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THE LOGIC OF SPEECH AND RELIGION RIGHTS IN THE PUBLIC WORKPKLACE

Scott R. Bauries*

TABLE OF CONTENTS

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I. INTRODUCTION

Can government function if its employees have individual rights that override their workplace duties? Intuitively, the answer is no, and the doctrine of public employee speech has mostly reflected this assumption.[1] The Supreme Court has spoken authoritatively on these limitations on public employee speech, most recently in *Garcetti v. Ceballos*[2] and *Lane v. Franks*,[3] but its jurisprudence on public employee religious expression has been less authoritative and more conflicting.[4] Recent events pitting public employees' personal religious exercise against public rights and limitations on government necessitate the question at the beginning of this paragraph.

This Article accordingly examines the limitations that the Constitution imposes on the expression and religious exercise of public employees. The Article begins by setting forth a familiar framework for conceptualizing rights relationships originally developed by Wesley Newcomb Hohfeld.[5] It then uses this framework to compare the jurisprudence of free speech and free exercise in the public workplace, illuminating its underlying logic. The Article then unifies these doctrines, clarifying the nature and purpose of the much-criticized[6] "employee—citizen" dichotomy the Court drew in *Garcetti*.[7] The Article then concludes with some thoughts about how these principles can inform future cases resembling the matter involving Rowan

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1. *See* Waters v. Churchill, 511 U.S. 661, 675 (1994) ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.").

2. 547 U.S. 410 (2006).

3. 573 U.S. 228 (2014).

4. *See infra* Part III (discussing the cases).

5. *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*].

6. *See, e.g.*, Paul M. Secunda, *Neoformalism and the Reemergence of the Rights-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 942-44 (2011) [hereinafter Secunda, *Neoformalism*] (criticizing the distinction as a neoformalist reinstatement of the right-privilege distinction that the preceding cases on public employee speech had rejected).

7. *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.").

County, Kentucky Clerk Kim Davis and her refusal to issue marriage licenses to same-sex couples[8] following the Court's decision in *Obergefell v. Hodges*.[9]

II. RIGHTS RELATIONSHIPS AND THE CONSTITUTION

In the early Twentieth Century, Wesley Newcomb Hohfeld gave us an important and still-influential way of thinking about what we generally term "rights," which is a term that Hohfeld re-characterized to describe eight different conceptions, each of which relates to two of the others, either as a "jural opposite" or as a "jural correlative."[10] Importantly to this Article, jural opposites are statuses that cannot simultaneously exist in the same holder as to the same object.[11] Jural correlatives are statuses that a holder and another person hold in relation to each other as to the same object.[12]

Hohfeld's typology recognizes the following jural relationships as aspects of what we term "rights":

> (1) *Claim-Right*: A claim correlative to a duty that obligates another to take or refrain from taking action. Its opposite [of the holder] is the absence of a claim-right (i.e., a "no-right");
>
> (2) *Privilege* (or "*Liberty*"): The freedom [of the holder] to engage in action, correlative to another's lack of any claim-right (thus, a no-right) to stop the action. Its opposite [in the holder] is a duty [to engage in or refrain from action];
>
> (3) *Power*: The ability [of the holder to create or] change legal relationships (e.g., by [] [passing

8. *See, e.g.*, Colin Dwyer, *Gay Couple's Lawsuit Against Kentucky Clerk Kim Davis Is Back On After Court Ruling*, NAT. PUB. RADIO (May 3, 2017), https://www.npr.org/sections/thetwo-way/2017/05/03/526615385/gay-couples-lawsuit-against-kentucky-clerk-is-back-on-after-appeals-court-ruling [https://perma.cc/A4VV-AQGT] (summarizing Davis's actions while reporting a then-pending lawsuit against her).

9. 135 S. Ct. 2584, 2599 (2015) (holding that same-sex couples have a fundamental right to marry under the United States Constitution).

10. The discussion in this section is adapted from an earlier work of mine, which mapped state constitutional rights onto the Hohfeld matrix. *See* Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 306 (2011).

11. *Id.* at 307.

12. *Id.*

> legislation]), correlative to another's liability to the legal relationship [the holder] [] chooses to create [or change]. Its opposite [in the holder] is a disability [to create or change a legal relationship]; and
>
> (4) *Immunity*: A status [in the holder] that creates a correlative disability in another to change [the holder's] [] legal relationships (e.g., a contractual provision forbidding termination of [the holder's] [] employment relationship without cause). Its opposite [in the holder] is a liability [to another's action to change the holder's legal relationships].[13]

So, a person who holds a duty, for example to mow another person's lawn, cannot simultaneously hold a liberty not to mow the same person's lawn. And the duty that the holder has to mow the lawn correlates with the claim of the landowner to have his lawn mowed. A person who holds a power, for example to approve a proposed construction plan, cannot simultaneously hold a disability to approve the same plan.[14] And if the power is exercised within its proper scope, then anyone interested in the particular construction project at issue holds a liability to recognize and obey the approval or disapproval of the plan.[15] All Hohfeldian jural relationships work this way.[16]

It is common and helpful to express Hohfeld's typology by way of a matrix, as Hohfeld himself initially did.[17] In a Hohfeldian matrix, conceptions that appear horizontally across from each other are correlatives; conceptions that appear diagonally from each other are opposites.[18]

Table 1

Claim	Duty
Liberty	No-Claim

Table 2

Power	Liability
Immunity	Disability

13. *Id.*
14. *See id.*
15. *Id.* at 308.
16. *Id.*
17. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 5, at 30.
18. Bauries, *supra* note 10, at 307.

The important aspect of Hohfeld's framework is the way in which it proposes to portray rights as a series of relationships.[19] Scholars interpreting Hohfeld have argued that all statements of legal relationships relating to rights conceptions should be reducible to a three-variable arrangement: "A has a right against B to X," for example.[20] This is a central framework in all law, but its structure is relatively simple in basic, private law relationships, such as the contract and tort examples provided above.[21] In fact, Hohfeld developed his framework to describe private legal relationships,[22] and the Hohfeld system has, during most of its existence, been applied solely to private law questions.[23]

Recently, however, scholars have begun to make attempts at applying the Hohfeld framework in constitutional law.[24] Such application poses difficult problems, as constitutional law often does not involve the relatively simple and individualized party structures common to private transactions and torts.[25] Nevertheless a few scholars have shown how jural correlatives

19. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 5, at 30.

20. STEPHEN E. GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 304 (2d ed. 2006) (explaining Hohfeld's conceptions); *see also* Allen T. O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law: Hohfeldian Analysis of Constitutional Law*, 61 S.C.L. REV. 141, 151 (2009) (outlining Professor John Finnis's observation that every Hohfeldian legal relation has three elements—the legal positions occupied by two persons or entities and a third element called an "act-description," which states the conduct governed by the two positions); Hohfeld, *Fundamental Legal Conceptions*, *supra* note 5, at 742-43 (explaining the operation of the fundamental conceptions in hypothetical relationships).

21. Bauries, *supra* note 10, at 308.

22. *See generally* Hohfeld, *Fundamental Legal Conceptions*, *supra* note 5 (discussing the fundamental conceptions in the context of trust law and equity); Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 5, at 16, 20 (discussing the fundamental conceptions in the context of property, contract, and tort law).

23. Bauries, *supra* note 10, at 308-09.

24. *See, e.g.*, Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008); Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 252, 260 (2000) [hereinafter Bybee, *Common Ground*]; Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1544 (1995) [hereinafter Bybee, *Taking Liberties*]; Maarten Henket, *Hohfeld, Public Reason and Comparative Constitutional Law*, 26 INT'L J. FOR THE SEMIOTICS OF L. 202 (1996); H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 *passim* (1988); O'Rourke, *supra* note 20, at 142.

25. O'Rourke, *supra* note 20, at 154.

can be derived from relationships between individuals and the state.[26]

One very helpful contribution to this literature maps Hohfeldian conceptions within H.L.A. Hart's theory of "primary rules"—those rules that govern conduct itself—and "secondary rules"—those rules that enable or disable conduct's legal effects.[27] According to this account, the Hohfeldian conceptions of claims, duties, liberties, and no-claims are primary rules because these rules govern actual conduct.[28] For instance, if one has a duty, then one is required to act or refrain from acting in a certain way.[29] In contrast, the Hohfeldian conceptions of powers, liabilities, immunities, and disabilities are secondary rules because their presence or absence either enables or disables the legal effects intended by conduct.[30] For example, if one has a power, then one may cause a change in legal relationships by acting (legislatively, for example) in accordance with the power, and the power will enable the legal effect of the action, but if the object of the action has an immunity to the exercise of the power in the intended way, then the intended change—but not the action itself—is legally disabled.

In the legislative context, the primary "conduct" is the act of legislating. This act encompasses all of the bargaining, drafting, hearings, speech-giving, and voting that the enactment of a piece of legislation entails.[31] The resulting legislation, however, is not "conduct." Rather, it is the physical manifestation of an alteration of legal relationships, pursuant to a power to make

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26. O'Rourke, *supra* note 20, at 145, 158; Bybee, *Taking Liberties*, *supra* note 24, at 1544; Bybee, *Common Ground*, *supra* note 24, at 260.

27. O'Rourke, *supra* note 20, at 154-55 (citing H.L.A. HART, THE CONCEPT OF LAW 81 (2d ed. 1997)). O'Rourke was not the first to make this connection, but was the first to do so as part of a systematic analysis of constitutional law. *See, e.g.*, O'Rourke, *supra* note 20, at 156 (acknowledging Lon Fuller's recognition of the same principle).

28. O'Rourke, *supra* note 20, at 146-47. (O'Rourke takes this to mean "physical act[s]," but there does not seem to be any distinction between a primary limitation on a physical act, such as striking another person, and a primary limitation on a procedural action, such as engaging in the process of legislating. *See id.* at 147 ("physical actions or inactions"). *Id.* at 155 ("physical act"). In a basic sense, Congress and state legislatures, when they are in session, always have the liberty to engage in legislative acts—even to advocate for legislation that may be found to violate the Constitution. The question, from a Hohfeldian perspective, is whether their legislative actions will operate to cause changes to legal relationships.)

29. O'Rourke, *supra* note 20, at 145.

30. O'Rourke, *supra* note 20, at 147-48.

31. U.S. GOV'T., *How Laws Are Made* (Sept. 14, 2017), https://www.usa.gov/how-laws-are-made#item-213608 [https://perma.cc/FJ5Z-VN4G].

such changes. Thus, legislation itself is properly thought of as being the subject only of secondary rules, while the physical acts involved in making policy, as described above, may properly be the subject of primary rules.

As the case law on justiciability has established, no private individual can challenge the physical ways in which the houses of Congress choose to engage in legislating—those are matters for the houses to determine themselves and are unreviewable in court.[32] In Hohfeldian terms, then, the vast majority of the legal relationships set up in the United States Constitution between individuals and legislative bodies are relationships of powers, liabilities, immunities, and disabilities; in other words, secondary rules.[33]

In the context of enumerated powers, the text appears to compel a powers and immunities interpretation.[34] Congress is explicitly granted "Power" to regulate commerce,[35] which matches the Hohfeldian conception of "power"—the ability to alter legal relationships.[36] For example, under current interpretations of the Commerce Clause, Congress may exercise its commerce power by forbidding us to use or sell marijuana, thereby altering our legal status from having a liberty to sell marijuana to having a duty not to sell marijuana.[37] Conversely, the current interpretation of the commerce power does not provide Congress with the power to directly regulate public education, as public education is thought to reside beyond the definition of "interstate commerce."[38] However, the commerce power's limitations do not prevent Congress from actually

32. *See* Nixon v. U.S., 506 U.S. 224, 226 (1993) (applying the political question doctrine to preclude review of the trial of an impeached federal judge). *But see* Powell v. McCormack, 395 U.S. 486, 489 (1969) (declining to apply the political question doctrine to preclude review of a House decision not to seat a duly elected member, on the grounds that the Constitution contains judicially applicable standards for review of the decision).

33. *See* O'Rourke, *supra* note 20, at 158; Bybee, *Common Ground*, *supra* note 24, at 318.

34. U.S. CONST. art. I, § 8.

35. U.S. CONST. art. I, § 8, cl. 1, 3.

36. *See* Morse, *supra* note 24, at 639-40 nn.1-2 (outlining the terminological similarities between U.S. Constitutional text and Hohfeld's legal positions).

37. Gonzales v. Raich, 545 U.S. 1, 22 (2005).

38. *See* U.S. v. Lopez, 514 U.S. 549, 562-68 (1995). Of course, Congress accomplishes nearly identical, and often more far-reaching, results by way of its conditional spending power, which is subject to arguably less stringent limitations, but to use this power, Congress must at least appropriate some funds to the states. *See* S.D. v. Dole, 483 U.S. 203, 206 (1987).

enacting a particular piece of legislation seeking to directly regulate public education (i.e., they do not prohibit the conduct of enacting unconstitutional legislation).[39] Instead, these limitations prevent such legislation that transgresses the Constitution from being effective in causing the changes to legal relationships intended.

But what about the more familiar rights-based ideas expressed in the Bill of Rights? These are nearly uniformly stated as prohibitions[40] or general negative guarantees.[41] It is tempting, therefore, to view them as Hohfeldian duties "not to act."[42] But for the national legislature, as well as the state legislatures under the incorporation doctrine, function instead as a barrier to change a person's legal status based on any legislation that transgresses the Bill of Rights.[43] In other words, the act of passing an unconstitutional law that violated the First Amendment is permitted, but the First Amendment disables the effect of that law.[44]

In the context of state action other than legislation, however, the Bill of Rights (as interpreted) certainly does create such Hohfeldian duties and claims.[45] For example, if one reads the Fourth Amendment's search and seizure provisions as they have been interpreted, then one can reasonably conclude that each officer of the law has a Hohfeldian duty not to apply excessive force in seizing a person through arrest.[46] This is a primary rule of conduct, rather than a secondary rule of recognition.[47] Individual police officers themselves are bound not to search individuals or seize them unreasonably.[48] Correlatively, each of us has an individual claim not to be

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39. *See Lopez*, 514 U.S. at 551.

40. *E.g.*, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

41. *E.g.*, U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

42. *See, e.g.*, David P. Currie, *Positive & Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-65 (1986).

43. *See generally* Bybee, *Common Ground*, *supra* note 24.

44. Bauries, *supra* note 10, at 314-15, n.62 (discussing unconstitutional legislation that remains on the books, as well as the passage and signing of unconstitutional laws).

45. Bauries, *supra* note 10, at 316.

46. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (recognizing an implied cause of action to challenge the constitutionality of a search by federal narcotics agents).

47. *See* U.S. CONST. amend. IV.

48. Wolf v. Colo., 338 U.S. 25, 28 (1949).

searched or seized unreasonably. Any of us who is so searched or seized may enforce that claim, which might include an order prohibiting further similar conduct by the officer or compensation after the fact, under the right circumstances.[49]

It requires only a small additional step to conclude that the same is true for the First Amendment rights to free speech and free exercise of religion, where the potential violator is some person or entity other than a legislative body.[50] Outside the legislative context, each individual government employee is bound by a Hohfeldian duty not to violate the speech or religious exercise rights of any of us, and we each hold a Hohfeldian claim to prevent or punish any such violations. If this is correct, then it illuminates the reasons for much of our public employee speech jurisprudence, and it allows us to predict how the constitution will be applied in the relatively unexplored area of public employee free exercise claims against their employers.

III. PUBLIC EMPLOYEES AS INDIVIDUAL RIGHTS HOLDERS

A. The Unconstitutional Conditions Doctrine

In 1892, in *McAuliffe v. Mayor of New Bedford*,[51] Justice Oliver Wendell Holmes (in)famously stated that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[52] This understanding of public employees' possession of a Hohfeldian no-claim to free expression came to be known as the "right-privilege distinction"[53] because it was defended on the grounds that public employment is a privilege, not a right, and, therefore, could be conditioned and could not be demanded.[54] From the time of *McAuliffe* until well into the Twentieth Century, it was understood that government employees could be required to sacrifice all of their expressive rights as a condition of public

49. *Bivens*, 403 U.S. at 397 (holding cause of action existed for agents' violation of the Fourth Amendment).

50. *But see* Bybee, *supra* note 24, at 325 (arguing that only Congress is disabled by the First Amendment); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252-53 (2010) (making a similar argument, using the constitutional text, rather than Hohfeld).

51. 29 N.E. 517 (Mass. 1892).

52. *Id.* at 517.

53. *See* Secunda, *Neoformalism*, *supra* note 6, at 908.

54. *See McAuliffe*, 29 N.E. at 517.

employment.[55]

Then in the landmark case of *Pickering v. Board of Education*,[56] the Court decisively reversed course.[57] In *Pickering*, the plaintiff, a public school teacher, had penned a letter to the editor of a local newspaper charging that the school board—his employer—had dealt with public money irresponsibly by spending too much on athletics and not enough on academics, and that the superintendent had intimidated teachers into supporting previous bond issues.[58] In retaliation for this letter, the school board fired Mr. Pickering.[59] He sued the school board, alleging a violation of his First Amendment rights.[60]

In deciding the case, the Court finally and decisively jettisoned the right-privilege distinction, holding that public school teachers do not relinquish their First Amendment rights simply by virtue of becoming public employees.[61] In the parlance of constitutional law, this rule is seen as an example of the "unconstitutional conditions doctrine," which holds that, just as the government cannot compel any private individual to relinquish his or her constitutional rights directly, it cannot do the same indirectly by conditioning an important government benefit—including public employment—on the relinquishment of those same rights.[62]

Today, it is well understood that public employees have public rights under the Constitution, and the cases mostly involve explorations of the limitations on these rights.[63] In exploring these limitations, the Supreme Court has developed a rich jurisprudence of public employee free speech, but it has mostly left public employee free exercise of religion unaddressed.[64]

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55. *Id.* at 517-18; Secunda, *Neoformalism*, *supra* note 6, at 912.

56. 391 U.S. 563 (1968).

57. *Id.* at 564-65.

58. *Id.* at 566.

59. *Id.*

60. *Id.* at 565.

61. *Id.* at 568.

62. *See* Secunda, *Neoformalism*, *supra* note 6, at 908 (explaining the unconstitutional conditions doctrine).

63. *See* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006); Connick v. Myers, 461 U.S. 138, 146-48 (1983).

64. *See* Michael D. Moberly, *Bad News for Those Proclaiming the Good News: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1, 7 (2001); Brian Richards, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. PA. J. LAB. & EMP. L. 745, 747-48 (1998).

B. The Expressive Rights of Public Employees

1. Free Speech

In *Pickering*, the Court held that a public school teacher retains the right to speak out as a citizen on a matter of public concern.[65] However, due to the nature of the public employment relationship, this right to speak must be balanced against the interests of the school board in maintaining an effective public workplace.[66]

In Mr. Pickering's case, the Court conducted this balance and concluded that, in part due to the unique knowledge of the educational system that a teacher possesses, a teacher's public speech on the appropriate uses of school funds is particularly valuable to the public.[67] A teacher's deliberately false statements as part of such a debate might be cause for discipline, but only if such false statements are directed at matters peculiarly within this unique knowledge, rather than at matters that are part of the public record and subject to quick and easy verification and correction.[68] The school board could not state a governmental interest that might plausibly outweigh the value of this speech.[69] Thus, the *Pickering* doctrine was born.

The next development in this line of cases also came out of the public school context.[70] In *Givhan v. Western Line*

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

66. *Id.* at 568.

67. *Id.* at 571-72.

68. *Id.* at 572.

69. *Id.* at 572-73 ("What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.").

70. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977) (chipping away procedurally at Pickering). In *Mt. Healthy*, the Court addressed a claim against an employer which had both retaliated against an employee for engaging in speech addressing a matter of public concern and punished the same employee for non-speech-related misconduct. *Id.* at 276. Addressing this unique factual situation, the Court allowed the employer to escape liability by proving, essentially, that the employee's speech was not a "but for" cause of the employer's action. *Id.* at 281-82. Colloquially, this defense has become known as the

Consolidated School District,[71] a public school counselor lodged a complaint with her principal alleging race discrimination in the school's personnel decisions.[72] In retaliation for making this complaint, the counselor was terminated.[73] She sued, alleging, among other things, violation of her First Amendment rights.[74] The Court held that, despite the fact that she had complained internally and only to her supervisor, her complaints addressed a matter of public concern, and they remained protected under the First Amendment, subject to the *Pickering* balance of interests.[75]

In *Connick v. Myers*,[76] the Court further clarified the *Pickering* test's requirement that the public employee's speech be made on "matters of public concern."[77] In *Connick*, an employee of the New Orleans District Attorney's Office circulated to co-workers a questionnaire containing items overwhelmingly reflecting the employee's personal grievances against the District Attorney, Harry Connick, Sr.[78] Among these more personal items was one item asking employees whether they had ever felt pressured to engage in political activities.[79] While recognizing the public nature of the political activities item, the Court held both that (1) the main point of the questionnaire was to air a private grievance, not to comment on a matter of public concern; and (2) the managerial prerogatives of Mr. Connick's office outweighed any public interest in the items relating to political activity.[80] Most observers saw *Connick* as a tilting of the *Pickering* balance in favor of employers,[81] but the basic protection for public employee speech remained.[82]

"same decision anyway" defense, and most employment law observers viewed it as an affront to the rights protected by *Pickering*.

71. 439 U.S. 410 (1979).

72. *Id.* at 412-13.

73. *Id.* at 411-13.

74. *Id.* at 411-12.

75. *Id.* at 413-15.

76. 461 U.S. 138 (1983).

77. *Id.* at 140.

78. *Id.* at 141-42.

79. *Id.* at 141.

80. *Id.* at 147-48, 151-52.

81. *See, e.g.*, Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 49 (1988).

82. Indeed, the Court added one more significant precedent a few years after *Connick*, *Rankin v. McPherson*, recognizing an expansive definition of "matter of public concern." *See* Rankin v. McPherson, 483 U.S. 378, 384-87 (1987) (holding that

One of the Roberts Court's earliest decisions, *Garcetti v. Ceballos* was what many consider to be a radical departure from the *Pickering* regime, even as limited by *Connick*.[83] Ceballos, the plaintiff, was a calendar deputy for the Los Angeles District Attorney's Office.[84] Consistent with his responsibilities in this role, at the urging of defense counsel in a pending case, Ceballos examined a search warrant that had been obtained against the defense counsel's client.[85]

Concluding that the affidavit supporting the warrant was plagued by misrepresentations and serious factual inaccuracies, Ceballos authored a memorandum to that effect and submitted it to his superiors.[86] This submission led to a heated discussion, and ultimately, Ceballos's superiors rejected the memorandum's conclusions.[87] Subsequently, defense counsel called Ceballos as a witness in the suppression hearing, and Ceballos testified substantially in concert with his memorandum, but the judge denied the motion to suppress.[88] Finally, when all was said and done, Ceballos was transferred to a less desirable position.[89]

Ceballos filed suit claiming, among other things, retaliation for the exercise of his First Amendment right to speak out on matters of public concern.[90] When the case reached the Supreme Court, the only speech that was at issue was Ceballos's written memorandum to his superiors.[91] The Court considered the memorandum in light of the *Pickering* line of cases and concluded that it was not the kind of speech that the *Pickering* line was designed to protect.[92] Rather than "citizen speech," Ceballos's memorandum was speech made "pursuant to [Ceballos's] duties" as a calendar deputy.[93] The Court then stated as its holding a categorical rule of exclusion from the First Amendment's protection: "[w]e hold that when public employees make statements pursuant to their official duties, the employees

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a public employee's expression of hope that the failed shooters of President Reagan in 1981 "get him" if they were to try again was speech on a matter of public concern).

83. Secunda, *Neoformalism*, *supra* note 6, at 908-09, 912.
84. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).
85. *Id.* at 413-14.
86. *Id.* at 414.
87. *Id.*
88. *Id.* at 414-15.
89. *Id.* at 415.
90. *Id.*
91. *Id.*
92. *Id.* at 421-22.
93. *Id.* at 415.

are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[94]

The *Garcetti* Court's choice to adopt a categorical rule excluding certain speech from First Amendment protection has drawn fervent criticism.[95] Multiple legal commentators have critiqued the decision on the grounds that it is unthinkingly formalistic.[96] One commentator even predicted that the decision would lead to results contrary even to the professed values of formalist judging—namely the fostering of predictability and the cabining of the influence of ideology in the judicial process.[97]

These critiques appear to have been prescient. Indeed, many courts applying *Garcetti* have over-read the case to deny First Amendment protection of any kind, to speech simply made during the course of a public employee's employment, or speech related in some way to such employment.[98] These rulings have caused many to conclude that *Garcetti* was wrongly decided,[99] and have been used as support for more general critiques of the formalism of the Roberts Court.[100]

Ultimately, the Court was forced to take up the *Garcetti* rule again in the 2014 case *Lane v. Franks*[101] to correct the misapplication of its categorical rule.[102] *Lane* presented the

94. *Id.* at 421.

95. *See, e.g.*, Secunda, *Neoformalism*, *supra* note 6, at 912; Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123 (2008) [hereinafter Secunda, *Garcetti's Impact*]; Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174, 1192 (2007).

96. *See, e.g.*, Secunda, *Neoformalism*, *supra* note 6, at 912; Secunda, *Garcetti's Impact*, *supra* note 95 ("Consistent with Justice Stevens' dissent in *Garcetti*, I reject the dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both."); Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174, 1192 (2007).

97. Rhodes, *supra* note 95, at 1193.

98. *See* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 246 EDUC. L. REP. 357 (2011) (documenting the broadening of the *Garcetti* categorical exemption in lower court decision making).

99. Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 54 (2009); Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 75-76 (2009); Rhodes, *supra* note 95, at 1174; Secunda, *Garcetti's Impact*, *supra* note 95, at 117.

100. Secunda, *Neoformalism*, *supra* note 6, at 911.

101. 573 U.S. 228 (2014).

102. *Id.* at 239-40.

First Amendment claims of Edward Lane, an Alabama public community college employee who was hired to manage a community outreach and education program with several employees.[103] As one of his early tasks on the job, Lane audited the payroll and work records of all of his employees and discovered that, based on these records, a then-sitting member of the Alabama House of Representatives had been receiving a salary from the program but doing little to no work in exchange for it.[104]

Lane held a meeting with her at which he demanded that she begin doing work that would justify the salary, but she refused, so he terminated her employment.[105] Upon learning of her termination, she allegedly threatened retaliation against Lane.[106] Eventually, the Department of Justice learned of the former employee's no-show job, and because the program was funded in part federally, prosecuted her for fraud.[107] Lane was called as a fact witness during the trial, and he testified truthfully as to the facts set forth above.[108] Following Lane's testimony, the community college's program's entire twenty-nine person workforce was laid off, with all but Lane and one other former employee being rehired shortly thereafter.[109]

Lane sued the college's President, who ordered the layoffs and selective rehirings, asserting, among other claims, a claim that his First Amendment rights had been violated.[110] His argument was that his testimony in the employee's trial was speech protected by the First Amendment, and that the college's President had impermissibly retaliated against him for this protected speech.[111]

The case ultimately reached the Supreme Court after the United States Court of Appeals affirmed the District Court's grant of summary judgment against Lane.[112] The Court of Appeals based its decision substantially on *Garcetti*, along with some pre-*Garcetti* precedent that the court viewed as consistent

103. *Id.* at 231-32.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 233-34.
110. *Id.*
111. *Id.*
112. *Id.*

with *Garcetti*.[113] The Court of Appeals held that, since Lane had only learned about the employee's no-show job by virtue of his employment as head of the program, his testimony "owed its existence to [his] official duties," and was therefore unprotected under *Garcetti*.[114]

The Supreme Court unanimously reversed the Court of Appeals.[115] Holding that the *Garcetti* decision removed from the protection of the First Amendment only from speech the employee was required to make as part of a job duty, the Court easily concluded that offering testimony in a criminal case did not meet this test for Lane.[116] He was not employed to testify in criminal trials, nor did his job duties even suggest that his employer would ever ask him to do so.[117] In Hohfeldian terms, his employment relationship did nothing to extinguish the liberty to testify that each of us possesses, and the subpoena he received converted this liberty into a duty to testify. So, even though the Court issued a very strong rebuke against the lower courts that had over-read *Garcetti*, it reaffirmed its categorical rule that when a public employee speaks pursuant to official duties, that employee's speech is not protected under the First Amendment.[118]

2. Free Exercise

The doctrine of free exercise has received far less attention from the Court in the public employee context. In fact, the four cases that outline the contours of the doctrine all came out of the unemployment compensation context—not the work context.[119] In other words, the Supreme Court has yet to hear a *Pickering*-type case directly challenging a public employer's termination or other adverse action against an employee for freely exercising his or her religion.

In the earliest case to address free exercise in the

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113. *Id.*

114. Lane v. Cent. Ala. Cmty. Coll., 523 F. App'x 709, 711 (11th Cir. 2013) (*per curiam*).

115. *Lane*, 573 U.S. at 231.

116. *Id.* at 240-41.

117. *Id.* at 238.

118. *Id.* at 237-40.

119. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Board of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

workplace, *Sherbert v. Verner*, the Court considered an appeal of a denial of unemployment compensation to a Seventh Day Adventist who was fired for her inability to work on Saturday, which is the Sabbath for Seventh Day Adventists.[120] The Court held that Ms. Sherbert could not be denied unemployment compensation on the ground of employee misconduct for not reporting to work on a day of the week when her religion forbade her to work.[121] Notably, however, Ms. Sherbert was not a public employee—the case came to the Court on an appeal of the public unemployment compensation commission and commissioner's decision.[122] So the Court did not have the opportunity to opine on any limitations that the Free Exercise Clause might place on public employers in managing their workers.

Following *Sherbert*, the Court considered essentially the same question in *Thomas v. Review Board of the Indiana Employment Security Division*.[123] The plaintiff in *Thomas* was a Jehovah's Witness who worked in a foundry making metal industrial parts.[124] During his employment, the foundry began taking orders to manufacture parts for military weapons, and Thomas terminated his own employment to avoid violating his conscience by assisting in the manufacture of weapons of war.[125] He filed for unemployment compensation, was denied in the state courts, and then appealed to the Supreme Court.[126] The Court held that, similar to Sherbert, Thomas was compelled to terminate his employment due to a deeply held religious belief, and that public benefits, such as unemployment compensation, cannot be conditioned on relinquishing such beliefs.[127]

Continuing this line of cases, in *Hobbie v. Unemployment Appeals Commission of Florida*, the Court once again applied *Sherbert* to reverse the denial of unemployment compensation.[128]

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120. *Sherbert*, 374 U.S. at 399.

121. *Id.* at 403-05.

122. *Id.* at 399-402.

123. *Thomas*, 450 U.S. at 713.

124. *Id.* at 709.

125. *Id.* at 709-10.

126. *Id.* at 710-12.

127. *Id.* at 717-18 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.").

128. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 139-40 (1987).

The plaintiff in *Hobbie*, like the plaintiff in *Sherbert*, was a Seventh Day Adventist, who was asked to work on Friday nights and Saturdays and refused.[129] When she applied for unemployment compensation, she was denied, and she appealed ultimately to the Supreme Court.[130] The Court held that the case was indistinguishable from *Sherbert* and reversed the denial.[131]

The Court's next—and really its last—opportunity to address the Free Exercise rights of employees came in *Employment Division, Department of Human Resources of Oregon v. Smith*. Similar to *Sherbert*, *Smith* involved two private employees who were both dismissed for workplace misconduct—in their case the ritual consumption of peyote, a hallucinogen—and then were denied unemployment compensation benefits on the grounds of that misconduct.[132] Unlike in *Sherbert*, however, the Court in *Smith* did not strike this denial down.[133] Instead, basing its decision on the Oregon Legislature's designation of the consumption of peyote as a criminal act, the Court held that a neutral, generally applicable law such as Oregon's could be applied to deny benefits despite any burden it may place on religious free exercise.[134]

This decision, of course, was in significant tension with *Sherbert*, *Thomas*, and *Hobbie*, all of which appeared to allow individual religious objectors to exempt themselves on free exercise grounds from otherwise generally applicable laws.[135] But the Court dismissed that tension, stating, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid [criminal] law prohibiting conduct that the State is free to regulate."[136] Thus, the Court apparently drew a line between criminal prohibitions and employment misconduct that did not rise to a level of criminality.[137]

The other decision relevant to this analysis—and one that

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129. *Id.* at 138.

130. *Id.* at 139.

131. *Id.* at 146.

132. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

133. *Id.* at 890.

134. *Id.*

135. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981); *Hobbie*, 480 U.S. 136.

136. *Smith*, 494 U.S. at 878-79 (alteration to clarify that the Court was referring to Oregon's criminalization of peyote, not necessarily to all manner of regulation).

137. *Id.* at 884.

arguably muddies the waters on the claim made in the last sentence of the previous paragraph—is the Court's recent ruling in *Hosanna-Tabor Evangelical Church and School v. EEOC*.[138] In that case, a private religious school terminated one of its teachers in retaliation for her protected conduct in reporting what she reasonably believed to be unlawful discrimination.[139] The school did not contest that its termination was motivated by a desire to retaliate against the teacher, but instead claimed that it was exempt from regulation under the Americans with Disabilities Act (the law in question) due to the employee's status as a minister of the church.[140]

Known as the "ministerial exception," the doctrine had developed in the lower courts over time to hold that federal courts were prohibited by the Religion Clauses from second-guessing the ecclesiastical decisions of religious employers.[141] The most common justification for this doctrine was that a contrary approach would constitute an intolerable intrusion on the free exercise rights of the religious employers by effectively giving courts power of who the churches chose to minister their flocks.[142]

Ultimately, the Court accepted the Church's argument and adopted the ministerial exception as law, taking care to indicate that courts should be skeptical of designations of employees as "ministers" going forward, but should be willing to apply the exemption where the designation is made in good faith.[143] Pressed to justify the decision in light of *Smith*'s pronouncement that religious objectors could not exempt themselves from generally applicable regulations based on free exercise concerns, Chief Justice Roberts drew a distinction between the "outward physical acts" of the plaintiffs in *Smith* and the "internal church decision that affects the faith and mission of the church itself" at issue in *Hosanna-Tabor*.[144] According to Chief Justice Roberts, state interference with the former was less problematic from a free exercise perspective than state interference with the latter; thus, arguably privileging religious institutions over religious worshippers in terms of their Hohfeldian claims against

138. 565 U.S. 171 (2012).
139. *Id.* at 178-80.
140. *Id.* at 180.
141. *Id.* at 186-87.
142. *Id.* at 188-89.
143. *Id.* at 196 (Thomas, J., concurrence).
144. *Id.* at 190.

government actors.[145]

Summarizing the free exercise cases, then, we have four cases that challenge the denial of unemployment compensation, but not the adverse action that caused the unemployment, because the employers in all four cases were non-governmental entities.[146] And we have a fifth case that challenges the application of an anti-discrimination statute to a religious employer, on the ground that it should be able to freely determine the employment status of its own religious employees on ecclesiastical grounds, even if church doctrine allows or even requires discrimination that would otherwise be prohibited by law.[147] So, four cases police the denial of a public benefit incident to termination, but say nothing about permissible grounds for termination where a public employee exercises religion in the workplace, and the fifth case privileges a private religious employer's decision making, again saying nothing about public employees and their free exercise rights.[148]

In short, whereas the free speech protections of the First Amendment benefit from a rich jurisprudence of the public workplace, the free exercise protections for public workers essentially are a blank slate in the Supreme Court. The next Part examines why this may be and posits that a Hohfeldian understanding helps to answer the question.

IV. RECONCILING DUTIES WITH RIGHTS

A. Free Speech and Official Duties

As outlined above, the *Pickering* doctrine is premised on the notion that, though the government may not condition public employment on the relinquishment of speech rights, a government employer must be able to infringe those rights in some cases.[149] But why should that be so, as a constitutional matter? If public employees remain individuals possessed of

145. *Id.* at 194-95.

146. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Board of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

147. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. 171.

148. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. 171; *Smith*, 494 U.S. 872; *Hobbie*, 480 U.S. 136; *Thomas*, 450 U.S. 707; *Sherbert*, 374 U.S. 398.

149. *See supra* Part III.B.1.

speech rights, and if the Constitution forbids employment conditioned on giving up these rights,[150] then how can the government ever justify infringing them in ways that would not be permissible where the rights holder is a non-employee?

In most of the cases discussed above, the Court has offered an intuitive assumption as a theoretical justification. This assumption is that government must be able to infringe employee speech rights because doing so is essential to operating an effective and efficient workplace, and to serving the public.[151] This is intuitively plausible, and one can easily imagine examples of public employee expression that would create chaos in the public workplace (e.g., a DMV worker suddenly disrobing for the artistic value of it). But the justification finds firmer footing within a Hohfeldian view.

In truth, the reason that the government can act against employees whose speech causes disruptions to the workplace or negatively affects the government's ability to serve the public is because the employees in question are subject to Hohfeldian duties not to act in ways that disrupt government operations or impair government services to individuals. Ordinary citizens are not subject to such duties, other than the generally applicable duties not to trespass or otherwise break the law, so the government cannot act against their speech, other than as permitted by ordinary First Amendment principles.

As employees, however, government workers are subject to workplace duties—the primary one being the duty of loyalty, which prohibits an employee from working against his or her employer's interests while employed.[152] Thus, embedded in government work is the Hohfeldian duty to pursue the government's ends while performing government work. Naturally, this means that, if a public employee has a personal interest (expressive or otherwise) that conflicts with his or her government mission, the employee is required to subvert that personal interest while performing government work.[153] Every public employee speech case that has resulted in a government

150. Connick v. Myers, 461 U.S. 138, 143-45 (1983).

151. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

152. *See, e.g.*, 5 C.F.R. § 2635.101 (2017).

153. *Id.*

victory can be defended on this basis.[154]

The key is in figuring out when an employee-plaintiff is performing government work, and when that employee-plaintiff is outside that role. So, for Mr. Pickering, the Court tacitly concluded that, as the writer of a letter to the editor of the local paper, Mr. Pickering was not performing any part of the government duties he had.[155] In fact, the Court reserved the possibility that, had Mr. Pickering spoken deliberately false, his speech could have been regulated, but only if the false speech in question was "about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts."[156] Rather, according to the Court:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.[157]

As the Court explains, then, the touchstone is whether the speech interferes with the employee's performance of his duties, or whether it interferes with the operation of the school (with which any public school employee has a duty not to interfere).[158] This conception makes Hohfeldian duty the reason speech can be regulated.

Conversely, as the author of the disposition memo in question in *Garcetti*, the Court explicitly concluded that Mr. Ceballos was performing his Hohfeldian government duty in writing that memo.[159] Simply put, the fact that the speech in question was Ceballos's Hohfeldian duty made it subject to

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154. *See, e.g., Connick*, 461 U.S. 138.

155. Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill., 391 U.S. 563, 572 (1968).

156. *Id.*

157. *Id.* at 572-73.

158. *Id.*

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

regulation. If there is a flaw in that ruling, it is that the Court deferred too completely to the employer because it could easily have asked the employer to justify the regulation by showing that the duty-required speech was incompetent, wrong, unwise, or poorly written. But the central justification of *Garcetti* is harmonious with that of *Pickering*—if the speech interferes with the performance of Hohfeldian public duties, then the government employer to whom those duties are owed can regulate it based on its own Hohfeldian claim.

The difficult cases fall between these extremes. Ms. Meyers, the plaintiff in *Connick*, seemed to be speaking for her own purposes in spreading the questionnaire around the office, but at that time in that place, she had the Hohfeldian duty not to engage in workplace disruption. Conversely, Ms. Givhan, though she worked in the counseling role for her school employer, did not have the Hohfeldian duty to refrain from calling problems to her supervisor's attention. No part of what she did operated to subvert her government mission or to prevent private individuals from receiving government services.

What about Roe, the pseudonymous plaintiff in *San Diego v. Roe*,[160] though? In selling pornographic videos of himself online,[161] surely he was not performing a public duty, or failing to perform one. That case requires some understanding of the employment expectations of certain government employees, primarily police officers and teachers. Throughout the history of the common law, those who occupy these roles have assumed workplace duties that go beyond the work they directly perform. These duties are controversial, but it is settled doctrine in the contract law of most states that actions taken outside the workplace that bring these workers into the disrespect or disrepute of the community are sanctionable—even through termination.[162] And as the *Roe* Court pointed out:

> Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link

160. City of San Diego v. Roe, 543 U.S. 77 (2004).

161. *Id.* at 78.

162. *See, e.g.*, Winters v. Ariz. Bd. of Educ., 83 P.3d 1114, 1119 (Az. Ct. App. 2004) ("Instead, we hold that the off-campus acts for which a teacher is being disciplined need not be limited to teacher-student interactions but must relate to his/her fitness as a teacher and must have an adverse effect on or within the school community. This 'nexus' requirement has been adopted by the majority of jurisdictions that have considered this issue.").

> his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.[163]

In most states, the common law of contracts recognizes that the duties of some workers extend beyond the workday and into the community.[164] *Roe* is best understood as the application of that principle in the context of the Hohfeldian duties-claims relationship that justifies government suppression of speech that contravenes a public employment duty. In other words, in the context of this Article's inquiry, Roe's expression was subject to government sanction because he used that speech to subvert his government duty.[165]

The upshot of this discussion is that, rather than being a sharp divergence from the public employee speech law that came before it, *Garcetti* is logically consistent with that prior law. In fact, *Garcetti* is best understood as an explicit expression of what remained implicit in all of these prior cases—public employee speech can be regulated only when that speech has a demonstrable negative impact on the employee's performance of his or her public duties.[166] In *Garcetti*, the negative effect may have been that the speech flatly contradicted these duties, though if so, the Court assumed that and should have instead required proof of it. So, as mentioned above, *Garcetti* may have been wrongly decided on the facts, but in Hohfeldian terms, its logic is consistent with the *Pickering* line of cases. Where a public employee holds the Hohfeldian duty not to engage in certain speech and conduct, and the employee nevertheless does so, the government acquires the Hohfeldian claim to stop or punish such behavior.

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163. *Roe*, 543 U.S. at 81.

164. *See* Marisa A. Pagnattaro, *What Do You Do When You Are Not at Work: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 683 (2004).

165. *Roe*, 543 U.S. at 84-85.

166. Garcetti v. Ceballos, 547 U.S. 410, 422-23 (2006).

B. Free Exercise and Official Duties

It seems at first blush curious that the law of public employee speech is so well-developed and internally consistent, while the law of public employee religious exercise is far less so. But examining the constitutional provisions at issue under a Hohfeldian lens reveals why this is so.

Public employees certainly are not required to relinquish their rights under the Free Exercise Clause as a condition of public employment.[167] As the Court has held again and again, the unconstitutional conditions doctrine applies with just as much force to employment as to unemployment compensation, welfare benefits, and other government benefits.[168] So, one might expect that there should be a number of cases pressing the free exercise claims of public employees against their employers, and that some of these claims should be met with success.

But the Supreme Court has never decided such a case, and it is useful to ask why this is. One plausible answer is that the duty-claim relationship that has existed mostly under the surface in public employee speech cases is constitutionally explicit in public employee free exercise cases. And the duty side of the equation in speech cases is always a case-by-case determination, while the duty side of the equation in free exercise cases is universal. This latter fact most likely does more to prevent claims from filtering up to the Supreme Court than anything.

Under the extant interpretations of the Establishment Clause, the First Amendment places a Hohfeldian duty on all government employees[169] not to endorse religion or coerce religious observance while performing their government employment duties.[170] A public school principal cannot encourage a group of students to offer a prayer over the school loudspeaker, even if that principal sincerely and deeply believes

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167. Brian Richards, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. PA. J. LAB. & EMP. L. 745, 757-58 (1998).

168. *Id.*

169. Other than military chaplains and similar workers, of course, who have always occupied an ambiguous constitutional position. *See, e.g.*, Klaus Hermann, *Some Considerations on the Constitutionality of the United States Military Chaplaincy*, 14 AM. U.L. REV. 24, 24 (1964).

170. *See, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibiting public school officials from forcing Jehovah's Witness students to salute or pledge allegiance to the flag).

that it is his duty to save the souls of the listeners.[171] A DMV employee cannot hand out copies of the New Testament or the Koran when issuing driver's licenses. These are duties that only burden government employees, and the claims that exist relative to these duties reside in both the individuals who might interact with the public employees and in the government employer, which itself may be faced with suits if the public employees transgress their duties.

Another plausible answer is that the claims do in fact find their way into court, but not as free exercise claims by public employees against their employers. Rather, they are styled as establishment claims by private individuals against the public employer due to the actions of its employee or employees. Through these claims, we learn the limits of governmental authority in advancing or inhibiting religion, and thereby learn the scope of government employees' duties not to advance or inhibit religion by exercising their own religious beliefs at work.

What these two possible answers illustrate is that, unlike in the speech context, in the religion context, the duties of government and the duties of government employees are coextensive. What the public school has a Hohfeldian duty not to do as a matter of school policy, the public school teacher also has the same duty not to do as a matter of individual conscience while performing her public duties.

This is not true in the area of free speech. Often, a public employee's duties related to speech do not extend to her public employer, or vice versa. For instance, Ceballos's duty to draft disposition memos was not also the duty of his employer.[172] Because the identity of Hohfeldian duties between public employers and their employees that exists in the religion context does not exist in the speech context, it is natural to expect that speech claims—even if all such claims boil down to an analysis of the employees' Hohfeldian duties, as this Article argues—will have to be fleshed out case-by-case. Public employees' free exercise claims, in contrast, will generally be resolved through the litigation of Establishment Clause claims against their employers.[173]

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171. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that student-led and initiated prayer at a high school graduation violates the Establishment Clause because the school board endorses the exercise).

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

173. Richards, *supra* note 167, at 763-64.

C. Free Exercise or Establishment?

Considering the foregoing, in light of the purpose of this Symposium, it is worth asking what would happen if, rather than an elected (and therefore un-fireable) County Clerk taking action similar to that of Kim Davis,[174] instead her Deputy Clerk decides, based on his own religious conviction, to deny marriage licenses to same-sex couples? And what if the elected County Clerk then terminates him for that action? It seems clear that the Deputy Clerk in question would not have a free exercise claim against the Clerk's Office or the County Clerk. In such a case, the Clerk's public Hohfeldian duty is to issue licenses equally to all those who otherwise qualify, regardless of their sexual orientation or their partners' sex.[175] The failure to do so for religious reasons would give rise to an obvious Hohfeldian claim in the applicants under the Establishment Clause.

Any free exercise suit by the employee would run into a defense based on this duty-claim relationship. In other words, the employer, as the defendant in any such suit, would argue that its action in terminating the Deputy Clerk for exercising his religious beliefs at work was justified because the religious exercise in question was directly contrary to the Deputy Clerk's public duty to issue licenses without regard to the sex of each partner. That justification would surely work exactly the same way if the claim were a free speech claim, rather than a free exercise claim. If the Deputy Clerk, rather than refusing to issue the license, were to subject the same-sex applicants to a lecture on the alleged sinfulness of their behavior and then claim a right to speak out on that matter of public concern once terminated for it, the court would reject the claim based on the speech's flat inconsistency with the Deputy Clerk's public Hohfeldian duty to issue licenses without regard to sexual orientation.

This example illustrates that, in both the free speech and free exercise contexts, the government's justification for acting against otherwise constitutionally protected speech or religious exercise is that it contradicts or impairs the performance of a Hohfeldian duty. The duty will vary from plaintiff to plaintiff in the speech context, so those cases will lead to a good deal of

174. Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES, (Sept. 3, 2015) https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [https://perma.cc/AK6L-Z793].

175. Obergefell v. Hodges, 153 S. Ct. 2584, 2607-08 (2015).

litigation with public employee plaintiffs. The duty in the religion context will likely be universal in most free exercise cases, so those cases are less likely to lead to litigation where the public employee is the plaintiff, and are likely to be resolved more easily where this is so.

V. CONCLUSION

The foregoing discussion attempts to re-frame the doctrine of public employee free speech in a Hohfeldian context, and to use this re-framing to aid in understanding why the jurisprudence of public employee free speech is so much more developed than that of public employee free exercise. It then applies that understanding in a context likely to occur again—the denial of a public benefit to same-sex couples for religious reasons. An understanding of these claims as primarily matters of Hohfeldian public duty illustrates the connections between public employee free speech and public employee free exercise. Both rights are very important; public employees do not sacrifice either by accepting public employment.[176] But where such employees have Hohfeldian public duties, and they attempt to set up either their free speech interests or their free exercise interests as justifications for not performing these duties, or for performing them in a discriminatory or otherwise unacceptable manner, they should not prevail.

176. Richards, *supra* note 167, at 757-58.