Note

Dissent Without Disloyalty: Expanding the Free Speech Rights of Military Members Under the "General Articles" of the UCMJ

*Jason Steck**

In 1987, a 19-year-old airman in Japan hosted a "bulletin board system" or "BBS," where users could argue about sports, operating systems, and politics. To compete with other BBS systems, the young airman created a fictional character—Illyovich, named after a twisting of Lenin's middle name—to provide provocative fodder by spewing a vulgar Marxist line.[1] After an anonymous complaint, the airman was arrested and investigated for two months for the crime of making "disloyal statements" in violation of Article 134 of the Uniform Code of Military Justice (UCMJ).[2]

Nineteen years later, in an unrelated case, Army Lt. Ehren Watada was charged under Article 133 of the UCMJ[3] for, among other things, "conduct unbecoming an officer."[4] The al-

* J.D. and Ph.D. candidate, University of Minnesota. Special thanks to Professor Heidi Kitrosser, Professor Stephen Cribari, Professor Russell Anderson, and Brad Emmons for insightful suggestions. Thanks also to Professor Ronald Krebs, Professor Phil Shively, Professor Heidi Kitrosser, Geoff Pipoly, Stephanie Zuercher, Kelsey Kelley, Sandi Cruse, Lt. Col. Darin Williams, BJ Franqui, Warner Emdee, and the board and staff of *Minnesota Law Review*. The author would also like to extend special recognition to the Computer Crime Division of the United States Air Force Office of Special Investigations at Yokota Air Base, Japan, *circa* 1987. Without the aggressive eight-week investigation of a 19-year-old's Commodore 128 computer by those OSI investigators, this Note might never have been written.

1. Personal experience of the author.

2. Uniform Code of Military Justice (UCMJ) art. 134, 10 U.S.C. § 934 (2006). The investigation was conducted by the local Office of Special Investigations (OSI) and was eventually terminated without significant disciplinary action.

3. *Id.* art. 133, 10 U.S.C. § 933.

4. *See* Melanthia Mitchell, *Fort Lewis Soldier Opposed to War Faces Mil-*

leged conduct included participation in a peace rally where he expressed his belief that the war in Iraq was illegal.[5] In both of these cases, a military member was targeted for speech that would be legally uncontroversial for a civilian.

Compared to civilians, military personnel enjoy sharply curtailed First Amendment rights.[6] Defenders of these restrictions highlight a tradition of judicial deference to military culture.[7] Advocates of greater rights for service members respond that such deference is over-applied at the cost of basic civil liberties.[8] Had it not been ended by an unusual procedural error,[9] and Lt. Watada's subsequent resignation from the military,[10] *Watada v. Head* might have provided long-overdue ad-

itary Trial, SEATTLE TIMES, Nov. 10, 2006, at B2, *available at* http://community.seattletimes.nwsource.com/archive/?date=20061110&slug=watada10m.

5. *Id.*; *see also* Watada v. Head, 530 F. Supp. 2d 1136, 1138 (W.D. Wash. 2007).

6. *See, e.g.*, UCMJ art. 88, 10 U.S.C. § 888 (barring "contemptuous words" towards senior officials); UCMJ art. 133, 10 U.S.C. § 933 (proscribing "conduct unbecoming an officer and a gentleman"); UCMJ art. 134, 10 U.S.C. § 934 (prohibiting "all disorders and neglects to the prejudice of good order and discipline").

7. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of these protections."); Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 368 (1998) ("[J]udicial deference to the military . . . is necessary . . . for the continued maintenance of the military as an effective and efficient fighting force.").

8. *See, e.g.*, Emily Reuter, Note, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 336–37 (2007) (arguing for the application of "strict scrutiny" to military regulation of its members' free speech rights); Sarah N. Rosen, Comment, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations*, 12 U. PA. J. CONST. L. 875, 877 (2010) (arguing for application of public employee doctrine to the military); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 858 (1987) (advocating for loosened free speech restrictions for military members in peacetime but deference to the military's stringent regulations in wartime).

9. *Watada*, 530 F. Supp. 2d at 1161 (terminating Lt. Watada's second court-martial on double jeopardy grounds). The Obama Administration later decided to drop charges against Lt. Watada. *See* Hal Bernton, *Justice Department Drops Appeal in* Watada *Case*, SEATTLE TIMES, May 7, 2009, at A1, *available at* http://seattletimes.nwsource.com/html/localnews/2009184970_webwatada.html.

10. *See Army Officer Who Refused Iraq Duty Is Allowed to Resign*, N.Y. TIMES, Sept. 27, 2009, at A18, *available at* http://www.nytimes.com/2009/09/27/us/27discharge.html.

justments to the boundaries of dissent within the military. But similar cases arise whenever national security issues are prominent;[11] the *Watada* case will surely not be the last.

This Note argues that existing restrictions on military free speech rights are overbroad, obsolete, and should be replaced by an adjusted application of existing doctrines of employer regulation of employees' speech. Part I summarizes existing regulation of speech by military members under the general articles of the UCMJ—with particular focus on the treatment of disloyal statements—and the foundations of judicial deference to claims of military necessity. Part II critiques the assumptions that lie at the root of judicial deference to the military's regulation of its members' speech, exposing the myth of an entirely separate military community as well as the pernicious effects of extra judicial punishments on expressions of dissent. Part II also highlights the recent decline in judicial deference that may provide an opening to reexamine free speech rights for military members. Part III proposes that military speech regulation be reformed to apply existing *Pickering v. Board of Education* standards for government regulation of its employees' speech, with adjustments for particular military operations.[12] This Note concludes by arguing that implementation of modified *Pickering* standards would provide better free speech protections for military members than discretionary implementation by military commanders while avoiding interference with military objectives that could accompany implementation of unmodified *Pickering* standards.

I. DIFFERING FREE SPEECH RIGHTS FOR CIVILIAN GOVERNMENT EMPLOYEES AND MILITARY MEMBERS

The government has a narrower ability to regulate civilian employees' speech compared to its virtually unlimited ability to punish military members' speech. When the government acts as a civilian employer, the courts have required it to respect employees' rights to speak on matters of public concern unless doing so significantly harms the operation of the workplace. But when the government acts as military employer, the courts have broadly deferred to almost all government restrictions on speech.

11. Reuter, *supra* note 8, at 316 (noting the correlation between the occurrence of foreign wars and public interest in military dissent).

12. 391 U.S. 563 (1968).

A. CIVILIAN GOVERNMENT EMPLOYEES ENJOY SIGNIFICANT FREE SPEECH PROTECTIONS

Courts have been somewhat protective of the free speech rights of civilian government employees. In 1968, the Supreme Court in *Pickering* considered the case of a school teacher who was fired after writing a letter to a newspaper that was critical of her superiors' handling of school funding proposals.[13] The Court rejected the notion that civilian employees owe an unqualified duty to refrain from public criticism.[14] Instead, the Court established a balancing test for government regulation of its civilian employees' speech, weighing the government's interest as an employer against employees' free speech rights as citizens.[15] First, the Court noted that speech related to a "public concern" must receive First Amendment protections.[16] In fact, when civilian employees speak out on a matter of public policy, the Court noted that they are often among the best-informed contributors to public debate on the subject.[17] As such, the Court was reluctant to allow their speech to be suppressed by fears of termination.[18]

However, this protection is not absolute. Rather, it applies only to speech regarding matters of public concern. In *Connick v. Myers*, the Court considered the case of an Assistant District Attorney dismissed for insubordination after distributing a questionnaire containing material critical of her superiors.[19] The Court ruled that the First Amendment does not protect employee speech relating to purely personal interests, such as personal criticism of superiors.[20] When employee speech does not relate to a public concern, the Court instructs deference to the government's interest in maintaining the authority struc-

13. *Id.* at 564.

14. *Id.* at 568–69.

15. *Id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

16. *Id.* at 574 ("[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." (citing Garrison v. Louisiana, 379 U.S. 64, 85 (1964))).

17. *Id.* at 571–72.

18. *Id.* at 572.

19. 461 U.S. 138, 141 (1983).

20. *Id.* at 147; *see also id.* at 149 ("[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.").

ture and efficient functioning of the office.[21] Moreover, the Court has left open the question of whether statements that were "knowingly or recklessly false" might be the basis for termination even if they were regarding a matter of public concern.[22]

In *Connick*, the Court also limited the reach of the government's regulation of its civilian employees' speech in terms of when and where the speech occurs. The Court noted that, when acting as an employer, the government can punish speech that occurs in the workplace, occurs during work time, or otherwise interferes directly with the functioning of the office.[23] Specifically, the Court found that the purpose of the disgruntled employee's survey questions was "not to evaluate the performance of the office but rather to gather ammunition" in support of her protest against an adverse personnel action.[24] Thus, the effect of granting First Amendment protection in such a context would be to create a novel "grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State."[25] The Court thus apparently sought to balance the government's interest in an efficiently functioning workplace against the employees' right to engage in public advocacy on matters of public concern.[26] But the Court has limited the allowable scope of this regulation by prohibiting the government from punishing speech that relates to nonoffice matters, does not impact the workplace, or takes place outside the workplace.[27] Thus, while the *Connick* Court

21. *Id.* at 153; *see also id.* at 154 ("[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right . . . to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.").

22. *Pickering*, 391 U.S. at 574 n.6 ("[W]e have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would . . . still be protected by the First Amendment.").

23. *Connick*, 461 U.S. at 153; *see also id.* at 153 n.13 (noting that speech "on the employee's own time[] and in non-work areas of the office" might receive greater protection).

24. *Id.* at 148.

25. *Id.* at 147.

26. *Id.* at 150 (applying the *Pickering* balancing test).

27. *Compare id.* at 153 (noting that the distribution of a questionnaire took place in the workplace and caused the employee to "leave her work"), *with* United States v. Nat'l Treasury Emp. Union, 513 U.S. 454, 454 (1995) (striking down government regulations banning compensation for non-workplace speaking appearances by government civilian employees), *and* Rankin v. McPherson, 483 U.S. 378, 390–91 (1987) (holding that workplace comment ap-

may have disavowed any desire to extend government employees' speech rights beyond those of private sector workers, the restrictions placed on the scope of the government's regulation of employee speech nonetheless give government employees some unique protections.[28]

In *Garcetti v. Ceballos*,[29] the Court further narrowed the protection of employee speech in the workplace. *Garcetti* involved a case where a district attorney disagreed with his supervisor's decision to proceed with a prosecution notwithstanding what the district attorney believed to be significant government misconduct.[30] After expressing his disagreement, the district attorney alleged "a series of retaliatory employment actions" and brought suit alleging infringement of, inter alia, his First Amendment rights.[31] The Supreme Court ruled against the district attorney, holding that speech that takes place in the course of performing assigned duties is not protected by the First Amendment.[32] Thus, civilian speech in a government workplace is protected, but only if it involves a matter of public concern, does not disrupt the functioning of the office, and is not made merely in the course of official duties.

B. MILITARY MEMBERS FACE SIGNIFICANT CONSTRAINTS ON SPEECH

By contrast, free speech rights in the military are much more constrained. This Section highlights the constraints on free speech applied to military members. The UCMJ, which binds all military members, prohibits not only "conduct unbecoming an officer,"[33] but also "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces."[34] These provi-

plauding an attempt on the life of the President did not interfere with the functioning of the office and could therefore not be cause for termination), *and Pickering*, 391 U.S. at 572–73 (observing that writing a letter critical of government policy did not interfere with a teacher's ability to perform his duties).

28. *See generally* BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE 1–10 (2007) (arguing that freedom of speech in the workplace, particularly in the private sector, is excessively and needlessly limited).

29. 547 U.S. 410 (2006).

30. *Id.* at 414–15.

31. *Id.* at 415.

32. *Id.* at 421.

33. UCMJ art. 133, 10 U.S.C. § 933 (2006).

34. *Id.* art. 134, 10 U.S.C. § 934.

sions exist in Articles 133 and 134 of the UCMJ, and are commonly referred to as the "general articles."[35] Similar to the relationship between federal statutes and administrative rules, the general articles are implemented by detailed specifications of particular crimes in the Manual for Courts-Martial (MCM).[36] Among the wide range of speech and conduct prohibited by the general articles[37] is the making of "disloyal statements."[38]

Military members have, however, challenged the general articles as overbroad restraints on their free speech rights in violation of the First Amendment. For example, in the 1974 case *Parker v. Levy*, the Supreme Court took up an appeal from an Army officer who, while serving as a trainer for medics destined for service in the Vietnam War, encouraged black soldiers to refuse orders to serve.[39] Upon conviction by court-martial for, inter alia, violations of the general articles, the officer challenged the constitutionality of the general articles as overbroad, in violation of the First Amendment.[40] The Court rejected this challenge, holding that the general articles are not overbroad because the MCM narrows the wide textual reach of the general articles themselves.[41] The Court also noted that these MCM limits implemented earlier court decisions requiring that, in order to be punishable, speech must "directly and palpably"[42] threaten military discipline by "call[ing] for active opposition to the military policy of the United States."[43] Military courts have reviewed and reaffirmed the continuing relevance of this holding as recently as 2008.[44] Notwithstanding such gestures, however, the courts have generally applied a

35. *See, e.g.*, Parker v. Levy, 417 U.S. 733 *passim* (1974).

36. JOINT SERV. COMM. ON MILITARY JUSTICE, U.S. MANUAL FOR COURTS-MARTIAL pt. IV, para. 59–113 (2008) [hereinafter MCM].

37. The general articles are also implicated in other recent controversies, including the recent struggles to repeal the military's "don't ask, don't tell" policy barring service by homosexuals unless they concealed their sexual orientation. It is noteworthy, for example, that one of the most important works criticizing the policy drew its title from the language of Article 133. *See* RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY (1994).

38. MCM, *supra* note 36, pt. IV, para. 72.

39. *Parker*, 417 U.S. at 736–37 (1974); *see also id.* at 738–39 nn. 5–6.

40. *Id.* at 752.

41. *Id.* (citing what is now MCM, *supra* note 36, pt. IV, para. 72).

42. *Id.* at 753 (quoting United States v. Sadinsky, 34 C.M.R. 343, 345 (C.M.A. 1964)).

43. *Id.* (citing United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972)).

44. United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008).

much more deferential standard of review towards military cases involving free speech claims compared to similar civilian claims.

C. THE COURT HAS CITED A SEPARATE MILITARY CULTURE AS JUSTIFYING JUDICIAL DEFERENCE TO RESTRICTIONS ON SPEECH

Having noted the pattern of judicial deference towards military regulations impinging on members' free speech rights, this Section highlights the foundations of this deference. Specifically, this Section outlines the courts' adherence to a set of beliefs about the military as separate, apart, and even incompatible with the civilian world.

In cases upholding the general articles and applying them to free speech issues, the military courts have sometimes used the rhetoric of a balancing test, but without actually applying the balancing method outlined in the Court's civilian precedents in *Pickering* and *Connick*.[45] Rather, when assessing the reach of military members' free speech rights against military claims of necessity, courts "balance" using a scale heavily weighted in favor of the government, interpreting the MCM limitations on the general articles very loosely. For example, while the Court in *Parker* specifically rejected the common notion that military members entirely forfeit their free speech rights upon joining the military, it endorsed a fundamentally different basis for interpreting and applying those rights: the "different character of the military community."[46] Moreover, the Court drew the boundary of permissible government interests much more broadly in the military context, allowing the military to punish not only speech that interferes with office func-

45. *See, e.g.*, *Priest*, 45 C.M.R. at 344 ("[T]he proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American.").

46. *Parker*, 417 U.S. at 758; *see also* Brown v. Glines, 444 U.S. 348, 354 (1980) ("[T]he military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975))); *Parker*, 417 U.S. at 743 ("[T]he military is, by necessity, a specialized society separate from civilian society."); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian."); *Wilcox*, 66 M.J. at 448 n.3 ("[A]dditional burdens may be placed on First Amendment rights in the context of the military, given the different character of the military community and mission."); *cf.* Greer v. Spock, 424 U.S. 828, 838 (1976) ("[T]he business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum.").

tioning, but also any speech that might generally "undermine the effectiveness of response to command."[47]

This approach coheres with a pattern of civilian deference to military courts in the interpretation and administration of military justice.[48] The Court has analogized military law to state law, highlighting the absence of any role for federal civilian courts in interpreting it.[49] The Court has also emphasized the unique powers of Congress regarding military matters.[50] Because Congress has exercised these powers to establish a "carefully designed military justice system," the Court has been strongly inclined to forego meaningful civilian review whenever possible.[51] Perhaps most importantly, the Court has proclaimed that the judiciary has a general lack of competence regarding military affairs.[52] Indeed, the Court has tacitly embraced the views of Professor Samuel P. Huntington, who prescribed rigid cultural separation and mutual assumptions of professional in-

47. *Parker*, 417 U.S. at 759 (citing United States v. Gray, 42 C.M.R. 255 (1970)). *But see Wilcox*, 66 M.J. at 448 (requiring that the prosecution also show a "direct and palpable connection between [a member's] speech and the military mission or military environment," but failing to provide any definition as to what would or would not constitute such a connection).

48. *See generally* Stephanie A. Levin, *The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009 (1990) (arguing for a reconsideration of the proper balance between civil liberties and military institutions).

49. Burns v. Wilson, 346 U.S. 137, 140 (1953).

50. *See* Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (citing Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) as well as Congress's own invocation of U.S. CONST. art. I, § 8).

51. Schlesinger v. Councilman, 420 U.S. 738, 753 (1975) ("[Cases] must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress."); *see also Parker*, 417 U.S. at 744–49 (tracing the history of deference by civilian courts to the military justice system); *Burns*, 346 U.S. at 139–42 (staking out a carefully limited role for civilian courts when reviewing the actions of military courts); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186–87 (1962) (tracing the tradition of deference to military courts as far back as 1863 in an article authored by the then-sitting Chief Justice of the Supreme Court).

52. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."); *see also Rostker*, 453 U.S. at 66 (noting a "healthy deference to legislative and executive judgments in the area of military affairs"); Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army.").

capacity between civilian and military worlds.[53] Huntington's separatist civil-military prescription has, in fact, advanced to the level of consensus throughout American political culture.[54]

Provoked in part by the Vietnam War experience, however, some began to question whether the assumption of cultural separation and the resulting judicial deference remained appropriate, if indeed it ever was.[55] For example, some legal scholars questioned the underlying presumption of a unique and separate military culture requiring judicial deference and abstention.[56] Others specifically highlighted free speech controversies from the Vietnam era, arguing that the inadequacies of the military justice system in dealing with such issues demanded greater intervention by civilian courts.[57]

Scholars have broadened and deepened these critiques since the end of the Cold War. Some have posited the emergence of a "postmodern military" that in its essential elements is akin to any civilian profession.[58] Scholars specializing in civil-

53. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 83–85 (1957) (arguing that, at the height of the Cold War, robust cultural and professional separation between military and civilian spheres was vital to maintaining military effectiveness).

54. ELIOT A. COHEN, SUPREME COMMAND 226 (2002) ("[Huntington's view] has come . . . to be commonly viewed as the 'normal' theory of civil-military relations—the accepted theoretical standard against which the current reality is to be judged.").

55. *See, e.g.*, Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 396, 400 (1976) (detailing the growing together of civilian and military society).

56. *See, e.g.*, James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 205 (1984) ("[T]he typical or common member of the armed forces is not an alien outcast but is one of us.").

57. *See, e.g.*, Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 42 (1975) (reviewing Vietnam-era developments in the application of military restrictions on military members' First Amendment rights); Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325, 373 (1971) ("It is now vitally important that consideration be given to civilian law precedents . . . in these military speech cases."); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 156 (1974) (same); Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957) (reviewing earlier policy debates regarding free speech in the military).

58. Charles C. Moskos et al., *Armed Forces After the Cold War*, *in* THE POSTMODERN MILITARY 1, 2 (Charles C. Moskos et al. eds., 2000).

military relations have noted the increasing integration of the military into civilian political debates as well.[59]

Civilian courts have also begun to cast a more engaged and critical eye on military policies. In recent years, for example, the Court refused to defer to claims of military exigencies in the treatment of prisoners.[60] Lower courts have also begun to more aggressively review the claims of military members challenging infringements on civil liberties arising from military policies.[61] In fact, civilian courts generally appear to be increasingly willing to review military policies and the holdings of military courts.[62]

Still, constraints on the free speech rights of military members remain considerable, and legal scholars have proposed a range of responses. At one extreme, some argue that courts should continue to defer to military judgments, leaving any accommodations to the discretion of military commanders.[63] On the other extreme, some argue for unconditional application of *Pickering* balancing to military members.[64] Between these polar approaches, some have criticized specific military

59. *See generally* MICHAEL C. DESCH, CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT (1999) (emphasizing the notion that civilian authorities inevitably pay close attention to military matters, especially in wartime); PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS (2003) (arguing that the civilian executive monitors the actions of military agents).

60. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 727 (2008) (requiring the government to provide evidence of actual impact on the mission before the Court would defer to the withholding of civilian habeus corpus review for prisoners); Hamdi v. Rumsfeld, 542 U.S. 507, 529–33 (2004) (applying a balancing test between a detainee's interests and the government's interests rather than deferring to the military outright); *see also id.* at 535 ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war . . . it does not infringe on the *core role* of the military for the courts to exercise their own time-honored and constitutionally mandated roles." (emphasis added)).

61. *See, e.g.*, Witt v. U.S. Dep't of the Air Force, 739 F. Supp. 2d 1308, 1310 (W.D. Wash. 2010) (striking down the military's "don't ask, don't tell" policy on equal-protection grounds notwithstanding continuing military claims to require prohibitions against open homosexuality in the military as necessary to "high morale, good order, discipline, and unit cohesion").

62. *Id.*; *see also* Watada v. Head, 530 F. Supp. 2d 1136, 1147 (W.D. Wash. 2007) (asserting a willingness to intervene in ongoing court-martial proceedings once the petitioner's options within the military justice system are exhausted).

63. *See, e.g.*, Carr, *supra* note 7, at 307–11.

64. *See, e.g.*, Rosen, *supra* note 8, at 898–903.

regulations[65] and proposed reforms that would improve free speech protections only during peacetime.[66] Thus far, however, none have articulated specific proposals to adapt *Pickering* balancing to the unique requirements of the military context.

II. ANALYZING THE ASSUMPTIONS OF REDUCED MILITARY FREE SPEECH RIGHTS

This Part critiques the bases for civilian judicial deference towards restrictions on military members' free speech rights. Specifically, this Part argues that the assumption of a "separate culture" in the military was probably never true, and is certainly untrue in the post-Vietnam and post-Cold War eras. Moreover, because courts have misunderstood the role of dissent in the military, they have simultaneously overestimated its impact on military effectiveness and underestimated the impact of restrictions on military members' speech. However, courts' traditional deference with regard to military affairs has been fading in recent years. This new judicial engagement opens a window of opportunity for reform in military members' free speech rights, allowing courts to use the growing convergence between the concerns that motivate regulation of both military and civilian employees' speech.

A. THE MYTH OF CULTURAL SEPARATION BETWEEN CIVILIAN AND MILITARY WORLDS

This Section critiques the main judicial justification for deferring to claims of military necessity in the restrictions on members' free speech rights. Specifically, this Section argues that the image of a wall of separation dividing civilian and military cultures has always been more idealized myth than reality. From its beginning, the United States military and its civilian society have been unusually "permeable" compared to European countries.[67] In particular, the extensive use of militia to supplement military forces in the nation's early history

65. Katherine C. Den Bleyker, Note, *The First Amendment Versus Operational Security: Where Should the Milblogging Balance Lie?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401, 404–05 (2007) (critiquing restrictions on military bloggers and calling for strict scrutiny, but only in that specific context).

66. Sugin, *supra* note 8, at 876–90.

67. Ira Katznelson, *Flexible Capacity: The Military and Early American Statebuilding*, *in* SHAPED BY WAR AND TRADE 82, 101 (Ira Katznelson & Martin Shefter eds., 2002).

blurred the line between the civilian and military use of force.[68] And American political debates frequently feature debates over universal military training, seeking to conjoin military virtues with citizenship.[69] These debates are often intertwined with debates over conscription.[70] Indeed, many advocates of the draft saw conscription as an important tool for maintaining the history of civil-military integration in the United States.[71]

As discussed above, the courts have generally embraced Professor Huntington's view of a military society set apart in the name of military effectiveness and professionalism.[72] Specifically, the Supreme Court has noted that "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."[73] The Court has seen these restrictions as necessary to accomplish the military's mission.[74] These restrictions and their reasons are, according to the Court, "without counterpart in civilian life."[75] Moreover, the Court has disavowed even the role of the courts to weigh the necessity of military restrictions, deferring to "the professional judgment of military authorities concerning the relative importance of a particular military interest."[76] Thus, the Court has sanctioned even restrictions that involve fundamental First Amendment claims when the military's only interest is "uniform dress requirements."[77] The Court upheld these restrictions

68. *Id. But see* ELIOT A. COHEN, CITIZENS AND SOLDIERS 127 (1985) (noting the skepticism of professional military officers towards militia forces throughout American history).

69. *See* COHEN, *supra* note 68, at 129–33 (reviewing those debates).

70. *See, e.g.*, GEORGE Q. FLYNN, THE DRAFT, 1940–1973, at 88–109 (1993) (recounting President Truman's efforts to end the draft and enact universal military training at the same time).

71. *See, e.g.*, Morris Janowitz, *The All-Volunteer Military as a "Sociopolitical" Problem*, 22 SOC. PROBS. 432, 448 (1975); *see also* BERNARD ROSTKER, I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE 374–75 (2006) (recounting the testimony of Professor Charles Moskos to Congress seeking to either return to conscription or enact universal military training).

72. *See supra* notes 45–54and accompanying text.

73. Parker v. Levy, 417 U.S. 733, 751 (1974).

74. Goldman v. Weinberger, 475 U.S. 503, 506–07 (1986) (quoting *Parker*, 417 U.S. at 743).

75. Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

76. *Goldman*, 475 U.S. at 507.

77. *Id.* at 509 ("The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."); *see also id.* at 515 (Brennan, J., dissenting) ("The Court . . . evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of military personnel.").

even though there was "almost no danger of impairment of the . . . military mission"[78] and in spite of suspicion that "the Government has exaggerated the importance of [its] interest."[79] In short, because of its belief in the absolute incompetence of civilian institutions to evaluate the decisions of military professionals, the Court has adopted, as Justice Brennan put it in dissent, "a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities' . . . no matter how absurd or unsupported it may be."[80]

As noted earlier, this view of absolute civil-military separation has always been highly questionable.[81] Since the end of the Vietnam War, the all-volunteer force has transformed the U.S. military in ways that depart even more dramatically from the separate worlds presumed by the courts. Today's military contains no draftees[82] and no realistic prospect exists of ever returning to conscription.[83] Military jobs often require extensive technical expertise and specialized training unsuitable for conscripts.[84] Demographically, the average military member of an all-volunteer military remains in the military for a much longer period than soldiers in the draft-era military.[85] Even many overseas deployments now include family members, resulting in overseas military bases that sometimes resemble large American civilian communities.[86] Additionally, the uniformed ranks themselves are supplemented both in the United States and overseas by large numbers of civilian government workers

78. *Id.* at 511 (Stevens, J., concurring).

79. *Id.* at 512.

80. *Id.* at 515 (Brennan, J., dissenting) (quoting *id.* at 507 (majority opinion)).

81. *See supra* notes 66–70 and accompanying text.

82. The Pentagon announced the end of the draft on January 27, 1973. ROSTKER, *supra* note 71, at 265.

83. *See id.* at 756 (noting a nearly unanimous vote in the House of Representatives to reject a return to conscription even at the height of manpower pressures caused by the Iraq War); Janowitz, *supra* note 71, at 436 (explaining how a widespread "persistent reluctance to serve in the military" in advanced industrial societies leads inevitably towards all-volunteer militaries).

84. Janowitz, *supra* note 71, at 437 ("The all-volunteer system has also been designed to articulate with contemporary military technology which requires longer periods of training."); *see also id.* at 438–39.

85. *Id.* at 437–38.

86. *Cf.* GENERAL H. NORMAN SCHWARZKOPF & PETER PETRE, IT DOESN'T TAKE A HERO 261–63 (1992) (recounting the author's difficulties upon finding that his military command responsibilities in Germany included responsibility for a large number of American civilians).

and contractors.[87] In short, the military is not in fact segregated into a separate and distinct cultural environment. It is exposed to civilians and shares many features with a civilian career.

Research into the evolution of the all-volunteer military has often emphasized the degree to which the military life has become transformed into just another career choice. Indeed, Professor Charles Moskos speaks of a "postmodern military" where men and women in uniform perform daily duties that are often exactly the same as civilian counterparts.[88] When they return home from work and take off their uniforms, most military members are indistinguishable from their civilian neighbors.[89] In fact, the all-volunteer military puts great emphasis on comparisons between functional specialties in the military and corresponding civilian occupations.[90] And military leaders often value the all-volunteer force in part for the availability of civilian tools of workplace rule enforcement; for example, soldiers in a conscripted military often eagerly sought to get kicked out of the service,[91] while in an all-volunteer military termination is a punishment and a deterrent.[92]

87. *See* Charles C. Moskos, *Toward a Postmodern Military: The United States as Paradigm*, *in* THE POSTMODERN MILITARY, *supra* note 58, at 14, 21 (noting the deployment of 10,000 civilian workers to Saudi Arabia during the Gulf War). *See generally* P.W. SINGER, CORPORATE WARRIORS 19 (2003) (noting the increasing use of contractors to fulfill military functions, even including combat).

88. Moskos et al., *supra* note 58 ("The Postmodern military is characterized by . . . increasing interpenetrability of civilian and military spheres, both structurally and culturally."); *see also* Hirschhorn, *supra* note 56, at 205–06 (noting that most military jobs have exact civilian counterparts and that even combat soldiers may not experience a unique relationship with government authority).

89. *Cf.* Zillman & Imwinkelried, *supra* note 55 ("The 'society apart' was a valid description of the small, 19th century, regular Army fighting Indians on the frontier. . . . But by 1974, the military had become a multimillion-person employer involved in almost every aspect of American life. . . . [T]he modern military shows increasing signs of 'creeping civilianism.'").

90. *Cf.* BETH J. ASCH & JAMES R. HOSEK, MILITARY COMPENSATION: TRENDS AND POLICY OPTIONS 4–12 (1999) (evaluating the "pay gap" between military functional specialties and their civilian counterparts).

91. *See* Zillman & Imwinkelried, *supra* note 55, at 402 ("The very necessity of conscription in America's last four wars argues that [the civilian sanction of firing unsatisfactory performers] would be inadequate."); *see also* M*A*S*H (CBS television broadcast 1972–83) (character of Corporal Klinger).

92. *See Status of the All-Volunteer Armed Force: Hearing Before the Subcomm. on Manpower and Pers. of the S. Comm. on Armed Servs.*, 95th Cong. 60–61, 68 (1978) (testimony of General Smith, Army Deputy Chief of Staff for Personnel). *Compare* OTTO F. WAHL, MEDIA MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS 6 (1995) (recounting the struggles of fictional draftee

A few scholars have suggested that the existence of an ideological gap between civilian and military communities necessitates separation. According to this theme, military culture reflects a uniquely conservative worldview that must be isolated from contemporary political debate unless civilian society is also politically conservative.[93] Some have even suggested, rather fanatically, that political dissent arising within the American military risks a coup.[94] But although research shows that military members tend to be somewhat more politically conservative and religious than civilians, these are statistical deviations of degree rather than cultural type.[95] Ample groups of civilians exist that are just as politically conservative and religious as the military, if not more so.[96] Moreover, studies have found that college professors deviate politically from the rest of society far more than the military does,[97] yet no one suggests that academia be deemed a separate culture subject to reduced constitu-

Corporal Klinger seeking to obtain a discharge by feigning transvestite and bizarre behaviors), *with* NATHANIEL FRANK, UNFRIENDLY FIRE 1–25 (2009) (recounting the struggles of gay service members to remain in the military under the 1993 "don't ask, don't tell" policy).

93. *See* HUNTINGTON, *supra* note 53, at 79 (casting the "military ethic" as inherently conservative); *id.* at 90–91, 153–55 (arguing that civilian "liberalism" is hostile and contemptuous towards the military); *id.* at 83–85, 96–97 (arguing that the way to accommodate the conservative military mind with liberal civilian politics is separation); *id.* at 463–64 (arguing that if high international threat makes separation impossible, then civilian society must become more conservative to avoid undermining military effectiveness).

94. Zillman & Imwinkelried, *supra* note 55, at 405–06 ("Any expression of disagreement by servicemen might move the military into politics, or prompt a military coup."); *see also* Charles C. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992–93, at 2, *available at* http://media.portland.indymedia.org/media/2004/05/288433.pdf (hypothetically describing how a military drawn into politics could result in a coup).

95. *See* Peter D. Feaver & Richard H. Kohn, *Conclusion: The Gap and What It Means for American National Security*, *in* SOLDIERS AND CIVILIANS 459, 459–61 (Peter D. Feaver & Richard H. Kohn eds., 2001).

96. *Cf.* Robert S. Erikson et al., *State Political Culture and Public Opinion*, 81 AM. POL. SCI. REV. 797, 803 (1987) (finding that living in North Dakota was a greater predictor of political ideology than, among other things, religion).

97. *Compare* Stanley Rothman et al., *Politics and Professional Advancement Among College Faculty*, 3 THE FORUM, no. 1, art. 2, 2005, at 5 ("[C]ollege faculty are about four times as liberal as the general public."), *with* Ole R. Holsti, *Of Chasms and Convergences: Attitudes and Beliefs of Civilians and Military Elites at the Start of the New Millennium*, *in* SOLDIERS AND CIVILIANS, *supra* note 95, at 15, 27–29 (finding Republican party identification within the military approximately twice that in the nonveteran civilian population).

tional rights.[98] Given the reality of the "postmodern military," whatever validity the Huntingtonian thesis of separate cultures had for justifying a general legal separation between military and civilian free speech rights now seems questionable.[99] The combination of theoretical and empirical flaws in the hypothesis of civil-military separatism produces a weak foundation for judicial deference to military restrictions on members' free speech.

B. COURTS MISUNDERSTAND THE EFFECTS OF DISSENT IN THE MILITARY

In addition to the idea of cultural separation, courts have justified deference to military restrictions on speech by pointing to the threat of disorder in the ranks if speech were unconstrained. This Section examines those fears, concluding that they are overblown.

Courts frequently rely upon two common assumptions about the threat of dissent in the military ranks. First, courts frequently assume that even mere exposure to dissent may cause disorder in the form of actual disobedience among the troops.[100] Second, courts often assume that the restrictions that are imposed do not amount to a forfeiture of military members' First Amendment rights.[101] But neither of these assumptions regarding the role of dissent in the military holds true in practice.

1. Cases of Dissent by Military Members Have Not Resulted in Disorder

Case law upholding restrictions on "disloyal statements" is remarkable for the prevalence of speculative harms that are believed to flow from that dissent. Military and other courts have

98. *Cf.* Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) (acknowledging heightened First Amendment protections for education professionals).

99. *See* Brown v. Glines, 444 U.S. 348, 368 (1980) (Brennan, J., dissenting) (condemning the use of "a series of platitudes about the special nature and overwhelming importance of military necessity"). *But see* Hirschhorn, *supra* note 56, at 207–08 (arguing that Justice Brennan and others oversell their critique of the separate community theory).

100. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 759 (1974) ("Speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command." (quoting United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972))).

101. *See, e.g.*, *id.* at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

cast about in vain for cases featuring actual effects on morale or unit operation. For example, even in the seminal *Parker* case, where an Army officer openly encouraged enlisted men to disobey orders to deploy to Vietnam,[102] the Supreme Court cited no evidence that anyone had actually heeded the officer's call. In fact, the *Parker* dissent characterized the effect as harmless commentary.[103] Finding no actual mission impact, military courts have tacitly retreated from the requirement that the threat to discipline be "direct and palpable,"[104] emphasizing instead that disloyal statements need not be effective to be legally prohibited.[105] Indeed, courts have ruled that the damage to morale may be merely intended, unless the likelihood of success would be so remote "as to foreclose *all possibility* of successful promotion of disloyalty."[106] Some courts have even been willing to uphold punishment for speech that was not intended to promote disloyalty but might speculatively produce such an effect.[107] But this dearth of actual evidence that dissent causes military disorder raises the inference that many of the prohibitions against dissent by military members may be the result of unfounded fears.[108] In any case, the net effect is to strip the limitations that the *Parker* Court cited on the scope of the general articles of much of their bite.[109]

102. *See supra* note 39 and accompanying text.

103. *Parker*, 417 U.S. at 771–72 (Douglas, J., dissenting).

104. *See id.* at 752–53 (majority opinion) (citing the "direct[] and palpabl[e]" requirement as a key limitation on the scope of the general articles).

105. *See, e.g.*, United States v. Gray, 42 C.M.R. 255, 259 (C.M.A. 1970) ("Successful propagation of disloyalty is not an essential element of the offense.").

106. *Id.* at 68 (emphasis added); *see also* United States v. Priest, 45 C.M.R. 338, 343 (C.M.A. 1972) (finding that distribution of pamphlets calling for sabotage against the Vietnam War is sufficient to show prejudice to discipline even in the absence of any evidence of any military members heeding the call).

107. *See* Sec. of the Navy v. Avrech, 418 U.S. 676, 680 (1974) (per curium) (Douglas, J., dissenting) (noting that undistributed pamphlets for which the Court had affirmed a conviction merely asked questions that "might at best have resulted in letters to [] family or Congressman or Senators" rather than any effect on other members' accomplishment of their duties).

108. *See Parker*, 417 U.S. at 771 (Douglas, J., dissenting) (criticizing the failure of a military court in a previous case to weigh the plausibility of its speculation that a reservist second lieutenant could become a threat to civilian control of the military by making statements critical of the Vietnam War).

109. *See id.* at 778 (Stewart, J., dissenting) (dismissing the "direct and palpable" limitation as without any "substantive content" sufficient to limit Articles 133 and 134).

2. The Impact of Suppression of Speech Exceeds the Reach of Formal Restrictions

While courts have exaggerated the impact of dissent on military effectiveness, they have underestimated the impact of legal restrictions on free speech in the all-volunteer military. Because the available punishments for any offense include the possibility of discharge or career-ending stigma,[110] many military members are likely to steer clear of anything that even *might* result in investigation. Members may fear the investigation itself as much as its outcome because of nonjudicial punishments that exist within the military.[111] Specifically, military members faced with a court-martial are often offered a choice between nonjudicial punishment by their commander or a court-martial, either of which could end their career.[112] Moreover, a military member who is merely under investigation may lose his security clearance temporarily and be assigned to closely supervised menial duties wherein merely showing up late to work can be deemed "failure to go" in violation of the UCMJ.[113] Thus, because military members cannot be certain exactly where the line between allowable dissent and "disloyal statements" may lie[114] and because even coming within earshot of that line could endanger their career, the scope of speech that is suppressed in practice is probably far broader than even the broad scope of the restrictions actually applied. In a civilian context, the courts might be expected to closely scrutinize such a system as potentially having a "chilling effect" on otherwise protected First Amendment expression.[115] But courts' tradition

110. *See* LAWRENCE J. MORRIS, MILITARY JUSTICE 165–170 (2010) (outlining various nonjudicial means for separating military members from the service even without a court martial).

111. *See id.*

112. *See id.* at 148–73 (outlining the nonjudicial punishment process and its potential consequences).

113. *See id.* at 65–66 (explaining how failure to show up for work on time is a crime under military law).

114. *Compare* United States v. Wilcox, 66 M.J. 442, 451 (C.A.A.F. 2008) (holding that statements directed towards an entirely civilian audience lacked "direct and palpable effect" on discipline), *with* Watada v. Head, 530 F. Supp. 2d 1136, 1138 (W.D. Wash. 2007) (analyzing case of Army Lieutenant charged with violating Article 133 for having made "public statements" critical of the Iraq War), *and* Mitchell, *supra* note 4 (making clear that the "public statements" referenced in *Watada* were media interviews).

115. *Cf., e.g.*, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 556–57 (1963) (noting the Court's concern with statutes that are vague or broad enough to deter speakers from engaging in protected expression out of fear that they might cross an uncertain line).

of deference has thus far prevented application of this doctrine to the military context.[116]

C. CIVILIAN COURT DEFERENCE REGARDING MILITARY MATTERS IS DECLINING

While the courts have traditionally been very deferential with regard to military matters, cracks are beginning to emerge. In recent cases dealing with detainees at Guantanamo Bay, for example, the Supreme Court explicitly rejected the government's contention that the courts had no competence in national security matters.[117] In doing so, the Court approvingly cited a dissent from perhaps the most sweeping case of the Court's deference to a claim of military exigency—*Korematsu v. United States*, where the Court notoriously deferred to military claims of necessity and upheld the exclusion of Japanese Americans from the West Coast during World War II.[118]

Lower courts in recent years have also begun to press the boundaries of the Court's military deference. For example, in *Watada v. Head*, a federal district court stepped in to block a court-martial retrial in the case of a service member claiming double jeopardy.[119] While the district court claimed adherence to the Supreme Court's deferential mandates regarding military courts, it appeared to interpret the parameters of that deference much more narrowly than the Supreme Court had.[120]

116. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 754 (1974) (refusing to apply void-for-vagueness doctrine to a free speech infringement claim in the military context).

117. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 527, 534–35 (2004) (noting the traditional deference to the executive branch in time of war, but then applying an interest balancing test); *see also id.* at 535 ("What are the allowable limits of military discretion . . . are judicial questions." (quoting Sterling v. Constantin, 287 U.S. 378, 401 (1932))).

118. *See id.* at 535 ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled." (quoting *Korematsu*, 323 U.S. at 233–34 (1944) (Murphy, J., dissenting))).

119. *Watada*, 530 F. Supp. 2d at 1161.

120. *Compare id.* at 1148–49 (finding civilian courts competent to intervene at the point that military courts have concluded their consideration of the discrete issue of defendant's double jeopardy claims but prior to the conclusion of all of the defendant's military court proceedings), *with* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (refusing to allow civilian courts to issue injunctions until the "resolution of *his case*" in the military courts (emphasis added)). The difference is subtle, but important in that it may indicate a change from deference to the military courts pending the conclusion of a case

And in *Witt v. U.S. Department of the Air Force*, the district court considered a challenge to the military's "don't ask, don't tell" policy.[121] Other courts had upheld the policy, citing the tradition of judicial deference in military affairs.[122] But the *Witt* court rejected Congress's findings of a "fundamentally different" military context, striking down the policy as unconstitutional using the same standards used for civilian claims of discrimination based on sexual orientation.[123]

The Court of Appeals for the Armed Forces (CAAF), which provides the primary civilian review of military courts-martial,[124] has also begun to cast a more skeptical eye towards the general articles of the UCMJ. Specifically, in *United States v. Fosler*, the court held that prosecutors charging offenses under Article 134 must specify which clause of the Article was being charged.[125] While this represents only a relatively minor procedural change in practice, the reasoning in *Fosler* is important. The court held that more specific charging was required specifically in order to give military members greater clarity about what conduct was being charged under the broadly sweeping general articles.[126] It is reasonable to believe that the court could be sympathetic to a similar argument that military members need greater clarity about what kinds of speech are proscribed under Article 134 as well.

While, even collectively, these decisions continue to fall well short of challenging the linchpins of civilian courts' deference in military matters,[127] they nonetheless represent indications that the courts may be becoming less deferential towards

to a willingness to intervene repeatedly as particular issues become ripe for review within a case.

121. 739 F. Supp. 2d 1308, 1309–10 (W.D. Wash. 2010). The Don't Ask, Don't Tell (DADT) policy has since been repealed by President Barack H. Obama, thus mooting legal challenges. CNN Wire Staff, *Obama Signs Repeal of 'Don't Ask, Don't Tell' Policy*, CNN.COM (Dec. 22, 2010), http://articles.cnn.com/2010-12-22/politics/dadt.repeal_1_repeal-openly-gay-men-president-barack-obama. But it is sufficient to note the decline in judicial deference to claims of military necessity for special restrictions on service members' rights.

122. *See, e.g.*, Cook v. Gates, 528 F.3d 42, 57–60 (1st Cir. 2008).

123. *Witt*, 739 F. Supp. 2d at 1311, 1315–17.

124. *See Appellate Review of Courts-Martial*, U.S. COURT OF APPEALS FOR THE ARMED FORCES (Oct. 31, 2006), http://www.armfor.uscourts.gov/newcaaf/appell_review.htm (outlining the jurisdiction of the CAAF).

125. United States v. Fosler, 70 M.J. 225, 232–33 (C.A.A.F. 2011).

126. *Id.* at 229–31.

127. *See, e.g.*, Feres v. United States, 340 U.S. 135, 146 (1950) (barring military members from resorting to the courts to redress personal injuries suffered in the course of military service).

the military over time, particularly when basic civil liberties claims are implicated and particularly with regard to the kinds of matters addressed by the general articles.

D. CIVILIAN AND MILITARY CONCERNS ABOUT EMPLOYEE SPEECH ARE SIMILAR

The factors discussed above—the decreasing separation of military and civilian culture combined with the lack of harm from dissent within the military ranks and the increasing willingness of the courts to cast a skeptical eye on military policies—provide only an opportunity for reform in military members' free speech rights. By themselves, these factors do not indicate what form such reforms should take. This Section assesses the similarity between concerns about workplace speech in the civilian and military context. This similarity justifies using standards adapted from the civilian workplace in the military workplace.

It is noteworthy that concerns over potential disruption from workplace speech are similar in civilian and military workplaces.[128] For example, in *Connick*, the Supreme Court upheld disciplinary action in part because any employee's questionnaire that was critical of her supervisor's competence amounted to "an act of insubordination."[129] The Court underscored the importance of maintaining hierarchical office relationships.[130] The Court then applied the balancing test from *Pickering*, weighing the importance of maintaining that hierarchical authority against the minimal relationship that the employee's speech had to any matter of public concern.[131] It is thus apparent that the professional military environment is but a subset of a broader set of civilian professions wherein hierarchy is an important interest.[132] And military sociologists have noted

128. *Compare* Connick v. Myers, 461 U.S. 138, 141 (1983) (noting that government's disciplinary action was motivated in part by employee questioning competence of supervisor), *with* United States v. Gustafson, 5 C.M.R. 360, 361 (1952) (noting that government's disciplinary action was provoked by subordinate stating "Captain, you're no damned good").

129. *Connick*, 461 U.S. at 151.

130. *Id.* at 153.

131. *Id.* at 154.

132. Martin L. Cook, *Army Professionalism: Service to What Ends?*, *in* THE FUTURE OF THE ARMY PROFESSION 337, 348–49 (Lloyd J. Matthews ed., 2002) ("The relation between senior attending physicians in teaching hospitals and their interns is every bit as hierarchical as the military; senior partners of major law firms are without doubt as superior to their junior associates as senior military officers are to their subordinates.").

that the military has not escaped broader societal trends that require leaders to take into account growing individualism and differences of opinions.[133] Thus, the kinds of concerns and factors that structure authority in the military and civilian workplaces are similar and, presumably, amenable to a balancing approach like that in *Pickering*.

III. CONGRESS OR THE COURTS SHOULD ADAPT THE *PICKERING* BALANCING TEST TO GOVERN MILITARY AS WELL AS CIVILIAN EMPLOYEES' SPEECH

The growing erosion of the foundations for judicial deference towards military limitations on members' free speech rights opens a window for reform, but does not in itself indicate which reforms should be enacted. This Part notes two existing proposals intended to increase military members' free speech rights. The "discretionary" approach suggests that existing legal frameworks be retained, but that military commanders be encouraged to apply *Pickering* analysis on their own. At the other extreme, the "pure *Pickering*" approach suggests that rules applied to civilian employees derived from the *Pickering* line of cases be applied to military employees without any modification. This Part will critique each of these solutions, arguing instead for a "modified *Pickering*" approach that does away with the courts' traditional presumption of a military that is separate from and outside the law, while still accommodating specific functional military requirements. This Part also argues that the ideal method for implementing this reform is through modification of the Manual for Courts-Martial. However, reform could be applied through the courts as well.

A. DISCRETIONARY IMPLEMENTATION OF *PICKERING* STANDARDS WOULD PROVIDE INADEQUATE PROTECTIONS

One option for reform suggests that *Pickering* standards be applied to the military context informally, using the discretion of military commanders rather than the authority of the courts.[134] Specifically, those promoting discretionary *Pickering* standards argue that formal application of *Pickering* would burden military operations by threatening readiness and unit

133. *See, e.g.*, Anna Simons, *Backbone vs. Box: The Choice Between Principled and Prescriptive Leadership*, *in* THE FUTURE OF THE ARMY PROFESSION, *supra* note 132, at 379, 385–87.

134. Carr, *supra* note 7, at 367.

cohesion during deployments, even during peacetime.[135] These conjectures do not, however, include any specific scenarios as to how *Pickering* standards would cause these ill effects. Indeed, they merely highlight the social dynamics within military units that serve to dissuade most dissenters even in the absence of criminal sanctions contained in the general articles.[136] Since military customs, military culture, and the overall political demographics of military members would remain the same after application of *Pickering* standards to free speech, it is difficult to see where major new threats to readiness and cohesion would come from even if a few dissenters were allowed to speak out without punishment.

Those preferring discretionary application of *Pickering* standards also argue that judicial application would involve an "intrusive and disruptive inquiry into the personnel decisions of the military."[137] Specifically, they contend that applying *Pickering* would place civilian courts in a position of reviewing not only criminal convictions under the general articles, but also reviewing "administrative discharges and re-assignments."[138] Because of the chilling effect of the military's process for nonjudicial punishments, this concern is not completely without merit.[139] But there seems no reason to embrace the tacit belief that military courts would not be able to interpret and apply the *Pickering* standards in the same way that they apply the existing standards from *Parker*.[140] Moreover, there seems no basis for the assumption that administrative actions, like transfers, would be included in civilian judicial oversight any more than such actions have been included in the civilian context.[141] And civilian courts in the process of scrutinizing military policies have already restricted their review of military personnel decisions to situations where the case has advanced to the point of discharge.[142] It is reasonable to assume that the

135. *Id.* at 365.

136. *Id.* at 361.

137. *Id.* at 365.

138. *Id.*

139. *See supra* Part II.B.2.

140. *See* United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008) (applying a "balancing test" to an Article 134 case).

141. *See* Connick v. Myers, 461 U.S. 138, 143 (1983) (acknowledging "the common-sense realization that government offices could not function if every employment decision became a constitutional matter").

142. *See* Witt v. Dep't of the Air Force, 527 F.3d 806, 812 (9th Cir. 2008) (holding that completed discharge or "long-term suspension" linked to a dis-

same scope of limitations would apply to civilian judicial reviews based on *Pickering* standards.

Moreover, predicating *Pickering* protections on the discretion of military commanders would seem to present an inherent conflict of interest. After all, the Court has noted that mere dislike for the speech on the part of the workplace supervisor should not be sufficient grounds for punishment.[143] Rendering the protections of *Pickering* merely a component of commanders' discretion would strip away any meaningful check on such arbitrariness.[144] Most importantly, it is the courts—not workplace supervisors or military commanders—that are tasked with determining the proper scope of constitutional rights.[145]

B. PURE *PICKERING* BALANCING WOULD NEGLECT LEGITIMATE MILITARY NEEDS

At the opposite extreme from the discretionary approach lies the option of applying *Pickering* balancing to regulate military members' speech without modification in order to further accelerate the decline of judicial deference towards the military.[146] Indeed, some argue that the courts' traditional deference to the military is not merely conceptually wrong, but actively dangerous.[147] Deference, according to this view, has allowed the military to "manipulate" the Supreme Court into protecting the military from mere embarrassment[148] and conceal mistreatment of detainees since 9/11.[149] Thus, some view the application of *Pickering* balancing as a key opportunity to scale back deference, and thus is justified even apart from the First Amendment implications.[150]

charge recommendation was required to give a military member standing to challenge the military's action on constitutional grounds).

143. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

144. *See* Sugin, *supra* note 8, at 889 n.253.

145. *See* Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting).

146. Rosen, *supra* note 8, at 898–908.

147. *Id.* at 906–08.

148. *Id.* at 906 (citing as an example *United States v. Reynolds*, 345 U.S. 1 (1953)).

149. *Id.* at 907.

150. *See id.* at 899 ("[D]eference to the military has backfired in the past. The military must be held accountable to ensure that it does not abuse its power.").

Such a ham-handed rejection of all deference, however, sweeps too broadly. The military does, in fact, have unique requirements that require accommodation by the courts, including in the area of free speech. For example, while it may be correct that "[p]olitical dissent by off-duty, non-uniformed [military members] does not have the potential to derail the military from its objectives,"[151] this view fails to notice the different civilian and military meanings of "off-duty." For example, when military members are stationed on bases in the United States where they return to civilian homes at the end of each duty day, the conflation of civilian and military jobs may be appropriate.[152] But when military members are deployed overseas, and in particular in combat operations, they are, in effect, in the "workplace" twenty-four hours a day, seven days a week. This requires courts to treat differently military members' speech by inquiring into the specific location, time, and conditions surrounding it, acting to protect military members' speech more aggressively in the United States, but declining to act when the context of the speech is one that requires deference to uniquely military concerns due to overseas operational deployments.[153] But selective deference is still a form of deference that a purist rejection of judicial deference towards the military would seem to disallow.[154]

Because it is a combat organization, at times requiring intense discipline and camaraderie, the military also has some unique requirements regarding the substance of speech. While it is quite correct to note that expressions of dissent do not necessitate failures of discipline,[155] there are at least two areas where particular types of speech, that a pure application of the

151. *Id.*

152. *See supra* notes 87–89 and accompanying text.

153. *See* Carlson v. Schlesinger, 511 F.2d 1327, 1331–32 (D.C. Cir. 1975) (upholding restrictions against circulation of anti-war petitions on a military base in Vietnam as a time, place, or manner restriction on otherwise protected speech); A FEW GOOD MEN (Columbia Pictures 1992) ("It's because it was what they were ordered to do. Now, out in the real world, that means nothing. And here at the Washington Navy Yard, it doesn't mean a whole lot more. But if you're a marine assigned to Rifle Security Company Windward, Guantanamo Bay, Cuba, and you're given an order, you follow it or you pack your bags.").

154. *See, e.g.*, Rosen, *supra* note 8, at 905–06 ("National security interests do not justify an abuse of the public trust, which has previously occurred when the Supreme Court has taken too deferential a stance on military regulations. The Supreme Court should hold the military to a higher standard, and one way to achieve this is to apply the public employee doctrine.").

155. *Id.* at 905 ("[C]riticism does not automatically lead to insubordination.").

Pickering balancing would allow, might damage military discipline. First, the broad application of *Pickering* balancing would prohibit the government from punishing employees solely because of their "political affiliation."[156] In fact, some assert that "[t]he military has never indicated that political affiliation is a prerequisite for serving in the armed forces."[157] But the military penalizes members for participation in designated hate groups.[158] Such a ban on membership hate groups may be uniquely justified by the camaraderie necessary for effective combat units. Moreover, the case of Major Nidal Hasan shows the need for the military to be sensitive to the adoption by military members of political attitudes that sympathize with a current enemy.[159] A pure application of the *Pickering* public employee doctrine is blind to these considerations which are legitimately unique to the functional requirements of the military, even without embracing the "separate community" rationale.

Second, a pure application of *Pickering* balancing to the military is blind to the special military status of the President as Commander-in-Chief. In fact, some would apply *Pickering* not only to eliminate military restrictions under the general articles of the UCMJ, but also to eliminate military restrictions barring "contemptuous words" towards the President.[160] Indeed, some argue that not punishing even endorsements of assassi-

156. *Id.* at 893 (citing Elrod v. Burns, 427 U.S. 347, 375 (1976)).

157. *Id.* at 905. Note that Rosen does not provide any support for this assertion.

158. *See, e.g.*, DEP'T OF THE AIR FORCE, INSTRUCTION 51-903, ¶ 5.2 (1998), *available at* http://www.e-publishing.af.mil/shared/media/epubs/AFI51-903.pdf ("Commanders are authorized to use the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in [hate] groups."); *see also* Kevin Baron, *DoD Tightens Hate Group Restrictions*, MILITARY.COM (Apr. 15, 2010), http://www.military.com/news/article/dod-tightens-hate-group-restrictions.html (reporting on a recent updated Department of Defense directive increasing restrictions on hate group participation for all the armed services).

159. *See* Jim Miklaszewski, *9 Officers Face Disciplinary Action in Fort Hood Shooting*, MSNBC.COM (Mar. 10, 2011), http://www.msnbc.msn.com/id/42017230/ns/us_news-security/ (reporting punishment of officers supervising the Fort Hood shooter for failure to react to signs of his increasing radicalization).

160. *Compare* UCMJ art. 88, 10 U.S.C. § 888 (2006) (prohibiting "contemptuous words" toward the President from officers), *with* Rosen, *supra* note 8, at 900–01 (criticizing the contrast between *Rankin v. McPherson*, where the Court held that a civilian expression of support for presidential assassination was protected speech, and *United States v. Ogren*, where a military court found that a Naval officer's expression of support for presidential assassination was not protected).

nation by military members would lead to "more just results" than the current Article 88 prohibitions.[161] But while it may be true that Article 88 restrictions originate in "seventeenth century British anti-treason laws,"[162] the critique exaggerates the scope of the prohibitions[163] and ignores their underlying modern rationale. In fact, the modern rationale for Article 88 lies in an apparently legitimate military need to maintain discipline within a chain of command that places the President at the top.[164] Article 88 also covers only the President, Vice President, Congress, Secretaries of Defense, Homeland Security, military departments, and the governors of the states.[165] Article 88 thus in itself leaves open all other officials and all substantive policies for dissent. Moreover, the military has enforced Article 88 sparingly, mostly focusing narrowly on cases that do not involve substantive dissent based in policy.[166]

C. FREE SPEECH PROTECTION DURING PEACETIME AND DEFERENCE DURING WARTIME WOULD BOTH PROTECT TOO MUCH AND TOO LITTLE

Not all scholars have taken such an all-or-nothing approach to reform. For example, some suggest that the free speech protections of *Pickering* could be applied to military members during peacetime, but the courts could defer to the

161. Rosen, *supra* note 8, at 900.

162. *Id.* at 880.

163. *See id.* at 880–81 (claiming without support that Article 88 prohibits not only "contemptuous words" towards senior officials, but also "leaves soldiers unable to voice their criticism of a war in which they are forced to participate").

164. Michael J. Davidson, *Contemptuous Speech Against the President*, 1999 ARMY LAW. 1, 12 ("The President is more than just another politician. He is the Commander-in-Chief, and as such, is entitled to no less protection under the UCMJ than the most junior officer or noncommissioned officer who suffers disrespect at the hands of an insubordinate private.").

165. *See* UCMJ art. 88, 10 U.S.C. § 888.

166. *See, e.g.*, Ezra Klein, *How to Punish McChrystal?*, WASH. POST (June 23, 2010, 9:26 AM), http://voices.washingtonpost.com/ezra-klein/2010/06/how_to_punish_mcchrystal.html (speculating on the potential use of Article 88 to punish Gen. Stanley McChrystal for pejorative comments directed towards Vice President Biden and reported in *Rolling Stone* magazine). It is fairly certain that General McChrystal, the Afghanistan commander at the time, was not expressing dissent towards the substantive policy of pursuing military action in Afghanistan, but rather merely making personal attacks on administration officials. *See* Julian E. Barnes & Peter Nicholas, *General's Fate in the Balance*, CHI. TRIB., June 23, 2010, at 13. For an overview of the extent and limits of the military's policy on "contemptuous words," see generally Davidson, *supra* note 164.

military during wartime.[167] Such a compromise could produce the worst of both worlds, protecting both too much and too little. Too much protection could derive from the fact that most modern military operations—including combat deployments—take place in the absence of a declaration of war or even a formal authorization for use of force.[168] That means that even during times and at places in which the military's need for discipline and camaraderie are at their peak, the "wartime only" proposal would be as blind to them as a pure approach.

In other contexts, the wartime-only proposal could be too weak. In the event that there is a declaration of war or authorization for use of force that created "wartime," those military members who are far removed from the combat zone and working in jobs similar to civilians would be unnecessarily stripped of their free speech protections at a time when dissent may be vitally important to ongoing political debates about military action. Moreover, the military's use of wartime exigencies as a blanket justification to demand deference has a dark history in the *Korematsu* case,[169] and it would serve us well to be cautious about reenacting a standard that might allow the military to use the existence of a national emergency to broadly suppress dissent.

D. *PICKERING* STANDARDS CAN BE ADAPTED TO UNIQUELY MILITARY REQUIREMENTS

As the foregoing Sections have shown, the optimal balance for reform of military members' free speech rights cannot be found either in purist all-or-nothing approaches or in the black-and-white delineation of wartime from peacetime. Rights of dissent in the military demand a more nuanced approach that is sensitive to the unique mixture of combat from noncombat contexts that exist every day in the modern American military.

Although the military as a whole increasingly resembles a civilian profession, military life during overseas deployment

167. Sugin, *supra* note 8, at 857.

168. *See, e.g.*, Bruce Ackerman, *Obama's Unconstitutional War*, FOREIGN POL'Y (Mar. 24, 2011), http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war (lamenting the ease with which President Obama ordered military action in Libya without any authorization by Congress).

169. *See supra* note 118 and accompanying text. *See generally* Dawinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 494–500 (2010) (tracing the recurring theme of abuses when the Supreme Court allows "wartime" to trump civil liberties concerns).

more closely resembles the "separate community" traditionally viewed by the courts.[170] The *Pickering* Court's distinction between workplace and non-workplace speech does not contemplate the 24/7 workplace that is a defining feature of deployed combat operations.[171] Traditional concerns about the effect of dissent on morale and discipline are most intense in a combat environment and, when limited to that environment, constitute less of an infringement on First Amendment liberties than a general prohibition.[172] Thus, for military members deployed in combat or peacekeeping, the definition of "workplace" should be expanded to encompass the entire duration of their deployment. As the Court noted in *Garcetti v. Ceballos*, speech that takes place pursuant to actual performance of an employees' duties can be regulated much more heavily than speech outside the workplace.[173] While a military member stationed "in garrison" in the United States returns home from work each day and essentially transforms into a civilian while off-duty, a military member deployed overseas is always at some level a representative of the United States government to the people in the country where he or she is stationed. Thus, *Garcetti* offers additional justification for this particular adjustment of the *Pickering* approach to a military context.[174]

Military regulations prohibiting active membership in hate groups could also be retained under a modified *Pickering* approach. Acknowledging the unique military need for discipline and camaraderie, the military's prohibition on hate groups should be cast as a uniquely military version of the *Connick*

170. *See* Sugin, *supra* note 8, at 878–80 (proposing that judicial protections for military members' free speech be foregone in wartime under the political question doctrine). Sugin relies, however, on the assumption that wartime will involve a draft that serves to enhance the political representation of military members' interests. *See id.* at 880.

171. *Cf.* Carlson v. Schlesinger, 511 F.2d 1327, 1331–32 (D.C. Cir. 1975) (upholding restrictions against circulation of anti-war petitions on a military base in Vietnam as a time, place, or manner restriction on otherwise protected speech).

172. *Id.* at 1333; *see also* A FEW GOOD MEN, *supra* note 153 ("It's because it was what they were ordered to do. Now, out in the real world, that means nothing. And here at the Washington Navy Yard, it doesn't mean a whole lot more. But if you're a marine assigned to Rifle Security Company Windward, Guantanamo Bay, Cuba, and you're given an order, you follow it or you pack your bags.").

173. 547 U.S. 410, 418 (2006).

174. *See id.*

concern about preventing speech that interferes with the mission of the workplace.[175]

The *Pickering* approach should also be adapted to retain the Article 88 prohibitions on personal attacks directed against the President and other senior government officials. This should be done by interpreting the "public concern" test narrowly, allowing military members to speak freely in dissent with regards to the substance of policy while limiting the appropriate manner of that expression to preclude ad hominem attacks. Thus, it may be best to retain Article 88 prohibitions as exceptions to the *Pickering* balancing process while limiting the reach of those protections to those areas most essential to military discipline.

While still incorporating limits narrowly tailored to specific military concerns, this adaptation of the *Pickering* balancing approach towards workers' dissenting speech would still represent a dramatic expansion of the free speech rights of military members. As former Chief Justice Earl Warren noted in his influential description of the application of the Bill of Rights to military members, "situations in which the judiciary refrains from examining the merit of the claim of [military] necessity must be kept to an absolute minimum."[176] But the adaptations proposed here would apply the *Pickering* standards to a military context, protecting dissent on matters of public concern while at the same time weighing the government's interest in effective military operations.[177] Moreover, such a weighing would not prevent the government from addressing serious threats to military discipline, but would require the government to show actual, rather than merely speculative, threats to discipline before proscribing dissent.[178] But importantly, these adaptations would serve to balance military and members' interests without regard to formalistic wartime/peacetime distinctions.

E. THE ADAPTED *PICKERING* STANDARDS COULD BE ENACTED THROUGH THE MANUAL FOR COURTS-MARTIAL OR INDEPENDENT JUDICIAL OVERSIGHT

The most direct route for implementing reform would be through the President. Because the goal of maintaining "good

175. *See* Connick v. Myers, 461 U.S. 138, 153 (1983).
176. Warren, *supra* note 51, at 193.
177. *See* Sugin, *supra* note 8, at 884.
178. *Id.* at 888–89; *see also id.* at 888 n.247.

order and discipline" would be maintained as a legitimate government interest under the adapted *Pickering* rules,[179] it would not be necessary to amend the UCMJ itself. Rather, the President could insert the adapted *Pickering* rules into the relevant sections of the MCM, requiring the prosecution to show that "disloyal statements" took place within a workplace as defined above and either did not regard a matter of public concern or had an actual deleterious effect on the functioning of the unit's mission.[180]

Even if the President fails to act, however, the courts could apply *Pickering* standards to the military independently. After all, as the Supreme Court has noted, military members do not forfeit their constitutional rights upon joining the military.[181] The "different application" of those rights was a creation of the Court in *Parker*.[182] The Court is therefore surely competent to disabuse itself of its own doctrinal creation.

CONCLUSION

Although courts have traditionally drawn a sharp separation between the speech rights of government civilian employees and those of the military, this distinction has rested on erroneous assumptions regarding the separation between military and civilian communities and the role of dissent within military organizations. Recently, however, civilian courts have begun to question the deference traditionally accorded to the military, particularly with regard to service members' civil liberties. This presents an opportunity for the President or the courts to promulgate a more contemporary standard for regulating speech in the military workplace. This new standard need not be invented from whole cloth, however, as the balancing test developed in *Pickering* and *Connick* offers a sufficient basis for adapting a new doctrine for dealing with military dissent—a dissent without disloyalty.

179. *See* discussion *supra* Part II.B.1.

180. *See* UCMJ art. 36, 10 U.S.C. § 836(a) (2006) (empowering the President to issue regulations implementing the UCMJ "including modes of proof[] for cases arising under this chapter triable in courts-martial"); *see also* Levy v. Dillon 286 F. Supp. 593, 596 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969) (holding that the MCM has the force of statutory law).

181. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("[M]embers of the military are not excluded from the protection granted by the First Amendment . . . .").

182. *See id.*