

August 26, 2010

NEOFORMALISM AND THE REEMERGENCE OF THE RIGHTS/ PRIVILEGE DISTINCTION IN PUBLIC EMPLOYMENT LAW

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ABSTRACT

The First Amendment speech rights of public employees, which have traditionally enjoyed protection under the doctrine of unconstitutional conditions, have suddenly diminished in recent years. At one time developed to shut the door on the infamous privilege/rights distinction, the unconstitutional conditions doctrine has now been increasingly used to rob these employees of their constitutional rights.

*Three interrelated developments explain this state of affairs. First, a jurisprudential school of thought – 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 holding in *Pickering v. Bd. of Education*. Third, and most significantly, the nature of the subsidy argument in the government as employment context has morphed into the government speech doctrine, through which the government employer claims the speech of its employees as its own and may regulate it willy-nilly. It is this neoformalism of the subsidy school that explains the reemergence of the privilege-right distinction in public employment law.*

*This article 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 rights of public employees are not tolerated, will public employees be able again to assume the role of the vanguard of the citizenry, protecting fellow citizens from government fraud, waste, and abuse.*

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INTRODUCTION

Pickering v. Bd. 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, like a government employer, from being able to condition governmental benefits, like 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

¹ 391 U.S. 563 (1968).

notoriously inconsistent manner over the last forty years, and not just in the public employment arena.² Indeed, the doctrine continues to be for jurists, scholars, and practitioners alike, 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 speech⁴ and association cases.⁵ In the free speech context, the Court has developed the *Connick/Garcetti/Pickering* doctrinal analysis.⁶ Taken together, these three cases forbid public employers from taking adverse employment action against employees for speaking out on "matters of public concern,"⁷ but

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

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 (2006); *Bd. of Cty. Comms. v. Umbehr*, 518 U.S. 668 (1996); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Cons. Sch. Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

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

⁶ See *Garcetti*, 547 U.S. 410 (2006); *Connick*, 461 U.S. 138 (1983); *Pickering*, 391 U.S. 563 (1968).

⁷ See *Connick*, 461 U.S. at 141. Attempting 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 discussing the problems associated with the *Connick* "matter of public concern" test).

only if the employee is not speaking pursuant to their 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 – 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 employment 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 which I refer to as the Court’s neoformalism in handling these constitutional issues.¹² Instead of merely

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 810-816 (reviewing a number of Supreme Court cases that establish that the doctrine of unconstitutional conditions has been most vigorously applied in the First Amendment context).

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., 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 (2006); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV.

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 rights-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, 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 sovereign context to dilute other constitutional rights of citizens. What was once developed to shut the door on the infamous privilege/rights distinction¹⁴ 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 five Parts. Part I defines and explores the development of the neoformalist approach by a group of conservative Justices. Part II then delves into the story behind the dispute that led eventually to the Supreme Court's landmark penalty case of *Pickering v. Bd. of Education*, which established a robust form of the unconstitutional conditions doctrine in public employee free speech cases. Part III 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,

869, 891 (2002); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WISC. L. REV. 971. "Neoformalism," as used herein, means simply a new type of formalist thought that has helped to revive the rights/privilege distinction in public employment law.

¹³ 391 U.S. 563 (1968).

¹⁴ See generally William 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").

Part IV describes the infiltration of the subsidy argument into the government as employment context, post-*Pickering*, and how the penalty version of the unconstitutional conditions has been distorted by this emerging neoformalism. Part V 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.

I. 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.¹⁵ 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 implementing 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 refer 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."¹⁶ However, whereas more traditional forms of legal formalism seek to "identify . . . foundational principles, deduce legal rules from them, then apply those rules syllogistically to resolve individual disputes,"¹⁷ this new formalism concerns itself with the formal ability of

¹⁵ 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).

¹⁶ Isaiah Berlin, *Two Concepts of Liberty* in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 241 (2000).

¹⁷ Morgan Cloud, *The Fourth Amendment During the Lochner Era*:

individuals to exercise constitutional rights (free from physical restraint), though practical realities may suggest significant interference with the exercise of such 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.¹⁸ 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, an historical formalistic move can be seen when the Court adopts the foundational principle that public employees must be considered as employees or citizens, but never both in the case of *Garcetti v. Ceballos*.¹⁹ From that foundational principle, legal rules have been deduced such that public employees in their citizen role enjoy robust free speech protections,²⁰ while those acting purely as employees have absolutely no such rights.²¹ Finally, those rules are applied syllogistically in individual cases, so that an employee who engages in speech pursuant to his or her official job description is automatically treated as an individual with no free speech rights and subject to employer discipline for their expression.²²

This type of traditional formalism is no doubt troubling in its own right

Privacy, Property, and Liberty in Constitutional Theory, 48 STAN. L. REV. 555, 567 (1996).

¹⁸ This is an exceptionally important area for 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.

¹⁹ 547 U.S. at 410, 421 (2006).

²⁰ See *United States v. Nat. Treasury Union (NTEU)*, 513 U.S. 454, 465 (1995) (“[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.”).

²¹ *Garcetti*, 547 U.S. at 421-22.

²² *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.”).

as I and others have argued elsewhere,²³ but the neoformalism of the current Court is far more insidious and may potentially have a much larger impact on the constitutional rights of public employees and all citizens. Neoformalism's focus is on whether individuals' constitutional rights will be formally interfered with by the government 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 such rights given their personal circumstances.

Neoformalism can be seen as deriving most directly from an on-going debate between two jurisprudential schools of thought about the long-standing 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.²⁴ 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, as government actors simply compel a given result by saying they are doing nothing but subsidizing (or not subsidizing) a right a citizen or public employee already has under the Constitution.²⁵ Under these circumstances, if the government can

²³ See, e.g., Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123 (2008); Charles W. "Rocky" Rhodes, *Public Employee Free Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174 (2007).

²⁴ See *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (applying the subsidy approach in the abortion funding context).

²⁵ See *Regan vs. Taxation without Representation*, 461 U.S. 540, 544 (1983) ("[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

constitutionally induce a result through the conditioning of a government benefit, they need not worry about directly compelling the result.²⁶

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 privilege-rights distinction in constitutional law.²⁷

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.²⁸ 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 like 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.”²⁹ The seminal public employee free speech case of *Pickering v. Bd. of Education*³⁰ is a penalty case and establishes a strong form of the unconstitutional conditions doctrine.

that is not primarily 'aimed at the suppression of dangerous ideas.'").

²⁶ See *id.*

²⁷ 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.’”).

²⁸ *Id.* 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.”).

²⁹ *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

³⁰ 391 U.S. 563 (1968).

Yet since the days of *Pickering*, it appears that public employees are no longer being considered both employees and citizens.³¹ Under the *Connick/Garcetti/Pickering* doctrinal analysis,³² public employers are only forbidden from taking adverse employment action against employees for speaking out on "matters of public concern."³³ However, if the employee is speaking pursuant to their official duties, they lose all constitutional rights in his or her speech.³⁴ The Court has achieved this reintroduction of the rights/privilege distinction into the law by contending in its more recent public employee free speech decision, *Garcetti v. Ceballos*,³⁵ 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.³⁶

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 with 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. Bd. of Education*.³⁷ 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

³¹ 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. Board of Regents*, 385 U.S. 589, 605-606 (1967)).

³² *See Garcetti*, 547 U.S. 410 (2006); *Connick*, 461 U.S. 138 (1983); *Pickering*, 391 U.S. 563 (1968).

³³ *See Connick*, 461 U.S. at 141.

³⁴ *See Garcetti*, 547 U.S. at 421.

³⁵ 547 U.S. 410 (2006).

³⁶ *Id.* at 421.

³⁷ 391 U.S. 563 (1968).

cases where 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 privilege/rights distinction, has now been resurrected to rob individuals of First Amendment and other constitutional rights.

II. *PICKERING V. BOARD OF EDUCATION*³⁸

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 in Lyons Township South High School, also in the Chicago suburbs.

In 1959, the Lockport Township Central high school hired Pickering to teach science.³⁹ 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 School Board meetings and became familiar with the problems

³⁸ Unless otherwise indicated, the underlying story in this article is drawn from: *Pickering v. Bd. of Education*, 391 U.S. 563 (1968); *Pickering v. Board of Education of Township High School District 205*, 225 N.E. 2d 1 (Ill. 1967); U.S. Supreme Court Oral Argument Transcript of March 27, 1968, *Pickering v. Bd. of Education* (No. 510); Marvin L. Pickering, *Marvin L. Pickering – The Man* (an autobiography on file with author); and various emails between Marvin Pickering and the author (on file with author).

³⁹ Township High School District 205 is located in the town of Lockport, Illinois, near the city of Joliet, about an hour southwest of Chicago.

the Board was having 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 School Board and other teachers knew that Pickering was one who freely spoke his mind on a variety of topics and especially when he thought some school policy was unfair. The dispute between Pickering and the School 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 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 in the local *Lockport Herald* on the previous September 24th.⁴⁰ 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.⁴¹ Pickering

⁴⁰ Letter to Editor, *Lockport Herald*, Sept. 24, 1964 (original copy of editorial by Pickering can be found in public library in Lockport, IL). As discussed below, the Illinois Supreme Court reproduced the letter in whole in its majority opinion. *Pickering v. Board of Education of Township High School District 205*, 225 N.E. 2d 1, 2-4 (Ill. 1967). At the time, the *Lockport Herald* had 2900 subscribers. See Supreme Court Oral Argument Transcript.

⁴¹ There were four such referendum 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 v. Board of Education of Township High School District 205*, 225 N.E. 2d 1, 2 (Ill. 1967). 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).

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 non-athletes, 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 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.⁴²

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 school 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 statutorily 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, as 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 interest of the school" to dismiss him from employment. 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.

After being terminated from his \$6900/year school teaching job,⁴³ 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

⁴² *Pickering*, 225 N.E. 2d at 2-4. Most 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.").

⁴³ Norman Glubok, *Teacher Who Lost Job for Speaking Out Will Sue Board*, WASH. POST, Dec. 21, 1964, at C15.

continued employment. Next, he contacted the American Federation of Teachers (AFT) at their Chicago national headquarters.⁴⁴ The AFT pledged a fight to the finish for his cause.⁴⁵ The AFT appointed well-known civil rights litigator, John Ligtenberg, of Chicago's Ligtenberg, Goebel & DeJong, to defend him.⁴⁶

Pickering, then twenty-eight years old, challenged the Board's termination decision to the Will County Circuit Court in January 1965, arguing that his free speech rights had been violated by the Board's actions.⁴⁷ At the time, Pickering stated, "A man doesn't give up his right to freedom of speech when he becomes a school teacher."⁴⁸ Superintendent Blatnick responded: "We don't question his right to write letters. We just say that they should be true statements."⁴⁹

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

⁴⁴ "[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." See Developments in the Law, *Academic Freedom*, 81 HARV. L. REV. 1045, 1121 n.107 (1967-1968) (citing Letter from John Ligtenberg, General Counsel of the AFT, to the Harvard Law Review, Dec. 22, 1967).

⁴⁵ *Union to Help Fired Teacher in Court Fight*, CHICAGO TRIBUNE, Jan. 15, 1965, at D9.

⁴⁶ 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. Bd. 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) (extending due process protections to termination of government employees), and to submit amicus briefs in *Cleveland Board of Education v. Laflour*, 414 U.S. 632 (1974) (on brief with now-Justice Ruth Bader Ginsburg) (striking down restrictive maternity leave requirement that effectively served to punish women for exercising their right to bear children), and *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (finding university teacher plaintiff did not have property interest in continued employment).

⁴⁷ *Fired Teacher Files Suit To Be Reinstated*, CHICAGO TRIBUNE, Jan. 7, 1965, at W3.

⁴⁸ Glubok, *supra* note 43, at C15.

⁴⁹ *Id.*

Board.⁵⁰ Judge Orenic concluded that, “[t]he greater public interest of the schools overrides the issue of freedom of speech rights of a teacher.”⁵¹

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 decision⁵² 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.”⁵³ 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.’”⁵⁴ Justice Schaefer also took the majority to task for deferring to the fact-finding 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.⁵⁵ 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.”⁵⁶ After his defeat at the Illinois high court, Pickering filed a petition for certiorari with the United State 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.⁵⁷ John Ligtenberg, for

⁵⁰ *Court Upholds Board’s Firing of Teacher*, CHICAGO TRIBUNE, March 4, 1966, at B11.

⁵¹ *Id.*

⁵² 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, while the two dissenting justices were Democrats.

⁵³ *Pickering*, 225 N.E.2d at 6.

⁵⁴ *Id.* at 7 (Schaefer, J., dissenting).

⁵⁵ *Id.* at 7-8.

⁵⁶ *Id.* at 10.

⁵⁷ A recording of the oral argument is available at Oyez.org.

Pickering, framed the argument as a pure First Amendment question of whether a public school teacher had the constitutional right to criticize in the local press the School Board for its policies. In this regard, he maintained that public employees had constitutional rights just like ordinary citizens and should not have to forfeit them just because they became government employees. Lichtenberg cited the recently-decided *Keyishian v. Bd. of Regents* loyalty oath case for this proposition.⁵⁸ 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, School Board, and fellow teachers that 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.⁵⁹

In an 8-1 decision,⁶⁰ written by Justice Thurgood Marshall, the U.S.

⁵⁸ 385 U.S. 589 (1967).

⁵⁹ A number of the U.S. Supreme Court Justices seemed highly skeptical during oral argument that the medium of communication (oral speech versus written communication) or the audience for the communication (fellow teachers versus the public in general), should make any difference whatsoever. See Oral Argument Transcript of *Pickering v. Bd. of Education* on oyez.org. 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.

⁶⁰ Justice White wrote an opinion that concurred in part and dissented in part. *Pickering v. Bd. of Education*, 391 U.S. 563, 582-584 (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 that he disagreed that knowingly false comments that caused no harm should also be protected by the First Amendment.

Supreme Court held that *Pickering* had a First Amendment right to free speech that could not be forfeited because of the “best interests” of the school district.⁶¹ Although Justice Marshall recognized that the government’s relationship to individuals was necessarily different in the employment context;⁶² he nevertheless firmly stated that public employees have constitutional rights, including rights to free speech.

If public employees’ retain their first amendment rights, the question is then how should the Court balance the 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 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.”⁶³

To be clear, the governmental interests recognized in *Pickering* are not in any sense constitutional rights, but rather interests that a government employer has 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.”⁶⁴ The balance undertaken in *Pickering* is required because even though the government employer performs “important public functions,”⁶⁵ and consequently possesses far broader powers in its employer capacity than in its sovereign capacity;⁶⁶ “a citizen who works for the government is nonetheless a

⁶¹ 391 U.S. 563, 565 (1968). *See also Justices Extend Teachers’ Free Speech Rights*, NEW YORK 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.”).

⁶² *Id.* 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.”).

⁶³ *Id.*

⁶⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006) (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

⁶⁵ *Id.* at 420 (citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

⁶⁶ *Id.* at 418. (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1110 (3rd ed. 2006) (“Speech by public employees is clearly less protected than other speech.”).

citizen."⁶⁷ 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.⁶⁸

Important considerations in carrying out the *Pickering* balance include whether the public employee's speech impairs discipline by superiors, harmony among co-workers, close working relationships for which personal loyalty and confidence are necessary, or the performance of the employee's duties or the regular operation of the enterprise.⁶⁹ In *Pickering* itself, the balancing came out in favor of Pickering because: (1) the statements in the letter concerned matters of public concern (i.e., 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.⁷⁰ In such instances, Justice Marshall concluded that, "it is necessary to regard [Pickering] as the member of the general public he seeks to be."⁷¹

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 since such employees are many times in the best position to have "informed and definite opinions."⁷² In other words, public employees help to ensure the transparency and accountability of representative, democratic governments. Public employees will speak out

⁶⁷ *Garcetti*, 547 U.S. at 419

⁶⁸ *See id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) ("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.").

⁶⁹ *See Pickering*, 391 U.S. at 570-73.

⁷⁰ *See id.* at 571-72. Here, it can hardly be doubted that expressly signing the letter "*as a citizen*, taxpayer, and voter, not as a teacher," *see Pickering*, 225 N.E. 2d 1, 4 (Ill. 1967) (emphasis added), immeasurably helped Pickering under the standard developed by the Court.

⁷¹ *See Pickering*, 391 U.S. at 574.

⁷² *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.").

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 of 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.

III. 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 its destruction were already being planted in the parallel context of unconstitutional conditions doctrine when the government acts as sovereign towards its citizen. Importantly, in those cases, the subsidy-penalty 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. Bd. of Regents*,⁷³ but it had been applied to a wide variety of constitutional cases. These cases involved tax exemptions,⁷⁴ users of public facilities,⁷⁵ and

⁷³ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (striking down state law prohibiting employment of public school teachers who advocate overthrowing U.S. government as violation of employees' rights to free association).

⁷⁴ *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958).

⁷⁵ *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Healy v. James*, 408 U.S. 169 (1972).

recipients of government subsidies.⁷⁶ In these cases, the U.S. Supreme Court initially pushed back against government attempts to condition receipt of government largesse based on forfeiture of citizens' constitutional rights.⁷⁷

So where does the doctrine of unconstitutional conditions find its judicial roots? While not rooted in any single clause of the federal constitution, the doctrine of unconstitutional conditions is instead a creature of judicial implication.⁷⁸ In its simplest terms, the doctrine prohibits the government from conditioning a benefit based on an individual forfeiting a constitutional right.⁷⁹

The doctrine of unconstitutional conditions first enjoyed widespread use in the early part of the 20th century when the *Lochner* Court⁸⁰ first developed economic substantive due process.⁸¹ Under this form of substantive due process, the *Lochner* Court emphasized property rights and

⁷⁶ See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

⁷⁷ See Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988).

⁷⁸ *Id.*

⁷⁹ "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." Kathleen A. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

⁸⁰ See *Lochner v. New York*, 198 U.S. 45, 56 (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 personal liberty."). The *Lochner* Court constitutionalized property rights and the liberty to contract under a theory of economic substantive due process, as a mean to strike down much social welfare legislation during the first part of the 20th century. See Gregory M. Stein, *Nuance and Complexity in Regulatory Takings Law*, 15 WM. & MARY BILL RTS. J. 389, 395 (2006).

⁸¹ 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 clauses of the Fifth and Fourteenth Amendment. See Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 919-20 (1999).

the freedom to contract.⁸² But with the ascendancy of Roosevelt's New Deal Court in the late 1930's, and the overruling of much of the *Lochner* Court's substantive due process jurisprudence in the ensuing period,⁸³ 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 acting 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 utilize its Spending Clause Power⁸⁴ to award government largesse to individuals in return for these individuals agreeing to conditions that burdened their exercise of constitutional rights.⁸⁵ In such cases, the question became: "When 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?"⁸⁶

B. The Penalty/Subsidy Debate

In answering this foundational question, a considerable amount of dissonance has historically existed between two groups of Justices, and

⁸² See *id.* The doctrine of unconstitutional conditions can technically be first found 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).

⁸³ 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.").

⁸⁴ The Spending Clause of the United States Constitution states: "The Congress shall have the 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.

⁸⁵ Congress is allowed to provide incentives under its Spending Clause Powers, but it may not coerce federal funding recipients through this power. See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) ("Congress may not induce the recipient [of federal funding] to engage in activities that would themselves be unconstitutional.").

⁸⁶ See Sullivan, *supra* note 79, 1415.

indeed two different schools of jurisprudential thought have sprung up, concerning how to apply the unconstitutional conditions doctrine. So-called liberal or progressive Justices more expansively construe the unconstitutional conditions doctrine, 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.⁸⁷ 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 generally upheld as constitutional, since although individuals has the right to exercise their constitutional rights, they do not have a right to have those rights subsidized.⁸⁸

1. Penalty Cases

The contours of the penalty/subsidy debate can first be seen in the 1958 case of *Speiser v. Randall*.⁸⁹ In that case, the Supreme Court held that the State of California could not condition veteran tax exemptions on individuals declaring that they did not advocate the violent overthrow of the government.⁹⁰ 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."⁹¹ In the first hint of the debate to come, Justice Clark, writing in dissent, found that the veterans tax exemption program was in no sense a "penalty," and instead California was merely "declining to extend the grace of the State to appellants."⁹²

⁸⁷ See, e.g., *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

⁸⁸ See, e.g., *Maher v. Roe*, 432 U.S. 464, 474 (1977); *Regan vs. Taxation without Representation*, 461 U.S. 540, 544 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁸⁹ 357 U.S. 513 (1958).

⁹⁰ See *id.* at 518. In *Speiser*, California sought to have all veterans seeking a certain tax exemption to sign a declaration that they did not advocate the overthrow of the United States by force or violence or other unlawful means. See *id.* at 515.

⁹¹ See *id.* at 518.

⁹² See *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 Dep't of Agric.*, 128 S. Ct. 2146, 2156 (2008) ("[A]

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*.⁹³ There, plaintiffs challenged Section 399 of the Corporation for Public Broadcasting Act,⁹⁴ which conditioned public broadcasting subsidies based on non-commercial educational broadcasters agreeing not to editorialize.⁹⁵ 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.⁹⁶ In other words, Justice Brennan applied a strict level of scrutiny to this law because it burdened the First Amendment rights of broadcasters.⁹⁷ Although the government may have had a vital interest in regulating public broadcasters, Justice Brennan was unconvinced that the means by which the government attempted to accomplish its aims were narrowly tailored.⁹⁸

More recently, in *Legal Services Corporation v. Velazquez*,⁹⁹ 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.¹⁰⁰ 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

government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate.”).

⁹³ 468 U.S. 364 (1984).

⁹⁴ See 47 U.S.C. § 399.

⁹⁵ *League of Women Voters*, 468 U.S. at 366.

⁹⁶ *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 without Representation*, see discussion *infra* Part III.B.2, should have applied. See *id.* at 405 (Rehnquist, J., dissenting). Specifically, he argued that both cases involved the Government allocating 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. See *id.* at 407.

⁹⁷ *Id.* at 366 (arguing that the government regulation was overbroad and not crafted with sufficient precision to remedy the dangers that the government sought to address).

⁹⁸ *Id.*

⁹⁹ 531 U.S. 533 (2001).

¹⁰⁰ See *Velazquez*, 531 U.S. at 549.

representing an indigent plaintiff in a welfare dispute.¹⁰¹ 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."¹⁰² 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.¹⁰³

2. Subsidy Cases

Although subsidy arguments can be viewed in cases as early as *Speiser*,¹⁰⁴ 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 of Washington*,¹⁰⁵ the Court upheld a federal tax law provision that conditioned tax exempt status under Section 501(c)(3) of the Internal

¹⁰¹ See *id.* at 537-38.

¹⁰² *Id.* at 544.

¹⁰³ 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, "The [LSC] provision simply declines to subsidize a certain class of litigation, and . . . that decision 'does not infringe the right' to bring such litigation." See *id.* at 553-554 (quoting *Rust v. Sullivan*, 500 U.S. 173, 2000 (1991)). Whereas Justice Kennedy for the majority was concerned with the practical effect of having a 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.]" See *id.* at 554. And even if they were, Justice Scalia reasoned, "So what? The same result would ensue from excluding LSC-funded lawyers from litigation entirely." See *id.*

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 condition jurisprudence on a number of grounds. See Berman, *supra* note 14, at 18-19 (describing the various rejoinders to the greater includes the lesser argument).

¹⁰⁴ See *supra* notes 89-92 and accompanying text.

¹⁰⁵ 461 U.S. 540 (1983).

Revenue Code¹⁰⁶ on recipients not participating in lobbying or partisan political activities.¹⁰⁷ 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.¹⁰⁸ Whereas the former involves the doctrine of unconstitutional conditions, Rehnquist maintained, the latter falls into a broad category of cases which stand for the proposition that, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."¹⁰⁹ As Rehnquist later explained in his dissent in *League of Women Voters*, "when 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.'"¹¹⁰ 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.

Subsequent 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*,¹¹¹ recipients of Title X family planning funds¹¹²

¹⁰⁶ 26 U.S.C. §501(c)(3).

¹⁰⁷ See *Regan*, 461 U.S. at 551.

¹⁰⁸ *Id.*

¹⁰⁹ *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, 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) (refusing to force state to subsidize an individual's right of free exercise of religion in the higher education context).

¹¹⁰ See *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting) (quoting *Cammarano*, 358 U.S. at 513, in turn quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958), in turn quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950)).

¹¹¹ 500 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. Reproductive Health Services*, 492 U.S. 490 (1989) (finding constitutional statutory ban

were prohibited by new HHS regulations from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning.¹¹³ Chief Justice Rehnquist, analogizing *Rust* to *Regan*,¹¹⁴ asserted that what was at stake were only the subsidization of fundamental rights (i.e., free speech rights and substantive due process rights) and not the denial of these same fundamental rights.¹¹⁵ 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."¹¹⁶ 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, i.e., the promotion of the welfare of the mother and the unborn child.¹¹⁷

on use of public employees and facilities for performance or assistance of nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth); *Maier v. Roe*, 432 U.S. 464 (1977) (same).

¹¹² See Title X of the Public Health Service Act of 1970, 42 U.S.C. §§ 300-300a-6. Section 1008 of the Act prohibits funding recipients to use such funds where abortion is a potential family planning alternative. See *id.* at §300a-6.

¹¹³ See *Rust*, 500 U.S. at 178

¹¹⁴ See *id.* at 194, 197-198.

¹¹⁵ *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 192-193 ("[G]overnment may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'") (quoting *Maier*, 432 U.S. at 474 (1977)); *id.* at 196 (Title X regulations "simply insist[ed] that public funds be spent for the purposes for which they were authorized.").

¹¹⁶ *Id.* at 202.

¹¹⁷ *Id.* at 180. 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

In a later unconstitutional conditions case, the subsidy group of Justices could only muster a plurality. In *United States v. American Library Assoc.*,¹¹⁸ the dispute involved whether the Children Internet Protection Act (CIPA)¹¹⁹ provision that provided a federal subsidy for public libraries to install filtering software on their Web-accessible computers was an unconstitutional condition.¹²⁰ 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*."¹²¹ 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."¹²²

not spent for a purpose outside the program -- falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct." *See 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.").

¹¹⁸ 539 U.S. 194 (2003). Chief Rehnquist wrote the plurality decision in this subsidy case and was joined by subsidy Justices O'Connor, Scalia, and Thomas.

¹¹⁹ 114 STAT. 2763-A-335 (2001) (enacted as part of the Consolidation Appropriations Act of 2001). As Professor Desai has observed concerning CIPA, "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." *See* 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).

¹²⁰ *American Library Assoc.*, 539 U.S. at 210-213.

¹²¹ *Id.* at 212.

¹²² *Id.* (Stevens, J., dissenting); *see also id.* at 2318 (Souter, J., dissenting) ("[T]he blocking requirements of [CIPA] . . . impose an unconstitutional condition on the Government's subsidies to local libraries

More recently, the Court decided the First Amendment case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*.¹²³ *FAIR* concerned the enactment of the Solomon Amendment by Congress, which prevents colleges and universities from receiving certain federal funding¹²⁴ 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 to the access to campuses and to students that is provided to any other employer."¹²⁵ A number of law schools believed that the Solomon Amendment required them to choose between abandoning their policies against sexual orientation discrimination or lose a substantial amount of federal funding.¹²⁶ This, they argued, infringed on their First Amendment rights of speech and association.¹²⁷

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,¹²⁸ the Supreme Court reversed.¹²⁹ The Court avoided the unconstitutional condition question altogether by deciding that the expressive rights of the law school were minimally burdened by the presence of military recruiters on campus.¹³⁰ The Court concluded that a funding condition is not unconstitutional if it can be constitutionally imposed directly,¹³¹ and determined that imposing the access requirement would not violate the law

for providing access to the Internet."). The dissents believed that the filtering software would inevitably block protected First Amendment speech either through underblocking or overblocking of web sites. *See id.* at 221-222 (Stevens, J., dissenting).

¹²³ 547 U.S. 47 (2006).

¹²⁴ 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)(1), (2).

¹²⁵ *Id.* § 983(b) (Supp. 2005).

¹²⁶ *See FAIR*, 547 U.S. at 53.

¹²⁷ *Id.*

¹²⁸ *See FAIR v. Rumsfeld*, 390 F.3d 219, 243 (3d Cir. 2004).

¹²⁹ *FAIR*, 547 U.S. at 70.

¹³⁰ *Id.* at 69-70.

¹³¹ *Id.* at 59-60 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

schools' First Amendment rights to free speech or association.¹³² It may be that because the current group of Justices is no longer able to agree on basis to which to label unconstitutional conditions case as subsidy or penalty cases, they are simply choosing to avoid the issue all together whenever possible.

3. 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,¹³³ that appears to be where the agreement ends. In deciding what a penalty case is and what is a subsidy case, the disagreement seems to revolve around whether government subsidization of certain "alternative activity deemed in the public interest"¹³⁴ is tantamount to "coercive interference" by the government with an individual's constitutional rights.¹³⁵ Or perhaps put more simply, there is a certain line beyond which government subsidy of an alternative activity becomes nothing less than the government acting in an intimidating manner to

¹³² *Id.* at 70.

¹³³ *See* *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2420 (2008) (Breyer, J., dissenting) (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)) ("[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."). *See also* *Lyng v. Automobile Workers*, 485 U.S. 360, 368 (1988) (holding that 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").

¹³⁴ *See* *Harris v. McRae*, 448 U.S. 297, 315 (1980).

¹³⁵ *See id.* at 327-328 (White, J., concurring); *see also* Sullivan, *supra* note 79, at 1433 (noting that coercion has been invoked as a justification for "striking down conditions affecting rights to freedom of speech, religion, and association, but without consistency or satisfying theory."). *But see id.* at 1505 (maintaining that labeling a case as an unconstitutional conditions one based on concerns of coercion is really just a "conclusory label masquerading as analysis.").

interfere with the constitutional rights of its citizens.

The abortion funding cases¹³⁶ are typical of how the line drawing works in these cases. For example, the majority, subsidy judges labeled the state and federal laws mere subsidization, as 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.¹³⁷ 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.¹³⁸ Such a neoformalistic approach thus first became apparent dealing with unconstitutional conditions in government as sovereign cases.

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.¹³⁹ 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

¹³⁶ See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

¹³⁷ See, e.g., *Harris*, 448 U.S. at 316 ("[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.").

¹³⁸ 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.").

¹³⁹ See, e.g., *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.").

challenged regulations are to deny women the ability voluntarily to decide their procreative destiny."¹⁴⁰ 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.¹⁴¹ Such an approach requires nothing less than considering how the outcome of the case will actually affect the parties.¹⁴²

In short, it might be said without exaggeration that the quagmire that the

¹⁴⁰ *Id.* at 217 (Blackmun, J., dissenting). 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 213-214.

¹⁴¹ In other words, the penalty judges would argue that it is necessary to *practically* consider the impact that the non-subsidization 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 of a Supreme Court Justice to have empathy and to understand the real world implications of his or her decisions. *See, e.g.,* Janet Hook and Christi Parsons, *Obama Calls "Empathy" Key to Supreme Court Pick*, LA TIMES, May 2, 2009, available at <http://articles.latimes.com/2009/may/02/nation/na-court-souter2> ("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.'").

¹⁴² *See* JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 144 (2002) (in the federalism context asserting that, "[f]or 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."). *See also* Sullivan, *supra* note 79, at 1497-98 (arguing for a "systemic" approach to unconstitutional conditions which, among other things, "recognizes the 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."). Rehnquist clearly does not agree with Sullivan and her legal realist compatriots' approach, as 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.

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.¹⁴³ Yet, as discussed 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 of how to consistently apply the doctrine of unconstitutional conditions in the government as sovereign context persists.¹⁴⁴

But this neoformalist/pragmatic 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 the next section, the "subsidy" Justices have also emerged victorious in their judicial battles with the "penalty" Justices in cases where 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.

¹⁴³ Although the terms "legal formalism" and "legal realism" are capable of many different meanings, Judge Posner offers some helpful insights in this regard. He 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." See 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, 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.*

¹⁴⁴ See generally Barbara A. Sanchez, Note, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 492-493 (2005) (discussing the continuing chasm of views on the proper application of the unconstitutional constitutional doctrine in *American Library Association*).

IV. 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,¹⁴⁵ Justice Oliver Wendell Holmes once famously said in the employment context that a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹⁴⁶ 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,¹⁴⁷ the Court, at least initially, arrived at this same conclusion in the government as employer context as well.¹⁴⁸ For instance, in the landmark public employment case of *Keyishian v. Bd. 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."¹⁴⁹

¹⁴⁵ See, e.g., *People v. Crane*, 108 N.E. 427, 429 (per Cardozo, J.), *aff'd*, 239 U.S. 195 (1915) (limiting public employment to citizens on the theory that "whatever is a privilege, rather than a right, may be made dependent on citizenship").

¹⁴⁶ See *McAuliffe v. Mayor and City of New Bedford*, 29 N.E. 517 (1892). See also *Adler v. Board of Education*, 342 U.S. 485, 496 (1952) (finding "no constitutional infirmity" to a law which required public employees to declare past and present Communist affiliation).

¹⁴⁷ 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))).

¹⁴⁸ 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 the public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.").

¹⁴⁹ See *id.* at 605-606 (quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)); see also *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of

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."¹⁵⁰ 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,"¹⁵¹ and "'produce a result which (it) could not command directly.'"¹⁵² Yet, important distinctions do remain between when the government acts as employer as 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."¹⁵³

Although Justice Marshall in *Pickering* did not cite to any precedent to support his assertion about the uniqueness of the government act 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.¹⁵⁴ For example, in her opinion for

reasons, there are some reasons upon which government may not rely."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (in the unemployment compensation and free exercise of religion context stating that, "[i]t is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

¹⁵⁰ See *Perry*, 408 U.S. at 597.

¹⁵¹ *Id.*

¹⁵² *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); 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 the benefit.").

¹⁵³ *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968) (emphasis added).

¹⁵⁴ 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

the Court in *Bd. of Cty. Comm'ns v. Umbehr*,¹⁵⁵ Justice O'Connor explained that a government employee's close relationship with the government requires a balancing of important free speech and government interests.¹⁵⁶ 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."¹⁵⁷ In a similar vein, Justice Powell explained in

is correct -- that the government as employer indeed has far broader powers that does the government as sovereign.") (citing *Pickering*, 391 U.S. at 568; *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564 (1973); *Connick v. Myers*, 461 U.S. 138, 147 (1983)); *Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 US 687, 718 (1994) (O'Connor, J., concurring) ("We have ... no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on."). *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.").

¹⁵⁵ 518 U.S. 668 (1996).

¹⁵⁶ *See id.* at 680.

¹⁵⁷ *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 management. When acting there, it may restrict individual autonomy in the service of its programmatic goals.") (citing C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 16-21 (1998)). Indeed, absent contractual,

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."¹⁵⁸ Last, in her plurality decision in *Waters v. Churchill*, Justice O'Connor juxtaposed the two roles that government plays by describing certain First Amendment doctrines which could not be reasonably applied to speech of government employees,¹⁵⁹ and by outlining the less stringent procedural requirements for restrictions on government employees' speech.¹⁶⁰

But although it is generally agreed that the government has more power to interfere with constitutional rights in its employment capacity,¹⁶¹ it is far from clear how to assess what employment practices are permissible and which are not.¹⁶² In any event, the Court on numerous occasions since

statutory or constitutional restriction, the government is entitled to terminate employees and contractors on an at-will basis, for good reason, bad reason, no reason at all. *See Umbehr*, 518 U.S. at 674.

¹⁵⁸ *See 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.*

¹⁵⁹ *See Waters*, 511 U.S. at 672 (plurality opinion) (reviewing a number of First Amendment doctrines that do not apply with the same force in the government as employer context, including instances in which the employer "may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work.") (citing *Cohen v. California*, 403 U.S. 15, 24-25 (1971)).

¹⁶⁰ *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).

¹⁶¹ *See Waters*, 511 U.S. at 673 (observing that the Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.").

¹⁶² *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

Pickering has re-affirmed this view of government having greater latitude when conditioning public employee rights in the workplace.¹⁶³

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,¹⁶⁴ for publicly expressing dislike for prominent political figures,¹⁶⁵ and even when such workers are independent contractors for the government employer.¹⁶⁶

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 *Mt. Healthy Bd. of Education v. Doyle*¹⁶⁷ made it easier for employers to defend against these First Amendment claims. Under the *Mt. 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 they would have made the same decision regarding the employee in the absence

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.") (quoting *Connick*, 461 U.S. at 150).

¹⁶³ See, e.g., *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.")

¹⁶⁴ *Givhan v. Western Consol. Sch. Dist.*, 439 U.S. 410 (1979).

¹⁶⁵ *Rankin v. McPherson*, 483 U.S. 378 (1987).

¹⁶⁶ *Bd. of Cty. Comms. v. Umbehr*, 518 U.S. 668, 675 (1996).

¹⁶⁷ *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

of the protected speech, they may escape liability.¹⁶⁸ 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."¹⁶⁹

Next, the Court decided the "public concern" test of *Connick v. Myers*.¹⁷⁰ Recall that in *Pickering*, Justice Marshall set up the balancing test this way: "The problem in any case is to arrive at a balance between the interests of the [public employee], as citizen, in *commenting upon matters of public concern* and interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁷¹ 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.¹⁷² 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."¹⁷³ 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.¹⁷⁴

The *coup de grace* against *Pickering*, however, was recently delivered by the Roberts Court in *Garcetti v. Ceballos*.¹⁷⁵ 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.¹⁷⁶ Although the *Garcetti* Court

¹⁶⁸ *Id.* at 285-86.

¹⁶⁹ *Id.*

¹⁷⁰ 461 U.S. 138 (1983).

¹⁷¹ *Pickering*, 391 U.S. at 568 (emphasis added).

¹⁷² *Connick*, 461 U.S. at 140-41.

¹⁷³ *Id.*

¹⁷⁴ To be fair, though, the hurdle imposed by *Connick* becomes much more manageable in a small sub-set of cases where 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 non-working setting. See *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995).

¹⁷⁵ 547 U.S. 410 (2006).

¹⁷⁶ *Id.* at 414-15.

paid lip service to its commitment to the doctrine of unconstitutional conditions in public employment,¹⁷⁷ 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.¹⁷⁸ 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 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.

Garcetti drastically cuts down on public employees’ First Amendment speech rights.¹⁷⁹ In the name of managerial prerogative,¹⁸⁰ federalism, and separation of powers,¹⁸¹ *Garcetti* has the effect of making government less

¹⁷⁷ *Garcetti*, 547 U.S. 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.”).

¹⁷⁸ *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. Employment Relations Comm’n*, 429 U.S. 167, 176 n.11 (1976).

¹⁷⁹ David L. Hudson Jr., *Garcettized! ’06 Ruling Still Zapping Speech*, FIRST AMENDMENT CENTER, Jan. 15, 2010, available at <http://www.firstamendmentcenter.org/commentary.aspx?id=22501> (last visited March 8, 2010) (“[*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.”).

¹⁸⁰ 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.”).

¹⁸¹ *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 617 (2007) (quoting *Garcetti*, 547 U.S. at 423 (2006)) (“The Court has refused to establish a constitutional rule that would require or allow ‘permanent

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.¹⁸² The *Garcetti* majority, rather than focusing on the importance of public employees practically being able to help ensure the maintenance of an accountable and transparent government as the *Pickering* Court did, focuses 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* redefine the role public employees should play in ensuring the fair and efficient administration of government services.¹⁸³

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-grandfathers' legal formalism. To understand more fully how the subsidy school of thought has begun to hold sway in cases where government acts in its employment capacity, it is necessary to consider the majority's invocation in *Garcetti* of a line of argument extraneous to the *Pickering* doctrine.¹⁸⁴

This line of argument involves a particular brand of subsidy argument. In coming to its conclusion in *Garcetti*, the majority commented that Ceballos' speech "owed its existence to [his] professional responsibilities" and "simply reflects the exercise of employer control over what the employer itself has commissioned or created."¹⁸⁵ Justice Souter ponders

judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'").

¹⁸² See *Waters v. Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work.").

¹⁸³ 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).

¹⁸⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 436 (2006).

¹⁸⁵ *Id.* at 421-22.

aloud in his dissent, “why 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?”¹⁸⁶ The answer appears to be: Because the subsidy approach requires it.

Recall the abortion funding subsidy case of *Rust v. Sullivan*,¹⁸⁷ 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.”¹⁸⁸ 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.”¹⁸⁹

In *Garcetti*, rather than subsidizing a public health program and “simply insist[ing] that public funds be spent [by doctors] for the purposes for which they were authorized,”¹⁹⁰ 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 employee 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 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.¹⁹¹

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 its subsidized speech (in the mouth of its employee) be used to promote the particular policies for which

¹⁸⁶ *Id.* at 434.

¹⁸⁷ 500 U.S. 173 (1991).

¹⁸⁸ *Garcetti*, 547 U.S. at 437 (citing *Rust*, 500 U.S. at 192-200).

¹⁸⁹ *Id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

¹⁹⁰ *Rust*, 500 U.S. at 196.

¹⁹¹ 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).

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.¹⁹² 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.¹⁹³ 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.¹⁹⁴

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' 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.¹⁹⁵ Similarly, under *Garcetti*'s conception, a public school teacher, district attorney, or police officer, may have the right to talk politics on their own time, but such employees have no right to public employment if 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 neo-formalism which permits the court to say that as long as employees

¹⁹² *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' speech was government speech with a preset or proscribed content as exemplified in *Rust*.").

¹⁹³ 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.* (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001)).

¹⁹⁴ *Pickering* was certainly not hired to parrot the school board line (though the school board would have certainly liked him not to be such a nuisance).

¹⁹⁵ *McAuliffe v. Mayor and City of New Bedford*, 29 N.E. 517 (Mass. 1892).

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. Whereas much of the *Garcetti* decision is clearly based on traditional categorical distinctions between citizen and employees, the majority subsidy Justices also sneaks 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*.¹⁹⁶ In *Haynes v. City of Circleville, Ohio*,¹⁹⁷ 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. 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.¹⁹⁸

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,"¹⁹⁹ 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 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.²⁰⁰ The perverse incentive thus established by *Garcetti* is for employees such as the officer in *Haynes* not to

¹⁹⁶ See *supra* note 179.

¹⁹⁷ 474 F.3d 357 (6th Cir. 2007).

¹⁹⁸ *Id.* at 364.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

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.

V. 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 as 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 of 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. 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 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 for a compelling government interest.

Not only is the approach taken by the subsidy Justices in subsequent public employee free cases not narrowly tailored in that its approach is being applied to employees who are not hired to parrot the government line,²⁰¹ but the government interest being advanced is downright inimical to

²⁰¹ Justice Souter in his *Garcetti* dissent suggests ample reason why the government speech analysis should be mostly extraneous to the *Pickering*

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 informing 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.²⁰² 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.²⁰³ The Court itself developed this idea that public employees play a unique role in a representative democracy in *Pickering* and other cases.²⁰⁴ Given

doctrine. 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." *Garcetti*, 547 U.S. at 428 (Souter, J., dissenting) (citing *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542 (2001)).

²⁰² *Accord Garcetti*, 547 U.S. at 432 (Souter, J., dissenting) ("[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.'").

²⁰³ *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.").

²⁰⁴ *See Pickering v. Bd. of Education*, 391 U.S. 563, 572 (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 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."). *See also City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) ("The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of

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 comes to their attention. Only the realist approach of the penalty Justices that recognizes the practical consequences of government burdening 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.²⁰⁵ 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 that write or speak in a way that is not in the best interest of their employer – in other words, exactly the theory of law that existed prior to the development of the *Pickering* doctrine.

In this regard, recall the court majority in *Garcetti v. Ceballos* found Ceballos did not have First Amendment rights because the speech at issue "owed its existence to [his] professional responsibilities" and "simply reflects the exercise of employer control over what the employer itself has commissioned or created."²⁰⁶ In making this point, the Court cites to the case of *Rosenberger v. Rector and Visitors of University of Virginia*,²⁰⁷ with a parenthetical that, "when government appropriates public funds to

interest to the public at large, a subject on which public employees are uniquely qualified to comment.").

²⁰⁵ See *Garcetti*, 547 U.S. at 428 (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.* ("*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.").

²⁰⁶ See *Garcetti*, 547 U.S. 410, 421 (2006).

²⁰⁷ 515 U.S. 819 (1995).

promote a particular policy of its own it is entitled to say what it wishes."²⁰⁸ This language in turn was taken from similar language in the abortion funding case of *Rust v. Sullivan*,²⁰⁹ which, of course, relies on neoformalistic reasoning.²¹⁰

The solution to this cold 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."²¹¹ 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.²¹²

A practical realist approach, on the other hand, has judges decide 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 surrounding different case. In this vein, Justice Blackmun suggested in the *Rust* case that constitutional balancing of relevant interests would lead away from a conclusion which was "insensitive and contrary to common human experience."²¹³

²⁰⁸ *Id.* at 833.

²⁰⁹ 500 U.S. 173, 174-75 (1991).

²¹⁰ *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 *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

²¹¹ *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986).

²¹² 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 person affected are worthy of almost no attention . . . The people and their problems that have been grist for the constitutional mill are incidental.").

²¹³ 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

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 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 rights-privilege distinction of a long ago, discredited age.

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 v. Ceballos* 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 rights/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 such 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

Fifth Amendment substantive due process rights of pregnant women. *See id.* at 213-214.

concern. Such employees should not have to rely on statutory whistleblowing 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 case where 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 have to always relinquish vital constitutional rights in order to enjoy the benefits of public employment.