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TEACHING IN A DEMOCRACY: WHY THE *GARCETTI* RULE SHOULD APPLY TO TEACHING IN PUBLIC SCHOOLS

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INTRODUCTION

Courts of appeals have long split over how to resolve First Amendment claims that involve teaching in public schools; some courts have applied employee speech doctrine while others have applied rules from the student speech context. Despite the different analyses, both approaches granted teachers some limited First Amendment protection for their classroom speech, typically on the condition that the speech did not violate pre-existing curricular guidelines or school rules. But the Supreme Court altered the employee speech framework in *Garcetti v. Ceballos* by holding 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.”¹ The majority reasoned that statements made pursuant to official duties count as government speech about which the government may dictate its message.² At the same time, the Court explicitly declined to decide whether its holding should extend to scholarship or teaching.³ If the *Garcetti* rule does apply to teaching, teachers will no longer receive any protection for their classroom speech, and schools will have plenary power to dictate the content and style of teaching.

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¹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

² *Id.* at 422 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

³ *Id.* at 425.

This article analyzes whether the *Garcetti* standard should apply to teaching in primary and secondary public schools. Part II examines pre-*Garcetti* cases that addressed government employee speech and student speech, and it explores how the lower courts have applied both lines of case law to situations that involve teaching. Part III discusses *Garcetti*'s impact on employee speech doctrine. Part IV addresses arguments for and against applying the *Garcetti* rule to teaching in public schools, exploring how the issue fits within existing Supreme Court precedent and also whether traditional First Amendment theories suggest a result. It concludes, first, that courts should analyze teachers' classroom speech within the employee speech framework, because teachers are government employees. If teachers are to be granted greater speech rights than other government employees, courts should make clear that they have created an exception to *Garcetti*, rather than pretending that teachers and students are similarly situated. Second, proceeding within the employee speech rubric, the classroom speech of public school teachers should not receive First Amendment protection from employer discipline, because it is in students' best interests to vest ultimate power over the classroom with democratically accountable school boards, and because teaching qualifies as government speech about which the government should be able to dictate its own message. The article then proceeds to explore a few problems that may arise in practical attempts to determine what speech qualifies as "teaching." Finally, Part V distinguishes teaching at the university level and notes that it should likely receive at least some First Amendment protection.

II. PRE-GARCETTI CASES

A. *Employee Speech Cases*

To understand the circuit split regarding treatment of teachers' classroom speech, which developed before *Garcetti*, one must understand how pre-*Garcetti* jurisprudence treated employee speech claims. For many years, courts held that the First Amendment did not protect public

employees from adverse employment decisions, rather conceptualizing employment as a privilege that could be conditioned on the surrender of certain rights.⁴ To paraphrase the famous Justice Holmes quote, an employee may have had a constitutional right to talk politics, but he had no constitutional right to be an employee.⁵

In the second half of the twentieth century, the Supreme Court reversed course, and a balancing test announced in *Pickering v. Board of Education* became the new guiding principle for public employees' speech rights.⁶ In *Pickering*, a teacher wrote a letter to the editor criticizing his school board's allocation of funds between educational and athletic programs, so the board fired the teacher.⁷ The Court held that the First Amendment protected the teacher's speech.⁸ It balanced the teacher's interest as a citizen commenting on matters of public concern against the board's interest in efficiently managing the school system.⁹ Reasoning that the teacher's conduct did not impede his day-to-day teaching duties, the Court concluded 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."¹⁰

Later, *Connick v. Myers* clarified that courts need not apply the *Pickering* balancing if the employee speech did not embrace a matter of public concern.¹¹ In that case, a deputy district attorney resisted a transfer to a different section within the office, complained about the office's transfer

⁴ See, e.g., *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892).

⁵ *Id.*

⁶ See 391 U.S. 563, 568 (1968).

⁷ *Id.* at 565–66.

⁸ *Id.* at 572–73.

⁹ *Id.* at 568.

¹⁰ *Id.* at 572–73.

¹¹ See 461 U.S. 138, 147 (1983).

policy, and circulated a questionnaire about office morale.¹² She was fired as a result.¹³ The Court held this speech unprotected, explaining that the First Amendment does not protect public employees from adverse employment decisions when they speak merely as employees on matters of personal interest.¹⁴ After *Connick*, employee speech analysis proceeded with two inquiries: at the threshold, whether the employee had commented on a matter of public concern, and if so, whether the *Pickering* balancing weighed in favor of employee or employer.¹⁵

B. *Student Speech Cases*

Student speech jurisprudence is the other candidate for the law that should govern how the First Amendment applies to teaching. A somewhat incoherent collection of cases governs student speech. The Supreme Court first announced First Amendment protection for student speech in *Tinker v. Des Moines School District*.¹⁶ In that case, a school suspended students for wearing black armbands to school in protest of the Vietnam War.¹⁷ The Court held that the speech was protected, announcing, “Where there is no finding and no showing that the exercise of the forbidden right would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”¹⁸ Although *Tinker’s* holding reads like a general rule, the Court has not treated it as such, and indeed has retreated from the holding in later student speech cases, generally upholding schools’ power to regulate

¹² *Id.* at 140–41.

¹³ *Id.* at 141.

¹⁴ *Id.* at 147.

¹⁵ *See id.*

¹⁶ *See generally* 393 U.S. 503 (1969).

¹⁷ *Id.* at 504.

¹⁸ *Id.* at 509.

student speech.¹⁹ For instance, in *Bethel School District v. Fraser*, the Court determined that protection did not extend to a student who had delivered an innuendo-laden speech at a school assembly.²⁰ The *Fraser* opinion held that the First Amendment does not protect speech at an official school assembly that is lewd, vulgar, and offensive.²¹

As *Fraser* may have foreshadowed, the Court soon after clarified that the *Tinker* rule does not apply to school-sponsored student speech. In *Hazelwood School District v. Kuhlmeier*, a high school principal withheld from publication two pages of a student-run newspaper, because of his concerns about material concerning sexual activity and birth control, as well as references to individual pregnant students.²² Holding the speech unprotected, the Court reasoned that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.”²³ Most recently, the Court ruled in *Morse v. Frederick*—the “BONG HiTS 4 JESUS” case—that the First Amendment does not protect speech at a school-supervised event that can be reasonably viewed as promoting illegal drug use.²⁴

C. *Circuit Split: The First Amendment Standard for Classroom Speech*

¹⁹ Most scholars agree that *Tinker* marked the high point of protection for student speech, and some have observed that the contemporary protections for student speech more closely mirror the dissent than the majority opinion in *Tinker*. See, e.g., Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Door: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 529 (2000).

²⁰ 478 U.S. 675, 677–80 (1986).

²¹ *Id.* at 685.

²² 484 U.S. 260, 263 (1988).

²³ *Id.* at 273.

²⁴ 551 U.S. 393, 403 (2007).

Long before *Garcetti* came along, the circuits split over what First Amendment standard governs the classroom speech of teachers.²⁵ Some circuits applied the *Pickering* test from employee cases,²⁶ others extended student speech cases,²⁷ and a few merged elements of the two.²⁸

Circuits applying the *Pickering* test have generally found that school interests in overseeing the curriculum and teaching methods outweigh

²⁵ See Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 6–7 (2001).

²⁶ See *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (applying *Pickering*, holding that a teacher had no interest in using “Learnball,” a favorite teaching technique); *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229–32 (6th Cir. 2005) (school violated the First Amendment by firing a teacher for assigning materials purchased and approved by the school board); *Nicholson v. Bd. of Educ.*, 682 F.2d 858, 865 (9th Cir. 1982) (teacher could be fired for refusing to submit a student newspaper to the principal for approval); *Goldwasser v. Brown*, 417 F.2d 1169, 1176–77 (D.C. Cir. 1969) (Air Force could fire language instructor for in-class comments about Vietnam protests and discrimination against Jewish people).

²⁷ See *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (applying *Hazelwood's* standard to permit the non-renewal of a teacher's contract after her in-class discussion of the abortion of Down's Syndrome fetuses); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722–23 (2d Cir. 1994) (guest lecturer had no right to show clips involving partial nudity); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (upholding a ban on the teaching of creationism); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (upholding the punishment of a teacher who allowed students to write profane plays and poems); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991) (holding that a classroom was a nonpublic forum and that the school had a legitimate pedagogical interest in punishing a teacher for repeating rumors about students during class); *Bishop v. Aronov*, 926 F.2d 1066, 1075–77 (11th Cir. 1991) (holding that a public university could prevent a professor from sharing his religious views in class).

²⁸ See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368–70 (4th Cir. 1998) (en banc) (asserting both that the speech did not involve a matter of public concern under *Pickering-Connick* and that the school had a legitimate pedagogical interest in controlling its curriculum under *Hazelwood*); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799–801 (5th Cir. 1989) (same).

teacher interests in speech.²⁹ For example, the Fourth Circuit held en banc that selecting a play for drama class is not a matter of public concern and thus not protected.³⁰ Even where the speech involves a matter of public concern, it will probably not be protected if it strays beyond the bounds of the curriculum.³¹ For instance, courts have held that teachers had no right to present in class their personal points of view on evolution³² or the Vietnam War.³³

Turning to cases that have examined teaching under student speech standards, at least one case has applied the *Tinker* “materially and substantially interfere” standard³⁴ to student speech. In *James v. Board of Education*, a case that arose only a few years after *Tinker*, the Second Circuit held that a high school teacher had a right to wear a black armband similar to those at issue in *Tinker*.³⁵ The court opined that school authorities could not censor teachers simply because they disagreed with the teacher’s views, especially when “speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students.”³⁶ Of course, *James’s* age and factual similarity to *Tinker* probably minimize its

²⁹ See *supra* note 26.

³⁰ *Boring*, 136 F.3d at 368–70.

³¹ See, e.g., *Goldwasser v. Brown*, 417 F.2d 1169, 1176–77 (D.C. Cir. 1969) (Air Force could fire a language instructor for in-class comments about Vietnam protests and discrimination against Jewish people).

³² *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

³³ *Goldwasser*, 417 F.2d at 1176–77.

³⁴ *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (“Where there is no finding and no showing that the exercise of the forbidden right would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.” (citation omitted)).

³⁵ 461 F.2d 566, 573–75 (2d Cir. 1972).

³⁶ *Id.* at 573.

importance.³⁷ The case followed closely on the heels of *Tinker*—before the Supreme Court’s more recent retreat from that precedent—and it involved speech nearly identical to that in *Tinker*.³⁸ Indeed, the Second Circuit has seemingly abandoned its practice of applying *Tinker* in teacher speech cases, although it persists in analyzing the cases within the student speech paradigm.³⁹

More recently, some circuits have employed the *Hazelwood* “legitimate pedagogical interest” standard⁴⁰ to teaching.⁴¹ Various justifications have been advanced for this practice. For instance, the language of the test is tailored to the classroom context,⁴² as opposed to the more general *Pickering* balancing test.⁴³ Some have expressed a concern that classroom speech implicates values of academic freedom not raised when considering the rights of other government employees.⁴⁴ This line of reasoning, that *Hazelwood* somehow provides greater protection than *Pickering*, seems odd in light of *Hazelwood*’s suggestion of rational basis review. After all, a “legitimate pedagogical interest” is merely a legitimate interest—that familiar parlance of highly deferential rational basis

³⁷ Compare *id.* at 568–69, with *Tinker*, 393 U.S. at 504.

³⁸ Compare *James*, 461 F.2d at 568–69, with *Tinker*, 393 U.S. at 504.

³⁹ See, e.g., *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722–23 (2d Cir. 1994) (employing *Hazelwood*’s test in holding that a guest lecturer had no right to show clips involving partial nudity).

⁴⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).

⁴¹ See *supra* note 27.

⁴² See *Hazelwood*, 484 U.S. at 273.

⁴³ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

⁴⁴ *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 913–14 (10th Cir. 2000); Alison Lima, *Shedding First Amendment Rights At The Classroom Door?: The Effects Of Garcetti And Mayer On Education In Public Schools*, 16 GEO. MASON L. REV. 173, 198 (2008).

review⁴⁵—in a pedagogical context. With student speech, this lenient standard only applies to speech that occurs in the course of “school-sponsored expressive activities,”⁴⁶ but teaching is always a school-sponsored activity. Indeed, one circuit has asserted that regulating the content of a curriculum is “by definition a legitimate pedagogical concern.”⁴⁷ Ultimately, courts applying the *Hazelwood* standard to classroom speech have predominantly sided with the school.⁴⁸

In one sense, then, the split seems somewhat semantic, because courts have consistently held that public schools have the right to dictate both what is taught and how it is taught.⁴⁹ Simply put, courts have held that schools have broad discretion not only to dictate a curriculum⁵⁰ but also to control how teachers convey that curriculum.⁵¹ They may “both write the script and demand that teachers perform it.”⁵² For example, a school may both dictate the reading list that a teacher uses⁵³ and also prescribe the pedagogical techniques that the teacher may use in conveying the information in those books.⁵⁴ Of course, just like any other government

⁴⁵ See generally *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁴⁶ *Hazelwood*, 484 U.S. at 273.

⁴⁷ *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) (school had a right to regulate selection of a play for drama class).

⁴⁸ See *supra* note 27.

⁴⁹ Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 64 (2008).

⁵⁰ See, e.g., *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) (citing *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir.1990)).

⁵¹ See, e.g., *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (holding that a teacher had no interest in using “Learnball,” a favorite teaching technique).

⁵² Nahmod, *supra* note 49, at 64.

⁵³ *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799–801 (5th Cir. 1989) (teacher had no right to circulate an unapproved supplemental reading list).

⁵⁴ See *Bradley*, 910 F.2d at 1176.

actor, public schools may not violate other constitutional requirements in the course of regulating their classes.⁵⁵

On the other hand, cases on both sides of the split have sometimes extended protection to a teacher's in-class speech.⁵⁶ These cases tend to involve situations in which the teacher has been fired despite staying within the bounds of the prescribed curriculum.⁵⁷ For instance, a recent Sixth Circuit case held that a school violated the First Amendment when it fired a teacher for using material approved by the school board and purchased by the district.⁵⁸ But outside of cases like these, courts seem unsympathetic to teachers claiming an individual right to trump the school concerning what is taught or how to teach it.⁵⁹ Thus, in choosing between approaches taken by the courts of appeals, the main practical inquiry seems to be whether and to what extent the First Amendment should protect teaching that, although perhaps controversial, does not contravene the curriculum or other school

⁵⁵ See generally *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that teaching creationism violated the Establishment Clause).

⁵⁶ See *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229–32 (6th Cir. 2005) (school violated the First Amendment by firing a teacher for assigning materials purchased and approved by the school board); *Cockrel v. Shelby County Sch. Dist.* 270 F.3d 1036, 1055 (6th Cir. 2001) (lesson on industrial hemp); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113–14 (5th Cir. 1980) (racial role-playing project in class); cf. also *James v. Bd. of Educ.*, 461 F.2d 566, 573–75 (2d Cir. 1972) (high school teacher had a right to wear a black armband similar to those at issue in *Tinker*).

⁵⁷ See *Evans-Marshall*, 428 F.3d at 229–32; *Cooper*, 611 F.2d at 1113–14; *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd and remanded* (regarding issue of compensatory damages), 477 U.S. 299 (1986) (First Amendment protected teaching of an approved sex education unit to a junior high school class); *Cockrel*, 270 F.3d at 1054–55 (school had given prior approval for a lesson on industrial hemp).

⁵⁸ See *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229–32 (6th Cir. 2005).

⁵⁹ See *supra* notes 26–27.

rules.⁶⁰ Some commentators have argued that none of the approaches outlined by courts are sufficiently protective of teacher speech, such that a new standard should be forged.⁶¹

III. *GARCETTI V. CEBALLOS* CHANGES THE EMPLOYEE SPEECH LANDSCAPE

In 2006, the Supreme Court drastically altered employee speech analysis with *Garcetti v. Ceballos*, by holding that that the First Amendment does not protect any speech made as a part of one's official job duties.⁶² Richard Ceballos, a deputy district attorney in Los Angeles, was asked by a defense attorney to investigate the accuracy of an affidavit used to obtain a search warrant.⁶³ After visiting the site described by the affidavit, Ceballos came to believe that a police officer had made serious misrepresentations.⁶⁴ The prosecutor wrote a memo that recommended dropping the case, and after his office declined to do so, testified to the affidavit's inaccuracies at a hearing on the defendant's motion to traverse.⁶⁵ The district attorney's office allegedly retaliated against the plaintiff by transferring him and withholding promotion.⁶⁶

⁶⁰ Compare *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229–32 (6th Cir. 2005) (school violated the First Amendment by firing a teacher for assigning materials purchased and approved by the school board), with *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007) (teacher had no right to comment about personal views on Iraq war during a current events lesson).

⁶¹ See, e.g., Daly, *supra* note 25, at 3–4; JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-Garcetti Jurisprudence*, 63 U. MIAMI L. REV. 761, 791–92 (2009).

⁶² See generally 547 U.S. 410 (2006).

⁶³ *Id.* at 413.

⁶⁴ *Id.* at 413–14.

⁶⁵ *Id.* at 414–15.

⁶⁶ *Id.* at 415.

The Court held that the First Amendment did not apply to the plaintiff's situation.⁶⁷ It asserted that for *Pickering's* balancing to apply, the employee must have spoken both 1) as a citizen rather than as an employee and 2) about a matter of public rather than private concern.⁶⁸ Here, although the plaintiff's statements may have involved a matter of public concern, the Court reasoned 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."⁶⁹ Because the deputy district attorney spoke pursuant to an investigation required by his official duties, the First Amendment did not protect his speech.⁷⁰

That said, *Garcetti* expressly declined to decide whether its holding should extend to "teaching or scholarship," noting that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests."⁷¹

IV. EXTENDING GARCETTI: WHETHER TEACHING IN PUBLIC SCHOOLS SHOULD RECEIVE FIRST AMENDMENT PROTECTION

A. *Defining "Teaching"*

Before arguing about the proper level of First Amendment protection for teaching, it is important to define the sort of speech with which we are concerned. In referring to "teaching" or "classroom speech," this article means speech in furtherance of a teacher's official teaching

⁶⁷ *Id.* 421.

⁶⁸ *Id.* at 418.

⁶⁹ *Id.* at 421.

⁷⁰ *Id.*

⁷¹ *Id.* at 425.

duties, the quintessential examples being a teacher’s lecturing or moderating class discussion in a classroom setting.⁷²

Obviously, not every word spoken in a school constitutes classroom speech. Many teachers’ jobs include administrative duties or other duties unrelated to scholarship or teaching, and courts already agree that *Garcetti* applies to speech in the course of teachers’ administrative duties.⁷³ For example, a private conversation between a teacher and a principal about racism in the school would not qualify as classroom speech, nor would almost any conversation that occurred purely between school employees.⁷⁴ Likewise, the regular *Garcetti* analysis applies to a teacher’s complaints to the administration⁷⁵ or his defense of a student at a disciplinary tribunal,⁷⁶ assuming that those tasks comprise official duties. Other teacher speech may occur outside the performance of any official duties and resultantly receive the greater protections of *Pickering*.⁷⁷ Teaching should also be distinguished from scholarship, the other possible exception to the *Garcetti* rule.⁷⁸ Different sorts of First Amendment protection may be appropriate for scholarship than for teaching, because scholarship requires the ability to freely pursue research and candidly share results, while teaching primarily involves the conveyance of information prescribed by the curriculum.⁷⁹

⁷² See *Gorum v. Sessoms*, 561 F.3d 179, 185–86 (3d Cir. 2009); *Renken v. Gregory*, 541 F.3d 769, 773–75 (7th Cir. 2008).

⁷³ See, e.g., *Gorum*, 561 F.3d at 186.

⁷⁴ Cf. *Givhan v. Western Line Consolidated Sch. Dist.* 439 U.S. 410, 414–16 (1979) (holding that a teacher could not be dismissed for criticizing the school’s racially discriminatory practices while talking with a principal).

⁷⁵ See *Renken*, 541 F.3d at 773–75.

⁷⁶ See *Gorum*, 561 F.3d at 185–86.

⁷⁷ See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

⁷⁸ *Garcetti*, 547 U.S. at 425 (“We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

⁷⁹ See *Nahmod*, *supra* note 49, at 68–70 (advocating different standards for public schools and public higher education).

Although teaching and scholarship may often be intertwined at the university level, the same cannot usually be said of public primary and secondary schools.⁸⁰

B. *Classroom Speech Should Be Analyzed Within the Employee Speech Rubric*

Before arguing that *Garcetti* should apply to teaching, one must first establish that teaching should be analyzed within the employee speech rubric. Several arguments support this conclusion. First, and most obviously, teachers are government employees, and are not students. Student speech cases like *Tinker* and *Hazelwood* address themselves not only to the well-functioning of schools, but also to student interests.⁸¹ Students are a captive audience, and teachers exercise control over them under color of government authority. In fact, stretching the *Hazelwood* test to cover teacher speech threatens negative consequences for the protection of student speech, because extending the test to teachers necessarily requires watering down the amount of protection it provides.⁸² Those who advocate treating students and teachers similarly point out that giving too much control to schools could chill the speech of teachers, preventing them from effectively interacting with and teaching their students.⁸³ Even if this were true, a need for interaction does not necessarily signal equal First Amendment treatment for both parties to the conversation.⁸⁴ Otherwise, all government employees would receive full First Amendment protection any time they interacted with the public as part of their jobs. This does not hold,

⁸⁰ *See id.*

⁸¹ *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

⁸² *See Emily Gold Waldman, Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 65 (2008).

⁸³ *See, e.g., Lima, supra note 44*, at 189–97.

⁸⁴ *See Garcetti*, 547 U.S. at 421 (no exception for employees who must interact with the public).

as the *Garcetti* rule contains no exception for employees whose job requires speaking to members of the public.⁸⁵ In fact, *Garcetti* implies that the Court would analyze teaching within the employee speech framework. By expressly declining to decide whether the *Garcetti* rule applies to teaching, the Court suggested that if teachers are to receive special treatment, it should be as an exception to *Garcetti* rather than as a shoe-horning into the student speech realm.⁸⁶

C. *Garcetti Should Apply to Teaching in Public Schools*

1. Framing the Analysis

Once it is established that courts should analyze teaching as employee speech, the question remains whether teaching should be subject to the *Garcetti* rule, in which case teachers would not receive First Amendment protection for most of their interactions with students, or whether there should be an exception for teaching. For example, courts could decide to apply some sort of balancing test to classroom speech even though the speech comprised an official job duty.⁸⁷ Whereas *Garcetti* would generally exempt classroom speech from First Amendment protection, an alternative test might, for instance, extend some protection to classroom speech on matters of public importance or to teaching on matters that the curriculum did not expressly forbid.⁸⁸ This article argues that, at least in the case of primary and secondary teaching, courts should extend *Garcetti* to teachers' classroom speech.

⁸⁵ *See id.* Indeed, *Garcetti* itself involved speech to members of the public, insofar as the attorney was fired for his communications with the defendant and his testimony at the hearing on the motion to traverse. *See id.* at 413–15.

⁸⁶ *See id.* at 425.

⁸⁷ *Cf. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

⁸⁸ *Cf. Cockrel v. Shelby County Sch. Dist.* 270 F.3d 1036, 1055 (6th Cir. 2001) (lesson on industrial hemp); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (racial role-playing project in class).

2. Lower Courts Addressing the Issue

Only one circuit has directly applied the *Garcetti* rule to classroom speech. In *Mayer v. Monroe County Community School Corp.*, a probationary elementary school teacher sued after the school declined to renew her contract.⁸⁹ According to the teacher's allegations, the school made the adverse decision because of a controversial statement she made in class.⁹⁰ During a current events session, a student asked whether the teacher had participated in protests against the Iraq war.⁹¹ The teacher responded that she had recently driven past a demonstration and had honked her horn in response to a placard that read, "Honk for Peace."⁹² Several parents got wind of the exchange and complained to the school, after which the principal instructed the school's teachers to refrain from taking sides in political controversies.⁹³ When the school later decided not to bring the teacher back for a second year, she filed a First Amendment claim.⁹⁴ A district court granted summary judgment to the school, and the Seventh Circuit affirmed, holding that teachers do not have First Amendment rights in their classroom speech.⁹⁵ Because the teacher's speech occurred in the course of her official teaching duties, the First Amendment provided no protection from adverse employment consequences.⁹⁶ Other lower courts have addressed classroom speech since *Garcetti* but have found it unnecessary to decide whether the *Garcetti* rule applies to teaching, often

⁸⁹ 474 F.3d 477, 478 (7th Cir. 2007).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.* at 479.

⁹⁶ *See id.* at 480.

because they found the speech unprotected even under the *Pickering* or *Hazelwood* standards.⁹⁷

As one might expect, government speech ideas formed the basis for the Seventh Circuit’s extension of *Garcetti* to teaching. In the *Mayer* opinion, Chief Judge Easterbrook characterized the school as a purchaser rather than regulator of teacher speech: “[T]he school system does not ‘regulate’ teachers’ speech as much as it hires that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.”⁹⁸ Thus, although he did not explicitly invoke government speech doctrine, Judge Easterbrook couched his reasoning in similar terms, essentially asserting that the speech was unprotected because classroom speech is government-subsidized expression and thus government speech.⁹⁹

3. Counterargument: Protecting Teachers from Injustice

At this point, it will be useful to address one of the most common arguments against extending the *Garcetti* standard to teachers. Some protest that the broad discretion *Garcetti* grants to employers would chill innovative or dynamic teaching, casting a “pall of orthodoxy” on the classroom.¹⁰⁰ Many teacher speech cases involve teachers who have strayed

⁹⁷ See, e.g., *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (applying earlier circuit precedent to hold that a teacher had no speech right in postings on a classroom bulletin board); *Panse v. Eastwood*, 303 Fed. App’x 933, 934 (2d Cir. 2008) (holding that an art teacher had no right to encourage students to enroll in a for-profit course he was teaching that involved nude models); *Weingarten v. Board of Educ.*, 591 F. Supp. 2d 511, 519–20 (S.D.N.Y. 2008) (holding that teachers’ wearing of campaign pins to work is not protected speech because it would “bear the school’s imprimatur” within the meaning of *Hazelwood*).

⁹⁸ *Mayer*, 474 F.3d at 480.

⁹⁹ Compare *id.*, with *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.”).

¹⁰⁰ See, e.g., *Lima*, *supra* note 44, at 189–97.

considerably and been sanctioned, but schools may sometimes fire teachers for speech that appears relatively innocuous.¹⁰¹ Under *Garcetti*, as long as the speech occurred in the course of official teaching duties, the First Amendment would provide no recourse for the teacher.¹⁰² Thus, it is conceivable that a teacher might adhere to all official rules and yet lack a First Amendment recourse if the school were to sanction the teacher for some aspect of her teaching. For instance, the plaintiff in *Mayer* made her reference to the Iraq protest within the context of a current events section presumably prescribed by the curriculum.¹⁰³ Assuming that the curriculum simply directed teachers to discuss events “in the news,” then the teacher’s comment arguably fell within the bounds of the curriculum.¹⁰⁴ And if that is the case, wasn’t it an injustice for the school to fire a teacher for doing something that was within the bounds of her job duties? Because *Garcetti* would deny protection to teachers in this situation, some argue that a more protective standard should apply.¹⁰⁵

The problem with this argument is that it misconceives a contract dispute for a constitutional problem. The argument is not so much that teachers have an individual speech right as that they have a right not to be fired when they are conscientiously performing their jobs.¹⁰⁶ At bottom,

¹⁰¹ See, e.g., *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007).

¹⁰² See *id.* at 479.

¹⁰³ See *id.* at 477.

¹⁰⁴ See *id.*

¹⁰⁵ See Daly, *supra* note 25, at 53–62 (arguing for a presumption of protection if the speech was not explicitly forbidden by the curriculum or school rules); Newman, *supra* note 61, at 791–92 (arguing that courts should protect classroom speech unless it “creates a significant disruption to the educational process”).

¹⁰⁶ See *Ceballos v. Garcetti*, 361 F.3d 1168, 1189–91 (9th Cir. 2004) (O’Scannlain, J., concurring specially), *rev’d*, 547 U.S. 410 (2006) (“Ceballos had no *personal* stake (other than in doing his job well), and no cognizable First Amendment interest, in the speech for which he now seeks protection” (emphasis in

disputes like that are matters for contract and employment law, and the teacher should sue the school for breaching their employment agreement or applicable employment law.¹⁰⁷ Indeed, most public school teachers sign detailed union contracts¹⁰⁸ and many benefit from tenure statutes,¹⁰⁹ which often raise considerable barriers to the disciplining of teachers. To be sure, union contracts may not protect all teachers equally, especially in the case of student teachers or teachers hired on a probationary basis.¹¹⁰ But if one finds this concerning, one should work through the democratic process to pass more protective employment laws. Ultimately, the First Amendment is not a panacea for every dispute that happens to involve speech, and the federal courts are not a super-personnel department for government employees.¹¹¹

4. Traditional First Amendment Theories

In attempting to discern what sort of First Amendment protection teaching ought to receive, traditional First Amendment theories serve as a good starting point. This article considers the two most common theories,

original)); *cf. also* *Mayer*, 474 F.3d at 479 (holding that teachers have no constitutional right to determine what they say in class).

¹⁰⁷ The clarity of the *Garcetti* rule would help prevent use of the First Amendment to bootstrap employment disputes into federal court. The temptation to “constitutionalize” what is really an employment dispute is a very real practical litigation problem. *See, e.g.*, Brief of Defendants-Appellees at 34–39, 2006 WL 2618024, *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (No. 06-1993).

¹⁰⁸ *See generally* MYRON LIEBERMAN, UNDERSTANDING THE TEACHER UNION CONTRACT: A CITIZEN’S HANDBOOK (2000).

¹⁰⁹ *See generally* Annotation, *Teachers’ Tenure Statutes*, 127 A.L.R. 1298 (2010).

¹¹⁰ *See, e.g.*, *Mayer*, 474 F.3d at 478 (probationary teacher); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *1 (E. D. Pa. Dec. 3, 2008) (student teacher). Courts have generally held that student teachers should be treated as teachers rather than students for First Amendment purposes. *See Snyder*, 2008 WL 5093140, at *15 (collecting cases).

¹¹¹ *See Garcetti*, 547 U.S. at 423 (“This displacement of managerial discretion by judicial supervision finds no support in our precedents.”).

the marketplace of ideas and the theory of democratic self-governance. Although marketplace theory provides no clear answers, the democratic self-governance approach suggests that the *Garcetti* rule may be a tenable approach to classroom speech.

First, take the marketplace of ideas metaphor. This theory analogizes to free market principles; just as open competition in economic markets rewards companies with the best products and most efficient distribution, so open competition between ideas allows the best ideas to rise to the top.¹¹² One can argue that the classroom should present such a marketplace, where students can test different ideas and decide which are strongest.¹¹³ If free speech by teachers helps facilitate this “market,” then perhaps grounds exist for protecting teachers’ classroom speech.¹¹⁴ But the marketplace metaphor assumes a marketplace populated with individuals who are both free to exchange ideas and also capable of picking out the “best” ideas. One obvious problem is that students are rarely free to respond in kind to their teachers’ ideas; often, teachers will run classes as lectures in which students have limited or no ability to respond, and at those times, the marketplace analogy is of questionable relevance.

Even where the goal is an open class discussion, the assumption of independent thinking may not hold in classrooms of young students. They may without much thought simply adopt what they are told by the teacher, an authority figure.¹¹⁵ And even assuming a classroom of students old enough to think independently, a teacher’s free insertion of ideas into the

¹¹² See *Gitlow v. New York*, 268 U.S. 652, 673 (Holmes, J., dissenting) (“Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.”).

¹¹³ See *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967); Daly, *supra* note 25, at 37.

¹¹⁴ See Daly, *supra* note 25, at 37.

¹¹⁵ *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) (quoting Plato and Burke).

classroom may pose the risk of “market failure” by stifling what would otherwise be a freer exchange between students. Fears of risking one’s grade or being embarrassed in front of peers are strong incentives not to voice disagreement with a teacher in class. In other words, teachers may just as easily cast a “pall of orthodoxy” over the classroom as may the school’s administration. For these reasons, the marketplace theory carries limited relevance in the classroom setting.

Next, consider the democratic self-governance justification for free speech, which conceives the purpose of free speech as cultivating an informed electorate.¹¹⁶ Alexander Meiklejohn famously articulated this theory using a town hall meeting to illustrate the way in which speech should be protected; people should be allowed to discuss almost any point of view on the topic at hand, as long as they adhere to procedural rules that ensure orderly discussion.¹¹⁷ In applying this analogy to classroom speech, one must first acknowledge that classrooms are places of employment rather than public forums for teachers.¹¹⁸ As a result, it may be acceptable to limit teachers’ free speech on the job as long as they remain free outside of work to contribute to public discussion.¹¹⁹ And from the students’ perspective, even when the teacher runs class as a “town meeting” style discussion, the same market failure concerns discussed above will arise if teachers have an equal right to inject their views.

¹¹⁶ *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (advocating “the power of reason as applied through public discussion”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–27 (The Lawbook Exchange, Ltd. 3d prtg. 2004) (discussing town meeting analogy).

¹¹⁷ MEIKLEJOHN, *supra* note 147, at 22–27.

¹¹⁸ *See Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

¹¹⁹ *Cf. Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968) (“[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.”).

Others argue that providing some protection for teachers' classroom speech illustrates to students that everyone in our society is free to share their ideas. It would help ensure that students hear minority views; for example, in a small town with an overwhelmingly conservative electorate and school board, a maverick teacher might represent the students' best chance at receiving exposure to alternative points of view. But these arguments bring us back to the problem pointed out by Judge Easterbrook in *Mayer*—unlike a town hall gathering, students in a classroom are a captive audience.¹²⁰ There, the flip side of free speech for teachers is the power to impose one's own views, because authority to determine what goes on in a classroom always carries with it some risk of indoctrination.¹²¹ If some risk of indoctrination exists no matter who controls the content of teaching, better to entrust that power with the democratically elected school board than to leave students "subject to teachers' idiosyncratic perspectives."¹²² The curricular positions taken by school boards are at least transparent and subject to public scrutiny, even if the democratic process is imperfect.¹²³ In contrast, the viewpoints of individual teachers are unpredictable and not subject to democratic checks.¹²⁴ In the end, perhaps vesting ultimate authority with a democratically elected body provides an even stronger town-hall illustration to the students, because it gives every voter in the district some say in how classrooms are conducted. Attempting to ensure this sort of responsiveness to the electorate is important precisely because schools play such an important role our society—they not only

¹²⁰ *Cf. Mayer*, 474 F.3d at 479 (“[P]upils are a captive audience. Education is compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling. Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives.”).

¹²¹ *See Mayer*, 474 F.3d at 479.

¹²² *Id.* at 479–80.

¹²³ *See id.* at 479.

¹²⁴ *See id.*

teach technical skills, but also instill societal values in children.¹²⁵ Giving a democratically accountable body ultimate control over classrooms helps to ensure that teachers only inculcate values upon which some measure of democratic agreement exists.

5. Supreme Court Precedent: Government Speech and Academic Freedom

Extending *Garcetti* to apply to teaching would also fit with the Court's broader jurisprudence, especially in light of the government speech cases of which *Garcetti* is a part.¹²⁶ Government speech doctrine holds that when the government speaks, it remains free to determine the content of its own message.¹²⁷ It recognizes that the government sometimes acts as a speaker rather than as a regulator of speech.¹²⁸ The rule applies not only when the government speaks directly but also when it funds a particular message.¹²⁹ For instance, the Court in *Rust v. Sullivan* held that the government could condition its funding for family planning programs on the requirement that the programs not counsel abortion or refer patients to abortion providers.¹³⁰ The petitioners argued that the conditions amounted to viewpoint discrimination, but the majority reasoned that the government had merely chosen to "fund one activity to the exclusion of the other."¹³¹ If the government speech doctrine can be brought to bear in the employee

¹²⁵ See Nahmod, *supra* note 49, at 58–60.

¹²⁶ See *Garcetti*, 547 U.S. at 421–22 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

¹²⁷ See *Rosenberger*, 515 U.S. at 833 (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (“The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways.”).

¹²⁸ *Rosenberger*, 515 U.S. at 833; Nahmod, *supra* note 49, at 56–57.

¹²⁹ See *Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991).

¹³⁰ *Id.*

¹³¹ *Id.* at 193.

speech context, then the result in *Garcetti* readily follows.¹³² In other words, if employee speech equals government speech whenever employees speak “pursuant to their official duties,” then the government speech doctrine would suggest that the government (rather than the employee) has the right to determine the content of the message.¹³³

Yet the government does not have an unlimited ability to control speech that it subsidizes. For instance, the government may not impose viewpoint-defined conditions on subsidies intended to promote a diversity of viewpoints.¹³⁴ In *Rosenberger v. Rector of the University of Virginia*, the Court struck down a state university’s attempt to withhold funding from religious student groups.¹³⁵ The university’s rules made funding available to all types of clubs except those which endorsed a specific perspective on religion; the school argued that the restriction was necessary to avoid violating the Establishment Clause.¹³⁶ The majority, however, dismissed the Establishment Clause argument and distinguished the case from *Rust* by asserting that the club funding scheme created a limited public forum.¹³⁷ When the government creates a public forum, it may not engage in viewpoint discrimination.¹³⁸ Likewise, the Court held that when the government “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers,” it may not engage in viewpoint discrimination.¹³⁹

¹³² See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

¹³³ *Id.* at 421.

¹³⁴ See *Rosenberger*, 515 U.S. at 833.

¹³⁵ *Id.* at 845–46.

¹³⁶ *Id.* at 822–23, 837.

¹³⁷ *Id.* at 829–30, 837–45. Recognizing that the “forum” at issue was not a physical space, the majority noted, “The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.” *Id.* at 830.

¹³⁸ *Id.* at 829.

¹³⁹ *Id.* at 833.

Government speech logic easily extends to the teaching context, even if applying the idea in other employment contexts causes problems. Insofar as a teacher's job consists of conveying a government message, embodied in the curriculum, the teacher's classroom activities really are government speech.¹⁴⁰ Indeed, Justice Souter's dissent in *Garcetti* indirectly illustrated the difficulty of carving out an exception for teaching. The dissent distinguished *Garcetti's* situation from the doctors in *Rust* by noting that a district attorney is not hired to espouse a specific substantive policy position.¹⁴¹ But the same distinction does not hold up when the job at issue is teaching, because conveying the government messages embodied in a curriculum constitutes the central purpose of the job.¹⁴² Thus, because government-mandated messages are integral to the job, teaching arguably fits within *Garcetti's* logic even better than the district attorney position at issue in that case.¹⁴³ Moreover, the government may even control speech of non-employees if it is subsidizing their message; in *Rust*, the Court held that the government could regulate the advice of non-employee doctors participating in a federally-funded family planning program.¹⁴⁴ Few would assert that there is less need for freedom of communication between doctor and patient than between student and teacher.¹⁴⁵ If the doctor-patient relationship is not always sufficient to stave off government speech

¹⁴⁰ See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

¹⁴¹ *Garcetti*, 547 U.S. at 437 (Souter, J., dissenting).

¹⁴² Compare *id.* at 437, with *Mayer*, 474 F.3d at 479.

¹⁴³ Compare *Garcetti*, 547 U.S. at 437, with *Mayer*, 474 F.3d at 479.

¹⁴⁴ See *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991). The Court claimed that its holding did not significantly impinge on the doctor-patient relationship, because the program did not claim to offer comprehensive medical advice or force doctors to endorse opinions they did not hold, but the case undoubtedly gave the government significant power to control speech by doctors to patients. See *id.* at 200.

¹⁴⁵ Cf. *id.* at 200.

doctrine, then it seems unlikely that the teacher-student relationship can.¹⁴⁶ And even in the student speech context, more government support for speech means more government control over speech.¹⁴⁷ This is the lesson of *Hazelwood*, which granted schools the power to exercise “editorial control over the style and content of student speech in *school-sponsored* activities.”¹⁴⁸ As *Hazelwood* illustrates, the logic behind government speech doctrine does not evaporate at the schoolhouse gates.

Aside from government speech doctrine, applying *Garcetti* to public schools also meshes with the Court’s previous pronouncements about academic freedom, which suggest that the school, not the teacher, should be the arbiter of classroom speech.¹⁴⁹ As Justice Frankfurter famously described academic freedom, “It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹⁵⁰ Of course, democratically-elected school boards do not conjure the same ideas of academic independence as the semi-autonomous public universities of which Justice Frankfurter wrote, but the point is that the Court has conceived of schools, not individual teachers, as having the right to determine the substance and

¹⁴⁶ *Cf. id.*

¹⁴⁷ *See* 484 U.S. 260, 273 (1988).

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ *Urofsky v. Gilmore*, 216 F.3d 401, 414–15 (4th Cir. 2000) (collecting cases).

¹⁵⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 263–64 (1957) (Frankfurter, J., concurring); *see also Urofsky*, 216 F.3d at 414–15 (“[C]ases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual”); *Stronach v. Virginia State University*, civil action 3:07-CV-646-HEH (E.D. Va. Jan. 15, 2008) (holding that the rights of academic freedom are purely institutional rights); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497–98 (arguing that universities should be considered First Amendment actors distinct from the government and individual students and employees).

style of a curriculum.¹⁵¹ Thus, even if academic freedom doctrine suggests that school boards or universities should enjoy some autonomy from the legislature in making curricular decisions, it does not follow that teachers should enjoy the same autonomy vis-à-vis their employers.¹⁵²

In practical terms, extending the *Garcetti* rule would not pose a dramatic change from how circuits currently approach the matter. As described above, all circuits grant schools a large amount of discretion in determining their curriculum and teaching methods.¹⁵³ Teachers typically succeed with free speech claims only if they can show that their classroom speech did not run afoul of existing curricular rules, and then only if the court decides that the speech constituted good teaching.¹⁵⁴ In other words, schools already have near-total power to control classroom speech ex-ante, by codifying rules in an official curriculum.¹⁵⁵ Problematically, this creates an incentive for schools to assert their control by overwriting the curriculum, which may in itself stifle creative teaching.¹⁵⁶ Extending the *Garcetti* rule would give schools the flexibility to make ad hoc calls about what sorts of teaching styles work and are appropriate, as they observe them working or not working.¹⁵⁷ Relative to current approaches, *Garcetti* may actually leave schools more open to incremental experimentation by teachers, confident in their power over the classroom should the experimentation not work or go too far.¹⁵⁸ As for the plight of teachers, even where the First Amendment provides no protection against adverse

¹⁵¹ See *Sweezy*, 354 U.S. at 263–264.

¹⁵² See *id.*

¹⁵³ See *supra* notes 26–28.

¹⁵⁴ *Supra* notes 56–59 and accompanying text.

¹⁵⁵ See *Nahmod*, *supra* note 49, at 64.

¹⁵⁶ See *Daly*, *supra* note 25, at 50.

¹⁵⁷ *Cf. Mayer*, 474 F.3d at 478 (school instructed teachers to avoid taking sides in political controversies).

¹⁵⁸ Compare *id.* at 478–80 (briefly disposing of claim), with *Cockrel v. Shelby County Sch. Dist.* 270 F.3d 1036, 1048–55 (6th Cir. 2001) (lengthy *Pickering* analysis).

employment decisions, the employee retains the other types of First Amendment protections enjoyed by all citizens.¹⁵⁹ For example, even if the First Amendment does not protect a teacher from termination for allegedly libelous in-class speech, the teacher “would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.”¹⁶⁰ Simply put, the *Garcetti* rule leaves government employees in the same position as millions of private employees. Actually, it leaves government employees somewhat better off, because they still may receive protection for speech made outside the scope of their official duties.¹⁶¹ By contrast, employees of private entities receive no First Amendment protection whatsoever against their employers.¹⁶²

D. *The Outer Reaches of Garcetti: What Is the “Scope of Employment”?*

After concluding that *Garcetti* should limit First Amendment protection for speech made while teaching, it remains for courts to decide whether the speech in a given case actually constitutes teaching or otherwise falls within the scope of employment. As the Court noted, this is a practical inquiry.¹⁶³ In many cases it will be obvious, but some interesting problems arise in determining whether given speech qualifies as teaching, and it will be useful to consider a couple of the more obvious problems in this area. This part of the discussion assumes that *Garcetti* applies to teaching as well as other speech in the course of other official duties, and that *Pickering* analysis applies in all other situations. The following subsections address, in turn, several issues arising from in-person and online speech.

¹⁵⁹ See *Connick v. Myers*, 461 U.S. 138, 147 (1983).

¹⁶⁰ *Id.*

¹⁶¹ See *Garcetti*, 547 U.S. at 419–20.

¹⁶² See generally *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that Fourteenth Amendment does not restrict private actors).

¹⁶³ *Garcetti*, 547 U.S. at 424.

1. In-Person Speech

When teachers address students face-to-face, the speech will often be teaching, but borderline situations can occur. One interesting problem involves “passive” speech in the form of a symbolic object worn by the teacher or otherwise displayed in the classroom. This speech might include a religious symbol such as a crucifix or hijab worn by the teacher, a poster on the classroom wall, or even an object sitting on top of the teacher’s desk. In trying to determine whether these sorts of displays constitute classroom speech, courts should try to determine whether a reasonable student of the relevant age would have perceived the object as part of the classroom or as a personal effect of the teacher.¹⁶⁴ Under this analysis, something worn by the teacher will rarely count as teaching, whereas objects displayed around the classroom will very likely count.¹⁶⁵ This standard would ensure that schools retain plenary control over the learning environment while recognizing *Tinker’s* protection of passive personal effects.¹⁶⁶ Of course, even if the object is a personal effect of the teacher (rather than rising to the level of classroom speech) the teacher would need to satisfy a *Pickering* analysis to receive protection; this might, for instance, protect the teacher

¹⁶⁴ Compare *Lee v. York County Sch. Div.*, 484 F.3d 687, 699–700 (4th Cir. 2007) (applying *Pickering* analysis to hold that a teacher had no speech right in postings on a classroom bulletin board), with *Montle v. Westwood Heights Sch. Dist.*, 437 F. Supp. 2d 652, 655–56 (E.D. Mich. 2006) (holding that a school’s interest in a professional work environment outweighs a teacher’s interest in wearing a shirt that protested working without a contract).

¹⁶⁵ Compare *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 560–61 (W.D. Pa. 2003) (applying *Pickering* and granting a preliminary injunction against enforcement of a school rule that forbade the wearing of religious symbols such as cross necklaces), with *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 380–81 (E.D.N.Y. 2007) (denying summary judgment because questions of fact existed as to whether a picture of George W. Bush on a classroom wall was speech within scope of employment and, if not, whether *Pickering* balancing supported teacher or school).

¹⁶⁶ Cf. *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

from viewpoint discrimination¹⁶⁷ but would not prevent the school from putting in place a viewpoint-neutral dress code.¹⁶⁸

If a passive object or personal effect becomes an explicit topic of conversation during class, the speech ceases to be passive. Thus, even assuming a passive display that does not constitute classroom speech, the teacher may be put in a tricky spot if a student attempts to bring up the object in class.¹⁶⁹ That is the risk the teacher takes by bringing the object into the classroom, but the teacher can always decline to answer a question. If a teacher refuses a student's attempt to discuss an object but nevertheless is disciplined by the school, a court may conclude that the teacher was really fired for displaying the object rather than for any classroom speech, and accordingly may decide that the speech deserves protection under *Pickering*, as expression that fell outside the teacher's official duties.¹⁷⁰

Another interesting problem arises around quasi-teaching duties such as chaperoning field trips or school events, coaching or leading extracurricular activities, or even tutoring or discussing materials with students outside of official class time. For the speech to count as teaching, it must be part of the teacher's pedagogical duties. Even so, these quasi-teaching duties will most often be a required part of the teacher's job and therefore within the scope of official job duties, whether or not they

¹⁶⁷ Cf. *Nichol*, 268 F. Supp. 2d at 560–61.

¹⁶⁸ See *Comm'ns Workers of Am. v. Ector County Hosp. Dist.*, 467 F.3d 427, 437–41 (5th Cir. 2006) (no First Amendment violation to forbid the wearing of buttons and pins by hospital staff); *Montle v. Westwood Heights Sch. Dist.*, 437 F. Supp. 2d 652, 655–56 (E.D. Mich. 2006) (holding that a school's interest in a professional work environment outweighs a teacher's interest in wearing a shirt that protested working without a contract).

¹⁶⁹ Cf. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007) (teacher disciplined for her answer to a student's question).

¹⁷⁰ Cf. *Tinker*, 393 U.S. at 509 (protecting speech in part because it did not disrupt class); *Nichol*, 268 F. Supp. 2d at 560–61 (protecting a teacher's right to wear a cross necklace).

properly qualify as “teaching.”¹⁷¹ If *Garcetti* extends to teaching, as this article suggests, then all parts of a teacher’s official duties will be governed by the same standard.¹⁷² That is, teachers would not receive First Amendment protection for any speech that occurred in the course of official duties, whether or not that speech constituted “teaching.”¹⁷³ If teaching is simply a subset of a teacher’s official duties, it becomes irrelevant to bother about the line between teaching and other official duties. Rather, courts would simply inquire whether the speech occurred in furtherance of the teacher’s official duties.¹⁷⁴ Looking beyond any paper descriptions of the teacher’s job, which the school has an incentive to write too broadly, courts should inquire whether the school actually expected the teacher to perform the function as a part of the job.¹⁷⁵

2. Internet Speech

Computers have expanded the concept of the classroom, and with the increasingly prevalent use of computers and the Internet in schools and by school-age children, courts have begun to deal with cases in which schools discipline teachers for Internet-based speech. Like any other sort of speech, electronic speech can range from actual instruction of students to speech that has no relation to job duties. For an example of online speech that constitutes teaching, suppose a teacher requires students to make posts on a discussion board concerning some topic being studied by the class, and that the teacher also posts to this board. On the other end of the spectrum would be a Facebook page or email account used by a teacher for purely personal purposes.

¹⁷¹ See *Garcetti*, 547 U.S. at 421.

¹⁷² See *Mayer*, 474 F.3d at 479 (holding that teachers do not have First Amendment rights in their teaching).

¹⁷³ See *id.*

¹⁷⁴ See *Garcetti*, 547 U.S. at 421.

¹⁷⁵ See *id.* at 424–25.

At the threshold, the trick for courts dealing with online speech will be to determine whether the speech fell within the scope of job duties, because speech in furtherance of official job duties would receive no protection, regardless of whether the speech was made pursuant to teaching duties or other official duties.¹⁷⁶ As noted by the *Garcetti* opinion, the key inquiry will be whether the teacher spoke in furtherance of some responsibility actually imposed by the school.¹⁷⁷ The difficulty is that, unlike in-person speech, the physical location and time of Internet-based speech often becomes less important, because people often use the Internet to communicate when they are not available in the same place or at the same time. Of course, if the teacher requires students to view or respond to a message or website as part of a class assignment, the speech will almost certainly constitute teaching. Classifying the speech becomes more difficult if the teacher uses the Internet to communicate with students in a more informal or social manner. In close cases, courts will need to look to facts such as whether the speech occurred on school email or a school-controlled website, whether students were intended to have access to the message or website, whether students engaged in a dialog with the teacher or merely viewed the message or website, and, of course, the content of the message.

If a court determines that Internet communications fell within official job duties, *Garcetti* ends the First Amendment inquiry.¹⁷⁸ Otherwise, the speech may receive protection under *Pickering*, but only if it involved a matter of public concern.¹⁷⁹ In a way, *Pickering* offers quite limited protection, because a teacher could conceivably be fired for speech that has little connection to the school. Restrictions imposed by a government entity upon its employees' speech simply "must be directed at

¹⁷⁶ *See id.* at 421.

¹⁷⁷ *See id.* 424–25.

¹⁷⁸ *See id.* at 421.

¹⁷⁹ *See Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309 (D. Conn. 2008).

speech that has some potential to affect the entity's operations."¹⁸⁰

Maintaining a reputation for responsibility and professionalism is generally a legitimate concern for a government entity,¹⁸¹ and this concern carries special force with teachers responsible for supervising and teaching other people's children. Take, for example, the teacher who maintains a personal Facebook page for purely social purposes. Suppose that none of the information on the teacher's page refers to the teacher's job or to the school in any way, or even mentions the teacher's occupation. Further suppose that the teacher does not use the account to communicate with coworkers or students, and has in fact tailored the account's settings to ensure that neither coworkers nor students can view the teacher's page. The page would seem quite divorced from the teacher's job. Yet if the teacher posts pictures of himself in a drunken state and the school somehow learns of the pictures, it could conceivably discipline the teacher without any First Amendment repercussions.¹⁸² Under *Pickering*, a court would first ask whether the speech involved a matter of public concern, and this speech did not.¹⁸³ Thus, even though the posting of the photograph and the photo's contents involved non-school matters, *Pickering* would not protect the teacher.¹⁸⁴

To further illustrate how *Pickering's* public concern requirement would work in the Internet context, consider a teacher disciplined for using Facebook to interact socially with students. Disciplining teachers for interacting with students on social networking sites like Facebook raises a particularly interesting causation problem within the *Pickering* analysis: whether giving students access to a personal website that contains some speech on a matter of public concern meets *Pickering's* threshold "matter of

¹⁸⁰ *Garcetti*, 547 U.S. at 418.

¹⁸¹ *See, e.g., Philip v. Cronin*, 537 F.3d 26, 34 (1st Cir. 2008).

¹⁸² *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *6, 16 (E.D. Pa. Dec. 3, 2008) ("drunken pirate" MySpace picture).

¹⁸³ *See id.*

¹⁸⁴ *See id.*

public concern” requirement.¹⁸⁵ To receive protection under *Pickering*, an employee must show that the speech on a matter of public concern caused the adverse employment decision.¹⁸⁶ Plaintiffs must show causation in all cases, but the problem becomes more complex where the school ostensibly disciplines a teacher simply for interacting with students on a social networking site, and yet the teacher’s page contains speech on matters of public concern.¹⁸⁷ The question becomes whether the school punished the teacher for the act of socializing with students or for the content of his speech.¹⁸⁸ Also, even if the school’s decision was content-based, the teacher’s page (or messages to a student) will likely contain some speech on matters of public concern and other speech on private matters.¹⁸⁹ Unless the plaintiff can show that some speech on a matter of public concern caused the adverse action, the claim must fail.¹⁹⁰ For example, one district court decided it was not enough that a teacher’s Facebook page happened to contain a poem that criticized the war in Iraq, because the evidence showed that the school terminated the teacher for socializing with students through the social networking site rather than for any particular content of the teacher’s page.¹⁹¹ Lastly, if the school did discipline the teacher for material that addressed a matter of public concern, the court must balance the teacher’s interest as a citizen commenting on matters of public concern against the board’s interest in efficiently managing the school system.¹⁹² Schools may have an interest in regulating speech directed at students if the speech is likely to disrupt school in some way, but speech on matters of

¹⁸⁵ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309–11 (D. Conn. 2008).

¹⁸⁶ See *id.* at 311.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.* at 311.

¹⁸⁹ See *id.* at 310.

¹⁹⁰ See *Connick v. Myers*, 461 U.S. 138, 147 (1983).

¹⁹¹ See *Spanierman*, 576 F. Supp. 2d at 309–11.

¹⁹² See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

public concern will often receive protection, much like the teacher's letter to the editor in *Pickering*.¹⁹³

V. DISTINGUISHING HIGHER EDUCATION

Finally, a word is merited on why this article only advocates extending *Garcetti* to primary and secondary teaching, and not colleges. As the Court's limited academic freedom jurisprudence suggests, the freedom to determine the substance and form of teaching at a college may often lie with the college rather than the professor.¹⁹⁴ But colleges present additional problems for applying the *Garcetti* rule to classroom speech, because college classes frequently stress critical inquiry and may intertwine scholarship with teaching.¹⁹⁵ For that reason, this article does not advocate extending the *Garcetti* rule to college and university classrooms.

Classroom teaching at public primary and secondary schools is largely distinguishable from the sort of teaching that occurs at universities. First, the students at a university are not a captive audience in the same way as public school students. Truancy laws require public school attendance, at least up to a certain age.¹⁹⁶ And even in cases where students could legally drop out of high school, they often remain much more subject to the wishes of their parents than the typical college student. Conveniently, graduation from high school also roughly aligns with the age of majority.

College classes also involve a different sort of teaching than do public school classes, because the ability of students to think for themselves increases with age, whereas younger students will more likely accept

¹⁹³ See *id.* at 571–72.

¹⁹⁴ See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 414–15 (4th Cir. 2000).

¹⁹⁵ See Nahmod, *supra* note 49, at 68–69.

¹⁹⁶ See, e.g., 105 ILL. COMP. STAT. 5/26-1 et seq. (Illinois truancy laws); CAL. EDUC. CODE § 48260 et seq. (California truancy laws).

whatever a teacher says as true.¹⁹⁷ It is a fair generalization to say that public school classes primarily convey the specific information contained in the curriculum.¹⁹⁸ In contrast, college classes much more often seek not only to transmit information but also to spur critical thinking by exposing students to diverse ideas or the gray areas of their subject matter.¹⁹⁹ When legislatures create state colleges, they create educational forums of the sort described in *Rosenberger*.²⁰⁰ Of course, this bright-line distinction does not ring true in all cases. Some course offerings at community colleges may strikingly resemble a high school curriculum,²⁰¹ while some advanced high school courses may be conducted like university classes and even offered for college credit.²⁰² But it would be extremely difficult to condition First Amendment protection on, for instance, whether “critical thinking” actually occurred in a given classroom. The inquiry could engender immense satellite litigation involving the minutiae of the curriculum, manner of teaching, maturity of students, and so forth. And yet, if we are to say that primary school teachers and university professors receive different sorts of protection for their classroom speech, a distinction must be drawn in some way. On the whole, it is hard to dispute that there remains a fairly sharp contrast between high school and college.

CONCLUSION

¹⁹⁷ See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) (quoting Plato and Burke).

¹⁹⁸ See Nahmod, *supra* note 49, at 68–69.

¹⁹⁹ See *id.*

²⁰⁰ See 515 U.S. 819, 829–30 (1995); Nahmod, *supra* note 49, at 69.

²⁰¹ See, e.g., Kennedy King College Course Offerings: English, <http://kennedyking.ccc.edu/english.htm> (last visited Mar. 1, 2010) (offering a composition class that teaches “reading, writing and speaking basic English” and a basic writing skills class that teaches “expression in paragraph form, sentence clarity through knowledge of sentence structure, and correct word forms”).

²⁰² See College Board, AP Course Audit, <https://apcourseaudit.epiconline.org/ledger/search.php> (last visited Mar. 1, 2010) (listing over 15,000 high schools that offer Advanced Placement courses).

The *Garcetti* standard may have its flaws as applied to some professions, but withholding First Amendment protection from teachers makes good sense in primary and secondary classrooms. Because of the current circuit split regarding classroom speech, the problem of whether to extend *Garcetti* has two parts: first, whether courts should consider teaching under student speech or employee speech case law, and if the latter, whether the rule announced in *Garcetti* should extend to teaching at the primary and secondary levels. This article maintains that courts should analyze teaching within the employee speech rubric, because teachers are employees, and because student speech cases address themselves specifically to students, who are a captive audience to their teachers. Proceeding under employee speech analysis, primary and secondary teaching should not receive an exemption from the *Garcetti* rule. If public schools are to teach impressionable youth how to think, then voters should be kept close to what goes on in classrooms, and democratically elected school boards should have the final say on what is taught and how. Treating teaching as government speech is both true to reality and consistent with Supreme Court precedent. Moreover, applying the rule would not constitute a radical change in the law, because existing circuit approaches generally recognize that schools have the right to define their own curriculum and teaching methods. Practically, the *Garcetti* rule would clarify that teachers have no free speech grounds for challenging schools' control of teaching, whether or not the school has codified its decision in an official curriculum. Counterintuitively, extending *Garcetti* may even induce some schools to permit greater curricular flexibility, as the rule would eliminate the current incentive for schools to "overwrite" their curricula. Schools boards, and by proxy their constituents, would have the final say on the substance and style of teaching in public schools, as they should in a representative democracy.