certain educational objectives for the secondary schools within its jurisdiction. It might emphasize, for instance, achievement within the traditional disciplines of math, science, social studies, and language arts. Though the board might not specify how the secondary school administrators ought to deal with

134. *See* Lizette Alvarez, *More Americans Joining Military as Jobs Dwindle*, N.Y. TIMES, Jan. 18, 2009, at A1; Christian Davenport, *Downturn Drives Military Rolls Up*, WASH. POST, Nov. 29, 2008, at A4.

135. *See* Collin Hitt, Editorial, *Illinoisans Want Change—and Choices—in Education*, THE STATE J.-REG., Dec. 24, 2007, at 9; *School Choice*, LAS VEGAS REV.-J., Feb. 1, 2008, at 8B.

136. *See* Moss, *supra* note 5, at 1650–52 (arguing that the waiver argument for public employees "stands on shaky ground" because the choice to work for the government does not always involve a "free choice").

137. *See* Post, *Public Forum*, *supra* note 5, at 1807–09.

student protests, it might nonetheless expect the officials to allow the expression of dissenting views insofar as they do not materially disrupt the educational process. Or the board might have no position on the matter while members of local communities do. When courts defer to school administrators, particularly those without coherent school speech policies or open policymaking processes that allow for democratic participation or review, courts are not necessarily furthering democratic objectives. Rather, they are simply giving administrators a free hand to pursue their objectives in a speech-restrictive way.

My point here is not that free speech and government regulatory interests are equivalent, or that First Amendment norms ought to apply with equal force both inside and outside government institutions and programs. Indeed, government officials should regularly have authority to restrict speech within government institutions and programs in ways that they ought not to have outside those contexts. But the weak norms theory underestimates the free speech interests and overstates the government regulatory interests at issue. There are different First Amendment norms inside and outside government institutions and programs, but the former are not generally weak or anemic. There are often important First Amendment norms at stake, even when the Court, as in *Garcetti v. Ceballos*,[138] declines to apply anything more than reasonableness review. Accordingly, though the weak norms theory provides support for some diminished First Amendment protections within government institutions and programs, it falls short of providing a sufficient justification for the Court's current highly deferential approach.

C. The Judicial Underenforcement Theory

The judicial underenforcement theory provides a different justification for the courts' avoidance of heightened review. This theory does not presume that First Amendment principles are generally weak or anemic in government institutions or programs. Rather, it points to the judiciary's institutional limitations or the costs accompanying heightened scrutiny as an explanation for the courts' more limited review. On this view, even if First Amendment norms are significant, the courts are underenforcing them.[139] The case

138. 547 U.S. 410 (2006).

139. Constitutional law scholars have devoted significant attention to courts' underenforcement of constitutional norms. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 5–7 (2004); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1299 (2006); Kermit Roosevelt III, *Constitutional Calcification:*

law and scholarship suggest this theory in three ways: epistemic limits, democratic deficiencies, and pragmatic costs.[140]

1. Epistemic Limits

A common set of arguments advanced to justify courts' limited review of speech restrictions within government institutions or programs stresses the initial decisionmaker's superior knowledge or judgment in a particular field. On this view, executive and administrative officials such as school administrators, prison wardens, and military officials have the relevant experience and expertise to reach decisions that ensure well-functioning institutions. Along with legislators, they also have superior institutional resources to study and acquire knowledge to achieve their organizational ends. Courts, by contrast, lack such specialized knowledge and resources, and thus are less capable of assessing the extent to which challenged speech-infringing actions are necessary or appropriate. Absent some clear indication of unreasonableness, courts thus ought generally to defer, and not second-guess, the more informed decisions of others.

This view pervades free speech doctrine. In the prison context, for example, while emphasizing the "'inordinately difficult undertaking' that is modern prison administration,"[141] the Supreme Court has repeatedly invoked the "professional expertise"[142] of prison officials and the "planning[] and commitment of resources . . . which are peculiarly within the province of the legislative and executive branches of government."[143] Those considerations, the Court has explained, coupled with the fact that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management," call for courts to give broad deference to prison administrators.[144]

How the Law Becomes What the Court Does, 91 VA. L. REV. 1649 *passim* (2005); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978). For criticism of the underenforcement view, see, for example, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999).

140. As others have argued, institutional competence and pragmatic cost concerns regularly influence the courts' constitutional jurisprudence. *See, e.g.*, Berman, *supra* note 139, at 50–78; Fallon, *supra* note 139, at 1297–313; Levinson, *supra* note 139, at 873–913. According to the judicial underenforcement theory presented here, it is these concerns, rather than weak First Amendment norms, that account for courts' rejection of traditional heightened scrutiny of speech restrictions within government institutions and programs.

141. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (quoting Turner v. Safely, 482 U.S. 78, 85 (1987)).

142. Bell v. Wolfish, 441 U.S. 520, 548 (1979) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)); *see also Thornburgh*, 490 U.S. at 407–08.

143. *Turner*, 482 U.S. at 85.

144. *Thornburgh*, 490 U.S. at 407–08 (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

In the military context, the Court has similarly emphasized the need for courts to "give great deference to the professional judgment of military authorities."[145]

Some scholars, both explicitly within free speech law and not, have also focused on epistemic capacities as grounds for minimal or no review. First Amendment scholar Bruce Hafen, for instance, makes this point with respect to school officials. School administrators, rather than courts, understand "educational philosophy," he argues, and courts thus ought to be "cautious about assuming that the blunt tools of legal (even 'constitutional') analysis are a preferred substitute for the subtle, personal, extended process we call education."[146] Similarly, education law scholar David A. Diamond maintains that courts should accept "the good faith judgment of the expert authorities" because "[t]he judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning."[147]

Often, the doctrine and scholarship posit that judicial deference is due because of the decisionmaker's superior knowledge on matters that are apart, or distinct, from free speech values and interests. The prison warden, for instance, knows about the dangers endemic to correctional institutions,[148] and the military official understands the order and discipline to which uniformed service members must be subject.[149] In these situations, the courts decline to exercise heightened review because the warden and official have better knowledge of the interests that weigh against vigorous enforcement of the First Amendment. In other words, courts defer in spite of, not because of, the others' appreciation of free speech values and interests.

On other occasions, by contrast, the superior knowledge or expertise attributed to the initial decisionmaker concerns free speech interests and values themselves. Acting within special "First Amendment institutions,"[150] government decisionmakers such as school officials, journalists, or librarians

145. Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (considering a free exercise claim); *see also* Brown v. Glines, 444 U.S. 348, 354 (1980). Notably, in a recent case, the Supreme Court did not defer to a law school's judgment or expertise about how best to implement its educational mission. *See* Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613 *passim* (2007) (discussing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006)).

146. Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 702–03 (1987).

147. David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497–98 (1981).

148. *See Thornburgh*, 490 U.S. at 407–08; *Turner*, 482 U.S. at 84–85; Bell v. Wolfish, 441 U.S. 520, 548 (1979).

149. *See Brown*, 444 U.S. at 354; Parker v. Levy, 417 U.S. 733, 758–59 (1974).

150. Horwitz, *Universities*, *supra* note 5, at 1497; *see also* Hafen, *supra* note 146, at 695; Horwitz, *Three Faces*, *supra* note 5, at 1062.

ought to receive deference, some argue, because they have better judgment than do courts on how best to promote and implement free speech values and interests. Hafen, for example, an early proponent of this view, maintains that, in helping children to develop their minds and expressive powers, "the schools' primary purpose is to contribute affirmatively to the development of the American system of free expression."[151] More recently, Frederick Schauer and Paul Horwitz have similarly noted the special roles of editors[152] and university faculty,[153] respectively, in enhancing First Amendment values and interests.

2. Democratic Deficiencies

Another set of arguments suggesting the judicial underenforcement theory stress the democratic deficiencies of the courts. Often invoking separation of powers and federalism principles, these arguments emphasize that the Constitution commits some types of government decisionmaking responsibilities to politically accountable officials, not unelected federal judges. In light of those commitments, they maintain, the judiciary ought to defer to those officials' judgments and thereby resist encroaching upon distinctly political or local spheres of authority.

Advanced primarily in free speech doctrine, rather than scholarship, democratic arguments call for judicial restraint with respect to a broad range of government institutions. For the military, for instance, separation of powers arguments regularly appear in the case law. Courts should broadly defer to military officials' judgments not only because of their expertise, but also because "the military authorities have been charged by the Executive and Legislative branches with carrying out our Nation's military policy,"[154] and "both of those branches have been conferred that power explicitly by the Constitution."[155] Similarly, courts should generally accept Congress' judgments about the military because ""[j]udicial deference is . . . at its apogee

151. Hafen, *supra* note 5, at 701.

152. *See* Frederick Schauer, *Principles, Institutions and the First Amendment*, 112 HARV. L. REV. 84, 89–90 (1998).

153. *See* Horwitz, *Universities*, *supra* note 5, at 1497.

154. Ethredge v. Hail, 56 F.3d 1324, 1328 (11th Cir. 1995) (quoting Goldman v. Weinberger, 475 U.S. 503, 507–08 (1986)); Christoffersen v. Wash. State Air Nat'l Guard, 855 F.2d 1437, 1444 (9th Cir. 1988) (quoting *Goldman*, 475 U.S. at 507–08).

155. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 270 (2000) (summarizing the doctrine).

when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'"[156]

For the prisons and schools, courts emphasize both separation of powers and federalism concerns. In *Turner v. Safley*,[157] for example, the Supreme Court explained that beyond requiring the expertise, planning, and resources of the legislative and executive branches, "[p]rison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."[158] It then added, "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."[159] In the education cases, the Supreme Court has repeatedly stressed that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[160]

3. Pragmatic Costs

The third category of arguments suggesting the judicial underenforcement theory stresses the heightened pragmatic costs of reviewing speech restrictions within government programs and institutions. Some versions of these arguments relate to epistemic concerns. The emphasis here is that judicial error in evaluating government interests to regulate speech can have especially bad consequences. On this view, for example, if courts miscalculate and undervalue a prison warden's interest in limiting prisoner communications, grave harm such as "riot[s]" or other forms of "violent confrontation and conflagration" may result.[161] Likewise, failure to appreciate the military's interests may "undermine the effectiveness of response to command," thus "not only hazarding [soldiers'] lives but ultimately . . . the security of the Nation itself."[162] The implicit argument is that, even if courts are equally likely to commit errors in other cases, the potential harm is greater when certain

156. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

157. 482 U.S. 78 (1987).

158. *Id.* at 85; *see also* Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) ("The prison system is under the administration of the Attorney General . . . and not of the district courts. The court has no power to interfere with the conduct of the prison of its discipline.").

159. *See Turner*, 482 U.S. at 85 (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

160. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982)); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Wood v. Strickland, 420 U.S. 308, 326 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

161. Jones v. N.C. Prisoner's Labor Union, Inc., 433 U.S. 119, 132–33 (1977).

162. Parker v. Levy, 417 U.S. 733, 759 (1974).

government institutions and programs are involved, and thus courts ought to exercise only minimal or no review.

Other arguments stress the costs of judicial review independent of courts' epistemic capacities. On this perspective, even if the courts are as good as, or even better than, other government decisionmakers in correctly adjudicating the competing First Amendment and government interests in any given case, there are still reasons for courts to decline review. This point is implicit in Robert Post's argument that "the very process of judicial review" poses potentially adverse consequences to institutional authority.[163] Judicial review of institutional rules, he maintains, can "affect not merely the behavior specifically governed by these rules, but also the institutional culture or way of life which the [institution's] authority structure as a whole is designed to create."[164] He points to judicial review of military orders, for instance, as potentially "undermin[ing] that 'instinctive obedience' thought necessary for the achievement of the 'military mission.'"[165]

This theme—that the practice of judicial review itself, regardless of its outcome in any specific case, threatens governmental institutions—also underlies the repeated warnings about encouraging excessive, and often baseless, litigation. Concerning the workplace, for example, courts and scholars have consistently stressed the need for courts to defer to employers' exercise of managerial discretion and thereby to avoid "constitutionaliz[ing] the employee grievance."[166] Otherwise, they warn, active judicial superintendence of speech claims "would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."[167] Echoing the employee cases, Justice Breyer has explained the heightened difficulty courts face in providing "practically valuable guidance" for school speech claims:

> [T]he more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.[168]

163. Post, *Public Forum*, *supra* note 5, at 1819.

164. *Id.* at 1818.

165. *Id.* (quoting Brown v. Glines, 444 U.S. 348, 354, 357 (1980)).

166. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 154 (1983); Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).

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

168. Morse v. Frederick, 127 S. Ct. 2618, 2640 (2007) (Breyer, J., concurring in part and dissenting in part).

These arguments stress costs to not only the institutions whose judgments are under review, but also the judiciary. Courts and scholars argue that the flood of lawsuits engendered by active judicial oversight will both undermine the initial government decisionmakers' institutional authority and overwhelm the courts.[169]

D. The Force of the Combined Theories

Combined with elements of the weak norms account—in particular its emphasis on the government's heightened need to restrict speech within its institutions and programs—the judicial underenforcement theory provides a persuasive account for why courts ought regularly to avoid applying traditional heightened scrutiny to speech restrictions within government institutions and programs. The underenforcement theory's emphasis on the pragmatic costs accompanying judicial review of such restrictions provides the most powerful reasons why courts ought to resist reviewing free speech claims aggressively in those contexts. Officials in all government institutions and programs have a substantial interest in controlling, directing, or limiting speech in order to carry out their institutional or programmatic objectives. For some government institutions like the military and prisons, as Robert Post has pointed out, there is a constant and pervasive need for broad power to regulate speech because of the compelling interest in fostering obedience or submission to authority within the institution.[170] In those contexts, the availability of heightened judicial review cannot comfortably coexist with the government officials' need for virtually unquestioned authority.

For other institutions and programs, the need for substantial discretion to restrict speech depends on the specific function or activity. In the public workplace, for instance, when the speech is itself part of the job, employers generally need far more control over it than when the speech involves personal communications among colleagues. Similarly, in the public schools, teachers and administrators require greater power to direct and restrict speech that is a part of classroom and other school-sponsored activities than speech that is not, such as private communications among students or speech during recess. Government officials must have more control when the performance of the government's objectives directly depends on the nature or subject of the speech restricted, or, to be more precise, when the government's own speech interests, as shaped or defined by its institutional or programmatic

169. *See, e.g.*, *id.*; *Garcetti*, 547 U.S. at 423–24.
170. *See* Post, *Public Forum*, *supra* note 5, at 1769–74.

objectives, account for the restriction. Given that the government must limit or direct speech in those contexts as a matter of course, regular recourse to the courts to second-guess speech restrictions—which would be encouraged by an aggressive standard of review—would overwhelm institutions and programs, and undermine their ability to carry out their objectives.

The difficulty of crafting clear judicial standards in many such contexts, moreover, exacerbates this danger.[171] Consider, for instance, the term "legitimate pedagogical interest," as applied to some school speech claims. As Alan Brownstein has recounted, that term resists clear definition, and its lack of clarity has resulted in a flood of litigation challenging teachers' control of student speech in classroom and extracurricular activities.[172] Because of that inevitable disruption, Brownstein argues, courts ought not to entertain First Amendment challenges in those contexts.[173] When the government, in order to carry out its institutional and programmatic objectives, has an expressive interest in the speech that is restricted, and when courts cannot craft clear standards to distinguish legitimate from illegitimate restrictions or directions, then traditional heightened First Amendment scrutiny, which assumes that most regulations are invalid, makes little sense and encourages too much litigation. As the doctrine emphasizes, that litigation is highly disruptive and places a considerable burden on both the government institutions and programs and the courts. In other words, because government decisionmakers often have legitimate reasons to restrict speech in those contexts—a point stressed by the weak norms account—and because judicial review seriously impairs governmental efficiency and effectiveness, the costs of traditional heightened review there outweigh its benefits.

The epistemic arguments maintain that courts are less able to adjudicate First Amendment challenges to speech restrictions within government institutions and programs because the initial decisionmakers have greater expertise or knowledge about the impact or significance of the speech in question. These arguments are persuasive, however, with respect to only some types of speech restrictions. For example, when teachers evaluate the quality of student assignments, when professors assess scholarship to make tenure decisions, when librarians determine which books to add or remove from their collections, and when supervisors appraise their supervisees' work product, the proper execution of those functions often demands nuanced and

171. For an enlightening discussion of the concept of judicially manageable standards, see generally Fallon, *supra* note 139.

172. *See* Brownstein, *supra* note 5, at 734–41.

173. *See id.* at 784.

complex judgments. In each of these cases, the government decisionmaker has an interest in limiting, regulating, or restricting the speech because the speech itself—the student assignments, the academic scholarship, the library collection, the employee work product—is part of, or constitutive of, the institutional or program mission. Because generalist judges lack the knowledge and sophistication about how best to carry out these missions, and because the missions themselves are often deeply contested and evade clear definition, the courts' ability to review these sorts of decisions is very limited. Though courts can identify the outer bounds of inappropriate decisionmaking, they are less capable of evaluating with any precision the importance or need for particular limits or restrictions.

By contrast, the epistemic arguments are not convincing when courts assess speech restrictions within government institutions or programs designed to pursue relatively clear-cut objectives like limiting disruptions or ensuring respect for authority. Courts regularly have less knowledge or expertise than do the initial government decisionmakers on the conditions that might justify restricting speech for these purposes, or less capacity to amass the knowledge necessary to render informed decisions. This point is true regardless of whether courts are reviewing speech restrictions inside or outside government institutions and programs. In assessing whether a group of angry listeners is prone to become violent, for instance, police officials have more experience and familiarity in handling crowds and predicting the need for violence prevention measures. Likewise, legislatures have more time and resources to study whether political campaigning by government employees adversely affects public perceptions of fairness in elections and hence should be limited.[174] In those situations, courts decide free speech cases and articulate the contours of First Amendment rights not because of, but in spite of judges' knowledge of the specific regulatory contexts.[175] Their lack of expertise does not preclude heightened review because those sorts of issues ultimately entail relatively straightforward, commonsense empirical judgments about the likely impact of speech and speech restrictions on human motivations and social interaction. Though making good judgments can be difficult, and, of course, can benefit from informed opinions, litigants can usually explain the relevant factors or considerations in a clear and

174. *But see* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001) (arguing that legislatures often do not make use of those resources).

175. *See* Gregory v. City of Chicago, 394 U.S. 111 (1969) (courts determining the need for violence prevention measures as justification for limiting speech); Cox v. Louisiana, 379 U.S. 536 (1965) (same); Edwards v. South Carolina, 372 U.S. 229 (1963) (same).

understandable way. Courts generally need not master complex or remote bodies of knowledge to decide these sorts of free speech matters.

Yet even with respect to review of speech restrictions designed to pursue such clear-cut objectives, the epistemic arguments are persuasive when one takes into account elements of the weak norms theory—in particular its observation that for some government institutions or programs, or functions or activities thereof, First Amendment norms apply with less force. When First Amendment norms are especially robust, or, in other words, when it is extremely important to protect free speech rights, the adverse costs accompanying judicial review are more tolerable. In those contexts, we are more willing to accept the error that results from having judges, with their more limited expertise and knowledge, apply their own independent judgment to assess the need for contested speech restrictions. Notably, when courts apply traditional heightened review, rather than defer to the original decisionmakers' judgments, any epistemic errors will always result in more, rather than less, speech protection than would be accorded by the original decisionmaker. When, by contrast, the First Amendment norms are weaker, or when there is reason to give government decisionmakers greater discretion to restrict speech, the same errors are less tolerable. The weakened force of the First Amendment norms alters the constitutional calculus—courts have a less critical role to play, and the costs of aggressive review by courts with inferior knowledge and expertise outweigh its benefits.

A similar point applies to at least some of the democratic deficiency arguments. On their own, the democratic arguments against judicial review invoking the Constitution's text or its commitment to federalism and separation of powers principles prove too much. The Constitution explicitly gives Congress the power to regulate interstate commerce and to lay and collect taxes, yet it would eviscerate free speech protections if courts were to defer to congressional decisions restricting speech enacted pursuant to those powers. Along similar lines, federalism concerns apply whenever federal courts review the constitutionality of state and local actors, yet courts typically apply the same due process analysis regardless of whether the government decisionmaker is a state, local, or federal actor.[176] On their own, these types of democratic arguments fail to explain why the Constitution's text or federalism and separation of powers principles demand greater

176. Courts sometimes take into account the state, local, or federal status of governmental actors when reviewing the constitutionality of their actions. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489–90 (1989). For an illuminating empirical study of this phenomenon, see Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931 (2007).

solicitude in First Amendment cases adjudicating speech restrictions within government institutions or programs than in other First Amendment and constitutional rights cases.

Like the epistemic arguments, the federalism and separation of powers arguments become convincing when combined with elements of the weak norms theory. Federal court review of many decisions by state and local government actors is in tension with federalism principles. Likewise, judicial review routinely involves interfering with the executive branch's performance of its functions. Yet in both cases, the priority of aggressively safeguarding First Amendment norms—norms considered critical to furthering democratic principles—justifies the incursions on federalism and separation of powers concerns. Within government institutions and programs, in those contexts in which First Amendment norms have less force, there is less reason to tolerate such intrusions, and courts ought to give politically accountable decisionmakers broader discretion to pursue their institutional and program objectives. Accordingly, the argument against heightened review based on the courts' democracy deficit is more powerful in those circumstances, when the First Amendment norms are weaker.

III. THE FREE SPEECH CONDITIONAL DEFERENCE MODEL

The prior Part argued that the judicial underenforcement theory, combined with the basic insight of the weak norms theory, provides a forceful account for why courts ought sometimes to decline applying traditional heightened review to speech restrictions within government institutions and programs. Together, the theories make clear the courts' limited competencies and the substantial costs accompanying aggressive judicial review of some restrictions, and the increased salience, or unacceptability, of those deficiencies in light of the government's heightened regulatory interests. Yet the theories do not also compel the conclusion that courts should thus apply no more than reasonableness review to some challenged restrictions in those contexts. Indeed the theories provide little clarity on the appropriate degree of less stringent review. The remainder of this Article turns to this issue.

This Part examines what free speech jurisprudence ought to look like if it takes seriously the idea that free speech norms are significant within government institutions and programs, but that courts, because of institutional limitations, ought not to enforce them as they traditionally do. This Part argues that courts ought to follow what I call the "free speech conditional deference model." Under this model, courts ought not to devolve primary interpretive and enforcement authority of First Amendment norms to

nonjudicial actors unless those actors engage in a decisionmaking process worthy of deference. This Part begins by describing two distinct approaches, which I refer to as the hands-off model and the conditional deference model, used by courts in other contexts when declining primary interpretive and enforcement authority over constitutional or legal norms. The Part then argues that the conditional deference model provides the appropriate approach for the free speech context.

A. Two Models of Declining Primary Enforcement Authority

1. The Hands-Off Model

The political question doctrine provides one model under which courts decline primary interpretive and enforcement authority for constitutional norms. According to this doctrine, some issues of constitutional law are inappropriate for judicial resolution and should instead be resolved by the political branches of government.[177] As the Supreme Court catalogued in *Baker v. Carr*,[178] the following circumstances are "prominent on the surface of any [political question] case":

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[179]

In other words, political questions may arise when the Constitution expressly locates decisionmaking authority in a political, democratically accountable branch; when the courts lack institutional competence to resolve an issue properly; or when a judicial decision risks certain sorts of particularly adverse consequences.

In political question cases, courts deny their own authority to interpret and enforce constitutional norms, following what I call a hands-off model.

177. *See* Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1031 (1985).
178. 369 U.S. 186 (1962).
179. *Id.* at 217.

Upon concluding that a challenged action involves a political question, courts renounce any responsibility for defining and enforcing the constitutional principle at stake and instead leave that function to the political branches.[180] In other words, courts do not pass judgment on the political branches' interpretations of the Constitution's authorizations and limits.[181] As Martin H. Redish has explained, treating political questions as "'nonjusticiable,'" courts "will neither approve nor reject the judgments of the political branches, and will instead let the political process take its course."[182]

Yet the courts do retain a significant element of authoritative review in political question cases. They exercise independent judgment in deciding the essential issue of whether a contested matter qualifies as a political question.[183] The courts adopt a hands-off attitude only after they themselves have concluded that a political question is involved. As a number of commentators have pointed out, in many cases such determinations effectively decide the constitutional issue at stake.[184] This is particularly so when the judiciary is reviewing a political branch's action after the fact.[185] A judicial conclusion that a contested matter involves a political question means that the court will not intervene and invalidate the challenged action.[186] Courts thus play a significant role in political question cases by policing the boundaries of the doctrine's application.

2. The Conditional Deference Model

Courts also decline primary interpretive and enforcement authority in the administrative law context. Courts regularly recognize administrative agencies as the principal interpreters of their authorizing statutes.[187] Acknowledging the judiciary's inferior knowledge of the regulatory fields, as well as the

180. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538 (1966).

181. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599 (1976).

182. Redish, *supra* note 177, at 1031.

183. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244–45 (2002); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959).

184. *See, e.g.*, Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 224–25, 233–34 (1985); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 713 (1993).

185. *See* Barkow, *supra* note 183, at 245 n.20.

186. *See id.*

187. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

agencies' greater responsiveness to processes of democratic accountability, the courts in many cases effectively devolve the power to interpret statutes to agencies and retain only minimal oversight authority.[188] When Congress has expressly delegated specific interpretive authority to an agency, courts will treat agency interpretations as binding unless the interpretations are deemed to be "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[189] When the legislative delegation is implicit, rather than explicit, courts review agency constructions for their reasonableness.[190]

Notably, the determination whether there has been an implicit congressional delegation of authority does not turn on Congress' intent.[191] Rather, in deciding the degree of deference to accord agency interpretations of law, courts consider a variety of factors, including "the degree of the agency's care, its consistency, formality, and relative expertness, and the persuasiveness of the agency's position."[192] Courts are more likely to defer very strongly, and review only for reasonableness, when, for example, agency interpretations result from notice-and-comment rulemaking or formal adjudication.[193] As the Supreme Court has explained, "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[194]

Accordingly, whereas the courts recognize the political branches as having primary interpretive and enforcement authority over political questions in all cases, the courts do not similarly cede such authority to the administrative agencies in interpreting their authorizing statutes. Courts accord heightened deference to administrative interpretations of law only on a conditional basis; they follow, in other words, what I call a conditional deference model. When Congress has expressly mandated such deference, the courts will apply it. Otherwise, only when the courts conclude that the agencies'

188. *See id.* at 844, 865–66.

189. United States v. Mead Corp., 533 U.S. 218, 218–19 (2001); *see also Chevron*, 467 U.S. at 843–44.

190. *Mead Corp.*, 533 U.S. at 219.

191. *Id.* at 229; *Chevron*, 467 U.S. at 845; *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 198–99 (2006).

192. *Mead Corp.*, 533 U.S. at 228 (footnotes omitted). *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 872 (2001) (discussing the relationship of *Skidmore's* multifactorial deference and *Chevron's* two-step deference).

193. *Mead Corp.*, 533 U.S. at 230; *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

194. *Mead Corp.*, 533 U.S. at 230. Such administrative formality is not a prerequisite for heightened deference. The Court will generally consider the totality of circumstances to determine whether Congress would have expected the courts to accord heightened deference. *See id.* at 231.

determinations are of a kind that Congress would have thought of as "deserving [heightened] deference" will the judiciary decline to apply its own independent review and instead defer to reasonable agency interpretations.[195]

B. The Preferred Free Speech Approach

Courts decline primary interpretive and enforcement authority over political questions and agency interpretations of law for many of the same reasons that courts decide against applying heightened review of speech restrictions within government institutions or programs. In all three contexts, the courts routinely emphasize their inferior knowledge or expertise on the issue under review,[196] as well as the greater democratic accountability of the initial government decisionmaker.[197] In the free speech and political question contexts, the courts also point to the unique or serious adverse consequences that flow from the fact of judicial review itself.[198] In light of this last point, and because the political question doctrine addresses matters of constitutional, rather than statutory, interpretation, one might assume that the doctrine's hands-off approach would be especially germane for free speech cases. Yet, as this Subpart argues, the hands-off model has limited relevance.

When courts decline primary interpretive and enforcement authority over free speech norms within government institutions or programs, they ought to follow the political question hands-off model only to a limited extent, and instead principally track the agency interpretation-of-law conditional deference model. As in the political question context, courts should independently determine what contexts are immune from heightened judicial scrutiny. That is, courts should not cede to other government decision makers authority to police the boundaries of judicial enforcement of First Amendment norms. Yet unlike in the political question context, courts should retain the option of exercising heightened, independent review, even upon concluding that other government actors are generally better situated to interpret and enforce constitutional norms. Following the agency interpretation-of-law conditional deference model, courts should condition devolving their primary interpretive and enforcement authority upon a

195. *See id.*

196. *See supra* Part II.C.1 (free speech); *supra* note 179 and accompanying text (political question); *supra* note 188 and accompanying text (agency interpretations of law).

197. *See supra* Part II.C.2 (free speech); *supra* note 179 and accompanying text (political question); *supra* note 188 and accompanying text (agency interpretations of law).

198. *See supra* notes 163–169 and accompanying text; *supra* note 179 and accompanying text (political question).

finding that the decisionmaking process underlying the challenged speech restriction warrants such devolution.

1. The Limited Relevance of the Hands-Off Model

A growing number of scholars have recently called for courts to "take First Amendment institutions seriously" when crafting free speech doctrine.[199] They have largely built upon the work of Frederick Schauer, who, in a thoughtful and provocative essay, suggested that institutional identities might appropriately serve as a First Amendment doctrinal category.[200] Noting that "a certain number of existing social institutions in general, even if not in every particular, serve functions that the First Amendment deems especially important, or may carry risks that the First Amendment recognizes as especially dangerous," he has argued that "a recast First Amendment could more consciously treat these institutions in *rulelike fashion, with the institutions serving as under- and overinclusive*, but not spurious markers of deeper background First Amendment values."[201] On his view, upon identifying an institution as serving some important First Amendment value (for instance, colleges and universities furthering the purposes of inquiry and knowledge acquisition), a court could apply a second-order test, focusing on whether a specific decisionmaker belongs to the institution, rather than whether the challenged decision furthers First Amendment values.[202] Insofar as the envisioned method would treat government institutions as a determinative category justifying judicial deference, the proposal suggests a model of devolving interpretive and enforcement authority akin to the political question model.[203]

199. Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 589 (2005); *see also* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Hills, *supra* note 131, at 175, 183; Horowitz, *Three Faces*, *supra* note 5, at 1129–39; Horowitz, *Universities*, *supra* note 5, at 1503; Rosen, *supra* note 91; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1518 (2005); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 908–11 (2006) [hereinafter Schauer, *Academic Freedom*]; Schauer, *supra* note 152, at 85–86; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) [hereinafter Schauer, *Institutional First Amendment*].

200. Schauer, *Institutional First Amendment*, *supra* note 199, at 1274–76.

201. *Id.* at 1274 (footnote omitted).

202. *Id.*

203. Schauer does not explicitly address whether his proposal ought to apply to questions of judicial deference. *See generally id.* By contrast, he does suggest institutions (*e.g.*, elections) as meaningful markers for heightening First Amendment scrutiny. *See id.* at 1276. It bears emphasis that his proposal contemplates institutions more generally, and not government institutions in particular. *See generally id.*

There are two interrelated problems with such an approach. First, it conflicts with one of the foundational principles of the First Amendment: the deep distrust of government and, by extension, individual government decisionmakers. "Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and of somewhat deeper distrust of governmental power in a more general sense."[204] This distrust stems from doubts about not only government decisionmakers' capacities, but also their motives. The First Amendment reflects concerns that government decisionmakers will misuse (or force others to misuse) their power to suppress dissenting or unpopular views.[205] An approach that gives interpretive and enforcement power to government officials because of their institutional identities recognizes the institution's superior competence or status but insufficiently guards against abuses of power.

Vincent Blasi's well-known admonition that First Amendment doctrine ought to reflect a "pathological perspective" lends support to this view.[206] Because of the First Amendment's central role in constituting the American polity and governmental structure, Blasi argues, the doctrine should be "targeted for the worst of times."[207] That is, the courts' "overriding objective at all times should be to equip the First Amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[208] Applied in the devolution context, this means that courts should be constantly vigilant toward the risk that government decisionmakers could transform their programs and institutions—such as

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204. SCHAUER, *supra* note 130, at 86.

205. Here, and elsewhere, *see infra* at pp. 1735–49, I refer to government decisionmakers' "misuse" or "abuse" of power to suppress dissenting or unpopular views, or their "intolerance" for or "repression" of such views. To be clear, government officials, particularly those managing government institutions or programs, will regularly have legitimate reasons to censor or restrict such views. A director of a program advocating sexual abstinence, for example, can understandably punish employees who counsel contrary positions, and a school teacher can appropriately discipline students who urge violence against other students. When I use terms such as "misuse" or "abuse" of power, I refer to instances where government decisionmakers restrict speech principally for private, as opposed to public, reasons.

206. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 *passim* (1985).

207. *Id.* at 449–50.

208. *Id.* at 449, 455–56. For thoughtful criticism of Blasi's position, see George C. Christie, *Why the First Amendment Should Not Be Interpreted From the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683 *passim*; Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618 *passim* (1988).

legislatures, universities, libraries, schools, or workplaces—into sites of intolerance and repression. Thus, courts should be exceedingly cautious before devolving interpretive and enforcement power over free speech norms to other government institutions.

Second, and relatedly, an approach devolving power to government institutions *qua* institutions pays insufficient attention to their variation, across both space and time. Some schools, for example, differ markedly from other ones, and one today can change significantly tomorrow. Though courts could reasonably identify certain institutions as presently furthering some important First Amendment values, making judgments that remain accurate over time is more elusive. Adopting a pathological perspective, the courts ought to worry that the very institutions that uniquely further First Amendment values (such as enabling individual autonomy, promoting inquiry and knowledge acquisition, enhancing public deliberation, and checking governmental power) are the ones most attractive for purposes of governmental cooptation and control during periods of hysteria and intolerance. Reduced judicial skepticism of those institutions' decisions, moreover, will make them even more appealing targets.

Some might counter that the insistence here on the need to distrust government institutions is overstated. After all, some might argue, the Constitution itself exhibits a general distrust of government overreaching,[209] yet the courts nonetheless follow a hands-off model in the political question context. But the political question doctrine addresses a fundamentally different set of questions than would a comparable "free speech in government institutions and programs" doctrine. As numerous scholars have pointed out, the political question doctrine primarily applies, or ought to apply, to issues concerning the structure of government, rather than those directly implicating individual rights.[210] On this view, there is less need for judicial review of questions pertaining to constitutional structure because the political branches and state and federal governments can effectively vindicate their interests on their own.[211] Along similar lines, political questions, properly conceived, involve situations in which the political branches of government are

209. Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1055–56 (2004) (discussing the "negative constitution").

210. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 169 (1980); Rachel E. Barkow, *supra* note 183, at 327; Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 864–65 (1994); Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2d 367, 374 (1999); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 122–28 (2001).

211. *See* sources cited *supra* note 210.

expected to "'self-monitor[]'" their conformity to constitutional requirements.[212] By contrast, when individual rights are at stake—as they are in free speech cases—there is less reason to be confident that the right will receive protection through the political process alone, absent judicial review. Thus, there is a substantial need for independent judicial oversight of the political branches to ensure fidelity to First Amendment principles.

One important element of the political question hands-off model, however, is suitable in free speech cases: the courts' independent review of whether a challenged action involves a political question. As discussed above, courts in political question cases apply their own best judgment to determine this preliminary issue; they do not defer to the political branches' views.[213] Courts in free speech cases should follow a similar approach. Courts should not relinquish their authority to define and enforce free speech norms unless they independently conclude, or trial factfinders make reasonable factual findings leading to the conclusion, that such devolution of power is necessary and appropriate. Other government decisionmakers generally have strong self-interests in interpreting the domain of judicial responsibility narrowly, thus expanding the realm of their own authority and discretion. In order to counter that tendency, and in keeping with the First Amendment's general skepticism of government officials' capacities and motives, the courts should avoid deferring to the original decisionmakers' judgments on issues determining the applicability and extent of judicial power; that is, courts should avoid ceding their boundary-maintenance authority. Put simply, courts should not defer to other officials' judgments on whether those officials are entitled to deference.

Consider, for example, *Waters v. Churchill*,[214] involving the nurse in the obstetrics department who alleged that a public hospital fired her for her remarks on the state of the department. As discussed above, this case involved a boundary maintenance issue because the parties disputed the facts as to what the nurse actually said, and the resolution of the facts was central to determining the applicable degree of First Amendment protection.[215] While *Churchill* held that courts must accept the facts as the employer reasonably and in good faith found them to be,[216] the conditional deference

212. *See* Henkin, *supra* note 181, at 599, 622–23; Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1207 (2002).

213. *See supra* note 183 and accompanying text.

214. 511 U.S. 661 (1994) (plurality opinion).

215. *See supra* pp. 1707–08.

216. *Churchill*, 511 U.S. at 677.

model would require courts to privilege instead the factfinder's best understanding of the facts. Some commentators might object that the latter approach holds employers to too high a standard, effectively requiring them to replicate judicial factfinding to resolve employee speech disputes.[217] But that argument is overstated. As an initial matter, some employers would likely continue to conduct informal investigations rather than replicate formal judicial factfinding, and it would be rational for them to do so. Even if the employers proceeded under a cost-benefit analysis, for instance, the determination whether to mimic judicial factfinding would depend on the cost of additional procedures relative to the expected cost of liability without them. In light of the significant barriers to filing suit and hence the diminished expectation of liability, some employers would likely conclude that the additional procedures are not worth the expense.

More important, the conditional deference model's heightened standard is appropriate, for it would deter hard-to-discern bad-faith investigations. Under *Churchill*, employers must follow "reasonable" procedures to determine the speech's content.[218] As the Court acknowledged, because "many different courses of action will necessarily be reasonable," employers will have considerable discretion in determining "who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion."[219] As long as employers have met the minimum threshold requirement of reasonable procedures, they will have an interest, particularly when they are hostile to the speaker, in abandoning any further investigation once they conclude that the speech does not qualify for heightened protection. Though the *Churchill* standard makes clear that courts ought not to credit employer versions of the facts arrived at in bad faith, the ease with which employers can hide such bad faith means that the good-faith requirement has little bite. By contrast, if the courts decide whether speech is protected based on the factfinder's best understanding of what was said, employers will have reduced incentives to skew their factual findings in favor of speech that receives less protection.

So, for example, imagine that a parks department cafeteria employee said to her fellow employee that the department's selection of concessionaires was corrupt. Her supervisor, who overheard the comment, then fires the employee, alleging that the firing resulted from the employee's rude com-

217. The plurality opinion expressed this view in Churchill. *See id.* at 675–76 (O'Connor, J., plurality).
218. *See id.* at 677–78.
219. *Id.* at 678.

ments to customers. If it were reasonable, for example, for management to interview four, five, or six people to determine the cause of the firing, an employer who sought to stifle criticism of operations would stop interviewing at four if the facts then gathered indicated that the reason for the firing was the rude comments. Because additional factfinding will virtually always be more costly or time-consuming, the employer can justify the decision as a cost-saving measure; in other words, it would be relatively easy for the employer to conceal bad faith. While this example focuses on contested facts concerning what speech was responsible for the adverse employment action, rather than what speech was actually said, it nonetheless illustrates the First Amendment concerns raised when courts defer to employers' accounts of the facts. Courts in free speech cases do not defer to employers' good-faith accounts of what happened and why, even if reached after reasonable procedures;[220] nor should they defer to employer's good-faith accounts of what was said. Employers, and not employees, should bear the costs of less thorough procedures. This should especially be the case given that employers usually have broad authority to design and undertake investigatory procedures without public participation (which might otherwise encourage more rigorous investigations).

2. The Suitability of the Conditional Deference Model

Unlike the political question hands-off model, the courts' approach to reviewing agency interpretations of law provides a suitable model for the free speech context.[221] Courts ought not to relinquish categorically their authority to interpret and enforce free speech norms within government institutions and programs. Rather, insofar as they conclude that the judiciary ought to devolve primary interpretive and enforcement authority to nonjudicial actors, they should do so only upon finding that the actors' decisionmaking processes deserve it. If the nonjudicial actors' decisionmaking processes are unworthy of deference, then the courts should independently review the record to determine whether the challenged speech restriction conforms to First

220. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (making no suggestion that courts ought to defer to employer's reasonable, good-faith account of events).

221. To be clear, my argument for the free speech conditional deference model does not assume that courts' adjudication of free speech claims involves the same type of undertaking as courts' review of agency interpretations of law. Indeed, the former primarily involves individual rights concerns while the latter entails separation of powers and legislative delegation issues. The conditional deference model is relevant and attractive here because it offers a paradigm by which courts can devolve primary interpretive and enforcement authority for legal and constitutional norms to nonjudicial actors while taking steps to discourage abuse of that authority.

Amendment norms. In other words, courts should condition their deference to other governmental officials' judgments on the nature of the processes and procedures undertaken to reach the decision in question; that is, courts should follow a free speech conditional deference model.[222]

Courts should adopt the free speech conditional deference model for at least two reasons. First, following the model minimizes the risk of official abuse associated with devolving primary interpretive and enforcement authority. When courts review free speech restrictions only for their reasonableness, or hold speech to be outside the scope of First Amendment protection, there is a significant likelihood that the misuse of power will go undetected. This is especially so for speech restrictions within government institutions and programs because the government often has valid reasons to make content-based decisions, but the line between legitimate and illegitimate purposes is frequently elusive.[223] School officials must be able to prescribe curricula and restrict in-class discussions, for example, yet, as discussed above, courts have difficulty discerning the precise bounds of "legitimate pedagogical interests."[224] Accordingly, courts are more likely to accept, as reasonable, pretexts for illicit action. By contrast, the free speech conditional deference model shifts the emphasis of courts' analyses. In requiring courts to make an initial finding that the process leading to a challenged decision exhibited fairness and deliberation, a free speech deference model makes the devolution of interpretive and enforcement authority contingent on a reason to believe that the officials had acted appropriately. It renders devolution a function of not simply judicial review's shortcomings or costs, but the diminished need for the courts' policing function.

Second, applying the free speech conditional deference model encourages government officials to adopt decisionmaking processes that consider expertise and enable democratic accountability. As the justification for declining traditional review rests in part on the initial decisionmakers' greater expertise and accountability,[225] it is appropriate for courts to take steps to

222. Other scholars have similarly argued that the processes leading to the formulation of government provisions or regulations should have constitutional significance. *See, e.g.*, Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Laurence H. Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 440–46 (1977); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 *passim* (1975).

223. *Cf.* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988) (identifying, as a major First Amendment risk associated with unbridled licensing schemes, "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action").

224. *See supra* notes 172–173 and accompanying text.

225. *See supra* Part II.D.

encourage decisionmaking marked by these attributes. Because government officials generally seek broad discretion to implement their institutional or programmatic goals, they are likely to act in a manner that will minimize judicial intervention in their efforts. By following the conditional deference model, courts will thus promote changes in government decisionmaking processes. Of course, we might sometimes prefer government officials to make decisions with minimal accountability in order, for example, to enable the government to act quickly or efficiently, or to make decisions that are unpopular in the short term but wise in the long term. But the conditional deference model does not mandate changes in decisionmaking processes. It leaves those choices to government officials. When restricting speech, officials can determine on their own whether to act in a politically accountable manner and avoid judicial scrutiny, or to act otherwise and submit to judicial review. Because of the interest in providing at least some check over official conduct, it is appropriate to impose this set of alternatives.

Some may argue that it is inappropriate for courts to examine government decisionmaking processes when adjudicating First Amendment claims. On this view, while legislatures can require government officials to undertake certain procedures as a matter of good policy, courts have no constitutional authority to require such procedures as a condition of deference. But there is relevant precedent for the conditional deference model in contemporary First Amendment jurisprudence. In a series of cases, the Court has held that when the government regulates speech through a license or permit system, government officials must follow certain procedures to protect First Amendment rights.[226] For example, in *Freedman v. Maryland*,[227] involving a challenge to a state law requiring the prescreening of motion pictures for obscenity, the Court held that government officials must, among other things, assume the burden of proof to establish that speech is unprotected, provide for a judicial determination to challenge a licensing decision, and assure a prompt final decision.[228] Likewise, in *Thomas v. Chicago Parks District*,[229] concerning a

226. *See* Thomas v. Chi. Parks Dist., 534 U.S. 316 (2002); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Freedman v. Maryland, 380 U.S. 51 (1965). Indeed, First Amendment jurisprudence incorporates many procedural safeguards to protect free speech rights. *See generally* David S. Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 680–85 (1978); Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 519–20, 539–43 (1970).

227. 380 U.S. 51 (1965).

228. *Id.* at 58–59. While courts have applied *Freedman* beyond the obscenity realm to a wide range of governmental regulations, *see* Kathryn F. Whittington, *The Prior Restraints Doctrine and the* Freedman *Protections: Navigating a Gigantic Labyrinth*, 52 FLA. L. REV. 809, 823–24 (2000) (discussing cases), later Supreme Court decisions have greatly limited *Freedman*'s reach, clarifying, for example, that it applies only to content-based licensing regimes. *See Thomas*, 534 U.S. at 322; *see also* Daniel P. Taokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH.

municipal park ordinance requiring individuals to obtain permits before conducting large-scale events, the Court made clear that such regulations must "contain adequate safeguards to guide the official's decision and render it subject to effective judicial review."[230] Only when the original government decisionmakers abide by those conditions will courts defer and uphold decisions to deny permits.[231] Otherwise, the courts will strike down the speech licensing regime.[232] This doctrine recognizes and responds to the problem that, when government decisionmakers have substantial discretion to regulate speech, there is a heightened risk of misuse of authority.[233] This is precisely the problem that arises when government officials regulate speech within their programs or institutions.

Indeed, in the licensing context, as opposed to under the proposed conditional deference model, courts are more aggressive in prescribing procedures for executive branch officials to follow. There, courts strike down decisions reached under licensing regimes that do not follow the requisite procedures, regardless of the decisions' bases.[234] The conditional deference model, by contrast, does not demand automatic invalidation of challenged speech restrictions. Whereas in the licensing context government officials must adhere to the judicially prescribed procedures to protect their decisions from

L. REV. 2409 (2003); J. David Guerrera, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After* FW/PBS v. City of Dallas, 62 BROOK. L. REV. 1217 (1996). Because governments operate few content-based licensing regimes, especially outside the realm of obscenity or sexual expression, *Freedman*'s application is now quite limited. Yet its basic imperative, that government officials must follow procedures to protect First Amendment rights for content-based licensing regimes, remains unquestioned. Accordingly, *Freedman* provides significant and meaningful precedent for the conditional deference model.

229. 534 U.S. 316.

230. *Id.* at 323. Some might question *Thomas*'s relevance to the conditional deference model proposed here because the former involved review of a content-neutral licensing regime while the latter contemplates deference even for content-based speech restrictions. Yet, if anything, that distinction means that *Thomas* provides especially powerful support for the conditional deference model. If courts can require measures to limit discretion as a condition of deferring to content-neutral decisions, then courts ought certainly to be able to demand them before deferring to content-based decisions, which are usually considered more inimical to First Amendment interests. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002); R.A.V. v. City of St. Paul, 505 U.S. 377, 382–84 (1992).

231. *See Thomas*, 534 U.S. at 323–24. Justice Stevens took a position similar to that of the licensing cases when maintaining that the absence of written criteria cabining officials' discretion to select candidates for a political debate sponsored by a state-owned television network violated an excluded candidate's free speech rights. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 691–93 (1998) (Stevens, J., dissenting).

232. *See Thomas*, 534 U.S. at 323.

233. *Cf. id.* ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." (citing Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992))).

234. *See id.*

invalidation, the proposed model affords government officials a choice. They can follow prescribed procedures, and their decisions will receive judicial deference; alternatively, they can disregard those procedures and their decisions will receive heightened scrutiny, but may nonetheless survive if sufficiently justified. The flexibility and discretion afforded government officials by this choice is warranted because the courts can protect First Amendment interests either by reviewing the decisions directly or by reviewing the processes leading to the decisions.

Some may question whether courts can in fact effectively review the challenged decision. They may contend that the model's default heightened scrutiny is objectionable for the same reasons that heightened scrutiny (outside the model) is problematic from the outset. But this point is mistaken. As an initial matter, the primary difficulty with heightened scrutiny entails the pragmatic concerns about undermining institutional authority and causing excessive interference with institutions' abilities to carry out their objectives. Under the conditional deference model, courts apply heightened scrutiny only after the institutions themselves choose to make decisions without following the preferred decisionmaking processes. If government officials believe that heightened scrutiny would compromise their abilities to perform their objectives, they can take steps to avoid such review. Moreover, insofar as heightened scrutiny invites excessive litigation and risks overwhelming the courts, that concern is less severe under the conditional deference model. Because of their interest in securing broad discretion to implement their institutional and program objectives, many officials will follow processes worthy of deference, thereby reducing the risk of litigation flooding the courts. Though heightened scrutiny in the government institution and program context sometimes suffers from significant epistemic and democratic limitations, those shortcomings are not so severe that they would render the review arbitrary or meaningless. Despite the additional errors and greater democracy deficit that sometimes accompanies heightened scrutiny in those contexts, courts are nonetheless able to evaluate critically the competing government and First Amendment interests and render reasonable decisions accommodating those interests.

Some may also object that the free speech conditional deference model does not satisfactorily address the concern that the fact of judicial review itself interferes with or undermines government authority. Indeed, the courts' preliminary inquiry into the nature of the decisionmaking process can sometimes be as disruptive as heightened scrutiny of the decision itself. But the model is no panacea for reconciling the competing interests in checking

governmental abuse and overreaching, and in according officials broad discretion to accomplish their institutional and programmatic ends. Instead, it is a compromise. It gives government officials the option of insulating their substantive decisions from heightened judicial review by following a type of decisionmaking process that offers some protections against the misuse of authority.[235] Moreover, the proposed free speech conditional deference model is less disruptive than one might initially expect because it does not contemplate allowing plaintiffs unlimited grounds to challenge the individual processes leading to each decision. As the next section explains, courts should cabin those grounds by focusing instead on whether officials reached their decisions pursuant to a formal speech policy.

Before turning to the issue of speech policies, it bears emphasis that the free speech conditional deference model does not dispense with the need for heightened or independent scrutiny in all cases involving speech restrictions within government institutions and programs. Rather, the model comes into play only when traditional heightened scrutiny is inappropriate. As my principal aim here is to argue against the minimal scrutiny currently applied by courts to speech restrictions within government institutions and programs, it is beyond this Article's scope to discuss in detail the circumstances in which traditional heightened review is required. I address this issue briefly here, however, in order to explain why the conditional deference model ought not to apply in all cases involving speech restrictions within government institutions and programs.

The conditional deference model is appropriate when there is a strong interest in ensuring the minimal obtrusiveness of judicial review. As I discussed above, this is particularly true when an institution or program (for example, the military) demands "instinctive obedience" or unquestioned respect for authority from its participants, or when the government has an expressive interest in the nature or content of speech arising from its institutional or program objectives, and the courts cannot craft clear judicial standards to guide the government decisionmaker.[236] In the former circumstance, the availability of traditional judicial review is largely incompatible with the institution or program's ability to carry out its objectives. In the latter, because government decisionmakers advancing expressive interests must regulate speech as a matter of course, heightened judicial scrutiny without

235. This compromise, of course, does not resolve the competing interests, but simply shifts the terrain for the assertion of competing interests. That is, those stressing the need to protect First Amendment rights will argue for extensive limits on the decisionmaking process while those emphasizing the need for managerial discretion will advocate for fewer restraints.

236. *See supra* pp. 1711–12, 1723–27.

clear standards will yield excessive litigation, thereby paralyzing institutions and programs. Outside these circumstances, by contrast, there is generally room for more probing judicial inquiry. Rather than follow the conditional deference model and examine the process leading to the speech restriction as a proxy for protecting First Amendment interests, the courts can evaluate the restriction directly. Because review in these circumstances does not cause intolerable disruption to government functioning, such review is preferable because of its more targeted focus on First Amendment violations.

Consider, for example, the school context. In *Tinker v. Des Moines Independent Community School District*,[237] the Court applied a form of heightened scrutiny to review a challenged student speech restriction, and was correct to do so. There, school officials punished several high school students who, in violation of a district policy, had worn black armbands to school to protest the nation's involvement in the Vietnam War.[238] Though the district court upheld the action on the ground that it was "reasonable" in order to prevent disturbance of school discipline, the Supreme Court disagreed, holding that the action violated the First Amendment because of the absence of a showing that the armbands would cause a "substantial disruption of or material interference with school activities."[239] As the Court made clear in a later case, heightened scrutiny was appropriate there because the contested speech involved private, personal expression, and not student expression made pursuant to official educational channels or activities.[240] In the former circumstance, the government's interest in regulating the speech arises primarily from concerns about disruption and harm to the educational process. In the latter circumstance, the government's interest goes well beyond disruption and harm, as the speech is part of, indeed constitutive of, the educational process itself. Though evaluating the need for speech restrictions in either context is challenging, it is far less so in the former than the latter. Courts regularly assess the disruptive impact of restricted speech,[241] and hence heightened review in the former context would be akin in many ways to the

237. 393 U.S. 503 (1969).

238. *Id.* at 504.

239. *Id.* at 514.

240. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–73 (1988); *see also* Hafen, *supra* note 5, at 692–95.

241. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (analyzing whether publication of Pentagon Papers would interfere with national security and undermine the ability to conduct diplomatic negotiations); United States v. O'Brien, 391 U.S. 367 (1968) (assessing whether burning of draft cards frustrates government interest in administering selective service system); Edwards v. South Carolina, 372 U.S. 229 (1963) (evaluating whether a civil rights march threatened government interest in peace and order); Feiner v. New York, 340 U.S. 315 (1951) (assessing whether a street speaker threatened government interest in peace and order).

judicial inquiry in cases involving speech restrictions outside government institutions. Though reasonable minds can differ when evaluating speech's potential impact, the analysis is relatively straightforward, involving judgments on how speech likely affects individual behavior and social interaction. By contrast, determining how speech ought to be encouraged, directed, and limited as part of the educational process itself is far more multifaceted and open ended. The conditional deference model should apply in the latter, but not the former context.

Finally, some might object to the conditional deference model on the ground that it places more obligations on government institutions and programs than identical nongovernmental institutions and programs when they regulate speech. On this view, public hospitals and universities, for instance, ought to have the same discretion to restrict speech within their institutions as private hospitals and universities. But this dissimilar treatment exists for most constitutional rights. The Constitution regularly places duties on government actors while overlooking similarly situated private ones. Though there are good reasons why the Constitution should limit private actors, and indeed it sometimes does,[242] and notwithstanding the fact that the line between private and government actors is increasingly difficult to discern,[243] there are substantial reasons why government institutions and programs should be directly subject to constitutional, and in particular First Amendment, constraints. I note two points briefly here.

First, government institutions and programs are generally more vulnerable to the risk of being used for improper political purposes, including, for instance, efforts to suppress or restrict speech not for any legitimate governmental objectives, but solely as a means of consolidating and entrenching official power. This is so because government institutions are generally more dependent on elected government officials for their resources and funding than are private institutions, and more subject to elected officials' direct intrusion into their affairs.[244] Elected officials, for example, often play a

242. *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 415 (2003) ("Although no constitutional duties are . . . placed on private actors, constitutional rights have substantial impact on (1) what individuals can lawfully be permitted or required to do, and (2) which of their interests, preferences, and actions can be protected by law.").

243. *See* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 176–89 (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 592–664 (2000); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 386–95 (1998).

244. *See* George A. Boyne, *Public and Private Management: What's the Difference?*, 39 J. MGMT. STUD. 97, 98–100 (2002); Peter Smith Ring & James L. Perry, *Strategic Management in Public and Private Organizations: Implications of Distinctive Contexts and Constraints*, 10 ACAD. MGMT. REV. 276,

substantial role in setting government institutions' and programs' budgets and agenda, and in appointing (or at least approving the appointment of) their top officials.[245]

Second, even if government and nongovernmental institutions and programs are equally vulnerable to abuse, the former should have greater obligations than the latter to act in a fair and evenhanded manner.[246] Because they "belong to" and represent the public, they should embody, or act consistently with, the polity's fundamental ideals, including those reflected in the First Amendment and the Constitution more generally.[247] Put another way, government institutions and programs should be held to higher standards because, as Justice Brennan once wrote, "[g]overnment is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct."[248]

IV. THE CONDITIONAL DEFERENCE MODEL IN PRACTICE

The prior Part began to examine how free speech law ought to work if the law assumed both that free speech norms retain significance within government institutions and programs, and that courts should not directly enforce those norms because of institutional limitations. It presented two models under which courts have devolved primary interpretive and enforcement authority of constitutional and legal norms to other governmental actors, and then argued that the second model, which routinely conditions devolution on the decisionmaking process followed by other officials, is compatible with free speech principles. This Part turns to the emphasis of the court's devolution analysis—the decisionmaking process. It maintains that, in free speech cases, courts should focus not on the particular processes underlying each challenged decision, but instead, more generally, on whether the government official made the decision pursuant to and in conformity with a formal speech policy. This Part sets forth the rationale for focusing on formal speech policies, the minimal requirements of

277–79 (1985); Hal G. Rainey et al., *Comparing Public and Private Organizations*, 36 PUB. ADMIN. REV. 233, 238–39 (1976).

245. *See* Boyne, *supra* note 244, at 98–100; Ring & Perry, *supra* note 244, at 278; Rainey et al., *supra* note 244, at 238.

246. *See* Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1061 (1990).

247. *See id.*

248. Adickes v. S.H. Kress & Co., 398 U.S. 144, 190–91 (1970) (Brennan, J., concurring in part and dissenting in part).

such policies, and the effect of a speech policy precondition on case law and government decisionmaking.

A. The Case for Formal Speech Policies

Courts should condition their deference in First Amendment cases involving speech restrictions within government institutions and programs on the restrictions' conformity with formal speech policies. In particular, courts should make two findings before devolving primary interpretive and enforcement authority over free speech norms to other governmental actors. They should find (1) that the institution or program in question operates pursuant to a formal speech policy that confines official discretion to reasonable bounds, and (2) that the policy authorizes the decision in question. If either condition is unmet, courts should resist applying only reasonableness review to the challenged speech restriction or holding the speech to be outside the amendment's protection. In other words, unless other governmental actors act in compliance with a formal speech policy, courts ought not to defer to those actors' judgments about the content and requirements of the First Amendment, but ought instead to assume direct responsibility for the amendment's interpretation and enforcement.

1. Promoting First Amendment Norms

Formal speech policies are an appropriate touchstone for judicial deference primarily because they serve as an alternative means to judicial review for encouraging fidelity to free speech norms or principles. Formal policies serve First Amendment interests in at least three ways. First, they promote *deliberation* on First Amendment concerns and greater awareness of them. Speech policymaking puts the First Amendment on the official agenda. It forces government decisionmakers to consider the appropriate balance between free speech principles and competing interests within their institutions or programs. When the public has an opportunity to participate in the policies' formation, it also encourages the broader polity to contemplate the proper scope and content of First Amendment norms. Regardless of the extent of their free speech protections, the formal policies' mere existence reminds government decisionmakers of the special solicitude demanded by the First Amendment. In addition, the formal policies alert institutional participants and the citizenry more generally of their free speech rights and the ways in which specific institutions or programs approach those rights.

Second, formal speech policies protect First Amendment interests by encouraging *equal treatment* of speech.[249] As Kenneth Karst argued in his landmark article, *Equality as a Central Principle in the First Amendment*, "the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech."[250] By eliminating ad hoc decisionmaking, policies temper and channel individual discretion, thereby decreasing the risk of misuse or abuse of power and increasing the likelihood that like cases will be treated alike. Formal policies transform speech regulation from rule by a person, in reaction to the moment, to rule by a common set of standards and principles, agreed upon after deliberation. Through defining the appropriate criteria and considerations for speech restrictions, formal policies enable individual decisionmakers throughout the chain of command to know what management expects of them and to respond accordingly. Formal policies also inform those whose speech is restricted of the proper bases for such restrictions, thus allowing them to conform their speech to the stated requirements and helping them to assess whether the authorities have overstepped their bounds.

Third, policies serve the First Amendment purpose of checking government abuses by facilitating *accountability* for speech restrictions. When institutions or programs lack formal policies and individual officials make decisions on their own, there is a greater likelihood that individual wrongdoing as well as broader patterns and practices of misbehavior will go unreported or unnoticed. Individuals who suffer wrongful penalties or retaliations for their speech are often reluctant to challenge them publicly. The broader public has less awareness of an institution or program's intended and actual practices restricting free speech rights. As Anthony Amsterdam has stated in another context, "Decisionmaking that is diffuse is also thereby invisible; and those who make invisible decisions cannot be held properly accountable for them."[251] Formal policies, by contrast, render decisionmaking more visible. By providing the institutions' or programs' official statement on the proper accommodation of free speech principles, policies offer a focal point for discussion and review.

Formal policies promote accountability for speech restrictions at three levels. The first level is internal management. Policymaking encourages

249. *Cf.* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 425 (1974) (arguing that search and seizure policies promote equal treatment).

250. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975); *see also* Geoffrey R. Stone, *Kenneth Karst's* Equality as a Central Principle in the First Amendment, 75 U. CHI. L. REV. 37 (2008) (discussing Karst's article).

251. *See* Amsterdam, *supra* note 249, at 426 (arguing that the Fourth Amendment requires police to adopt policies governing their search and seizure activities).

management to study the need for various speech restrictions and to learn of their actual implementation.[252] Once an institution or program adopts a formal speech policy, the management then assumes responsibility for its content and enforcement. Policies establish rules and standards for which the entire chain of command can be held accountable. Furthermore, a court decision striking down a policy on free speech grounds is more likely to receive management's attention and action than would judicial invalidation of an individual act. While management could reasonably perceive the latter as limited, concerning only aberrant behavior,[253] it could not do so for the former. The conclusion that a formal policy was unconstitutional would represent a repudiation of the official position on the proper accommodation of free speech rights, and would demand official changes.

Formal policies also enhance accountability to the public. Policies enable the public to point to an institution's avowed free speech commitments and to mobilize support for or against them. Policies also provide a yardstick against which to measure official conduct. When policies publicly commit to particular free speech principles, that public record makes it more difficult for officials to deviate from those principles than would be the case in the policies' absence. Organizational management studies reporting the effectiveness of corporate statements of values,[254] and social psychology studies detailing the binding effect of individuals' stated commitments,[255] support this argument. Furthermore, insofar as individuals can decide whether to join or take part in an institution or program (for example, whether to attend, or have one's children attend, a school; whether to work for a government employer; or whether to join the military or a government program), the availability and accessibility of speech policies will enable individuals prioritizing certain free speech rights to make more informed choices. When significant numbers of individuals object to or shun an institution

252. *See id.* (discussing police investigatory policies).

253. *See id.* at 421 (noting that when a court invalidates a rule, as opposed to an individual act, "the court's decision does not simply get lost or filed in a vice-squad detective's 'testimony to avoid' file"); *see also* Joanna Schwartz, Myths and Mechanics of Deterrence (unpublished manuscript, on file with author) (discussing findings that government agencies often fail to reform their practices in response to adverse litigation outcomes because of poor information and claims management).

254. *See, e.g.*, Ronald R. Sims, *The Challenge of Ethical Behavior in Organizations*, 11 J. BUS. ETHICS 505, 510–12 (1992); Myrna Wulfson, *Rules of the Game: Do Corporate Codes of Ethics Work?*, 20 REV. BUS. 12 (1998). *But see, e.g.*, Margaret Anne Cleek & Sherry Lynn Leonard, *Can Corporate Codes of Ethics Influence Behavior*, 17 J. BUS. ETHICS 619, 620, 622 (1998).

255. *See, e.g.*, Jerry M. Burger & Tara Cornelius, *Raising the Price of Agreement: Public Commitment and the Lowball Compliance Procedure*, 33 J. APPLIED SOC. PSYCHOL. 923, 927–31 (2003); Barry R. Schlenker et al., 20 PERS. & SOC. PSYCHOL. BULL. 20 *passim* (1994).

or program because of its speech policies, moreover, some institutions and programs will likely reform their approaches.

Formal polices also improve intergovernmental accountability. Policies inform not only the public about how various institutions and programs approach free speech issues, but also other government bodies.[256] The availability of concrete policies, as opposed to diffuse and low-visibility decisionmaking, clearly enhances legislators' and other government officials' ability to exercise oversight authority.[257] Insofar as the policies are sensitive or controversial, moreover, their heightened visibility also makes it more difficult for legislators and other governmental actors to evade their oversight responsibilities.[258]

Of course, formal speech policies do not guarantee conformity with free speech principles. Indeed, some government institutions or programs might adopt policies that restrict speech excessively, and some lower-level government decisionmakers might be more solicitous of free speech principles than the higher-level ones charged with policymaking. Thus the adoption of some formal speech policies might lead to outcomes less respectful of First Amendment principles than would have been the case absent their implementation.

Yet such outcomes would likely be the exception, rather than the rule. As I discuss further below, policymaking entailing an open and deliberative process often helps to guard against policies that restrict speech excessively.[259] Even if it does not, the choice becomes one between formal policies, promoting considered, visible, and consistent speech management, and no formal policies, allowing ad hoc, invisible, and variable speech regulation. The latter is attractive when there is reason to believe that most government officials are predisposed to act in the correct or appropriate manner, but public pressures risk leading them astray.[260] Here, in light of the priority accorded achieving institutional objectives rather than providing fora for free expression, there is little reason to conclude that officials in most government institutions or programs generally prioritize free speech norms and principles, or, more importantly, that those officials value free speech norms more than do members of the general public. Though that might be the case in some government institutions, such as public universities and research institutions,

256. *See* Amsterdam, *supra* note 249, at 426–27.
257. *See id.*
258. *See id.* at 427.
259. *See infra* pp. 1751–54.
260. *Cf.* Carole S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, *in* FORGIVENESS, MERCY AND CLEMENCY 16 (Austin Sarat & Nasser Hussain eds., 2007) (suggesting that permitting government officials to exercise mercy, with its attendant discretion and inequality, might be preferable to policies prohibiting mercy and securing equality given current conditions of widespread draconian criminal sentencing).

for which the freedom of speech is essential for pursuing their institutional missions, it seems unlikely that rendering their decisionmaking more considered, visible, and consistent would lead them to disregard free speech norms. Accordingly, decisionmaking pursuant to formal speech policies, which define in advance the scope of official authority to limit speech and promote community and democratic review of those definitions, better serves First Amendment interests than does decisionmaking absent such policies.

2. Minimally Interfering With Government Functioning

Formal speech policies are an appropriate precondition for judicial deference not only because they promote conformity with First Amendment norms and principles, but also because they minimally interfere with government functioning. In adopting policies, government officials can tailor them to account for the unique issues and concerns arising within individual institutions or programs. In prisons or the military, for example, insofar as officials determine that speech must be tightly controlled, they can adopt highly restrictive speech policies, subject only to reasonableness review. In universities or research institutions, by contrast, officials can adopt more speech-protective policies. Of course, individual prisons, military units, universities, and research institutions can also follow different approaches from each other. By focusing on formal policies, rather than any minimal degree of First Amendment protection, the courts recognize the great variation across government institutions and programs as well as the significant interest in fostering their institutional autonomy.

Other scholars have also suggested that courts ought to condition their deference in cases involving speech restrictions within government programs and institutions. The approaches proposed by these scholars, however, either mandate excessive interference with government functioning, or are so minimalist as to generate little confidence that the judicial inquiry will further First Amendment norms. In discussing judicial deference in constitutional cases more generally, Paul Horwitz, for example, maintains that parties invoking deference might have an obligation to "reason *in good faith*," "to reason *thoughtfully*," and "to observe a minimum level of appropriate *process* in its deliberations."[261] On his view, before deferring, courts ought to determine whether the institution "deliberate[d] fully and transparently on the question as to which it seeks deference."[262] To illustrate this point, Horwitz discusses a

261. Horwitz, *Three Faces*, *supra* note 5, at 1101–02.
262. *Id.* at 1105.

situation in which a public law school seeks deference for its decision to exclude military recruiters from its campus on the ground that the recruiters' sexual orientation-discriminatory policies conflicted with the law school's educational mission.[263] There, Horwitz contends, courts should determine, *inter alia*, whether the school reached that decision "after meaningful academic deliberation," which "might well require that faculty become meaningfully involved in the on-campus recruitment process rather than leaving that task to administrators."[264]

But "meaningful deliberations" ought not to be the touchstone for judicial deference. Public school teachers, for example, routinely restrict student speech for legitimate pedagogical grounds, yet it would be unrealistic, and undesirable, to pressure them always to deliberate or consult with others before doing so. Also, an approach that requires courts to assess in detail the decisionmaking process underlying each challenged decision ignores the risk posed by judicial review to many institutions' ability to function. As discussed above, in some institutions like the military and prisons, the mere fact of judicial review interferes with their ability to cultivate the intense obedience and discipline thought necessary to achieve their objectives.[265] In other institutions like the schools and workplaces, in which decisionmakers must regularly limit and structure speech, liberally allowing free speech suits that can be dismissed only after substantial discovery risks overwhelming institutions by forcing them to concentrate significant resources on legal defense.[266] Because Horwitz's proposal would have courts base their deference determination on a detailed analysis of the decisionmaking process underlying each challenged decision, it offers institutions and programs little ability to protect themselves against judicial review's potential harms.

By contrast, the emphasis on formal speech policies recognizes that different contexts, both across and within institutions and programs, demand different forms of decisionmaking. It allows government officials to retain flexibility to adapt their decisionmaking to changing circumstances. Of course, the creation and implementation of formal speech policies would require a degree of uniformity in official decisionmaking. But that uniformity is simply that the decisionmaking be guided by principles that are reasonable, considered, visible, and generally consistent. I say "generally" consistent because policies can, of course, specifically provide for exceptions. Accordingly, though

263. *Id.* at 1106–40.
264. *Id.* at 1138.
265. *See supra* pp. 1720–21.
266. *See supra* p. 1721.

a formal speech policy requirement imposes some limits on official decisionmaking, it nonetheless allows officials to retain substantial discretion and flexibility to carry out their institutional or programmatic objectives.

Robert Post has suggested a far more minimalist inquiry by the courts. He maintains that "it is a necessary precondition of deference that a court believe that institutional authorities are aware of the constitutional principles that should guide their judgment and are in good faith attempting to enact those principles."[267] In discussing the factors that should inform courts' assessment of this precondition, Post states only that courts will "perceive danger signals when they confront institutional decisions that on the merits seem . . . 'arbitrary, capricious, or invidious,' or . . . 'unreasonable.'"[268] In other words, he suggests no factors beyond a minimum rationality or reasonableness requirement. Yet there is little reason to assume that, simply because a decision is reasonable, government decisionmakers are aware of First Amendment principles and are acting in good faith to enact them. Indeed, decisionmakers often can easily conjure pretexts to conceal their misuse of authority. Notwithstanding its virtue of minimally interfering with government functioning, a mere reasonableness finding should thus be an inadequate ground to trigger judicial deference.

B. Policy Requirements

Having explained why formal speech policies are the proper focus of courts' conditional deference analysis, this Subpart turns to what such policies must entail. To justify judicial deference, formal speech policies must meet five requirements. First, the speech policies must result from an *open and deliberative process*. Government officials must provide the public with reasonable notice and an opportunity to comment on a proposed policy and policy amendments. Upon adopting or amending policies, officials must also provide a written statement of reasoned elaboration for the policy or changes. Though government officials could create their own procedures demonstrating open and deliberative processes, the federal Administrative Procedure Act[269] and its state analogs already provide ready guides for officials to follow to meet the notice, comment, and reasoned elaboration requirements.[270]

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267. Post, *Public Forum*, *supra* note 5, at 1810.

268. *Id.* at 1810–11 (quoting Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) and Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)).

269. 5 U.S.C. §§ 551–559 (2006).

270. *See, e.g.*, *id.* §§ 551–559, 701–706 (2006); N.Y. A.P.A. LAW §§ 201–202 (McKinney 2008); VA. CODE ANN. §§ 2.2-4000–4031 (2008).

Notably, while executive branch officials would likely establish most speech policies,[271] legislatures could also do so. The notice, comment, and reasoned elaboration requirements would apply to policies adopted by either group.

Second, the policies must reflect the government decisionmakers' *good-faith and considered judgment* that the speech restrictions therein are necessary to serve an important government interest.[272] The government decisionmakers should take free speech interests seriously and presume that speech restrictions demand substantial justification. They should adopt speech restrictions only if they conclude, after careful consideration, that the institutions or programs require the limits to perform their functions appropriately and effectively. To be clear, this does not mean that decisionmakers must narrowly circumscribe official discretion to restrict speech. Rather, it means that decisionmakers should tailor the degree of discretion according to their best understanding of what officials need to carry out their institutional and program objectives properly. This standard is appropriate because it demands that government officials give due respect to free speech interests while also acknowledging that those officials should have sufficient leeway to carry out their institutional and program objectives.

To evaluate these first two requirements, the courts must examine the process leading to a policy, and not the policy itself. While courts regularly examine the decisionmaking processes of administrative agencies when reviewing their actions,[273] courts do not generally follow such an approach when reviewing legislation. Indeed, the proposed focus here on the actual deliberations and subjective intentions of the decisionmakers runs counter to the Court's admonition in *United States v. O'Brien*[274] that the constitutionality of laws restricting speech turns on the nature of the restrictions themselves and

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271. *See infra* pp. 1760–61.

272. In explicating the phrase "necessary to serve an important government interest," the Supreme Court has on some occasions suggested that the term "necessary" ought to be understood loosely, to mean that there is a reasonable fit between means and ends. *See, e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476–77 (1989); Ward v. Rock Against Racism, 491 U.S. 781, 799–800 (1989). The Court has interpreted that term generously, in part to defer to, or to avoid second-guessing, the original decisionmakers' judgment. *See Fox*, 492 U.S. at 477; *Rock Against Racism*, 491 U.S. at 799–800. Here, by contrast, the policymakers are simply applying their own best judgments on what restrictions are necessary, and there is no issue of courts second-guessing those judgments. Accordingly, by "necessary," I mean to suggest a tighter fit between means and ends. Before adopting speech restrictions, policymakers should conclude that the limits are essential for appropriately and effectively carrying out their institutional objectives.

273. *See* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (requiring courts to examine the actual grounds for agency decisions). For an illuminating discussion of the rationale for this approach, see Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952 (2007).

274. 391 U.S. 367 (1968).

not the legislators' motives or purposes.[275] But the departure from that approach here is justified. Under the conditional deference model, courts are not supposed to evaluate whether a policy's speech restrictions meet the intermediate scrutiny standard. Rather, they should defer to the decisionmaker's judgments on that issue. That deference rests on a variety of assumptions, including the beliefs that judicial second-guessing of individual decisions undermines officials' ability to carry out their objectives, and that, as compared to courts, the officials are more knowledgeable, more democratically accountable, and hence more likely to make policies that properly accommodate the competing free speech and non–free speech interests. Though requiring officials to engage thoughtfully and earnestly in an open and deliberative process does not guarantee that decisionmakers will appropriately accommodate the competing interests, it improves the odds of such results. Serious, good-faith deliberators are more likely to craft policies worthy of deference, and are more deserving of deference, than are careless, bad-faith decisionmakers.

Some might also argue that, at least for speech policies in the form of legislation, courts ought not to second-guess the legislative process and ought instead to accept unconditionally the speech policies as reflecting the democratic will. But that argument fails to appreciate the significance of the courts' inquiry. Courts should not defer when officials act pursuant to formal speech policies simply because a co-equal branch has endorsed the course of conduct. Rather, they should defer when they have reason to believe that government policymakers, in consultation with the polity, have deliberated seriously on the proper scope and enforcement of First Amendment norms. Courts cede their traditional role of interpreting and enforcing those norms because of concerns about their institutional shortcomings and the costs associated with judicial review. Before doing so, they ought to be reasonably confident that the other branches are carrying out the tasks of interpretation and enforcement seriously and thoughtfully. In light of the heightened concern about the entrenchment of government power embodied by the First Amendment, moreover, courts ought to pay particular attention to whether government officials have sought to perform these functions in consultation with the polity. When the polity actively participates in First Amendment interpretation and enforcement—in other words, when the people participate in a form of popular constitutionalism by engaging jointly with government officials in interpreting and enforcing the Constitution—the courts have firmer grounds for

275. *Id.* at 382–86.

presuming that the policies' balance between First Amendment and competing interests does not unduly favor entrenching official power.

Furthermore, there is precedent requiring courts to examine legislative processes to ensure that legislatures are performing their constitutional enforcement responsibilities properly. In a series of cases concerning Congress' Section 5 enforcement authority under the Fourteenth Amendment, for example, the Supreme Court has instructed courts to scrutinize carefully a law's legislative history to determine whether a challenged law is a "congruent and proportional" response to any alleged constitutional violations.[276] While the Supreme Court has not instructed courts there to assess the legislators' motivations or purposes, the nature of the judicial inquiry under the conditional deference model to assess motivation or purpose would be substantially similar to the analysis undertaken in the Section 5 context. That is, courts should not engage in some sort of psychological inquiry to determine whether individual policymakers have acted in good faith in adopting free speech policies. Rather, they should examine the nature of the deliberations as a whole as a proxy (though imperfect) for assessing the policymakers' good faith. They should determine, for example, whether the policymakers sought out expert views and public comment, considered whether the policy's speech restrictions were necessary to serve substantial government interests, and provided a reasonable explanation, in writing, for their conclusions that the speech restrictions were warranted at the time of their adoption.[277] In the Section 5 context, courts similarly examine the legislative process—including, for example, floor deliberations, hearings, and committee reports explaining the law's adoption—to determine whether Congress had accumulated a sufficient record from which reasonably to conclude that the challenged law was a "congruent and proportional" remedy.[278]

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276. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728–32, 736 (2003) (quoting Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001)); *see, e.g.*, *Garrett*, 531 U.S. at 365, 369–72; United States v. Morrison, 529 U.S. 598, 625–27 (2000); Kimmel v. Fla. Bd. of Regents, 528 U.S. 62, 81, 88–91 (2000).

277. In this way, the courts avoid some of the difficulties raised by attempting to discern legislative purposes or motives. *See* Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 927–30 (1978); Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99–102; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1220–21 (1970). The courts are not seeking to identify a single purpose or motive, but instead to see whether there was, in general, serious and thoughtful deliberations that led to the policy's restrictions.

278. Some commentators have criticized the Court's insistence of a detailed factual record in the Section 5 context, maintaining that it leads to excessive judicial second-guessing, *see, e.g.*, John Martinez, *Rational Legislating*, 34 STETSON L. REV. 547, 582–84 (2005), or empty record-padding, *see, e.g.*, Megan McMillan, *Trading Constitutional Principles for Policy Ends: An Ideographic Study of Disability Interest Group and Agency Response to* Board of Trustees of the University of Alabama v. Garrett, 5

Some might argue that these process requirements would place too great a burden on some government institutions and programs. On this view, while some larger institutions would have sufficient capacities and resources to meet these standards, many other institutions or programs would not. Also, while it might be worthwhile for some institutions, such as schools, libraries, and universities, to devote substantial time and resources to adopt formal free speech policies because their "business," so to speak, centers on speech, it is excessive to demand that other institutions and programs, such as the pest control bureau, the rent stabilization board, or the fire department, do so. But each institution or program need not formulate and adopt its own, unique policy. Legislative and executive officials can adopt broadly applicable speech policies. Institutions and programs like the pest control bureau that do not have unique speech concerns relating to their regular activities, for example, would likely require only a speech policy that specifies the bounds of permissible employee speech. One could readily imagine a statewide default public employee speech policy that specifies, for instance, protections for whistleblowers, requirements of civility and decorum toward customers and coworkers, and prohibitions against disclosing private or confidential information.

Even when institutions and programs need to develop their own particular policies, moreover, the deliberation requirements do not demand that officials write their policies from scratch. It would be perfectly acceptable for officials to draw on other programs' and institutions' free speech policies or proposed model policies, as well as the evidence and reasoning supporting those policies, when adopting their own. To be clear, the officials cannot simply rubber stamp other policies' speech restrictions, but must deliberate seriously about whether the restrictions suggested by others are necessary to serve a substantial government interest in their own institutions and programs. They must also provide the public with notice and an opportunity to comment on the policies, and a written statement explaining the policies'

J.L. SOC'Y 501, 546–51 (2004). Yet the criticism of judicial second-guessing in those cases derives, in large part, from the idea that Congress, under its Section 5 power, ought to have broad authority to protect Fourteenth Amendment rights. In the free speech conditional deference context, by contrast, courts are second-guessing to ensure that policymakers do not overlook, or ignore, First Amendment interests. Especially when they defer to officials' judgments about how best to resolve competing free speech and non–free speech interests, it is appropriate for courts to examine the legislative record to assess whether the policymakers have reached those judgments through serious, considered deliberations. Moreover, the benefits that accrue from requiring legislators to assemble a record that demonstrates serious and thoughtful deliberations outweigh any costs of excessive record padding. Requiring policymakers to gather sufficient information and analyses to support their restrictions promotes considered and rational decisionmaking, and that is especially important when courts refrain from evaluating the decision directly.

adoption. Yet insofar as they understand and agree with others' written explanations for a policy's speech restrictions, the officials may incorporate those explanations in their own statements. Consider, for example, a group of public school officials who sought to develop a free speech policy for their district. These officials would have many models at their disposal, as other districts, school board associations, and a national First Amendment organization have all adopted or written policies that could serve as a template.[279] If the officials simply read a variety of policies and then decided to adopt one as their own, then the policymaking process obviously would be inadequate. If, however, the officials (1) identified a policy or specific restrictions as worth adopting, (2) invited comment on those restrictions from the relevant interested parties, including administrators, teachers, students, parents, and community members, (3) examined whether the district's particular circumstances called for such a policy, and (4) provided a written reasoned elaboration for the restrictions' adoption, then the policymaking process could suffice to trigger deference for decisions restricting speech authorized by the policy. If interested parties raised substantial objections that were ignored or unanswered in the written statement, then the process would not have been sufficiently deliberative. But, if there were no such objections and the record indicated that the officials (perhaps in consultation with their lawyers) believed and had reason to believe that the restrictions were necessary to serve an important institutional or program interest for the reasons set forth in the model policy, then the officials could simply adopt the policy and accompanying statement of reasons.

Some might question whether interested parties and the public actually must participate in the policymaking process as a condition of deference, or whether the fact that interested parties and the public had notice and an opportunity to comment would suffice. Interested parties regularly forego the opportunity to provide comment on proposed legislation or regulations,[280] and that may well be the case here. But, as long as the public had reasonable notice and an opportunity to comment—through written submissions, town hall meetings, or public hearings, for example—then the subsequent absence

279. *See, e.g.*, First Amendment Ctr., First Amendment Schs., Policies & Procedures, http://www.firstamendmentschools.org/resources/samplepolicies.aspx (last visited June 8, 2009) (providing expert commentary and sample policies); E-mail From Sharon Fissel, Director of Policy Servs., Pennsylvania Sch. Bds. Ass'n, to Robin Shofner, Research Assistant to Professor Gia Lee (Aug. 25, 2008, 06:21 PST) (on file with author); E-mail From Robert Ebersole, Assistant Legal Counsel, Mich. Ass'n of Sch. Bds., to Robin Shofner, Research Assistant to Professor Gia Lee (Aug. 22, 2008, 07:10 PST) (on file with author).

280. *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 958–59 & nn. 69–70 (2006).

of public participation should not preclude judicial deference. The determination ought to turn on whether the policymakers seriously and thoughtfully deliberated on the competing considerations and concluded that the restrictions adopted were necessary to serve an important government interest. Evidence of serious and thoughtful deliberations would include, at a minimum, critical analysis of the rationale for the proposed restrictions and the availability of alternative, less speech-restrictive measures to achieve the stated objectives, and a written statement detailing that analysis.

While the first two requirements for a formal speech policy concern the processes leading to the policy, the last three requirements concern the policy itself. The third requirement is that policies must provide *clear standards* on permissible speech restrictions. That is, policies must be sufficiently particular to enable institutional or program participants to have reasonable notice of the types of speech that are or may be prohibited, and the alternative channels of communication left open. This requirement does not demand exactitude or precision, and hence many speech restrictions that would not survive traditional First Amendment vagueness challenges would survive here. Workplace policies could prohibit "rude or offensive" behavior toward coworkers and customers, and school policies could require pre-publication review of "controversial" materials in school-sponsored publications. Though those terms do not define the precise boundaries of restricted and unrestricted speech, they are sufficiently particular, in light of the contexts in which they are used, to allow common (and commonsense) interpretations of their meaning.

Fourth, the policies must provide reasonable *enforcement methods*. In particular, the policies must afford individuals a reasonable opportunity to challenge the propriety of any speech restrictions enforced under the policy and to secure a fair determination of the challenge. Such procedures do not need to provide the full range of procedural protections afforded through judicial review, but they must be sufficient to encourage administrative challenges and to deter would-be violators. The process must thus provide, at a minimum, unbiased decisionmakers, opportunities to present argument and evidence, and a timely written decision. To be clear, while the policy must afford measures to allow its own enforcement, it need not (though it may) provide means to challenge the terms of the policy itself.[281] The policies

281. Complainants could challenge policies on First Amendment grounds in the courts. Under the conditional deference model, courts would review policies that met the five requirements detailed here only for their reasonableness; otherwise courts would apply heightened review to the policies. To be clear, government institutions and programs do not have to operate under formal speech policies. They must do so only if they wish to secure judicial deference for their officials' decisions restricting speech.

must include provisions to ensure that officials follow them; they do not have to establish administrative procedures to allow complainants to challenge the wisdom of their speech policies and thereby second-guess any decision restricting speech.

It is clear that the provision of such enforcement methods has its costs, including costs to institutional authority. But the costs would be far less than those imposed by heightened judicial scrutiny because the authority to decide disputes would reside within the institution or program, and officials would have considerable flexibility and discretion in designing enforcement mechanisms. Institutions may vary the procedures for adjudicating challenges depending on the type of speech at issue and the extent of the restriction. Employers could provide more process, for instance, for allegations of retaliation for whistleblowing than for complaints about supervisors' erroneous evaluations of memo quality. Moreover, officials could adopt, as part of their policies, reasonable methods to discourage frivolous complaints. Schools, for instance, may allow teachers to report in student evaluations prior patently frivolous complaints about speech restrictions (for example, a complaint about a junior high school teacher's decision to ban the distribution of obscene materials in class). Though officials should proceed cautiously when adopting such regimes, they may do so if they believe that such a regime is necessary to serve an important government interest (for example, preserving institutional authority), and if the regime does not effectively render the policy's enforcement methods unreasonable. Measures discouraging frivolous complaints are acceptable only insofar as the policy as a whole may still be understood as providing reasonable methods to ensure its own enforcement.

Fifth, the policies must be *written, publicly available, and easily accessible*. Publication on the internet would generally satisfy this mandate. In some institutions or programs, where internet access is severely limited or restricted (for example, in some prisons), officials would have to take other steps to make sure that the policies were widely and easily available.

To be sure, each of these five requirements involves a general standard, and hence their contours are imprecise. The guiding factors for reviewing courts ought to be twofold. With respect to the first two requirements concerning the deliberative process, courts should determine whether the processes included consideration of the knowledge and expertise of government officials as well as the broader polity's views, if available, on the extent of the need for the proposed restrictions, and whether the policymakers demonstrated a sensitivity to and respect for First Amendment interests when designing their

policies.[282] With respect to the other three requirements, courts should contemplate whether the policies effectively confine official discretion within reasonable bounds. In other words, they should consider whether the policies provide meaningful safeguards against arbitrariness and abuse of authority.

Some might argue that, notwithstanding those guiding principles, the requirements' imprecision is unacceptable because some government officials must be able to determine in advance whether their policies meet the five requirements for judicial deference in order to preserve their institutions' or programs' abilities to function. Yet while there might be some lack of clarity on the margins, it is relatively easy to identify policies that would meet the five requirements: internet-posted, available-on-demand written policies adopted by Administrative Procedure Act notice-and-comment rulemaking that specify the types of speech protected and restricted, that explain why the speech restrictions are necessary to serve important government interests, and that provide enforcement methods akin to those provided in formal adjudication. While it might be difficult to identify ex ante the most minimal speech policy that would meet the deference requirements, officials deeming it absolutely necessary to avoid exposure to heightened judicial review can easily identify formal policies that would meet the deference requirements.

C. Applying the Model

Finally, this Subpart discusses the application of the free speech conditional deference model. I start by returning to the two cases with which the Article began, *Morse v. Frederick*[283] and *Garcetti v. Ceballos*,[284] and discuss how the courts' analyses would have changed had they followed the conditional deference model. I then briefly turn to the model's broader impact, on both other cases and the decisionmaking processes within government institutions and programs more generally. I argue that many government decisionmakers would likely have to reform their current practices should they seek judicial deference for their judgments on the scope and meaning of First Amendment norms within their programs and institutions.

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282. Though it would be desirable for officials to specify regular time intervals or events that would trigger reconsideration of policies, it would not be a requirement. The public can pressure the political branches to revisit their policies, and the fact that the policies are written and widely available makes it more likely that interested parties can learn of and mobilize public debate on the restrictions.

283. 127 S. Ct. 2618 (2007).

284. 547 U.S. 410 (2006).

1. *Morse v. Frederick*

In *Morse*, Juneau-Douglas High School student Joseph Frederick filed suit against principal Deborah Morse and the Juneau School Board, alleging that his ten-day suspension for displaying a fourteen-foot banner with the phrase "BONG HiTS 4 JESUS" on a public sidewalk violated his First Amendment rights.[285] Frederick had held the banner on a sidewalk across from the school on a January school day when the Olympic Torch Relay passed through Juneau, Alaska, on its way to the 2002 winter games in Salt Lake City, Utah.[286] Morse had authorized students and staff to leave class to observe the relay from the street in front of the school, and teachers and administrative officials monitored the students' actions at the relay.[287] When the torchbearers and camera crews passed by, Frederick and his friends unfurled the "BONG HiTS 4 JESUS" banner.[288] Morse immediately crossed the street and demanded that it be taken down.[289] When Frederick failed to comply, she confiscated the banner and suspended him for ten days.[290] She later explained that she told Frederick to take the banner down because she believed that it encouraged illegal drug use and hence violated Juneau's school-board policy prohibiting "any assembly or public expression" that "advocates the use of substances that are illegal to minors."[291] Frederick appealed his suspension to the Juneau School District Superintendent and the Juneau School District Board of Education, but it was sustained.[292] He then filed suit in federal district court, seeking declaratory and injunctive relief, damages, and attorney's fees.[293]

The district court granted summary judgment for the school board and Morse, holding that they had not violated Frederick's First Amendment rights.[294] Disagreeing with the district court's analysis, the Ninth Circuit vacated and remanded.[295] Initially, the circuit court rejected Frederick's arguments that he had attended the parade on his own accord, and not as part of a school trip, and that the banner did not promote illegal drug use but was

285. *Morse*, 127 S. Ct. at 2622–23.
286. *Id.* at 2622.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 2622–23.
292. *Id.* at 2623.
293. *Id.*
294. *Id.* The district court further held that, even if the school board and Morse had violated Frederick's First Amendment rights, they were entitled to qualified immunity. *Id.*
295. Frederick v. Morse, 439 F.3d 1114, 1125 (9th Cir. 2006).

instead "just nonsense meant to attract television cameras."[296] The circuit court decided that Frederick had displayed the banner during an off-campus, school-authorized activity, and "proceed[ed] on the basis that that banner expressed a positive sentiment about marijuana use, however vague and nonsensical."[297] Nonetheless, the Ninth Circuit concluded that the suspension violated Frederick's First Amendment rights because the school failed to demonstrate "a reasonable concern about the likelihood of substantial disruption to its [basic] educational mission."[298] In doing so, the court rejected the idea that the Juneau school's mission, as evidenced by its school board policies, could include discouraging drug use.[299] "There has to be some limit on the school's authority to define its mission," the court explained, because, otherwise, schools could prohibit any disfavored speech, and hence eviscerate the bedrock principle that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[300]

The Supreme Court reversed.[301] In an opinion written by Chief Justice Roberts, the Court held that the suspension did not violate Frederick's First Amendment rights.[302] The Court initially clarified that the case involved student speech because, among other things, Frederick stood "in the midst of his fellow students, during schools hours, at a school-sanctioned activity."[303] Though the Court acknowledged that the banner's message was "cryptic," it nonetheless accepted Morse's view of the banner as promoting illegal drug use because, as discussed in detail above, her interpretation was "plainly a reasonable one."[304] Rejecting the Ninth Circuit's "substantial disruption" requirement, the Court then emphasized the important, and "perhaps compelling," interest of deterring illegal drug use by schoolchildren.[305] The "governmental interest in stopping

296. *Id.* at 1117–18.
297. *Id.*
298. *Id.* at 1123.
299. *See id.* at 1118–20.
300. *Id.* at 1120 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). The Ninth Circuit further concluded that Morse was not entitled to qualified immunity because "Frederick's right to display his banner was so 'clearly established' that a reasonable principal in Morse's position would have understood that her actions were unconstitutional." Morse v. Frederick, 127 S. Ct. 2618, 2623–24 (2007) (quoting *Frederick*, 439 F.3d at 1123–25).
301. *Morse*, 127 S. Ct. at 2621.
302. *Id.* at 2622. While the Court did not reach the qualified immunity issue, Justice Breyer wrote separately, stating that the Court should not decide the First Amendment issue and should hold instead that qualified immunity barred Frederick's claim for monetary damages. *Id.* at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part).
303. *Id.* at 2624 (majority opinion) (internal quotations omitted).
304. *Id.*
305. *Id.* at 2627–28 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)) (citation omitted).

student drug abuse—reflected in the policies of Congress and myriad school boards, including [Juneau's]" and the "'special characteristics of the school environment,'" the Court explained, "allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[306] The Court stressed that the speech was proscribable not because it was somehow "offensive," but instead because it was "reasonably viewed as promoting illegal drug use."[307]

The Court noted several times that the Juneau school board had a policy expressly prohibiting public expression promoting illegal drug use and that the principal, in punishing Frederick, had acted in conformity with the policy. Beyond the reference quoted in the previous paragraph, for example, the Court stated, "The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy."[308] Also, near the conclusion of its opinion, the Court stated, "It was reasonable for [Morse] to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."[309] Yet the Court never clarified whether, or to what extent, the policy's existence influenced its decision. The Court's silence on that matter is surprising for several reasons. First, defendants' counsel, both in briefs and at oral argument, repeatedly emphasized that the principal had acted pursuant to a written policy and that, therefore, among other things, there was no issue of standardless discretion.[310] Second, many Justices during the oral argument questioned the significance of written policies.[311] Third, as described above, the Ninth Circuit had rejected defendants' argument and spent considerable effort explaining why courts ought not to defer to school policies.[312]

Had the Court followed the conditional deference model, its analysis would have been very different. Instead of simply pointing out the compelling interest in deterring illegal drug use and approving the school's punishment of Frederick's speech as reasonable, the Court would have of course carefully scrutinized the school policy and the processes that led to the policy before deciding to defer to the principal's judgment. There was evidence in *Morse*

306. *Id.* at 2629 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
307. *Id.*
308. *Id.* (citations omitted).
309. *Id.*
310. *See* Brief for Petitioner *passim*, Morse v. Frederick, 127 S. Ct. 2618, 2623–24 (2007) (No. 06-278), 2007 WL 118979; Transcript of Oral Argument at 4, 5, 10, Morse v. Frederick, 127 S. Ct. 2618, 2623–24 (2007) (No. 06-278), 2007 WL 880748.
311. *See* Transcript of Oral Argument, *supra* note 310 *passim*.
312. *See* Frederick v. Morse, 439 F.3d 1114, 1120–22 (9th Cir. 2006).

supporting a finding that the policy met at least four of the five requirements described above. Concerning adoption by an open and deliberative process, the principal stated that the board policies "were adopted by the Board pursuant to a public process and are subject to review pursuant to a collaborative process that includes students, parents, teachers, and others responsible for student safety."[313] With respect to substantive clarity, the policy's text clearly prohibited assembly and public expression promoting illegal drug use and specified the provisions' applicability to off-campus school-sponsored activities.[314] As for reasonable enforcement methods, Frederick received multiple opportunities to challenge the policy's enforcement before what appear to be neutral factfinders,[315] and received a written statement from the district superintendent explaining his modification and approval of the punishment.[316] In terms of broad availability, the policy was set forth in a student handbook.[317] Though a court would need further evidence to assess the policy (for example, information on whether the enactment process permitted broad, as opposed to select, public participation, and whether the student handbooks or policies were widely available), it appears likely that those four requirements were met in this case.

Whether the policy met the fifth requirement—a process demonstrating sensitivity to First Amendment interests—is less clear. Based on the materials in the record, it is unclear whether the board members reached a good-faith and considered judgment that the restriction on speech promoting drug use was necessary to serve a substantial government interest. While other provisions of the policy on their face expressly acknowledge the importance of respecting students' freedom of expression,[318] the evidence does not indicate whether such language was included merely as boilerplate. The evidence also does not reveal whether the board considered First Amendment interests with respect to the particular provision addressing speech on illegal drug use. While the board here clearly concluded that discouraging illegal drug use was an important government interest, there was no showing that it considered the availability of less restrictive alternatives. My point here is not that the board should have been required to adopt a less restrictive alternative, but

313. Joint Appendix at 22, Morse v. Frederick, 127 S. Ct. 2618, 2623–24 (2007) (No. 06-728), 2007 WL 119039 (declaration of Deborah Morse).

314. *See Morse*, 127 S. Ct. at 2623.

315. *See id.*

316. Petition for Writ of Certiorari at 59a, Morse v. Frederick, 127 S. Ct. 2618, 2623–24 (2007) (No. 06-278), 2006 WL 2506659.

317. *See* Joint Appendix, *supra* note 313, at 22 (declaration of Deborah Morse).

318. Petition for Writ of Certiorari, *supra* note 316, at 53a, 54a.

instead that it must have at least seriously considered the alternatives.[319] Though the board did not have to offer transcripts of its discussions, it had to be able to point to evidence such as memoranda, reports, or summaries of discussions showing such deliberation. Moreover, the superintendent's written statement modifying and upholding Frederick's punishment, explaining, ex post, why the policy's application satisfied First Amendment principles,[320] is irrelevant here. The conditional deference model rests on the assumption that other governmental actors are creating free speech policies according to their best understandings of what the law requires; that is why courts devolve their authority to interpret and enforce the First Amendment. The availability of persuasive post hoc rationalizations does not bear on that issue.

Two points bear additional clarification. First, as discussed above, the conditional deference model would have been relevant in *Morse* only because the Court concluded that it could be appropriate to defer to school officials' reasonable judgments about the types of speech that would interfere with the educational mission. The model maintains that courts ought not to defer to other government officials unless there is an appropriate speech policy, but it does not demand that courts defer if there is one. Speech policies are a necessary, but not sufficient, condition for judicial deference. Put another way, the free speech conditional deference model establishes only a floor, not a ceiling, for the intensity of judicial review. Accordingly, the model does not offer a view on the disputed issue in *Morse* as to whether, in order to prevail, the school must have satisfied the *Tinker* heightened scrutiny standard requiring a showing of substantial disruption to the basic educational mission.[321] Had the Court, like the Ninth Circuit, concluded that that standard ought to apply and that courts should therefore exercise their independent judgment to review the restriction, then the conditional deference model would have been inapplicable.

Second, following the conditional deference model, the *Morse* Court should not have deferred to principal Morse's interpretation of the banner. That is, even if there had been an appropriate speech policy in effect, the Court should not have deferred to her interpretation that the banner promoted illegal drug use. Rather, the Court should have credited, insofar as it was reasonable, the independent trial factfinder's best understanding of the banner. As argued above, courts should not defer to the original government

319. One such alternative could have included, for example, exempting from the prohibition speech advocating illegal drug use made in the context of arguments for legalizing drugs.

320. *See* Petition for Writ of Certiorari, *supra* note 316, at 59a.

321. For a brief discussion of the applicability of the *Tinker* standard, see *supra* text accompanying notes 237–240.

decisionmakers' judgments about whether those judgments are entitled to deference, but should retain their responsibility to police the boundaries of the First Amendment's application.[322] Though it might seem odd that a court would not defer to the policymaker's interpretation of whether speech fell under its policy, it is important to note that the policy's claim to deference lies in its embodiment of not only the government institution's expertise, but also the shared judgment of the larger political community. The emphasis on the reasonableness of the trial factfinder's judgment here protects against institutional interpretations that enlarge the scope of policy-authorized (and polity-authorized) regulatory powers.

2. *Garcetti v. Ceballos*

In *Garcetti*, deputy district attorney Richard Ceballos brought suit against Los Angeles County and his supervisors in the district attorney's office, alleging that they had violated his First Amendment rights by retaliating against him for authoring a memorandum reporting alleged governmental misconduct.[323] In February 2000, Ceballos, who had been working in the district attorney's office since 1989, investigated an allegation, reported to him by the defense attorney in a case handled by one of Ceballos' supervisees, that one of the arresting deputy sheriffs may have lied in a search warrant affidavit.[324] After concluding that the affidavit had, "at the least, grossly misrepresented the facts" and consulting with his supervisors, Ceballos prepared a disposition memorandum explaining his findings and recommending dismissal of the case.[325] At the direction of his supervisors to make the memorandum less accusatory of the deputy sheriff, Ceballos then rewrote the memorandum.[326] When the head deputy district attorney decided to proceed with the prosecution pending the outcome of a defense motion challenging the warrant, Ceballos, believing he had a constitutional obligation to do so, informed the defense counsel of his findings.[327] Defense counsel then subpoenaed Ceballos to testify at the motion hearing, and after the court denied the motion, Ceballos' supervisors removed him from the case.[328] Contending that his supervisors then retaliated against him with a series of adverse

322. *See supra* Part III.B.2.
323. Garcetti v. Ceballos, 547 U.S. 410, 413–15 (2006).
324. Ceballos v. Garcetti, 361 F.3d 1168, 1170–71 (9th Cir. 2004).
325. *Id.* at 1171.
326. *Id.*
327. *Id.*
328. *Garcetti*, 547 U.S. at 413–15.

employment actions, including reassignment, transfer, and denial of a promotion, Ceballos filed a grievance, and when that grievance was denied, brought suit in federal district court.[329]

The district court granted summary judgment to the defendants.[330] Because Ceballos wrote the memorandum pursuant to his employment duties, the court explained, he was not entitled to First Amendment protection for the memo's contents.[331] The Ninth Circuit reversed.[332] The Ninth Circuit rejected the view that public employee speech lacks First Amendment protection if made pursuant to an employment responsibility.[333] Instead, the court stated, the critical inquiry is (1) whether "the speech addresses a matter of public concern," and (2) whether the employee's "interest in expressing himself outweighs the government's interests 'in promoting workplace efficiency and avoiding workplace disruption.'"[334] Ceballos' memorandum addressed a matter of public concern, the appellate court explained, because government employee speech about "corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees . . . is inherently a matter of public concern."[335] Ceballos' interest outweighed the government's, the Ninth Circuit continued, because the defendants offered "no explanation as to how Ceballos' memorandum to his supervisors resulted in inefficiency or office disruption."[336]

The Supreme Court reversed.[337] Agreeing with the district court, the Court held in a 5–4 decision that public employee statements "pursuant to their official duties" do not receive First Amendment protection.[338] The Court drew a sharp distinction between "citizen" speech, which is eligible for such protection, and "employee" speech, which is not.[339] When employees make statements pursuant to their official duties, and not on their own accord, the Court explained, they simply express "what the employer itself has commissioned or created."[340] In order to "manage their operations" and secure "the efficient provision of public services," the Court stressed, employers must have substantial discretion to control and evaluate that

329. *Id.* at 415.
330. *Id.*
331. *Id.* The district court held in the alternative that defendants were in any event entitled to qualified immunity. *Id.*
332. *Garcetti*, 361 F.3d at 1168.
333. *Id.* at 1174–75.
334. *Id.* at 1173.
335. *Id.* at 1174.
336. *Id.* at 1179.
337. *See* Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).
338. *Id.* at 421.
339. *Id.* at 418–20.
340. *Id.* at 421–22.

speech.[341] To hold otherwise and accord First Amendment protection to speech pursuant to an employee's duties, the Court warned, "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[342] Finally, acknowledging the importance of "[e]xposing governmental inefficiency and misconduct," the Court noted that, despite the First Amendment's inapplicability, public employees would still receive significant legal protections because of "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."[343]

Following the conditional deference model, the Court would have determined whether the district attorney's office operated under a formal speech policy. At least from the record before the Court, the district attorney's office had not adopted its own policy informing supervisors' discretion in regulating employee speech or responding to employee allegations of official misconduct.[344] Yet, there was a state law, the California Whistleblower Protection Act,[345] establishing the state's policy on handling employee disclosures of official misconduct. That law "imposes severe criminal liability upon, and establishes a private cause of action for both actual and punitive damages against, '[a]ny person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee . . . for having made a protective disclosure.'"[346] The law defines "protective disclosure" to include "any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition."[347] In protecting disclosures only if they were "made for the purpose of remedying that condition," the law strikes a balance between encouraging good-faith disclosures and discouraging purely personal grievances.

341. *Id.* at 418, 422.
342. *Id.* at 423.
343. *Id.* at 425.
344. It is possible that there was such a policy, but that defendants did not identify it. They might have thought it irrelevant to do so because of the policy's lack of significance in existing case law, or their position that the challenged employment actions were not retaliatory, but instead motivated by legitimate reasons such as staffing needs.
345. CAL. GOV'T CODE § 8547 (West 2005).
346. Ceballos v. Garcetti, 361 F.3d 1168, 1192 (9th Cir. 2004) (O'Scannlain, J., specially concurring) (quoting CAL. GOV'T CODE § 8547.8 (b) & (c) (West 2005)).
347. CAL. GOV'T CODE § 8547.2(d) (West 2005).

Insofar as an open and deliberative process led to the law's passage,[348] and the deliberations considered the law in terms of its fidelity to free speech principles, and not simply as a means of enhancing government efficiency,[349] then the law would constitute an appropriate free speech policy under the conditional deference model.[350] It would thus be constitutionally permissible (though not required) under the model for a court to decline applying traditional First Amendment review to the alleged retaliation. To be clear, this would be true regardless of whether Ceballos could have himself brought suit under the whistleblower law. Through the Act, the political branches would have established the official policy in all state workplaces circumscribing supervisors' discretion to restrict speech alleging official misconduct. By proposing and adopting the law through an open and deliberative process, and deliberating on the significance of First Amendment norms in that context, the legislature would have worked, in consultation with the community, to interpret the amendment and define the proper accommodation of free speech interests and managerial prerogatives. That the law might not have accorded Ceballos a specific remedy is irrelevant.

In his dissenting opinion in *Garcetti*, Justice Souter criticized the majority's suggestion that "the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses."[351] Beyond

348. The legislative history suggests that legislators held public hearings and debates on the bill and its amendments. *See* Cal. Bill Analysis, SB 413, Assemb. Appropriations Comm., 2001–2002 Reg. Sess. (Aug. 29, 2001), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0401-0450/sb_413_cfa_20010828_134006_asm_comm.html; Cal. Bill Analysis, SB 413, Assemb. Judiciary Comm., 2001–2002 Reg. Sess. (July, 3 2001), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0401-0450/sb_413_cfa_20010702_101044_asm_comm.html; Cal. Bill Analysis, SB 413, S. Appropriations Comm., 2001–2002 Reg. Sess. (May 7, 2001), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0401-0450/sb_413_cfa_20010507_140029_sen_comm.html; Cal. Bill Analysis, SB 413, S. Public Employee & Retirement Comm., 2001–2002 Reg. Sess. (Apr. 24, 2001), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0401-0450/sb_413_cfa_20010425_102351_sen_comm.html; Cal. Bill Analysis, SB 951, Assemb. Appropriations Comm., 1999–2000 Reg. Sess. (Aug. 18, 1999), *available at* http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0951-1000/sb_951_cfa_19990817_095018_asm_comm.html; Cal. Bill Analysis, SB 951, S. Public Employment & Retirement Comm., 1999–2000 Reg. Sess., (Apr. 12, 1999), *available at* http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0951-1000/sb_951_cfa_19990414_062017_sen_comm.html.

349. A full text search of the legislative journals (available only from the 1995–1996 legislative session), bill analyses, and bill histories from the California Assembly and Senate on Westlaw (California Legislative History databases (CA-LH)) revealed no evidence that legislators considered the bill and its amendments in terms of its relationship to First Amendment principles. This may reflect a perception that whistleblower laws aim principally to improve government performance, not to protect First Amendment rights.

350. The law satisfies the other requirements of clear standards, reasonable enforcement methods, and broad public availability.

351. Garcetti v. Ceballos, 547 U.S. 410, 440 (2006) (Souter, J., dissenting).

pointing to the inconsistencies and inadequacies of the "patchwork" of whistleblower definitions and protections, Justice Souter emphasized "the tenet that "'[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.'"'[352] Yet the Supreme Court has regularly pointed to remedies afforded by other laws as a reason for declining First Amendment review. In *Bush v. Lucas*,[353] for example, the Court declined to recognize a nonstatutory constitutional damages action, or *Bivens* action, for federal employees alleging First Amendment violations by their superiors because of the comprehensive regulatory scheme giving federal employees "meaningful remedies" against their employer.[354] The Court reached that conclusion while acknowledging that the remedies afforded by the scheme were not necessarily equally effective to those in a *Bivens* suit.[355] Similarly, while holding in *Houchins v. KQED, Inc.*[356] that the news media had no First or Fourteenth Amendment right of access to a California county jail to report on inmate conditions, the Court noted, among other things, that the news media and public could learn about those conditions in reports mandated by California law.[357]

To be clear, unlike *Lucas* and *Houchins*, the conditional deference model does not assume that alternative remedies render the First Amendment's application unnecessary. Rather, the model posits that state or federal laws, or administrative regulations or policies, are relevant in some circumstances to determine whether and to what extent the judiciary ought to enforce the First Amendment. According to the model, when courts' institutional limitations, or the costs associated with judicial review, militate against judicial interpretation or enforcement, the fact that other governmental actors and the broader polity have sought to interpret and enforce the First Amendment ought to be constitutionally relevant. When other government decisionmakers

352. *Id.* (quoting Bd. of Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 680 (1996)).

353. 462 U.S. 367 (1983).

354. *See id.* at 368. In *Garcetti*, Justice Souter acknowledged, in a footnote, that previous cases had held that a § 1983 remedy for alleged violations of federal law might be unavailable "when the underlying statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under § 1983." 547 U.S. at 439 n.7 (Souter, J., dissenting). Though the *Lucas* decision turned ultimately on the Court's deference to Congress' institutional competence to craft appropriate relief for aggrieved federal employees, *Lucas*, 462 U.S. at 389, the Court's subsequent cases make clear that it is the availability of other avenues of redress, and not necessarily the incompatibility with federal statutory schemes, which militates against authorizing *Bivens* remedies. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001); Schweiker v. Chilicky, 487 U.S. 412, 421–22 (1988).

355. *Lucas*, 462 U.S. at 377.

356. 438 U.S. 1 (1978).

357. *Id.* at 14–15. The Court also pointed out that the news media had a First Amendment right to receive letters from inmates and could interview others, such as lawyers, former inmates, visitors, public officials, or institutional personnel, who had had access to the jail. *Id.* at 15.

and the polity have determined, through an open and deliberative process, the appropriate application of free speech principles, and have instituted fair measures to secure conformity with those judgments, then there is less need for independent judicial review. Though Justice Kennedy erred in *Garcetti* in suggesting that the general availability of whistleblower and labor laws in many jurisdictions, as opposed to the existence of such a law in the particular jurisdiction in question there, supported withholding judicial review, his basic insight—that such laws should affect the judicial review calculus—was correct.

Unlike the California Whistleblower Protection Act, many speech policies that would satisfy the conditional deference model's five requirements would be unlikely to apply uniformly to all of a government's workplaces. Though, as described above, statewide speech policies will suffice for some government workplaces,[358] they will clearly be inadequate in others. Political spokespersons and university professors, for instance, would presumably receive quite different degrees of First Amendment protections for their speech. Whereas the former would be expected to deliver official messages consistent with their supervisors' preferred views, the latter would generally have broad discretion to offer contrary or unrelated perspectives. Statewide speech policies will likely fail to specify with sufficient clarity the types of speech that are protected or unprotected in all types of government workplaces, for all their varied classes of employees. Accordingly, though statewide policies could theoretically meet the conditional deference model's five requirements, it is likely that many institutions and programs will have to write their own policies, or at least supplement existing ones.

3. Impact

Based on the foregoing discussion of *Morse* and *Garcetti*, some might assume that government institutions and programs regularly operate under formal speech policies or statutes that circumscribe the scope of their supervisory employees' discretion. If that were the case, some might argue that the free speech conditional deference model would have little impact because courts are rarely deferring in the absence of appropriate speech policies. Yet the extent to which government institutions and programs operate under formal speech policies or laws is unclear. While state school board associations and at least one national nonprofit organization dedicated to promoting First Amendment rights in the public schools, First Amendment Schools, make sample free speech policies available to public school districts, they have

358. *See supra* p. 1760.

little idea the extent to which schools have actually adopted such policies.[359] Also, in examining all First Amendment cases brought on behalf of prisoners or media organizations against prisons or their employees decided under a reasonableness standard by the federal district courts in 2002 and 2003,[360] I found that allusions to policies appeared in only about 60 percent of the opinions addressing the substantive merits of challenges to administrative actions.[361] Believing existing policies to be irrelevant, some courts or defendants simply may have not reported them. Yet that explanation seems unlikely, at least in most cases. When courts or defendants referred to policies, they did so usually to demonstrate that the challenged actions bore official imprimatur or reflected the government institutions' considered judgment.[362] Hence, one would expect that, had there been policies guiding challenged administrative actions, the defendants would have brought those policies to the courts' attention, and the courts would have at least acknowledged them.

Even assuming that many government institutions and programs have speech policies in effect, the question remains whether those policies meet the five requirements necessary to justify judicial deference. A brief examination of the public school and prison policymaking process suggest that that is not always the case. In some states, including Ohio, Pennsylvania, and Michigan, for example, there are few regulations governing how school boards adopt school policies.[363] The boards may thus adopt policies without

359. *See* Telephone Interview With Molly McCloskey, Project Dir., First Amendment Sch. (May 2008); E-mail From Sharon Fissel, Dir. of Policy Servs., Pa. Sch. Bds. Ass'n, to Robin Shofner, Research Assistant to Professor Gia Lee (Aug. 25, 2008, 06:21 PST) (on file with author); E-mail From Robert Ebersole, Assistant Legal Counsel, Mich. Ass'n of Sch. Bds., to Robin Shofner, Research Assistant to Professor Gia Lee (Aug. 4, 2008, 10:25 PST) (on file with author).

360. I focused on these cases because of the availability of a coded database focusing on prison cases applying the *Turner v. Safley* standard provided by Professor Adam Winkler. This database included cases found through Westlaw using the following search term: "(prison "penal institution" "correctional institution") /p ("turner v. safley" "reasonably related to legitimate penological interests") & da(2002 2003)."

361. Of the 111 First Amendment claims brought in fifty-four cases, forty-nine claims challenged prison policies, and sixty-two challenged administrative actions. The courts reached the substantive merits in only twenty-nine of the sixty-two administration action challenges, and acknowledged policies in only seventeen of the twenty-nine, or 58 percent, of the cases.

362. *See, e.g.*, Osterback v. Kemp, 300 F. Supp. 2d 1238, 1250–51 (N.D. Fla. 2003); Cline v. Fox, 266 F. Supp. 2d 489, 495 n.4 (N.D.W. Va. 2003); Hale v. Scott, 252 F. Supp. 2d 728, 732–33 (C.D. Ill. 2003); Dixon v. Kirby, 210 F. Supp. 2d 792, 800–01 (S.D.W. Va. 2002); Giba v. Cook, 232 F. Supp. 2d 1171, 1188 (D. Or. 2002); Farid v. Goord, 200 F. Supp. 2d 220, 229–30 (W.D.N.Y. 2002).

363. *See* OHIO REV. CODE ANN. § 3301-07 (West 2008); 24 PA. CONS. STAT. ANN. § 4-407 (West 2008); E-mail From Sharon Fissel, Dir. of Policy Servs., Pa. Sch. Bds. Ass'n, to Robin Shofner, Research Assistant to Professor Gia Lee (Aug. 25, 2008, 06:21 PST) (on file with author); E-mail From Robert Ebersole, Assistant Legal Counsel, Mich. Ass'n of Sch. Bds., to Robin Shofner, Research Assistant to Professor Gia Lee (Aug. 22, 2008, 07:10 PST) (on file with author).

consulting parents, students, teachers, and other interested members of the community. Along similar lines, in New York and Virginia, state laws expressly exempt prisons from having to follow the state administrative procedure act when promulgating policies.[364] As a Virginia state official explained, moreover, though the state prison authority issues regulations governing most aspects of prison life, local prison authorities also have significant discretion to implement their own policies, subject only to review by the state authority.[365] Accordingly, though *Morse* and *Garcetti* involved free speech policies that might have satisfied the conditional deference model's five requirements, many other cases likely will not. In mandating that courts decline to defer in the absence of formal free speech policies, the conditional deference model would thus have a significant impact on judicial decisionmaking in First Amendment cases challenging speech restrictions within government institutions or programs.

But the free speech conditional deference model's primary significance does not lie in its effect on judicial decisionmaking. As a model premised on the idea that other actors in our political culture, both government decisionmakers and members of the polity, can and should interpret and enforce the First Amendment, the model's fundamental import lies in its potential impact on the nature of speech restrictions within government institutions and programs. Were courts to follow the free speech conditional deference model, it would lead government decisionmakers concerned with the risks of constitutional litigation to deliberate seriously and thoughtfully, and to seek out the public's views, on the proper application of free speech principles and to institute measures promoting adherence to the resulting judgments. By threatening officials with heightened judicial scrutiny in the absence of formal speech policies, the free speech conditional deference model promotes the implementation of measures limiting the risk of arbitrary and capricious decisions restricting speech. Equally significant, it also encourages the broader political community, and not simply the political branches or the judiciary, to play a critical and more active role in determining the appropriate terms and conditions of speech within the nation's political life.

364. *See* N.Y. A.P.A. LAW § 102(1) (McKinney 2008); VA. CODE ANN. §§ 2.2-4002(B)(9)–(10) (West 2008).

365. *See* Telephone Interview by Robin Shofner, Research Assistant to Professor Gia Lee, With Jan Dow, Manager, Policies and Initiatives Unit, Va. Dep't of Corr. (July 29, 2008).

CONCLUSION

This Article has made three principal contributions to contemporary free speech jurisprudence. First, it has identified two distinct theories underlying the courts' minimal review in some First Amendment cases involving speech restrictions within government institutions and programs: the weak norms and judicial underenforcement theories. As this Article has shown, analyzing those theories substantially clarifies the longstanding debate in free speech law on the appropriate degree of judicial scrutiny in those cases. If only weak or anemic free speech norms generally apply within government institutions and programs, then the courts' current approach of no more than reasonableness review is uncontroversial. Yet if courts are underenforcing free speech norms that are significant (even if not entirely robust), then the courts' current approach is misguided.

Second, the Article has shown that the judicial enforcement theory, combined with elements of the weak norms theory, provides a persuasive account for why courts ought sometimes to resist applying traditional heightened scrutiny. Judicial review of speech restrictions within government institutions and programs raises unique problems and suffers serious limitations, and because First Amendment norms apply less fully there, courts should sometimes avoid applying traditional heightened review.

Finally, this Article has proposed and defended an alternative approach for courts to follow in light of this fuller understanding of the factors militating against traditional review. Courts should stop simply applying only reasonableness review or categorizing speech as unprotected. Instead, they should condition their deferential review on a finding that the challenged speech restriction adhered to a formal speech policy adopted by an open and deliberative process—a finding, in other words, that the challenged restriction reflects the considered judgment of the public and the government institution or program, as a whole, on the proper application of the First Amendment. While courts should decline sometimes to assume primary interpretive and enforcement responsibility for the First Amendment, they ought not to abandon their enduring obligation to defend and uphold it.