San Diego Law Review

Volume 48 | Issue 3 Article 6

8-1-2011

Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law

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* © Paul M. Secunda 2011. Associate Professor of Law, Marquette University Law School. A shorter version of this Article will appear as a chapter titled *The Story of* Pickering v. Bd. of Education*: Unconstitutional Conditions and Public Employment, in* FIRST AMENDMENT LAW STORIES (Richard W. Garnett & Andrew Koppelman eds., forthcoming 2011).

I. INTRODUCTION

Pickering v. Board of Education,[1] a foundational case in public employment law, prominently foreshadowed the coming prominence of the doctrine of unconstitutional conditions in constitutional law. Under that doctrine, the Supreme Court limits a government actor, such as a government employer, from being able to condition governmental benefits, such as public employment, on the basis of individuals' forfeiting their constitutional rights. It would thus seem to follow that a public employee should not have to sacrifice constitutionally protected rights in order to enjoy the benefits and privileges of public employment. Yet, today, that is far from the actual case.

Rather, the unconstitutional conditions doctrine has been applied in a notoriously inconsistent manner over the last forty years, and not just in the public employment arena.[2] Indeed, for jurists, scholars, and practitioners alike, the doctrine continues to be one of the thorniest issues in American constitutional law, and nowhere more so than in the context of public employment, where since the days of *Pickering*, the meaning of unconstitutional conditions for public employees has taken several dramatic, unpredictable, and less-than-beneficial turns.[3]

The doctrine of unconstitutional conditions in public employment has figured most notably in First Amendment free speech[4] and freedom of association cases.[5] In the free speech context, the Court has developed the *Connick*/*Garcetti*/*Pickering* doctrinal analysis.[6] Taken together,

1. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

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

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

4. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 417 (2006); Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996); Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion); Rankin v. McPherson, 483 U.S. 378, 384–85 (1987); Connick v. Myers, 461 U.S. 138, 140–41 (1983); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 412–13 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977).

5. *See, e.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 720 (1996); Rutan v. Republican Party of Ill., 497 U.S. 62, 73 (1990); Branti v. Finkel, 445 U.S. 507, 508 (1980); Elrod v. Burns, 427 U.S. 347, 350 (1976); Keyishian v. Bd. of Regents, 385 U.S. 589, 591–92 (1967).

6. *See Garcetti*, 547 U.S. 410; *Connick*, 461 U.S. 138; *Pickering*, 391 U.S. 563.

these three cases forbid public employers from taking adverse employment action against employees for speaking out on "matters of public concern,"[7] but only if the employee is not speaking pursuant to the employee's official duties,[8] and then only if the employee can prevail under a constitutional balancing test.[9] Needless to say, it is quite a gauntlet a public employee has to negotiate to succeed on a First Amendment free speech claim.[10]

So why have First Amendment public employee speech rights, which have traditionally enjoyed protection under the doctrine of unconstitutional conditions, suddenly diminished in recent years?[11] Three interrelated developments explain this state of affairs. First, a jurisprudential school of thought termed the "subsidy school" has significantly undermined the vitality of the unconstitutional conditions doctrine through its largely successful sparring with an alternative school of thought, the "penalty school." Second, although initially developed in the government-as-sovereign context, this subsidy approach to the unconstitutional conditions doctrine has now infiltrated the government-as-employer context and eviscerated large parts of the *Pickering* holding. Third, and most significantly, the nature of the subsidy argument in the government-as-employer context has morphed into the government speech doctrine, through which the government employer claims the speech of its employees as its own and regulates it freely. It is this last step that I refer to as the Court's neoformalism in handling these constitutional issues.[12] Instead

7. *See Connick*, 461 U.S. at 143. The Court's attempt to define the meaning of "matters of public concern" in *Connick* has alone led to an academic cottage industry. *See* Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 102 n.82 (2006) (collecting cases that discuss the problems associated with the *Connick* "matter of public concern" test).

8. *See Garcetti*, 547 U.S. at 421 ("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.").

9. *See Pickering*, 391 U.S. at 568.

10. *See* Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1107–11 (2008) (recounting the difficulty for public employees of surviving the complicated five-step free speech analysis).

11. *See* Mazzone, *supra* note 3, at 810–16 (reviewing a number of Supreme Court cases that establish that "[t]he doctrine of unconstitutional conditions has been most vigorously applied in the First Amendment cases").

12. This Article does not claim any connection with any other former use of the word *neoformalism* in the constitutional, contract, or commercial law literature. *See, e.g.*, John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM

of merely applying a legal principle in a mechanistic or categorical manner, this new form of formalism concerns itself more with the formal ability of individuals to exercise constitutional rights, though practical realities may strongly suggest that current realities may significantly interfere with such rights. It is this neoformalism that explains how the once-vital doctrine of unconstitutional conditions has come under attack and the long-buried right-privilege distinction in constitutional law has reemerged.

In order to more concretely illustrate the genesis of the unconstitutional conditions doctrine and its recent distortions, this Article conducts an in-depth exploration of the case that started it all: *Pickering v. Board of Education*.[13] Although the Court decided this case in Marvin Pickering's favor,[14] the resulting framework has, over the years, been interpreted by the Supreme Court in a manner that significantly limits public employee free speech rights. In fact, this same unconstitutional conditions doctrine has been utilized in the government-as-sovereign context to dilute other constitutional rights of citizens.[15] What was once developed to shut the door on the infamous right-privilege distinction[16] has now been increasingly used to rob individuals of First Amendment and other constitutional rights. Indeed, when one also considers the neoformalist use of the government speech doctrine, the civil liberties of public employees in this area of law may be at an all-time low.

This Article is divided into seven Parts. Part II defines and explores the development of the neoformalist approach by a group of conservative Justices. Part III then delves into the story behind the dispute that led eventually to the Supreme Court's landmark penalty case of *Pickering v. Board of Education*, which established a robust form of the unconstitutional conditions doctrine in public employee free speech

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L. REV. 869, 891 (2002) (discussing methods for discerning business agreements and obligations); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006) (using the term to describe a revival of formalist ideas in debating the role of precedent in constitutional adjudication); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 1004 (2001) (examining the effect that formal rules proposed in contract scholarship would have on the diverse and complex real world of contracts). *Neoformalism*, as used herein, means simply a new type of formalist thought that has helped to revive the right-privilege distinction in public employment law.

13. *Pickering*, 391 U.S. 563.

14. *See infra* Part III.A.

15. *See infra* Part IV.

16. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445–58 (1968) (discussing various means by which the U.S. Supreme Court has mitigated the "harsh consequences of the right-privilege distinction").

cases. Part IV then relates how the doctrine of unconstitutional conditions first came under attack in the government-as-sovereign context through the increasing use of the subsidy line of argument by conservative Justices in these cases. Next, Part V describes the infiltration of the subsidy argument into the government-as-employer context post-*Pickering* and how the penalty version of the unconstitutional conditions doctrine has been distorted by this emerging neoformalism. Part VI illustrates how this neoformalist conception of First Amendment rights has made the government less transparent and accountable because public employees are no longer secure in speaking their minds about their public employment. Consequently, it argues for the restoration of *Pickering*, its constitutional balancing standards, and the penalty version of the unconstitutional conditions doctrine. Only when government actions that practically truncate the constitutional rights of public employees are not tolerated will public employees be able to again assume the role of the vanguard of the citizenry, protecting fellow citizens from government fraud, waste, and abuse.

II. NEOFORMALISM AND UNCONSTITUTIONAL CONDITIONS

As noted above, the Supreme Court limits a government actor from conditioning governmental benefits based on individuals' forfeiting their constitutional rights under the doctrine of unconstitutional conditions.[17] Yet, through the recent ascendancy of the government speech doctrine in combination with the embrace of the subsidy version of the unconstitutional conditions doctrine, the Rehnquist and Roberts Courts have largely eviscerated the protection against government implementation of unconstitutional conditions in distributing government largesse.

In this regard, these Courts have adopted a new version of formalism, or neoformalism, to achieve these ends. Conceptually, neoformalism refers to those legal theorists and judges who look for their societal ideal in what has come before: "rooted in the past—*la terre et les morts*—as maintained by German historicists or French theocrats, or neo-Conservatives in English-speaking countries."[18] However, whereas more

17. *See* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 2–3 (2001). *But see id.* at 9 (criticizing the common definition of the doctrine of unconstitutional conditions as not being very useful).

18. Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191, 241 (Henry Hardy & Roger Hausheer eds., 2000).

traditional forms of legal formalism seek to "identify . . . foundational principles, deduce legal rules from them, [and] then apply those rules syllogistically to resolve individual disputes,"[19] this new formalism concerns itself with the formal ability of individuals to exercise constitutional rights free from physical restraint, though practical realities may suggest significant interference with the exercise of those rights. It is this neoformalism that explains how the once-vital doctrine of unconstitutional conditions has come to languish.

Take, for instance, the constitutional rights of public employees.[20] Through a number of decisions over the past four decades, the Supreme Court has drastically cut back on the ability of public employees to exercise rights to speech, privacy, and equal protection. In the First Amendment free speech context, the dynamic can be seen most plainly. In fact, the Court initiated a historical formalistic move in the case of *Garcetti v. Ceballos* by adopting the foundational principle that public employees must be considered as either employees or citizens, but never both.[21] From that foundational principle, legal rules have been deduced such that public employees in their citizen role enjoy robust free speech protections,[22] while those acting purely as employees have absolutely no such rights.[23] Finally, those rules are applied syllogistically in individual cases, so that employees who engage in speech pursuant to their official job description are automatically treated as individuals with no free speech rights and subject to employer discipline for their expression.[24]

As others and I have argued elsewhere, this type of traditional formalism is troubling.[25] However, the neoformalism of the current

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19. Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 567 (1996).

20. This is an exceptionally important area for the unconstitutional conditions doctrine because "[a] common benefit bestowed by the government is employment. Public employment therefore represents a constant opportunity for the government to persuade individuals to give up certain First Amendment protections in exchange for a regular paycheck." *See* Mazzone, *supra* note 3, at 810.

21. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

22. *See* City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam) ("[W]hen government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some government justification 'far stronger than mere speculation' in regulating it." (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995))).

23. *Garcetti*, 547 U.S. at 421–22.

24. *Id.* at 421 ("[W]hen 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 communication from employer discipline.").

25. *See, e.g.*, Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174 (2007); Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMENDMENT L. REV. 117, 123 (2008).

Court is far more insidious and may potentially have a much larger impact on the constitutional rights of both public employees and all citizens. Neoformalism's focus is on whether individuals' constitutional rights will be formally interfered with by the government's conditioning benefits on individuals taking certain actions. In other words, neoformalists emphasize the *formal* opportunity that individuals have to exercise their constitutional rights without considering the practical realities of whether the government benefit program in question inappropriately penalizes individuals for the exercise of those constitutional rights or makes it nearly impossible to exercise those rights given their personal circumstances.

Neoformalism can be seen as deriving most directly from an ongoing debate between two jurisprudential schools of thought about the longstanding and cryptic unconstitutional conditions doctrine: the penalty school and the subsidy school. The subsidy line of thought appears to derive from the belief that differential subsidization by the government is permissible as long as a *formal* opportunity to exercise constitutional rights exists outside the program in another forum.[26] Subsidy school adherents, mostly conservative-oriented Justices, maintain that as long as individuals are not formally compelled in not exercising their constitutional rights, the government is under no obligation to subsidize the exercise of those rights. Under this subsidy version of the unconstitutional conditions doctrine, in contexts as different as abortion funding to the provision of tax exemptions to public employment, the unconstitutional conditions doctrine has become largely toothless in recent years because government actors simply compel a given result by saying they are doing nothing but subsidizing—or not subsidizing—a right that a citizen or public employee already has under the Constitution.[27] Under these circumstances, if the government can constitutionally induce a result through the conditioning

26. *See* Rust v. Sullivan, 500 U.S. 173, 198 (1991) (applying the subsidy approach in the abortion-funding context).

27. *See* FCC v. League of Women Voters, 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting) ("[W]hen the Government is simply exercising its power to allocate its own public funds, [the Court] need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that is not primarily 'aimed at the suppression of dangerous ideas.'" (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959) (Douglas, J., concurring))); Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983).

of a government benefit, it need not worry about directly compelling the result.[28]

Specifically focusing on the constitutional rights of public employees, the subsidy Justices are in essence saying that public employment is "subsidized" by the government and thus the government is entitled to say what it wishes through its government employee without worry of First Amendment implications. This is the meaning of the government speech doctrine in its neoformalistic form, and its most troubling aspect may be the reinvigoration of the long-ago dismissed right-privilege distinction in constitutional law.[29]

Conversely, the penalty Justices in these same cases maintain just as strongly that such subsidization significantly and *practically* coerces individuals with regard to their constitutional rights.[30] So, under the penalty school, traditionally adhered to by more progressive Justices, government may not penalize individuals for exercising constitutional rights by withdrawing various government benefits such as tax exemptions, government funding, or public employment. As Justice Brennan maintained in one of the first of these cases over fifty years ago, "[the government program's] deterrent effect is the same as if the State were to fine them for this speech."[31] The seminal public employee free speech case of *Pickering v. Board of Education* is a penalty case and establishes a strong form of the unconstitutional conditions doctrine.[32]

Yet, since the days of *Pickering*, it appears that public employees are no longer being considered both employees and citizens.[33] Under the *Connick*/*Garcetti*/*Pickering* doctrinal analysis,[34] public employers are

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28. *See League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting).

29. Karin B. Hoppmann, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 998 (1997) ("Under the rights/privilege approach . . . . [t]he Court reasoned that since public employment is a privilege granted by the government and not a right itself, the public employee could not, during that employment, claim absolute rights otherwise guaranteed a private citizen. Therefore, freedom of speech, though established as a universal right in the Constitution, did not apply as such for those labeled 'employees.'").

30. *Rust*, 500 U.S. at 216 (Blackmun, J., dissenting) ("By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.").

31. Speiser v. Randall, 357 U.S. 513, 518 (1958).

32. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

33. The Court does, however, still pay lip service to the ideal. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam) ("A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967))).

34. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983); *Pickering*, 391 U.S. 563.

only forbidden from taking adverse employment action against employees for speaking out on "matters of public concern."[35] However, if the employees are speaking pursuant to their official duties, they lose all constitutional rights in their speech.[36] The Court has achieved this reintroduction of the right-privilege distinction into the law by contending in its more recent public employee free speech decision *Garcetti v. Ceballos* that the government employer is not conditioning public employment on the public employees' forfeiting their rights to speech but instead is merely requiring its speech—in the mouth of its employee—be used to promote the particular policies for which the employee was hired.[37]

This Article therefore suggests that the First Amendment public employee speech rights, which have traditionally enjoyed protection under the doctrine of unconstitutional conditions, have suddenly diminished in recent years through the largely successful jurisprudential sparring between the subsidy school and the penalty school. In order to more concretely illustrate the genesis of the unconstitutional conditions doctrine and its recent distortions by these neoformalistic trends, this Article first conducts an in-depth exploration of the penalty case of *Pickering v. Board of Education*.[38] Although the Court decided this case in Marvin Pickering's favor, the resulting framework has, over the years, been interpreted by the Supreme Court in a manner that significantly limits public employee free speech rights. To understand its erosion in the government-as-employer context, however, it is first necessary to understand the growing preeminence of the subsidy school of thought in unconstitutional conditions cases in which the government acts in its sovereign capacity. It is those principles from the sovereignty context that have now infiltrated the government employment context and explain the resulting neoformalism that has taken hold there and cut away vast amounts of constitutional protections for public employees. In both sovereignty and employment contexts, the unconstitutional conditions doctrine, once developed to shut the door on the infamous right-privilege distinction, has now been resurrected to rob individuals of First Amendment and other constitutional rights.

35. *See Connick*, 461 U.S. at 142.
36. *See Garcetti*, 547 U.S. at 421.
37. *Id.* at 421–23.
38. *Pickering*, 391 U.S. 563.

III. *PICKERING V. BOARD OF EDUCATION*[39]

Marvin Pickering is now an energetic and spirited septuagenarian. In 1964, he was a recently minted high school science teacher with a strong desire to teach students and an idealistic view on the importance of citizen engagement in representative government. He never expected that his name would one day become synonymous with the U.S. Supreme Court's most important modern case on public employee speech rights.

A. The Background Events Leading to Pickering

As a young man, Pickering made his way to Illinois and did his student teaching at Downers Grove South High School in the suburbs of Chicago. That experience was followed by the completion of his first year of teaching science at Lyons Township South High School, also in the Chicago suburbs.

In 1959, Lockport Township Central High School hired Pickering to teach science.[40] He was twenty-three years old. In the next five years, he became active in community and school politics. During that time, he often attended the Board of Education of Township High School District 205 (Board) meetings and became familiar with the problems the Board was having in addressing various school-related issues, including how to deal with a rapidly growing student population and the need to raise taxes to build new facilities. By 1964, the Board and other teachers knew that Pickering was one who freely spoke his mind on a variety of topics, especially when he thought some school policy was unfair. The dispute between Pickering and the Board over how the latter was spending funds on athletics rather than on school materials and teacher salaries seemed to be just another instance of Pickering's speaking his mind on something about which he passionately cared.

That dispute, however, turned out to change the constitutional landscape for millions of public employees in the United States. On October 8, 1964, the Board of Education of Township High School District 205 in Will County, Illinois, fired teacher Marvin Pickering for writing a blistering editorial about the Board and Superintendent published in the

39. Unless otherwise indicated, the underlying story in this Part is drawn from the following sources: *Pickering*, 391 U.S. 563; Pickering v. Bd. of Educ., 225 N.E.2d 1 (Ill. 1967), *rev'd*, 391 U.S. 563; Transcript of Oral Argument, *Pickering*, 391 U.S. 563 (No. 510); Marvin L. Pickering, Marvin L. Pickering—The Man (unpublished autobiography) (on file with author); and E-mail from Marvin Pickering to Paul Secunda, Assoc. Professor of Law, Marquette Univ. Law Sch. (Mar. 5, 2010, 7:50 CST) (on file with author).

40. Township High School District 205 is located in the town of Lockport, Illinois, near the city of Joliet, about an hour southwest of Chicago.

local *Lockport Herald*.[41] The letter addressed a series of four tax referenda initiated and supported by the Board of Education, which sought to allocate tax money for a variety of school-related purposes.[42] Pickering believed that the Board and Superintendent had bungled the matter and that tax money was better spent on teachers' salary, funding for school lunches for nonathletes, and educational needs generally.

He wrote, in pertinent part, in this letter to the editor of September 24, 1964:

> Dear Editor:
>
> I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. . . .
>
> . . . .
>
> Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their 'stop at nothing' attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, 'Any teacher that opposes the referendum should be prepared for the consequences.' I think

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41. Pickering's editorial was published on September 24, 1964, just two weeks prior to his firing. Letter from Marvin Pickering to Editor, Lockport Herald (Sept. 24, 1964) (on file with the Lockport Public Library). As discussed below, the Illinois Supreme Court reproduced the letter in whole in its majority opinion in *Pickering*. At the time, the Lockport Herald had 2900 subscribers. *See* Transcript of Oral Argument, *supra* note 39.

42. There were four such referenda involving similar issues over a three-year period. In early 1961,

> the voters of the school district turned down a proposal for the issuance of $4,875,000 in school building bonds to erect two new schools to accommodate freshmen and sophomores only to feed existing Lockport Central High School, which was then to accommodate juniors and seniors only. Upon defeat, this program was discarded.

Pickering, 225 N.E.2d at 2. Subsequently, later in 1961,

> the voters approved the issuance of such bonds in the amount of $5,500,000 to erect two new schools, one (Lockport East) to accommodate freshmen and sophomores only, which was to operate as a feeder school to Lockport Central, and the other (Lockport West) to be a full four year high school. Existing Lockport Central was then to accommodate juniors and seniors only on the East side of the district.

Id. "In 1964, proposals to increase the educational and transportation tax rates were twice defeated, on May 23 and on September 19." *Id.* at 8 (Schaefer, J., dissenting).

> this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.
>
> . . . .
>
> As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.
>
> I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school? Respectfully, Marvin L. Pickering.[43]

So, in summary, the superintendent of the Lockport schools, Dr. William Blatnick, had first sent a letter to the editor of the local newspaper in support of one of the tax referenda. Pickering responded with the letter above, with many accusations of misfeasance and suggesting the Board was placing athletics above teachers' salaries and education generally. Not surprisingly, the Lockport School Board viewed Pickering's public statements as insubordination. The Board decided to dismiss Pickering on October 8, 1964, but did hold a hearing on the dismissal, as required under the Illinois state tenure law.

The same seven-member, elected Lockport School Board that had already decided to dismiss Pickering held a hearing over two days in the Lockport East High School library in November 1964. Of course, Pickering was not surprised when the Board unanimously decided, on December 7, 1964, to terminate him because the Board acted as judge, jury, and prosecutor during the hearing. The Board concluded that numerous statements in the letter were false and it was in the "best interests of his school" to dismiss him from employment.[44] Pickering's last day of employment was the beginning of Christmas vacation, 1964. During his time away from Lockport Central High School, which period would end up lasting nearly five years, Pickering initially worked for the Campbell Soup Company as a food processing supervisor and then later in the Uniroyal-Joliet Arsenal in the Production Training Department.

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43. *Id.* at 2–4 (majority opinion). Much of the Illinois Supreme Court majority decision is spent trying to establish that Pickering's allegations were false or misleading and therefore the Board's termination of his employment had been justified because he had not acted in the "best interests" of the school when he wrote this letter. *Id.* at 4–7 ("A teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him.").

44. *Id.* at 6–7.

After being terminated from his $6900-per-year school teaching job,[45] Pickering did not take the School Board's actions against him lying down. He first petitioned the Board and delivered 1260 signatures in support of his continued employment.[46] Next, he contacted the American Federation of Teachers (AFT) at its Chicago national headquarters.[47] The AFT pledged a fight to the finish for his cause.[48] The AFT appointed well-known civil rights litigator John Ligtenberg, of Chicago's Ligtenberg, Goebel & DeJong, to defend him.[49]

Pickering, then twenty-eight years old, challenged the Board's termination decision in the Will County Circuit Court in January 1965, arguing that his free speech rights had been violated by the Board's actions.[50] At the time, Pickering stated, "A man doesn't give up his right to freedom of speech when he becomes a school teacher."[51] Superintendent Blatnick responded: "We don't question his right to write letters. We just say that they should be true statements."[52]

In March 1966, while Pickering was still working at Campbell Soup, Will County Circuit Court Judge Michael A. Orenic held in favor of the

45. Norman Glubok, *Teacher Who Lost Job for Speaking Out Will Sue Board*, WASH. POST, Dec. 21, 1964, at C15.

46. Pickering, *supra* note 39.

47. "[The AFT's] activity in aiding individual teachers in academic freedom disputes has been ad hoc in nature, limited to supplying legal and financial aid for teachers seeking relief in the courts." *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1121 (1968) (citing Letter from John Ligtenberg, Gen. Counsel, Am. Fed'n of Teachers, to the Harvard Law Review (Dec. 22, 1967) (on file with the Harvard Law Review)).

48. *Union To Help Fired Teacher in Court Fight*, CHI. TRIB., Jan. 15, 1965, at D9.

49. John Ligtenberg was also the general counsel of the AFT at the time. *Id.* Ligtenberg already had a national reputation, having submitted an amicus brief for the AFT in *Brown v. Board of Education*, 347 U.S. 483 (1954). He would later go on to argue the important due process employment law case of *Perry v. Sindermann*, 408 U.S. 593 (1972), which extended due process protections to termination of government employees, and to submit amicus briefs in *Cleveland Board of Education v. Lafleur*, 414 U.S. 632 (1974), on brief with now-Justice Ruth Bader Ginsburg, which struck down a restrictive maternity leave requirement that effectively served to punish women for exercising their right to bear children, and *Board of Regents v. Roth*, 408 U.S. 564 (1972), which found a university teacher plaintiff did not have a property interest in continued employment.

50. *Fired Teacher Files Suit To Be Reinstated*, CHI. TRIB., Jan. 7, 1965, at W3.

51. Glubok, *supra* note 45.

52. *Id.*

Board.[53] Judge Orenic concluded that "[t]he greater public interest of the schools overrides the issue of freedom of speech rights of a teacher."[54]

Pickering then bypassed the Illinois Appellate Court and filed for review of the Circuit Court's decision with the Illinois Supreme Court. He based his challenge on free speech and denial of due process claims under the First and Fourteenth Amendments of the U.S. Constitution. After oral argument of the case in November 1966, on January 19, 1967, the Illinois Supreme Court decided in a 3–2 decision[55] in favor of the Lockport School Board. Justice Ray I. Klingbiel, for the majority, held that the school need not "continue to employ one who publishes misleading statements which are reasonably believed to be detrimental to the schools."[56] Yet, in a stinging dissent, Justice Walter V. Schaefer found that "the State and Federal constitutions require a more precise standard than 'the interests of the schools.'"[57] Justice Schaefer also took the majority to task for deferring to the factfinding of the very Board that fired Pickering and for not pointing to any evidence that Pickering knew that any of the statements he made in his letter to the editor were false.[58] He concluded by stating that "[t]o be entitled to the protection of the first amendment it is not necessary that the plaintiff's letter be a model of literary style, good taste and sound judgment. In my view it is not, but my view is irrelevant."[59] After his defeat at the Illinois high court, Pickering filed a petition for certiorari with the United States Supreme Court. The Court granted certiorari, noting probable jurisdiction, on November 6, 1967.

B. Pickering at the U.S. Supreme Court

Oral argument in the case took place on March 27, 1968. The oral argument lasted for some forty-nine minutes.[60] John Ligtenberg, for Pickering, framed the argument as a pure First Amendment question of whether a public school teacher had the constitutional right to criticize the School Board and its policies in the local press. In this regard, he

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53. *Court Upholds Board's Firing of Teacher*, CHI. TRIB., Mar. 4, 1966, at B11.
54. *Id.* (internal quotation marks omitted).
55. The Illinois Supreme Court normally has seven justices, but there were two vacancies at the time of the *Pickering* case. Of the five justices who heard the case, the three justices in the majority were Republicans, and the two dissenting justices were Democrats. Pickering, *supra* note 39.
56. Pickering v. Bd. of Educ., 225 N.E.2d 1, 6 (Ill. 1967), *rev'd*, 391 U.S. 563 (1968).
57. *Id.* at 7 (Schaefer, J., dissenting).
58. *Id.* at 7–8.
59. *Id.* at 10.
60. Transcript of Oral Argument, *supra* note 39.

maintained that public employees had constitutional rights just like ordinary citizens and should not have to forfeit them just because they became government employees. Ligtenberg cited the recently decided *Keyishian v. Board of Regents* loyalty oath case for this proposition.[61] He also pointed out that even if some of Pickering's written statements were false, they nevertheless served the important function of helping the public arrive at the truth of the matter.

John F. Cirricione argued the case for the Lockport School Board. His argument, like the Illinois Supreme Court's opinion, focused on the alleged harm Pickering's statements caused to the Superintendent, Board, and fellow teachers who supported the tax increase referenda. In essence, Cirricione maintained the essential falsity of Pickering's statements in the letter, though he did not allege the statements were knowingly false. He also contended that because Pickering was negligent in his allegations, the school district had the ability to terminate him so that the efficiency of its services to the public would not be undermined. This argument gave little weight to Pickering and his First Amendment speech rights and concentrated instead on the control that an employer should have over an employee in such circumstances.[62]

In an 8–1 decision[63] written by Justice Thurgood Marshall, the Court held that Pickering had a First Amendment right to free speech that could not be forfeited to serve the "best interests" of the school district.[64] Although Justice Marshall recognized that the government's relationship

61. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

62. A number of the U.S. Supreme Court Justices seemed highly skeptical during oral argument that the medium of communication (oral versus written) or the audience for the communication (teachers versus the general public) should make any difference whatsoever. *See* Transcript of Oral Argument, *supra* note 39. Of course, Justice Marshall's opinion for the majority in *Pickering* specifically found that such differences in mode and manner of public employee speech did not warrant different legal standards. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

63. Justice White wrote an opinion that concurred in part and dissented in part. *Pickering*, 391 U.S. at 582–84 (White, J., concurring in part and dissenting in part). Although Justice White agreed with the majority holding that Pickering had the right to author the letter, he wrote a partial dissent to say he disagreed that knowingly false comments that cause no harm should also be protected by the First Amendment. *Id.*

64. *See id.* at 565, 567 (majority opinion); *see also Justices Extend Teachers' Free Speech Rights*, N.Y. TIMES, June 4, 1968, at 24 ("Public school teachers may not be discharged for good-faith criticism of school officials, even if some of the charges are false, the Supreme Court ruled today.").

to individuals was necessarily different in the employment context,[65] he nevertheless firmly stated that public employees have constitutional rights, including rights to free speech.[66]

If public employees retain their First Amendment rights, the question is then, How should the Court balance each of the parties' competing interests? Justice Marshall described the appropriate balance this way:

> The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[67]

To be clear, the governmental interests recognized in *Pickering* are not in any sense constitutional rights but rather are interests that government employers have in maintaining "a significant degree of control over their employees' words and actions" because "without it, there would be little chance for the efficient provision of public services."[68] The balance undertaken in *Pickering* is required because even though the government employer performs "important public functions"[69] and consequently possesses far broader powers in its employer capacity than in its sovereign capacity,[70] "a citizen who works for the government is nonetheless a citizen."[71] Consequently, the First Amendment does limit the ability of the public employer to condition employment of that employee on the forfeiture of his or her constitutional rights under this doctrine of unconstitutional conditions.[72]

Important considerations in carrying out the *Pickering* balance include whether the public employee's speech impairs discipline by superiors, harmony among coworkers, close working relationships for which personal loyalty and confidence are necessary, or the performance of the

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65. *Pickering*, 391 U.S. at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

66. *Id.* at 565.

67. *Id.* at 568.

68. Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006) (comparing to *Connick v. Myers*, 461 U.S. 138, 143 (1983), which found that "government offices could not function if every employment decision became a constitutional matter").

69. *Pickering*, 391 U.S. at 568.

70. *Garcetti*, 547 U.S. at 418 (citing Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion)); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1110 (3d ed. 2006) ("[S]peech by public employees is clearly less protected than other speech.").

71. *Garcetti*, 547 U.S. at 419.

72. *See id.* ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972))).

employee's duties or the regular operation of the enterprise.[73] In *Pickering* itself, the balancing came out in favor of Pickering because (1) the statements in the letter related to matters of public concern—whether the school system required additional funds for transportation and other educational needs, (2) no evidence existed that the statement interfered with Pickering's job duties or with the operation of the school in general, and (3) he was speaking in his capacity as a private citizen.[74] In such instances, Justice Marshall concluded that "it is necessary to regard [Pickering] as the member of the general public he seeks to be."[75]

Perhaps equally important, the Court majority in *Pickering* also noted how critical it was to allow public employees, like Pickering, to speak out on matters of public concern because such employees are at many times in the best position to have "informed and definite opinions."[76] In other words, public employees help to ensure the transparency and accountability of representative, democratic governments. Public employees will speak out on matters of government abuse, waste, or fraud, but only if they are assured that they do not risk those very jobs every time they speak. Unfortunately, more recent case developments since *Pickering* suggest that the Supreme Court has not focused enough on this important aspect of the *Pickering* decision. The initial unraveling of this strong statement of the unconstitutional conditions doctrine in the government-as-employment context finds its root in parallel developments in the government-as-sovereign context.

IV. UNCONSTITUTIONAL CONDITIONS WHEN GOVERNMENT ACTS AS SOVEREIGN

Public employee free speech rights reached their zenith as a result of the *Pickering* holding. Yet, the seeds of their destruction were already being planted in the parallel context of the unconstitutional conditions

73. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 569–73 (1968).

74. *See id.* at 571–73. Here, it can hardly be doubted that expressly signing the letter "*as a citizen*, taxpayer, and voter, not as a teacher," *see* Pickering v. Bd. of Educ., 225 N.E.2d 1, 4 (Ill. 1967) (emphasis added), immeasurably helped Pickering under the standard developed by the Court.

75. *Pickering*, 391 U.S. at 574.

76. *Id.* at 572 ("Teachers are . . . members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

doctrine when the government acts as a sovereign towards its citizen. Importantly, in those cases, the penalty-subsidy debate among the Justices shaped the modern contours of the unconstitutional conditions doctrine. As will be illustrated, the holdings in the government-as-sovereign cases have now slowly infiltrated into the government-as-employer context, primarily through the doctrinal innovation of the government speech doctrine. After reviewing the government-as-sovereign precedent, the Article will therefore discuss how the penalty-subsidy jurisprudential divide has come to shape the Court's modern treatment of public employee speech law.

A. The Historical Foundations of the Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions existed in various forms before Marvin Pickering's fateful showdown with the Lockport School Board. Not only had the doctrine been applied the year before in a seminal loyalty oath case involving a public university professor, *Keyishian v. Board of Regents*,[77] but it has since been applied to a wide variety of constitutional cases. These cases involved tax exemptions,[78] users of public facilities,[79] and recipients of government subsidies.[80] In these cases, the Court initially pushed back against government attempts to condition receipt of government largesse based on forfeiture of citizens' constitutional rights.[81]

So where does the doctrine of unconstitutional conditions find its judicial roots? Although not rooted in any single clause of the Constitution, the doctrine of unconstitutional conditions is a creature of judicial implication.[82] In its simplest terms, the doctrine prohibits the government

77. Keyishian v. Bd. of Regents, 385 U.S. 589, 609 (1967) (striking down state law prohibiting employment of public school teachers who advocate overthrowing U.S. government as a violation of employees' rights to free association).

78. *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958).

79. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395–96 (1993) (holding unconstitutional a law that allowed the school district to deny the church use of its property to show religious films); Healy v. James, 408 U.S. 169, 187–88 (1972) (holding that a state college campus may not, consistent with the First Amendment, deny recognition to a student organization based on political affiliation).

80. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984).

81. *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988) (noting that the unconstitutional conditions doctrine "has bedeviled courts and commentators alike").

82. *Id.* at 10–11.

from conditioning a benefit based on forfeiture of an individual's constitutional right.[83]

The doctrine of unconstitutional conditions first enjoyed widespread use in the early part of the twentieth century when the *Lochner* Court[84] initially developed economic substantive due process.[85] Under this form of substantive due process, the *Lochner* Court emphasized property rights and the freedom to contract.[86] But with the ascendancy of Roosevelt's New Deal Court in the late 1930s and the overruling of much of the *Lochner* Court's substantive due process jurisprudence in the ensuing period,[87] the doctrine of unconstitutional conditions went through a substantial period of disuse.

Subsequently, the Warren Court renewed the unconstitutional conditions doctrine in a number of cases involving civil liberties. Many of these cases involved the government in its role as sovereign, seeking to induce certain preferred outcomes through use of government subsidies and tax exemptions. In these cases, the government sought to

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83. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415, 1421–22 (1989) ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

84. *See* Lochner v. New York, 198 U.S. 45, 56–57 (1905) (utilizing a substantive due process analysis to strike down maximum hour law for bakers because of its "arbitrary interference with the right of the individual to his personal liberty"). The *Lochner* Court constitutionalized property rights and the liberty to contract under a theory of economic substantive due process as a means to strike down much social welfare legislation during the first part of the twentieth century. *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 919–20 (1999); *see also* Gregory M. Stein, *Nuance and Complexity in Regulatory Takings Law*, 15 WM. & MARY BILL RTS. J. 389, 395 (2006) (noting that the *Lochner* Court protected property rights at the expense of popular government).

85. Economic substantive due process commonly refers to the constitutionalization of an economic libertarian judicial philosophy through use of the substantive component of the Due Process Clause of the Fifth and Fourteenth Amendments. *See* Phillips, *supra* note 84, at 918 n.5, 919–20.

86. *See id.* at 919–920. The doctrine of unconstitutional conditions can technically be found first in *Doyle v. Continental Insurance Co.*, 94 U.S. 535 (1876): "Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so." *Id.* at 543 (Bradley, J., dissenting).

87. Indeed, *Lochner* itself came into disfavor during this time. *See* Whalen v. Roe, 429 U.S. 589, 597 (1977) ("The holding in *Lochner* has been implicitly rejected many times." (citing Roe v. Wade, 410 U.S. 113, 117 (1973); Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965); Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963); FHA v. Darlington, Inc., 358 U.S. 84, 91–92 (1959))).

utilize its Spending Clause power[88] to award government largesse to individuals in return for these individuals' agreeing to conditions that burdened their exercise of constitutional rights.[89] In such cases, the question became, "[W]hen government conditions a benefit on the recipient's waiver of a preferred liberty, should courts review the conditioned benefit deferentially, as a benefit, or strictly, as a burden on a preferred liberty?"[90]

B. The Penalty-Subsidy Debate

In answering this foundational question, a considerable amount of dissonance has historically existed between two groups of Justices, and indeed two different schools of jurisprudential thought have sprung up concerning how to apply the unconstitutional conditions doctrine. So-called liberal or progressive Justices construe the unconstitutional conditions doctrine more expansively and generally find that conditions placed on government benefits represent a penalty on the exercise of individual rights protected by the Constitution. As such, these conditions are subject to strict scrutiny and are usually found unconstitutional.[91] In contrast, the subsidy group of conservative Justices narrowly construes the doctrine and finds most government conditions to be mere "subsidies." As such, these conditions are subjected to rational basis review and are generally upheld as constitutional; although individuals have the right to exercise their constitutional rights, they do not have a right to have those rights subsidized.[92]

1. Penalty Cases

The contours of the penalty-subsidy debate can first be seen in the 1958 case of *Speiser v. Randall*.[93] In that case, the Supreme Court held that the State of California could not condition veteran tax exemptions

88. The Spending Clause of the United States Constitution states, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

89. Congress is allowed to provide incentives under its Spending Clause powers, but it may not coerce federal funding recipients through this power. *See* South Dakota v. Dole, 483 U.S. 203, 210 (1987) ("[T]he [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional.").

90. *See* Sullivan, *supra* note 83, at 1415.

91. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547–49 (2001); FCC v. League of Women Voters, 468 U.S. 364, 380, 402 (1984).

92. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 192–93 (1991); Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983); Maher v. Roe, 432 U.S. 464, 474 (1977).

93. Speiser v. Randall, 357 U.S. 513 (1958).

on individuals' declaring that they did not advocate the violent overthrow of the government.[94] In this regard, Justice Brennan stated for the majority that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[95] In the first hint of the debate to come, Justice Clark, writing in dissent, found that the tax exemption program for veterans was in no sense a penalty and instead California was merely "declining to extend the grace of the State to appellants."[96]

In another penalty case over twenty-five years later, the Court struck down a government subsidy program in *FCC v. League of Women Voters of California*.[97] There, plaintiffs challenged section 399 of the Corporation for Public Broadcasting Act,[98] which conditioned public broadcasting subsidies based on noncommercial educational broadcasters' agreeing not to editorialize.[99] Justice Brennan found that section 399 violated the First Amendment rights of broadcasters because the law's ban on editorializing far exceeded what was necessary to protect against the risk of governmental interference with the political process.[100] In other words, Justice Brennan applied a strict level of scrutiny to this law because it burdened the First Amendment rights of broadcasters.[101] Although the government may have had a vital interest in regulating

94. *Id.* at 518. In *Speiser*, California sought to have all veterans seeking a certain tax exemption sign a declaration that they did not advocate the overthrow of the United States by force or violence or other unlawful means. *Id.* at 515.

95. *Id.* at 518.

96. *Id.* at 541 (Clark, J., dissenting). This idea of declining to extend legislative "grace" has been recently repeated by Chief Justice Roberts in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 607 (2008): "[A] government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate."

97. FCC v. League of Women Voters, 468 U.S. 364 (1984).

98. *Id.* at 366; *see* 47 U.S.C. § 399 (2006).

99. *League of Women Voters*, 468 U.S. at 366.

100. *Id.* at 395. Then-Justice Rehnquist, for his part, dissented in *League of Women Voters* based on his belief that the same analysis utilized in *Regan v. Taxation with Representation*, *see* discussion *infra* Part IV.B.2, should have applied. *League of Women Voters*, 468 U.S. at 405 (Rehnquist, J., dissenting). Specifically, he argued that both cases involved government allocation of public moneys as it desired and that such allocations should not be disturbed if the government is able to show that the subsidy is rationally related to its governmental purpose. *Id.* at 407.

101. *League of Women Voters*, 468 U.S. at 395 (majority opinion) (arguing that the government regulation was overbroad and not crafted with sufficient precision to remedy the dangers that the government sought to address).

public broadcasters, Justice Brennan was unconvinced that the means by which the government attempted to accomplish its aims were narrowly tailored.[102]

More recently, in *Legal Services Corp. v. Velazquez*, Justice Kennedy found that the federal law in question unreasonably interfered with the First Amendment rights of lawyers participating under the Legal Service Corporation (LSC) program.[103] Under that program, LSC attorneys could be prohibited from being involved in litigation challenging the validity of existing welfare laws for constitutional or statutory reasons when representing an indigent plaintiff in a welfare dispute.[104] Specifically, Justice Kennedy found that government "may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary."[105] The government subsidy, in short, had crossed the line from a mere subsidy to an unconstitutional condition that coerced individuals in the exercise of their First Amendment rights.[106]

2. Subsidy Cases

Although subsidy arguments can be viewed in cases as early as *Speiser*,[107] the rise of the subsidy argument appears to mostly coincide with the rise of the Rehnquist and Roberts Courts and their conservative judicial philosophy. For example, in *Regan v. Taxation with Representation*

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102. *Id.*
103. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001).
104. *See id.* at 537–38.
105. *Id.* at 544.
106. *See id.* The dissenting opinion, written by Justice Scalia, found that the program was merely a subsidy and did not interfere with the indigent plaintiff's right to bring a welfare claim. *See id.* at 558–59 (Scalia, J., dissenting). In this regard, Justice Scalia stated that "[t]he [LSC] provision simply declines to subsidize a certain class of litigation, and . . . that decision 'does not infringe the right' to bring such litigation." *Id.* at 553–54 (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)). Although Justice Kennedy, for the majority, was concerned with the practical effect of having an LSC attorney withdraw in the middle of the case, Justice Scalia cursorily responded, "No litigant who, in the absence of LSC funding, would bring a suit challenging existing welfare law is deterred from doing so by [the LSC provision in controversy]." *Id.* at 554. And even if they were, Justice Scalia reasoned, "So what? The same result would ensue from excluding LSC-funded lawyers from welfare litigation entirely." *Id.* at 556. It appears that Justice Scalia is arguing here that the greater right to completely not fund welfare litigation necessarily includes the lesser right to prohibit certain types of welfare litigation. Such reasoning, however, has been persuasively rejected in modern unconstitutional conditions jurisprudence on a number of grounds. *See* Berman, *supra* note 17, at 18–19 (describing the various rejoinders to the greater-includes-the-lesser argument).
107. *See supra* notes 93–96 and accompanying text.

of Washington,[108] the Court upheld a federal tax law provision that conditioned tax exempt status under § 501(c)(3) of the Internal Revenue Code[109] on recipients' not participating in lobbying or partisan political activities.[110] Then-Justice Rehnquist, writing for the majority, made a distinction between whether an organization is permitted to lobby as a result of a law, as opposed to whether Congress is required to provide the organization with public money with which to lobby.[111] Whereas the former involves the doctrine of unconstitutional conditions, Rehnquist maintained, the latter falls into a broad category of cases that stand for the proposition that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[112] As Rehnquist later explained in his dissent in *League of Women Voters*, "[W]hen the Government is simply exercising its power to allocate its own public funds, [the Court] need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily 'aimed at the suppression of dangerous ideas.'"[113] Finding such a rational relationship and the lack of an intention to suppress dangerous ideas, the majority in *Regan* upheld the IRC provision in dispute.[114]

Subsidy cases after *Regan* have failed to shed much light on how this important distinction between a penalty and a subsidy can be made in an objective, consistent manner. For instance, in the abortion-funding case of *Rust v. Sullivan*,[115] recipients of Title X family planning funds[116] were

108. Regan v. Taxation with Representation, 461 U.S. 540 (1983).
109. 26 U.S.C. § 501(c)(3) (Supp. V 1982).
110. *See Regan*, 461 U.S. at 551.
111. *Id.*
112. *Id.* at 549; *see also* Cammarano v. United States, 358 U.S. 498, 515 (1959) (upholding a Treasury regulation that denied business expense deductions for lobbying activities and rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State"). For a recent example of this subsidy principle, see generally *Locke v. Davey*, 540 U.S. 712 (2004), in which the Court refuses to force a state to subsidize an individual's right of free exercise of religion in the higher education context.
113. FCC v. League of Women Voters, 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting) (quoting *Cammarano*, 358 U.S. at 513).
114. *Regan*, 461 U.S. at 550–51.
115. Rust v. Sullivan, 500 U.S. 173 (1991). *Rust* was, at the time, the latest in a long line of abortion-funding cases that had been similarly characterized as subsidy cases by the Court. These cases permitted various restrictions on a woman's ability to choose to terminate her pregnancy. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 509 (1989) (finding constitutional a statutory ban on use of public employees and facilities for performance or assistance of nontherapeutic abortions); Harris v. McRae, 448 U.S.

prohibited by new Health and Human Services regulations from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning.[117] Chief Justice Rehnquist, analogizing *Rust* to *Regan*,[118] asserted that what was at stake was only the subsidization of fundamental rights—free speech rights and substantive due process rights—and not the denial of these same fundamental rights.[119] In this regard, he maintained that "Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all."[120] Consequently, he applied rational review and found that the government's subsidization practices in this area were rationally related to a legitimate governmental interest and not related to the suppression of a dangerous idea, namely, the promotion of the welfare of the mother and the unborn child.[121]

In a later unconstitutional conditions case, the subsidy group of Justices could only muster a plurality. In *United States v. American*

297, 315–17 (1980) (upholding governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth); Maher v. Roe, 432 U.S. 464, 478–80 (1977) (same).

116. *See* 42 U.S.C. §§ 300–300a-6 (2006). Section 1008 of the Public Health Services Act prohibits funding recipients from using those funds if abortion is a potential family planning alternative. *See id.* § 300a-6.

117. *See Rust*, 500 U.S. at 178, 180.

118. *See id.* at 194, 197–98.

119. *Id.* at 193 ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."); *see also id.* at 192–93 ("[G]overnment may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" (quoting *Maher*, 432 U.S. at 474)); *id.* at 196 ("[Title X regulations] simply insist[ed] that public funds be spent for the purposes for which they were authorized.").

120. *Id.* at 202.

121. *See id.* at 193. Justice Blackmun, on the other hand, wrote in his dissent that the law in question based the granting of governmental largesse on the condition that doctors and other family planning funding recipients give up their rights to free speech under the First Amendment. *See id.* at 207 (Blackmun, J., dissenting) ("Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech."). Moreover, he argued that "ensuring that federal funds are not spent for a purpose outside the scope of the program . . . falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct." *Id.* at 214. He also noted that the regulation detrimentally impacted the Fifth Amendment rights of pregnant women to choose whether or not to have a child. *See id*. at 216 ("By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.").

Library Ass'n,[122] the dispute involved whether the Children Internet Protection Act (CIPA)[123] provision that provided a federal subsidy for public libraries to install filtering software on their web-accessible computers was an unconstitutional condition.[124] Here, the plurality found the provision to be a mere subsidy, finding that "the use of filtering software helps to carry out these programs, [and therefore] it is permissible under *Rust*."[125] Both dissents found the CIPA provision in question to impose an unconstitutional condition, with Justice Stevens writing that the provision "impermissibly conditions the receipt of Government funding on the restriction of significant First Amendment rights."[126]

More recently, the Court decided the First Amendment case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*).[127] *FAIR* concerned the enactment of the Solomon Amendment by Congress, which prevents colleges and universities from receiving certain federal funding[128] if they prohibit military recruiters "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope

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122. United States v. Am. Library Ass'n, 539 U.S. 194 (2003). Chief Justice Rehnquist wrote the plurality decision in this subsidy case and was joined by subsidy Justices O'Connor, Scalia, and Thomas. *Id.*

123. Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000). Concerning CIPA, Professor Desai has observed:

> Rather than imposing a broad prohibition on the material that Congress considered inappropriate, CIPA requires public libraries and public schools, as a condition of receiving certain federal benefits, to use 'technological protection measures' (for example, filtering software) to prevent library patrons and public school students from accessing objectionable sexually explicit material over the Internet.

Anuj C. Desai, *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 1, 3 (2004).

124. *Am. Library Ass'n*, 539 U.S. at 210–13.

125. *Id.* at 212.

126. *Id.* at 225 (Stevens, J., dissenting); *see also id.* at 231 (Souter, J., dissenting) ("[T]he blocking requirements of [CIPA] . . . impose an unconstitutional condition on the Government's subsidies to local libraries for providing access to the Internet."). The dissenters believed that the filtering software would inevitably block protected First Amendment speech either through underblocking or overblocking of web sites. *Id.* at 221–22 (Stevens, J., dissenting); *see id.* at 233–34 (Souter, J., dissenting).

127. Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (*FAIR*), 547 U.S. 47 (2006).

128. *Id.* at 51. Although student financial assistance is not covered by the law, federal funding from the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education, among other agencies, may be lost at the university-wide level if schools do not comply with the Solomon Amendment. *See* 10 U.S.C. § 983(d) (2006).

to the access to campuses and to students that is provided to any other employer."[129] A number of law schools believed that the Solomon Amendment required them to choose between abandoning their policies against sexual orientation discrimination or losing a substantial amount of federal funding.[130] This, they argued, infringed on their First Amendment rights of speech and association.[131]

Although the Third Circuit Court of Appeals struck down the Solomon Amendment, holding, inter alia, that it significantly interfered with the First Amendment expressive association rights of the law schools in question and therefore imposed an unconstitutional condition,[132] the Supreme Court reversed.[133] The Court avoided the unconstitutional condition question altogether by deciding that the expressive rights of the law schools were minimally burdened by the presence of military recruiters on campus.[134] The Court concluded that a funding condition is not unconstitutional if it can be constitutionally imposed directly[135] and determined that imposing the access requirement would not violate the law schools' First Amendment rights to free speech or association.[136] It may be that because the current group of Justices is no longer able to agree on a basis on which to label unconstitutional conditions cases as subsidy or penalty cases, they are simply choosing to avoid the issue altogether whenever possible.

C. The Penalty-Subsidy Schools at Loggerheads

All in all, when the government acts in its sovereign capacity, applying the doctrine of unconstitutional conditions remains fraught with uncertainties; and it appears that there is no end in sight to the current doctrinal stalemate. Even though the two sides in this jurisprudential struggle agree that government may unequally subsidize the exercise of a constitutional right and may not condition a benefit on the denial of a constitutional right,[137] that appears to be where the agreement ends. In

129. 10 U.S.C. § 983(b) (2006).
130. *FAIR*, 547 U.S. at 53.
131. *Id.*
132. *See* Forum for Academic and Institutional Rights, Inc., v. Rumsfeld, 390 F.3d 219, 243 (3d Cir. 2004), *rev'd*, 547 U.S. 47.
133. *FAIR*, 547 U.S. at 70.
134. *Id.* at 69–70.
135. *Id.* at 59–60 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).
136. *Id.* at 70.
137. *See* Chamber of Commerce v. Brown, 554 U.S. 60, 79 (2008) (Breyer, J., dissenting) ("[T]he law normally gives legislatures broad authority to decide how to spend the People's money. A legislature, after all, generally has the right *not* to fund activities that it would prefer not to fund—even where the activities are otherwise protected." (citing Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983)));

deciding what a penalty case is and what a subsidy case is, the disagreement seems to revolve around whether government subsidization of certain "alternative activity deemed in the public interest"[138] is tantamount to "coercive interference" by the government with an individual's constitutional rights.[139] Or perhaps put more simply, there is a certain line beyond which government subsidy of an alternative activity becomes nothing less than the government's acting in an intimidating manner to interfere with the constitutional rights of its citizens.

The abortion-funding cases are typical of how the line drawing works in these cases.[140] For example, the majority—subsidy Justices—labeled the state and federal laws mere subsidization because they did not believe the subsidization of an alternative activity—in those cases, the promotion of child birth over abortion—significantly impinged on the right of pregnant women to choose to abort their pregnancies.[141] This stance appears to derive from the belief that differential subsidization is permissible as long as a *formal* opportunity to exercise constitutional rights exists outside the program in another forum.[142] Such a neoformalistic approach thus first became apparent dealing with unconstitutional conditions in government-as-sovereign cases.

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see also Lyng v. Auto. Workers, 485 U.S. 360, 368 (1988) (holding that the federal government's refusal to provide food stamp benefits to striking workers was justified because "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right").

138. *See* Harris v. McRae, 448 U.S. 297, 315 (1980).

139. *See id.* at 327–28 (White, J., concurring); *see also* Sullivan, *supra* note 83, at 1433 (noting that coercion has been invoked as a justification for "strik[ing] down conditions that affect rights to freedom of speech, religion, and association, but without a consistent or satisfying theory"). *But see id.* at 1505–06 (maintaining that labeling a case as an unconstitutional conditions one based on concerns of coercion is really just a "conclusory label masquerading as analysis").

140. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); *Harris*, 448 U.S. 297; Maher v. Roe, 432 U.S. 464 (1977).

141. *See, e.g.*, *Harris*, 448 U.S. at 315–16 ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

142. *See Rust*, 500 U.S. at 198 ("By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.").

Conversely, the dissenting penalty Justices in these same cases believe just as strongly that such subsidization significantly coerces doctors in their free speech rights when counseling pregnant women and also coerces these same women in their Fifth and Fourteenth Amendment rights in deciding whether to carry a pregnancy to term.[143] As an example, Justice Blackmun in the *Rust* case found the majority's conclusion "insensitive and contrary to common human experience, [as b]oth the purpose and result of the challenged regulations are to deny women the ability voluntarily to decide their procreative destiny."[144] This point of view derives from these penalty Justices' firmly held belief that a formal analysis under these circumstances is insufficient and that social justice instead requires a more practical analysis of the impact of such cases.[145] Such an approach requires nothing less than considering how the outcome of the case will actually affect the parties.[146]

In short, it might be said without exaggeration that the quagmire in which the Court finds itself in these unconstitutional conditions cases where government acts in its sovereign capacity is as fundamental as the distinction between legal formalism and legal realism.[147] Yet, as discussed

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143. *See, e.g.*, *id.* (Blackmun, J., dissenting) ("By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.").

144. *Id.* at 217. Justice Blackmun would instead have applied a more searching form of scrutiny and, at the very least, balanced the government's interests in promoting a certain type of family planning against the First Amendment rights of doctors and the Fifth Amendment substantive due process rights of pregnant women. *See id.* at 213–14.

145. In other words, the penalty Justices would argue that it is necessary to *practically* consider the impact that the nonsubsidization will have on individuals whose constitutional rights may be impacted. This line of reasoning resonates with the current political debate between President Obama and his detractors over the need for a Supreme Court Justice to have empathy and to understand the real world implications of his or her decisions. *See, e.g.*, Janet Hook & Christi Parsons, *Obama Says Empathy Key to Court Pick*, L.A. TIMES, May 2, 2009, at A1 ("President Obama, who will choose the nominee, focused not on volatile ideological questions but on personal character, saying he wanted someone with 'empathy' for 'people's hopes and struggles.'").

146. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 144 (2002) ("For the Supreme Court, proceeding as it appears to proceed in these [federalism] cases with an agenda, the facts are of minor importance and the persons affected are worthy of almost no attention. . . . The people and their problems that have been grist for the constitutional mill are incidental."); *see also* Sullivan, *supra* note 83, at 1497–98 (arguing for a "systemic" approach to unconstitutional conditions, which, among other things, "recognizes that background inequalities of wealth and resources necessarily determine one's bargaining position in relation to government, and that the poor may have nothing to trade but their liberties"). Justice Rehnquist clearly does not agree with Sullivan's and her legal realist compatriots' approach because in deciding *Rust*—for which Sullivan was on brief for petitioners—he sided with respondents and characterized the case, yet again, as a subsidy case.

147. Although legal formalism and legal realism are capable of many different meanings, Judge Posner offers some helpful insights in this regard. He defines legal

above, the practical or realist approach adopted by the penalty Justices is more of a response to an emerging neoformalism in which the subsidy group pays insufficient attention to the real world consequences of its decisions. And as the sides continue to talk past one another, the gap in understanding how to consistently apply the doctrine of unconstitutional conditions in the government-as-sovereign context persists.[148]

But this neoformalist-pragmatist divide in unconstitutional conditions cases is not limited to the government-as-sovereign context. Since the Court's decision in *Pickering*, the same divide has animated the unconstitutional conditions analysis in the public employment context. As demonstrated in Part V, the subsidy Justices have also emerged victorious in their judicial battles with the penalty Justices in cases in which government acts in its employer capacity. But in this area, the use of the government speech doctrine has done a substantial amount of the heavy analytical lifting for the subsidy Justices.

V. UNCONSTITUTIONAL CONDITIONS WHEN GOVERNMENT ACTS AS AN EMPLOYER

In some ways, the development of the doctrine of unconstitutional conditions in employment has paralleled its development in the subsidy context. For example, just as the United States Supreme Court once held that government benefits were mere privileges that could be withheld or limited on any condition,[149] Justice Oliver Wendell Holmes once famously said that in the employment context, a person "may have a constitutional

formalism as "enabl[ing] a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced as correct or incorrect." Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986). Legal realism, in contrast, is defined as "deciding a case so that its outcome best promotes public welfare in nonlegalistic terms; it is policy analysis." *Id.* Interestingly, Judge Posner does not believe formalism or realism should be utilized when interpreting statutes or constitutional provisions, but only in developing the common law. *See id.*

148. *See generally* Barbara A. Sanchez, Note, United States v. American Library Association*: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 492–93 (2005) (discussing the continuing chasm of views on the proper application of the unconstitutional conditions doctrine in *American Library Association*).

149. *See, e.g.*, People v. Crane, 108 N.E. 427, 429–30 (N.Y. 1915), *aff'd*, 239 U.S. 195 (1915) (limiting public employment to citizens on the theory that "[w]hatever is a privilege, rather than a right, may be made dependent on citizenship").

right to talk politics, but he has no constitutional right to be a policeman."[150] But just as Supreme Court precedent has sought to establish the end of the right-privilege distinction when the government acts in the sovereign capacity,[151] the Court, at least initially, arrived at this same conclusion in the government-as-employer context as well.[152] For instance, in the landmark public employment case of *Keyishian v. Board of Regents*, the Supreme Court stated emphatically: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[153]

Thus, as in the sovereignty context, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[154] The same reasoning that applied to the government-as-sovereign cases also applies here: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"[155] and "produce a result which [it] could not command directly."[156] Yet, important distinctions do remain when the government acts as an employer as

150. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *see also* Adler v. Bd. of Educ., 342 U.S. 485, 496 (1952) (finding "no constitutional infirmity" to a law that required public employees to declare past and present Communist affiliation).

151. *See* Sugarman v. Dougall, 413 U.S. 634, 644 (1973) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971))).

152. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 605 (1967) ("[C]onstitutional doctrine which has emerged since [*Adler*] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.").

153. *See id.* at 605–06 (quoting Keyishian v. Board of Regents, 345 F.2d 236, 239 (2d Cir. 1965)) (internal quotation marks omitted); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which government may not rely."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (stating that in the unemployment compensation and free exercise of religion context, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

154. *See Sindermann*, 408 U.S. at 597.

155. *Id.*

156. *Id.* (alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)) (internal quotation marks omitted); *see also* Laird v. Tatum, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights."); Mazzone, *supra* note 3, at 806 ("The doctrine of unconstitutional conditions rejects the notion that the government's power to grant a benefit includes the lesser power to attach any conditions at all to receiving that benefit.").

opposed to when it acts in its sovereign capacity. As already discussed, Justice Marshall emphatically stated in *Pickering* that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the speech of the citizenry in general."[157]

Although Justice Marshall in *Pickering* did not cite to any precedent to support his assertion about the uniqueness of the government in its employer capacity, the Supreme Court on numerous occasions since has affirmed this view of the varying degrees of power that government has depending upon which hat it is wearing.[158] For example, in her opinion for the Court in *Board of County Commissioners v. Umbehr*,[159] Justice O'Connor explained that a government employee's close "relationship with the government requires a balancing of important free speech and government interests."[160] In such relationships, "[t]he government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption."[161] In

157. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (emphasis added); *see supra* notes 63–67 and accompanying text.

158. *See* Waters v. Churchill, 511 U.S. 661, 671–72 (1994) (plurality opinion) ("We have never explicitly answered this question [about the government's dual roles], though we have always assumed that its premise is correct—that the government as employer indeed has far broader powers than does the government as sovereign." (citing *Pickering*, 391 U.S. at 568)); Bd. of Educ. v. Grumet, 512 US 687, 718 (1994) (O'Connor, J., concurring) ("We have . . . no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on."); Connick v. Myers, 461 U.S. 138, 147 (1983); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973); *see also* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1497 (1999) ("Administrative efficiency is generally not considered a compelling interest under strict scrutiny, which may be one reason that free speech cases have explicitly adopted a more deferential standard for government-as-employer regulations, instead of purporting to apply strict scrutiny." (citation omitted)).

159. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996).

160. *Id.* at 680.

161. *Id.* at 674; *see also Waters*, 511 U.S. at 674–75 ("[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to the agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."); *see also* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1250 (1999) ("The government has instrumental or programmatic goals within the domain of

a similar vein, Justice Powell explained in his concurring opinion in *Arnett v. Kennedy* that "the Government's interest . . . is the maintenance of employee efficiency and discipline. . . . To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."[162] Lastly, in her plurality decision in *Waters v. Churchill*, Justice O'Connor juxtaposed the two roles that government plays by describing certain First Amendment doctrines that could not be reasonably applied to speech of government employees[163] and by outlining the less stringent procedural requirements for restrictions on government employees' speech.[164]

But although it is generally agreed that the government has more power to interfere with constitutional rights in its employment capacity,[165] it is far from clear how to assess which employment practices are permissible and which are not.[166] In any event, the Court on numerous occasions since *Pickering* has reaffirmed this view of the government's greater latitude when conditioning public employee rights in the workplace.[167]

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management. When acting there, it may restrict individual autonomy in the service of its programmatic goals." (footnote omitted) (citing C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 16–21 (1998))). Indeed, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate employees and contractors on an at-will basis, for good reason, bad reason, or no reason at all. *See Umbehr*, 518 U.S. at 674.

162. Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring). If it were otherwise, Justice Powell explains, the government employer would not be able to remove inefficient and unsatisfactory workers quickly, and the government's substantial interest in so doing would be frustrated without adequate justification. *Id.*

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

164. *See id.* at 673 (observing that although speech restrictions on private citizens must precisely define the speech they target, a government employer is permitted to prohibit its employees from acting "rude to customers," even though this restriction would be void for vagueness under traditional First Amendment jurisprudence).

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

166. *See* Connick v. Myers, 461 U.S. 138, 150 (1983) (noting the difficulty associated with the *Pickering* balancing); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 204 (1998) ("The Court has acknowledged that 'such particularized balancing is difficult,' and this seems to be an understatement. From all we've seen of the lower court decisions, the test is essentially indeterminate in all but the easiest cases." (footnote omitted) (quoting *Connick*, 461 U.S. at 150)).

167. *See, e.g.*, *Waters*, 511 U.S. at 671–72 (plurality opinion) ("We have never explicitly answered this question [about the government's dual roles], though we have

*A. The Dwindling First Amendment Speech Rights of Public Employees Post-*Pickering

Although *Pickering* came out in favor of Marvin Pickering, the development of the doctrine since then has been generally one of limiting the scope of the balancing test set forth therein. Initially, the Court continued to protect public employee rights through the *Pickering* constitutional balance. For instance, public employee free speech cases post-*Pickering* have established that the First Amendment protects government workers from being terminated for privately criticizing their employer's policies,[168] for publicly expressing dislike for prominent political figures,[169] and even when those workers are independent contractors for the government employer.[170]

Yet, not too long after public employee free speech protection reached its apex in *Pickering*, a new group of Justices began to whittle away these protections. First, the Court in *Mount Healthy Board of Education v. Doyle* made it easier for employers to defend against these First Amendment claims.[171] Under the *Mount Healthy* framework, even if a public employee can show that an employer's adverse employment action was motivated by the employee's protected speech, Justice Rehnquist developed the "same decision" test to protect public employers from liability in a subcategory of cases. Under the same decision test, if the employer can prove that it would have made the same decision regarding the employee in the absence of the protected speech, it may escape liability.[172] Justice Rehnquist wrote in this regard: "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[173]

Next, the Court decided the "public concern" test of *Connick v. Myers*.[174] Recall that in *Pickering*, Justice Marshall set up the balancing test this way:

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always assumed that its premise is correct—that the government as employer indeed has far broader powers that does the government as sovereign.").

168. *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414–16 (1979).
169. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 386 (1987).
170. *See, e.g.*, Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996).
171. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977).
172. *Id.* at 285–86.
173. *Id.*
174. Connick v. Myers, 461 U.S. 138, 154 (1983).

> The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in *commenting upon matters of public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[175]

Justice White, the partial dissenter in *Pickering* and now writing for the majority in *Connick*, utilized the italicized language above from *Pickering* to require that the public employee first show that he or she spoke on a matter of public concern before getting the benefit of the *Pickering* balance.[176] The Court adopted this new requirement based on "the common-sense realization that government offices could not function if every employment decision became a constitutional matter."[177] Going forward, public employee speech characterized as being a matter of "private interest," like a personnel dispute, would no longer receive the protection of the First Amendment.[178]

The coup de grâce against *Pickering*, however, was recently delivered by the Roberts Court in *Garcetti v. Ceballos*.[179] In *Garcetti*, a deputy district attorney for Los Angeles County, Richard Ceballos, was subjected to adverse employment actions for speaking out about an allegedly defective search warrant in a criminal case.[180] Although the *Garcetti* Court paid lip service to its commitment to the doctrine of unconstitutional conditions in public employment,[181] Justice Kennedy for the 5–4 majority nonetheless held that if employees are engaged in speech pursuant to their official duties at work, they are not speaking as "citizens" and thus enjoy no First Amendment protection for their speech.[182] Because Ceballos was engaged in speech pursuant to his job duties, he was not speaking *as a citizen* on a matter of public concern but only as a government employee. As such, the Court concluded that Ceballos did

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175. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (emphasis added).
176. *Connick*, 461 U.S. at 140–41, 143.
177. *Id.* at 143.
178. To be fair, though, the hurdle imposed by *Connick* becomes much more manageable in a small subset of cases in which the public employee speech is found to be completely unrelated to his or her public employment and is spoken on the employee's own time in a nonworking setting. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465–66, 475 (1995).
179. Garcetti v. Ceballos, 547 U.S. 410 (2006).
180. *Id.* at 413–15.
181. *See id.* at 417 ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").
182. *Id.* at 424. Interestingly, this holding that government workers cannot act as employees and citizens at the same time controverts a previous statement of the Court that a teacher making a presentation before a board of education "spoke both as an employee and a citizen exercising First Amendment rights." City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 176 n.11 (1976).

not have any First Amendment protection, and there was no need to consider under *Connick* whether he spoke on a matter of public concern or to conduct a *Pickering* balancing of interests.[183]

Garcetti drastically cuts down on public employees' First Amendment speech rights.[184] In the name of managerial prerogative,[185] federalism, and separation of powers,[186] *Garcetti* has the effect of making government less transparent, accountable, and responsive. This is because public employees are now less secure in their ability to speak out against governmental fraud, abuse, and waste without facing retribution from their public employers.[187] The *Garcetti* majority, rather than focusing on the importance of public employees' ability to help ensure the maintenance of an accountable and transparent government as the *Pickering* Court did, focused instead on more sinister concerns about employees' impairing the proper performance of efficient governmental functions. The decision also inappropriately focuses on the formal opportunity to still exercise constitutional rights, even though employees cannot now exercise those rights while working and performing their assigned duties. In all, then, *Garcetti* redefines the role public employees should play in ensuring the fair and efficient administration of government services.[188]

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183. *See Garcetti*, 547 U.S. at 421.

184. David L. Hudson Jr., Garcettiz*ed! '06 Ruling Still Zapping Speech*, FIRST AMENDMENT CTR. (Jan. 15, 2010), http://www.firstamendmentcenter.org/commentary.aspx?id=22501 ("[*Garcetti*] has led to the dismissal of legions of public-employee lawsuits. It has threatened legitimate whistleblowers wanting to speak out on important matters of public concern.").

185. *See* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 38 (2008) ("The Court's opinion [in *Garcetti*] contains a sketch—concededly partial and somewhat obscure—of managerial control over employee speech as essential if management is to be held politically accountable for the performance of public institutions.").

186. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 617 (2007) (Kennedy, J., concurring) ("The Court has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" (quoting *Garcetti*, 547 U.S. at 423)).

187. *See* Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know what ails the agencies for which they work.").

188. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech To Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009).

B. Garcetti *as a Subsidy Public Employment Case*

Prior examination of *Garcetti*, however, does not sufficiently explain how the doctrine of unconstitutional conditions has been undermined in the public employment free speech context. This is not your great-grandfather's legal formalism. To understand more fully how the subsidy school of thought has begun to hold sway in cases in which government acts in its employment capacity, it is necessary to consider the *Garcetti* majority's invocation of a line of argument extraneous to the *Pickering* doctrine.[189]

This line of argument involves a particular brand of subsidy argument. In coming to its conclusion in *Garcetti*, the majority commented that Ceballos's speech "owe[d] its existence to [his] professional responsibilities" and "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[190] Justice Souter pondered aloud in his dissent, "[W]hy do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job?"[191] The answer appears to be: Because the subsidy approach requires it.

Recall the abortion-funding subsidy case of *Rust v. Sullivan*,[192] in which the Court "held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning."[193] A corollary to this subsidy argument later developed by the Court is that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[194]

In *Garcetti*, rather than subsidizing a public health program and "simply insisting that public funds be spent [by doctors] for the purposes for which they were authorized,"[195] the Court is in essence saying that public employment itself is "subsidized" by the government and thus the government is entitled to say what it wishes through its government employees without worrying about these same employees' First Amendment free speech rights. Thus, when an employee speaks out of turn like Assistant District Attorney Ceballos in the *Garcetti* case—or

189. *See Garcetti*, 547 U.S. at 436 (Souter, J., dissenting).
190. *Id.* at 421–22 (majority opinion).
191. *Id.* at 434 (Souter, J., dissenting).
192. Rust v. Sullivan, 500 U.S. 173, 177–78 (1991).
193. *Garcetti*, 547 U.S. at 437 (Souter, J., dissenting) (citing *Rust*, 500 U.S. at 192–200).
194. *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)) (internal quotation marks omitted).
195. *Rust*, 500 U.S. at 196.

perhaps this reasoning even applies to Mr. Pickering himself—the employee is no longer engaged in government speech. He or she is also without First Amendment protection according the Court because the government employer need not subsidize speech of which it does not approve.[196]

The Court thus does nothing less than turn the unconstitutional conditions doctrine on its head by saying that the government employer is not conditioning public employment on public employees' forfeiting their rights to speech but instead is merely requiring that its subsidized speech—in the mouth of its employee—be used to promote the particular policies for which the employee was hired.

Now, as Justice Souter points out in his *Garcetti* dissent, the comparison between the subsidization of speech in *Rust* and *Garcetti* is totally inapt.[197] Whereas doctors are only allowed to take Title X funds if they agree not to promote abortion, most public employees do not take their jobs on the condition that they say only what the government wants them to say.[198] This is not to say that such policymaking public employees do not exist, but employees like Pickering, Myers, and Ceballos are hired to perform a discretionary function, not to parrot the government.[199]

Yet, by treating *all* public employees as merely promoting government speech, the *Garcetti* court does nothing less than transform government employment back into a privilege. Justice Holmes's observation is once again apposite: "[A public employee] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[200] Similarly, under *Garcetti*'s conception, public school teachers, district attorneys, or police officers may have the right to talk politics on their own time, but those employees have no right to public employment if

196. Under the government speech doctrine, individuals can be compelled to parrot government speech without implicating any individual First Amendment rights. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005).

197. *See Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) ("[T]hese interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*.").

198. In this regard, Justice Souter notes that "[s]ome public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto." *Id.* at 437 (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001)).

199. Pickering was certainly not hired to parrot the Board line, though the Board would have certainly liked him not to be such a nuisance.

200. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

they wish to engage in on-duty speech the government does not sanction. To do so, according to the majority in *Garcetti*, would be tantamount to requiring the government to subsidize employee speech that the government does not approve.

In short, under the government speech doctrine, completely absent in *Pickering*, the subsidy school of jurisprudential thought has eviscerated the unconstitutional conditions doctrine in public employment. What is left is a neoformalism that permits the Court to say that as long as employees have a formal opportunity to exercise their constitutional rights as citizens outside of their on-job work responsibilities, nothing more is required to protect them from the penalty imposed by this unconstitutional condition. This neoformalism is particularly problematic because of its insidious nature. Although much of the *Garcetti* decision is clearly based on traditional categorical distinctions between citizen and employees, the majority subsidy Justices also sneak in this observation about the connection between unconstitutional conditions and the government speech doctrine. The problem is that once lower federal courts begin to treat public employee speech as equivalent to government speech, even less of a possibility exists that the speech will garner any constitutional protection. So, although public employee free speech rights are presently in the process of fading away, an expansion of this government speech doctrine to encompass most government employees would be outright catastrophic for these employees' constitutional rights in the workplace.

Consider the impact of this neoformalistic approach on just one subsequent case, though there are many examples in the four years since *Garcetti*.[201] In *Haynes v. City of Circleville, Ohio*, a police officer was fired for complaining about the incompetence of his superior in reducing training for the canine unit and for asserting his belief that these actions would adversely affect public safety.[202] Before *Garcetti*, the police officer actually survived summary judgment at the district court level on his First Amendment retaliation claim because he was clearly speaking out on a matter of public concern.[203]

After *Garcetti*, however, the Sixth Circuit dismissed the officer's claim. Once the court classified the officer as a "public employee carrying out his professional responsibilities,"[204] from that point forward he was robbed of citizen status and was considered a mere employee without constitutional protections. Remarkably, the court hinted that if

201. *See* Hudson, *supra* note 184.
202. Haynes v. City of Circleville, 474 F.3d 357, 359 (6th Cir. 2007).
203. *Id.* at 364.
204. *Id.* (citing Garcetti v. Ceballos, 547 U.S. 410, 422 (2006)).

the police officer had taken his gripe outside the police department and written a letter to a newspaper editor criticizing the city's canine program—much in the way Pickering brought his complaints about his school to the public—he could have received First Amendment protection.[205] The perverse incentive thus established by *Garcetti* is for employees such as the officer in *Haynes* not to bring their concerns and complaints through internal dispute mechanisms but rather to make any workplace disagreement into a public affair. Although one would think such an outcome flies in the face of *Pickering*'s concern of ensuring the efficiency of governmental service, nevertheless the neoformalist approach of *Garcetti* leads to this absurd result.

VI. EMBRACING THE REALIST CRITIQUE OF NEOFORMALISM

The neoformalist conception of First Amendment rights in the public employment context has made the government less transparent and accountable because public employees are now less secure in speaking about their public employment. It is therefore important to restore the vitality of the unconstitutional conditions doctrine through a restoration of *Pickering*, its constitutional balancing standards, and the penalty version of the unconstitutional conditions doctrine. Only when government actions that practically truncate or impinge on the right of public employees are no longer tolerated will public employees again be able to be the vanguard of the citizenry, protecting all citizens against government fraud, waste, and abuse.

A. A Return to Pickering*'s First Principles*

Pickering itself is a penalty case. Consider that Pickering himself was not hired to parrot the government line of the employer. Indeed, he wrote specifically "as a citizen" when he wrote his letter to the *Lockport Herald*.[206]

The *Pickering* Court recognized that there was a potential of government abuse if Pickering were able to be fired merely because "the best interests" of the school required it. That line of argument, adopted by the Illinois Supreme Court majority in *Pickering*, would have held the constitutional rights of Pickering and others at the mercy of school

205. *Id.* (citing *Garcetti*, 547 U.S. at 422).
206. *See supra* note 43 and accompanying text.

officials. The majority opinion in *Pickering* rejected the subsidy argument and adopted the penalty view that a substantial burden on a public employee's free speech rights would be considered unconstitutional unless narrowly tailored to a compelling government interest.

Not only is the approach taken by the subsidy Justices in subsequent public employee free speech cases not narrowly tailored in that its approach is being applied to employees who are not hired to parrot the government line,[207] but the government interest being advanced is downright inimical to the idea of an open and transparent democratic society. *Pickering* spends much time discussing the importance of having teachers and other public employees who work for the government inform the rest of us about the events that transpire in the government workplace. These employees are ideally placed to sound the alarm when government is no longer acting in the best interest of its people. Through its holding in *Garcetti*, however, the Court has now made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers.

Under *Pickering*, it was not seen as inconsistent that the same person could be both an effective government employee and an outspoken citizen concerned for the greater society.[208] Under this broader conception of public employment, there was no internal tension within these citizen-employees because when they spoke publicly to point out an injustice in government or to right a government wrong, not only were they making their own workplace better but they were making society better as well.[209] The Court itself developed this idea that public employees play a unique role in a representative democracy in *Pickering* and other cases.[210] Given

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207. Justice Souter in his *Garcetti* dissent suggests ample reason why the government speech analysis should be mostly extraneous to the *Pickering* doctrine. *Garcetti*, 547 U.S. at 428 (Souter, J., dissenting). He notes that "[s]ome public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto." *Id.* at 437 (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001)).

208. *Accord id.* at 432 ("[T]he very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's 'object . . . to unite [m]y avocation and my vocation.'" (second alteration in original) (quoting Robert Frost, *Two Tramps in Mud Time*, *in* COLLECTED POEMS, PROSE, & PLAYS 251, 252 (R. Poirer & M. Richardson eds., 1995))).

209. *Id.* ("[T]hese citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.").

210. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."); *see also* City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per

the sheer size of American government, it is impossible for ordinary citizens to keep tabs on everything their government is doing at any given time. Government employees therefore must be the vanguard of the citizenry. This is so not only because of their physical proximity to the problem but also because of their special expertise in dealing with the governmental issues that come to their attention. Only the realist approach of the penalty Justices, which recognizes the practical consequences of government burdens on public employees' constitutional rights, permits these employees to carry out their essential role.

B. Constitutional Balancing as an Antidote to Neoformalist Reasoning

As discussed above, *Garcetti*'s government speech doctrine has the ability to wreak havoc on public employees' remaining constitutional rights in a large subcategory of public employee free speech cases by taking away public employees' *Pickering* rights.[211] By writing broad job descriptions, government employers can claim that they are disciplining employees only for government speech by employees. Because employees can claim no constitutional protection for such speech, employers are free to sanction employees who write or speak in a way that is not in the best interest of their employer; in other words, this is exactly the theory of law that existed prior to the development of the *Pickering* doctrine.

In this regard, recall the Court majority in *Garcetti* found Ceballos did not have First Amendment rights because the speech at issue "owe[d] its existence to [his] professional responsibilities" and "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[212] In making this point, the Court—in a parenthetical—draws language from the case of *Rosenberger v. Rector*

curiam) ("The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.").

211. *See Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) ("The fallacy of the majority's reliance on *Rosenberger*'s understanding of *Rust* doctrine . . . portends a bloated notion of controllable government speech going well beyond the circumstances of this case."); *see also id.* at 437 ("*Rust* is no authority for the notion that the government may exercise plenary control over every comment made by a public employee in doing his job.").

212. *See id.* at 421–22 (majority opinion).

& Visitors of University of Virginia,[213] which stated that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[214] This language in turn was taken from similar language in the abortion-funding case of *Rust v. Sullivan*,[215] which, of course, relies on neoformalistic reasoning.[216]

The solution to this neoformalist approach is to push for more standards and balancing of interests than bright-line rules. Consider that Judge Posner defines legal formalism as "enabling a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced as correct or incorrect."[217] Of course, as Judge Noonan has pointed out, what is lost in such a mechanistic approach to the law is that the problems of real people become "grist for the constitutional mill."[218]

A practical, realist approach, on the other hand, has judges decide the case so that the decision attempts to promote the public welfare. Given the inevitable conflict of interest between employee speech rights and employer efficiency interests in these public employment free speech cases, the constitutional balancing set out by *Pickering* is perfectly suited to provide an outcome based on the specific circumstances of different cases. In this vein, Justice Blackmun suggested in the *Rust* case that constitutional balancing of relevant interests would lead away from a conclusion that was "insensitive and contrary to common human experience."[219]

Rather than blindly following a neoformalist analysis, which asks whether a formal opportunity exists in another forum to exercise constitutional rights, all in the service of more predictable rules, the realist approach of constitutional balancing is consistent with notions of social justice. It is also consistent with the penalty approach to the

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213. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

214. *Garcetti*, 547 U.S. at 422; *Rosenberger*, 515 U.S. at 833.

215. Rust v. Sullivan, 500 U.S. 173, 174–75 (1991).

216. *See id.* at 192–93 ("[G]overnment may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" (quoting Maher v. Roe, 432 U.S. 464, 474 (1977))).

217. *See* Posner, *supra* note 147, at 181.

218. NOONAN, *supra* note 146, at 144 ("For the Supreme Court, proceeding as it appears to proceed in these [federalism] cases with an agenda, the facts are of minor importance and the person affected are worthy of almost no attention. . . . The people and their problems that have been grist for the constitutional mill are incidental.").

219. One of the approaches that Justice Blackmun suggests in his dissent in *Rust* is balancing the government's interests in promoting a certain type of family planning against the First Amendment rights of doctors and the Fifth Amendment substantive due process rights of pregnant women. *See Rust*, 500 U.S. at 213–14 (Blackmun, J., dissenting).

unconstitutional conditions doctrine in requiring judges to *practically* consider the actual impact that penalizing employees' free speech will have on their constitutional rights. Perhaps most importantly, it shuts the door on the reemerging neoformalist-inspired right-privilege distinction of a long-ago discredited age.

VII. CONCLUSION

Neoformalism has slowly insinuated itself into the unconstitutional condition doctrine over the years, without many commentators noticing the large role it now plays in substantially reducing the constitutional rights of all sorts of individuals, but perhaps especially public employees. Through the use of the subsidy line of argument under the doctrine of unconstitutional conditions, the notion advanced by the majority in *Garcetti* is that public employee speech is nothing more than government speech when these employees speak pursuant to their official duties. In this manner, neoformalism has wreaked havoc on the *Pickering* doctrine and reinvigorated the right-privilege distinction in constitutional law. A formal opportunity to exercise a constitutional right is simply not the same thing as the practical ability to exercise those rights.

This neoformalistic approach adopted by the majority in *Garcetti* is contrary to good government. Without the ability of public servants to bring to light government's baser practices without jeopardizing their careers, all citizens suffer from the resulting lack of government transparency and accountability. This is especially so at a time when it is harder for ordinary citizens to keep track of all the myriad departments that make up federal, state, and local government. In fact, *Garcetti*'s pigeonholing of public employees as mere employees does not comport with how most employees view themselves. Nor does it comport with the reality of the modern public workplace, where employee-citizens discuss and speak out on issues of public concern as a matter of course.

This Article therefore argues in favor of reestablishing First Amendment protections for public employees who speak out on matters of public concern. Such employees should not have to rely on statutory whistle-blowing or civil service protections, which may not protect their specific activity and which, unlike the First Amendment, may not apply to all levels of government and to all jurisdictions. Instead, *Garcetti*'s overbroad government speech doctrine must be limited to appropriate cases in which employees are actually hired to transmit a specific government message. This necessary doctrinal transformation can be accomplished

through a recommitment to *Pickering*'s penalty version of the doctrine of unconstitutional conditions, with its emphasis on constitutional balancing and a recognition that employees should not always have to relinquish vital constitutional rights in order to enjoy the benefits of public employment.