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# Academic Freedom and the Post-Garcetti Blues

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# ACADEMIC FREEDOM AND THE POST-GARCETTI BLUES

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## INTRODUCTION

The Supreme Court's reasoning in *Garcetti v. Ceballos*,<sup>1</sup> a significant public employee free speech case, raises troublesome questions because it appears to leave little breathing space for First Amendment protection for teacher speech in the classroom and for academic scholarship. In this Article, I argue for a normative approach to academic freedom<sup>2</sup> in public elementary and secondary education and in higher education that takes account of *Garcetti* but is not over-determined by it. This normative approach is grounded on the self-government rationale of the Constitution's text and structure, including the First Amendment,<sup>3</sup> and inquires into the purposes of education in a

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1. 547 U.S. 410 (2006). Justice Kennedy wrote the majority opinion, while Justices Stevens, Souter, Ginsburg and Breyer dissented in three opinions. See generally Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008) [hereinafter *A Critique of Garcetti v. Ceballos*] (analyzing and critiquing *Garcetti*).

2. For the specific purposes of this Article, I define academic freedom as First Amendment protection for classroom speech and academic scholarship. I therefore do not discuss possible First Amendment protection for non-scholarly teacher speech and writing that occurs outside of the classroom.

3. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Harper & Brothers 1948) [hereinafter *FREE SPEECH*] (explaining that the First Amendment is rooted in self-government); see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961) [hereinafter *First Amendment*] (arguing that First Amendment protection involves a government responsibility).

democracy.<sup>4</sup> I then address the doctrinal implications of these educational purposes for academic freedom and the First Amendment. Painting with a broad First Amendment brush, I conclude that the scope of academic freedom in elementary and secondary education has not been changed by *Garcetti*: it remains quite limited. However, I also conclude that academic freedom in higher education should not be governed by *Garcetti*. Rather, as high-value speech in a democracy, it deserves maximum First Amendment protection.

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### I. *GARCETTI* AND ACADEMIC FREEDOM

*Garcetti* did not explicitly involve academic freedom. Rather, it arose out of a dispute between a deputy district attorney and his supervisors over the attorney's actions. The attorney informed his supervisors orally and in a written memorandum of his findings that a police officer's affidavit in support of a search warrant contained significant misrepresentations. Thereafter, the attorney alleged, in a section 1983<sup>5</sup> suit, that his supervisors retaliated against him in violation of the First Amendment. In an opinion by Justice Kennedy, the Court revisited and revised its almost forty-year-old decision in *Pickering v. Board of Education*<sup>6</sup> and declared: "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

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4. See generally AMY GUTMANN, *DEMOCRATIC EDUCATION* (Princeton Univ. Press 1987) (discussing the purposes of education in a democracy).

5. See 42 U.S.C. § 1983 (2000) (creating a Fourteenth Amendment damages action against state and local government officials as well as against local governments). See generally SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (4th ed. 1997, 2008) (analyzing, in a three-volume treatise, section 1983 cases, issues, and procedures).

6. 391 U.S. 563 (1968). Establishing what I call the *Pickering* three-step, the Court there held that when a public employee speaks as a citizen on a matter of public concern (step one), there is an inquiry into the government's interest, such as the existence of an adverse effect on either the employment relationship or the functions of the government entity involved (step two), followed by a balancing of the free speech interest against the government interest (step three). If the free speech interest outweighs the government interest, the employee is protected against employer discipline by the First Amendment. However, if the public employee's speech is on a matter of private concern only, then the First Amendment drops out at step one, and plays no further role.

does not insulate their communications from employer discipline.”<sup>7</sup> In a very real sense, *Garcetti* resurrected the now discredited<sup>8</sup> right-privilege distinction<sup>9</sup> in such cases.

Consider the possible academic freedom implications not only for the classroom speech of teachers at all academic levels, but also for the scholarship of professors. If *Garcetti* is taken seriously and read broadly, then all such speech and scholarship, inherently made pursuant to official employment duties, is unprotected by the First Amendment from discipline imposed by elementary, secondary, and higher level educational officials. Amplifying this concern in *Garcetti* is the Court’s apparent use of the government speech doctrine in support of its ruling. Justice Kennedy stated that immunizing public employee speech that is part of one’s job from First Amendment protection against employer discipline “simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>10</sup> He then cited *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>11</sup> quoting its statement that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”<sup>12</sup>

The problem is that government speech is presently not covered by the First Amendment because the government’s role as speaker in the

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7. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). This created what I call the new *Garcetti* four-step: first comes *Garcetti*’s job-required speech inquiry, which, if satisfied by the public employee, is followed by the *Pickering* three-step. If the first (*Garcetti*) step is not satisfied by the employee—that the speech is a matter of public concern is irrelevant at this first step—then the First Amendment drops out with respect to employer discipline.

8. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (explaining that although a person may be denied a valuable government benefit for a variety of reasons because the benefit is a privilege and not a right, the government may not deny a benefit for a reason that infringes a person’s freedom of speech).

9. The essence of this distinction is captured by Justice Holmes’ famous statement for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . The servant cannot complain, as he takes the employment on the terms which are offered him.”).

10. *Garcetti*, 547 U.S. at 422.

11. 515 U.S. 819 (1995).

12. *Id.* at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

marketplace of ideas is considered that of a participant and not that of a regulator.<sup>13</sup> Justice Kennedy's reference to a government speech justification for the Court's approach in *Garcetti* may be read as suggesting that a teacher's classroom speech and a professor's scholarship are the First Amendment equivalents of government speech, and as such, unprotected by the First Amendment from official discipline. Indeed, Justice Souter, in his dissent, argued that the majority's reliance on a government speech rationale was not justified.<sup>14</sup> In response, Justice Kennedy was almost dismissive; he simply observed that the facts in *Garcetti* did not raise an academic freedom issue. At the same time, however, he acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."<sup>15</sup>

One might begin a discussion of academic freedom from a doctrinal perspective in an attempt to discern how conventional First Amendment doctrines apply to classroom speech and scholarship. However, I believe that it is more illuminating to take a normative approach<sup>16</sup> in which the following questions are addressed: first, what are the functions of primary and secondary education and of higher education in a democracy; and second, what follows normatively from those functions for academic freedom and the First Amendment? These questions require us to address self-government, which is the primary

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13. See *A Critique of Garcetti v. Ceballos*, *supra* note 1, at 582-83 (discussing the government speech doctrine).

14. *Garcetti*, 547 U.S. at 437 (Souter, J., dissenting) ("Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden."). See also Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 591-92 (2008) (arguing that government speech must be identified as such, and be transparent, in order to promote the important value of political accountability and thereby receive immunity from First Amendment scrutiny).

15. *Garcetti*, 547 U.S. at 425. I argue later, reasoning from the purposes of education in a democracy, that higher education should be off-limits to *Garcetti* because university classroom speech and professorial scholarship constitute a unique kind of high value speech in a democracy.

16. See PLATO, *REPUBLIC* (Francis MacDonald Cornford trans., Oxford Univ. Press 1945) (explaining Plato's consideration of the characteristics of the ideal political community and proceeding to discuss the appropriate educational policies for his Republic under the realm of political theory).

purpose of the United States Constitution as embedded in its text and structure, as well as the closely related self-government rationale of the First Amendment, as famously articulated by Alexander Meiklejohn.<sup>17</sup> Only then should the relevant academic freedom and First Amendment doctrines be considered.

## II. THE CONSTITUTION, SELF-GOVERNMENT AND EDUCATION

Self-government and citizenship are at the core of the United States Constitution itself, which is a product of the Enlightenment.<sup>18</sup> The United States was constituted not as a pure democracy but rather as a republic or representative democracy.<sup>19</sup> Whether one is a classical Republican<sup>20</sup> or a Madisonian Republican,<sup>21</sup> citizen participation in self-government is essential for both survival and progress. Young people must be educated to be citizens,<sup>22</sup> even though their education surely includes more, such as the ability to make good life choices.<sup>23</sup> Amy

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17. See FREE SPEECH, *supra* note 3.

18. See generally GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87 (Univ. of North Carolina Press 1969) (evaluating the political and social culture in which the American Republic was formed).

19. See, e.g., THE FEDERALIST NO. 10 (James Madison) (discussing control of factions and the advantages of a republic over a democracy).

20. See generally THE COMPLETE ANTI-FEDERALIST VOL. 1, 15-23 (Herbert J. Storing ed., Univ. of Chicago Press 1981) (detailing original Republican ideas of the Anti-Federalists, including their stance against a centralized federal government and against the Constitution).

21. See generally THE FEDERALIST NO. 39 (James Madison) (arguing for a strong federal government as opposed to a mere consolidation of the states' powers in a national government, and defining a true republic as one in which the power to govern is derived from the people, and in which the representatives are elected from all of the people).

22. Amy Gutmann calls this conscious social reproduction, meaning the design by citizens of institutions that shape political values, attitudes and models of future citizens. GUTMANN, *supra* note 4, at 14.

23. Famously describing the importance of elementary and secondary education, the Supreme Court said the following in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public

Gutmann has argued powerfully that education must encourage the development of *moral character*, which means an understanding of, and predisposition toward, life in a democratic society and a willingness to deliberate about moral questions.<sup>24</sup> Moral character comprehends the attributes of truth-telling, tolerance for diversity, and employing nonviolence to resolve disputes. However, education must go further; it must ultimately provide for its young people the ability to engage in what Gutmann calls *moral reasoning*, meaning the critical faculty of exercising reasoned deliberation and analysis in order to participate as citizens in self-government.<sup>25</sup>

Notice how this concept of education fits comfortably into Meiklejohn's self-government explanation for the First Amendment,<sup>26</sup> a rationale reflected in *New York Times v. Sullivan*.<sup>27</sup> This Article is not the place to discuss whether this self-government rationale works better than the Mill/Holmes marketplace of ideas rationale<sup>28</sup> or the self-fulfillment

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responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

*Id.* at 493.

24. GUTMANN, *supra* note 4, at 41-47.

25. GUTMANN, *supra* note 4, at 50-52.

26. See *First Amendment*, *supra* note 3, at 252. Meiklejohn argues that the core of the First Amendment is political expression because of its relation to self-government. Other kinds of expression are important only to the extent they relate to self-government. He explains: "[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *First Amendment*, *supra* note 3, at 256. Of course, Meiklejohn was not the first to articulate a self-government rationale of the First Amendment. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) ("[Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

27. 376 U.S. 254, 296-97 (1964) (Black, J., concurring).

28. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting) (explaining that "the best test of truth is the power of the

and individual autonomy rationale.<sup>29</sup> It is enough for present purposes that the self-government rationale not only follows from the text and structure of the Constitution, but also explains the hierarchical character of First Amendment jurisprudence better than the alternatives.<sup>30</sup> Just as the First Amendment plays a crucial educational role in self-government—citizens educating one another about political matters<sup>31</sup>—it should also play a crucial role in the education of students for self-governance.

### III. ACADEMIC FREEDOM

As others have frequently pointed out,<sup>32</sup> the Supreme Court has, in various First Amendment,<sup>33</sup> substantive due process,<sup>34</sup> and affirmative

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thought to get itself accepted in the competition of the market”); see also JOHN STUART MILL, *ON LIBERTY* 19 (Elizabeth Rapaport ed., Hackett Publishing Co. Inc. 1978) (stating “that the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind”).

29. See, e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 21-55 (The Michie Co. 1984) (arguing that free speech fosters the development of both intrinsic and instrumental values, which can be grouped together as “self-realization,” and advocating for a balancing test approach to interpret the First Amendment).

30. Thus, under current First Amendment jurisprudence, political speech is the most highly protected speech, obscenity, fighting words and threats are unprotected, and commercial speech is somewhat protected. I argued some time ago that none of these three conventional rationales, even the self-government rationale, truly explains First Amendment protection for artistic expression. Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WISC. L. REV. 221, 235-43 (1987).

31. Only the First Amendment’s Petition Clause protects citizen-to-government speech; apart from the Religion Clauses, the other clauses protect citizen-to-citizen speech. Regarding the need for constitutional education of the people, see Sheldon H. Nahmod, *Constitutional Education for The People Themselves*, 81 CHI-KENT L. REV. 1091 (2006).

32. E.g., Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111 (2007) (recognizing academic freedom as a “special concern of the First Amendment” and tracing the origins of the modern view of academic freedom in an attempt to set the stage for future academic First Amendment cases (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW &



action cases,<sup>35</sup> suggested (but not held) that there exists a constitutionally based teacher's or institution's academic freedom. My focus here is on the teacher's academic freedom under the First Amendment, and not on that of the institution.<sup>36</sup>

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CONTEMP. PROBS., Summer 1990, at 79, 81-82 (taking a historical approach to the Supreme Court's treatment of the First Amendment freedoms of educational institutions over time and arguing that institutional academic freedom has progressively developed from earlier notions of general free speech); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L. J. 251 (1989) (critiquing the roles of the courts and the Constitution in promoting and protecting academic freedom at the university level and arguing for the autonomy of higher level educational institutions in determining curriculum, teaching methodology, student admittance, and faculty appointments).

33. See, e.g., *Keyishian*, 385 U.S. at 603 (treating academic freedom as special concern of the First Amendment).

34. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 402-403 (1923) (holding unconstitutional state law prohibiting the teaching in public and private elementary schools of any modern language but English); see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-36 (1925) (holding unconstitutional state law requiring students to attend public schools instead of private schools).

35. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (emphasizing the importance of "expansive freedoms of speech and thought associated with the university environment").

36. See, e.g., Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497-98 (2007) (arguing that universities should be considered separate First Amendment entities and afforded special protection because of the significant role they play in First Amendment dialogue); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 907-908 (2006) (evaluating the various institutional and individual concepts of a right to constitutional academic freedom); Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 817-19 (1982-1983) (arguing that academic freedom and institutional autonomy are distinct ideas, using *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) as a case study). When a teacher's academic freedom is allegedly abridged, it is ordinarily the result of challenged conduct that is institutionally based, thereby creating tension between the teacher's academic freedom and institutional autonomy. For a recent decision upholding private schools' institutional academic freedom under the First Amendment, see *Assoc. de Educ. Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 19 (1st Cir. 2007) (holding that the selection of textbooks and editions is closely tied to schools' First Amendment rights, and that any interference by the government will be subjected to strict scrutiny).

*A. Public Elementary and Secondary Education*<sup>37</sup>

Academic freedom issues in elementary and secondary education concern not only *what* is taught, *how* and *by whom*, but also *who* decides these matters. Students are a captive audience and, to generalize overbroadly, they are highly impressionable with underdeveloped critical faculties.<sup>38</sup> Their parents and the school board surely have an important

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37. While I address public education because of the Fourteenth Amendment's state action requirement for First Amendment protection, my normative arguments should apply to secular private elementary and secondary schools and to universities as well. See GUTMANN, *supra* note 4, at 115-23 (discussing the role of private schools in a democracy).

38. Secondary students have obviously developed, emotionally, more than their elementary counterparts and are further along in their ability to think critically; however, for the purpose of analysis of teacher academic freedom, I treat elementary and secondary students the same: both groups are captive audiences and are, for the most part, minors unable to vote. Nevertheless, I want to make clear my view that treating elementary and secondary students the same in a First Amendment setting may be too simplistic. The latter can surely handle controversial topics and different viewpoints better. In this vein, consider the opinion of Judge Rovner, concurring in the judgment in *Nuxoll ex rel Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008), which involved a lawsuit by a high school student against a school district and officials. The student alleged that the officials violated his First Amendment rights by forbidding him to make negative comments about homosexuality at school by wearing a T-shirt saying "My Day of Silence, Straight Alliance" on the front and "Be Happy, Not Gay" on the back. *Id.* at 669-70. Judge Rovner stated:

Moreover, I heartily disagree with my brothers about the value of the speech and speech rights of high school students, which the majority repeatedly denigrates. Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women's rights movement, the anti-war protests for Vietnam and Iraq, and the recent presidential primaries where the youth voice and the youth vote are having a substantial impact . . . . The young adults to whom the majority refers as "kids" and "children" are either already eligible, or a few short years away from being eligible to vote, to contract, to marry, to serve in the military, and to be tried as adults in criminal prosecutions. To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults, is contrary to the values of the First Amendment.

*Id.* at 677-78 (Rovner, J., concurring) (citations omitted).

stake in their education.<sup>39</sup> Moreover, while these students should be starting to develop their critical deliberative faculties and the ability to engage in moral reasoning, they are, at one and the same time, developing moral character and attachment to the political community through civil religion and sacred political rituals.<sup>40</sup> In addition, they are learning basic information (mathematics, science, the humanities, social science, and history) and skills (reading and writing).

Normatively, these considerations suggest a strong and probably determinative role under the First Amendment for the school board in deciding what is taught and how (curricular decisions), and by whom (teacher qualifications). They also suggest very little role, if any, under the First Amendment for the elementary and secondary teacher in making such decisions.<sup>41</sup> Moreover, students learn outside of the school setting from their parents, their peers, and the society at large; the school board does not have a monopoly on what they learn.<sup>42</sup> Thus, courts have uniformly ruled, before and after *Garcetti*, that teachers in elementary

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39. See GUTMANN, *supra* note 4, at 42 (discussing the shared authority of states, parents, and professional educators in deciding how to cultivate moral character).

40. See Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L. J. 511, 539-41 (1991); Sheldon H. Nahmod, *The Pledge as Sacred Political Ritual*, 13 WM. & MARY BILL RTS. J. 797, 799-804 (2005). See generally DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* (Yale Univ. Press 1988) (explaining why ritual has always been and will continue to be an essential part of political life); CATHERINE BELL, *RITUAL: PERSPECTIVES AND DIMENSIONS* (Oxford Univ. Press 1997) (surveying the most influential theories of religion and ritual, the major categories of ritual activity, and the key debates that have shaped our understanding of ritualism).

41. This indicates a correspondingly limited role for the judiciary in reviewing (and second-guessing) a school board's curricular and pedagogical decisions when an elementary or secondary schoolteacher claims academic freedom protection for classroom speech. This is not to say, of course, that teachers should have no educational role or input in these matters. See GUTMANN, *supra* note 4, at 76. However, the inquiry here is whether the First Amendment should mandate such a role.

42. Students even have a First Amendment right to learn from one another in the classroom apart from the curriculum. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that elementary and secondary students may wear black armbands protesting the Vietnam war in the classroom so long as they do not create material and substantial interference with the operations of the school). However, as discussed *infra*, *Tinker's* reach has been significantly limited by the Supreme Court.

and secondary education do not have a First Amendment right of academic freedom to decide for themselves what should be taught and how.<sup>43</sup> In curricular and pedagogical matters, consequently, there is precious little First Amendment “breathing space.” For better or for worse educationally, and without running afoul of the First Amendment, the school board may both write the script and demand that teachers perform it.<sup>44</sup> *Garcetti* did not change this.

For example, a Seventh Circuit case involved a social studies teacher who was disciplined for using a classroom session on current events to express her view on an anti-Iraq War demonstration.<sup>45</sup> The Seventh Circuit ruled against the teacher, declaring: “[T]he [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or

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43. See generally Ronald D. Wenkart, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 ED. LAW. REP. 1 (Dec. 28, 2006) (collecting cases on teacher disregard of the prescribed curriculum, on classroom management techniques, on the choice of play to be performed, and on the display of inappropriate materials on school bulletin board).

44. Thus, under this normative approach, a school board may adopt whatever educational theory or approach it desires, whether open or traditional, or some combination thereof, so long as it can reasonably be defended as promoting the development of moral character and the teaching of basic knowledge and skills, thereby laying the foundation for students to develop their critical faculties and their ability to engage in moral reasoning in the future. This promotes educational diversity and is, at the same time, consistent with experimentation, an important value of federalism. See *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) for a classic statement by Justice Brandeis in dissent:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*Id.* at 311 (Brandeis, J., dissenting).

45. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007). The teacher was told that she could teach about the controversy surrounding United States military involvement in Iraq, but was to keep her opinions to herself. Although the Seventh Circuit cited *Garcetti*, it relied on *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990), for the principle that “public school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority).” *Mayer*, 474 F.3d at 478-79.

advocate viewpoints, that depart from the curriculum adopted by the school system.”<sup>46</sup> Similarly, the Fourth Circuit ruled against a high school Spanish teacher who posted “overly religious” materials on his classroom bulletin board.<sup>47</sup> Rejecting the teacher’s First Amendment argument, the Fourth Circuit held that materials posted on a teacher’s bulletin board are curricular in nature and must be related to the subject taught.<sup>48</sup> In that case, the materials were not only religious in nature, but were not related to the teaching of Spanish.

Such results are consistent, I contend, not only with a normative approach to elementary and secondary education in a democracy, but also with conventional First Amendment forum analysis and government speech doctrine. Consistent with forum analysis, the unique functions of elementary and secondary education in developing moral character and teaching basic knowledge and skills to minors are taken into account. That is, government has intentionally created an educational forum primarily for the purposes of teaching values, basic knowledge, and skills, with the result that it can restrict speakers, teachers, and students alike to those purposes in the classroom, and in the curriculum generally.<sup>49</sup> That politically accountable school boards have broad decision-making authority over curricular and pedagogical matters is also consistent with the government speech doctrine that allows the government to engage in content and viewpoint discrimination when it

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46. *Mayer*, 474 F.3d at 480.

47. *Lee v. York County Sch. Div.*, 484 F.3d 687, 691, 700 (4th Cir. 2007).

48. *Id.* at 698. *But cf. Weathers v. Lafayette Parish Sch. Bd.*, 520 F. Supp. 2d 827, 837 (W.D. La. 2007) (stating, in dictum, that a substitute high school teacher’s art website was characterized not as curricular but rather as the private speech of a citizen on matters of public concern).

49. *Compare Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (upholding the regulation of the content of school-sponsored student newspaper on ground that such school-sponsored publications are part of the curriculum), *with Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (upholding the granting of access to interschool mailing system to the union, teachers’ exclusive bargaining representative, and the exclusion of rival teachers’ union from that mailing system), *and Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (upholding public television station’s decision to exclude presidential candidate from series of debates on ground that he had not generated appreciable voter support and was not considered serious candidate by the press).

speaks.<sup>50</sup> Consequently, though *Garcetti* did not explicitly address academic freedom, its rationale is both normatively and doctrinally appropriate in the elementary and secondary education setting.

Indeed, the Supreme Court has already adopted such a curricular and pedagogically based approach to *student* speech on school premises. Despite the broad assertion in 1969 in the famous *Tinker v. Des Moines School District* case that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[.]”<sup>51</sup> the Court has gradually limited this principle, as applied to students, to the facts in *Tinker*—a silent, passive, symbolic expression of opinion on a political topic that was the subject of prior official viewpoint discrimination. Specifically, the Court has refused to extend *Tinker* to a high school student’s speech, containing sexual innuendo, in connection with a student election;<sup>52</sup> to a high school principal’s exclusion of stories in a school-sponsored newspaper;<sup>53</sup> and to a high school student’s unfurling of a banner, interpreted as advocating drug use, at a school-sponsored outdoor activity.<sup>54</sup> In a kind of deconstructive move, the Court has emphasized the sentences in *Tinker* that precede and follow the above quote.<sup>55</sup> The sentence immediately preceding states: “First Amendment rights, *applied in light of the special characteristics of the school environment*, are available to teachers and students.”<sup>56</sup> Similarly, a subsequent sentence states: “On the other hand, the Court has repeatedly emphasized the need for affirming the *comprehensive authority of . . . school officials*,

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50. See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 566-67 (2005) (finding no First Amendment violation even though government speech was viewpoint-based and partially funded from nongovernmental source); *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 213-14 (2003) (upholding federal assistance to public libraries conditioned with the requirement of Internet filtering software as not violating the First Amendment). The seminal decision for this concept is *Rust v. Sullivan*, 500 U.S. 173 (1991) (finding no First Amendment violation even though viewpoint-discriminatory conditions were placed on government subsidies for family planning programs).

51. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

52. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

53. *Hazelwood*, 484 U.S. at 272-73.

54. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

55. *Tinker*, 393 U.S. at 506.

56. *Id.* (emphasis added).

consistent with fundamental constitutional safeguards, to . . . *control conduct in the schools*.”<sup>57</sup>

The common thread in these student cases is the disconnect between the student’s speech on the one hand and the school’s asserted curricular and pedagogical interests on the other, with the latter trumping the former. As the Court explained in one of these cases:

[S]chool-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.<sup>58</sup>

Significantly, the curricular and pedagogical interests of elementary and secondary schools identified by the Court in these student speech cases appear to be the same interests asserted by elementary and secondary schools that are implicated when teachers make First Amendment claims of academic freedom in the classroom. Therefore, under the normative approach suggested here, neither teachers nor their students in elementary and secondary schools have First Amendment protection regarding curricular and pedagogical decisions, regardless of whether the Court ultimately holds that *Garcetti* applies to the classroom (and curricular) speech of teachers.<sup>59</sup>

### *B. Public Higher Education*

Unlike the academic freedom of elementary and secondary teachers, as to whom, if *Garcetti* were applied, there would be no significant change in outcomes, there are serious problems for the

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57. *Id.* at 507 (emphasis added).

58. *Hazelwood*, 484 U.S. at 271.

59. Recall that even before *Garcetti* the First Amendment rights of elementary and secondary teachers in the classroom were almost non-existent.

continued viability of professorial academic freedom if the rationale of *Garcetti* were to control. What is taught in the public university classroom is surely bought and paid for by the government, as is faculty scholarship. If *Garcetti*, together with its categorical balancing,<sup>60</sup> its citizen-employee distinction, and its government speech approach, were applied here with blinders, professors would receive no First Amendment protection from university discipline for the views expressed in classroom teaching and in their scholarship. However, such an outcome does not take account of a crucial consideration: unlike elementary and secondary students, students at the university level are not a captive audience and, moreover, are legally adults.

Furthermore, a lack of First Amendment protection would be inconsistent with the democracy-promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge.<sup>61</sup> Classroom speech in the university and professorial scholarship are high-value speech deserving maximum First Amendment protection. As the plurality opinion in *Sweezy v. New Hampshire*<sup>62</sup> aptly put it:

The essentiality of freedom in the community of American universities is almost self-evident. No one

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60. See *A Critique of Garcetti v. Ceballos*, *supra* note 1, at 569-73 (addressing categorical balancing in *Garcetti*).

61. As noted *infra*, it is also inconsistent with the 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, American Association of University Professors (1940), <http://www.aup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf> [hereinafter AAUP Statement]. However, in contrast to my normative approach which is grounded on self-government, the AAUP's primary rationale appears to be the marketplace of ideas. Thus, the preamble to the AAUP Statement declares in relevant part:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth.

62. 354 U.S. 234 (1957).



should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>63</sup>

That under *Garcetti* there would be no First Amendment protection from university discipline for professorial classroom speech and scholarship is also inconsistent with First Amendment forum analysis and government speech doctrine. The university classroom is an intentionally created educational forum for the enabling of professorial (and student) speech, per the rationale of *Rosenberger*.<sup>64</sup> University classroom speech is thus not government speech. Similarly, professorial scholarship is an intentionally created metaphorical educational forum for the dissemination of knowledge by academics.<sup>65</sup> It, too, is not government speech. The First Amendment consequence is that the government should not be allowed to engage in viewpoint discrimination by punishing faculty because of what they say in the classroom or write in their scholarship.

These characterizations of the university classroom and of professorial scholarship as intentionally created educational forums should not depend solely on the subjective intent of state legislators or university officials, even though there are suggestions of a subjective test in various Supreme Court forum cases.<sup>66</sup> Rather, the test should be

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63. *Id.* at 250.

64. *See* *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995). This goes beyond mere compatibility of the speech and the public “property” at issue: here, the university classroom and professorial scholarship are specifically created for the promotion of high-value speech.

65. *Cf.* Principle 1 of the AAUP Statement, *supra* note 61, at 3, which provides in relevant part: “Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties . . . .”

66. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 733-37 (1990) (upholding the restriction against solicitation on postal sidewalk as reasonable because location was not a public forum and activities disrupted postal business); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 654 (1981)

objective in nature, as Justice Kennedy argued in *International Society for Krishna Consciousness v. Lee*,<sup>67</sup> which considered how to characterize an airport terminal for First Amendment purposes. Concluding that the airport terminal in question was a public forum, he argued that the government should not be permitted, under forum doctrine, to restrict speech by fiat through its "own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice" on public property.<sup>68</sup> Rather, "[i]f the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum."<sup>69</sup>

This objective approach to characterizing the university classroom and professorial scholarship makes First Amendment sense for at least two reasons. First, it looks at what actually takes place in university classrooms and during professorial scholarship activities. Second, it reflects a long-standing tradition of academic freedom in American universities that, even if not "time out of mind," goes back to early in the twentieth century.<sup>70</sup> This historical gloss, analogous to the role of history in the characterization of certain public property such as

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(upholding a state agricultural society rule that restricted solicitation to fixed locations because it was applied equally to all groups and furthered the valid interest of maintaining order).

67. 505 U.S. 672, 695 (1992) (Kennedy, J., concurring). Ironically, Justice Kennedy's reasoning in this case could turn out to limit the applicability of *Garcetti* in the university classroom and professorial scholarship settings.

68. *Id.* at 694-95.

69. *Id.* at 698. Speaking of institutional academic freedom, Justice Frankfurter quoted a conference statement from The Open Universities in South Africa in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring): "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."

70. See generally RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (Columbia Univ. Press 1955) (tracing and analyzing the history of academic freedom in the United States). Compare *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (where the Court said: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us.") and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Where Justice Powell stated: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.").

streets and parks as traditional public forums,<sup>71</sup> supports the carving out of a special First Amendment role for professorial academic freedom, even after *Garcetti*.

Indeed, a special First Amendment high-value speech role for professorial academic freedom, based in part on tradition, would parallel the Supreme Court's reasoning regarding the free speech and associational rights of college students in *Healy v. James*.<sup>72</sup> There, it ruled in favor of the First Amendment rights of college students to obtain official campus recognition of a chapter of Students for a Democratic Society:

[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. . . . The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.<sup>73</sup>

Soon thereafter the Court applied the reasoning of *Healy* in *Papish v. Board of Curators of the University of Missouri*<sup>74</sup> when it similarly ruled in favor of a university student expelled for distributing a newspaper on campus containing indecent but not obscene speech. The Court explained:

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71. See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939):  
Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

72. 408 U.S. 169 (1972).

73. *Id.* at 180-81 (citations omitted).

74. 410 U.S. 667 (1973) (per curiam).

We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’ . . . [T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . .<sup>75</sup>

Nevertheless, under the First Amendment there are legitimate educational constraints on professorial academic freedom. In the classroom, these include the requirement of some relation between professorial speech and the subject matter that is being taught, as well as a prohibition against disruptive tactics that interfere with the educational process.<sup>76</sup> For example, a Seventh Circuit post-*Garcetti* case dealt with student complaints directed at an instructor in a public college’s cosmetology program who distributed anti-gay religious pamphlets to students she thought were homosexual. She also attempted to lecture them to change their sexual orientation during classes held in the college’s beauty salon.<sup>77</sup> Ruling against the instructor, who sued because her contract was not renewed, the Seventh Circuit concluded that although homosexuality was an issue of public concern, the college’s interest in keeping its instructors on message, in conjunction with her actions’ disruptive effect on the educational process, outweighed the instructor’s First Amendment interest.<sup>78</sup>

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75. *Id.* at 670-71.

76. Under the First Amendment, what constitutes unpermitted material and substantial interference with the elementary and secondary educational process, *see supra* note 42, is surely broader than what, under the First Amendment, constitutes unpermitted interference with the university classroom. As noted earlier, university students are adults who are not a captive audience. They can and should be able to handle unsettling and controversial content, even if it is one-sided, so long as what the professor expresses in the classroom does not amount to physical disruption, actual intimidation, threats, obscenity or defamation.

77. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668 (7th Cir. 2006).

78. *Id.* at 671-74. This result is also consistent with Principle No. 2 of the AAUP Statement, *supra* note 61, at 3, which provides in relevant part: “Teachers are entitled to freedom in the classroom in discussing their subject, but *they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.*” (emphasis added).

Finally, there are also legitimate educational constraints on professorial scholarship under the First Amendment. Perhaps the main constraint is scholarly standards. The university as employer is surely entitled to evaluate a professor's fitness through the application of well-established scholarly standards.<sup>79</sup>

### CONCLUSION

In thinking about, and assessing, the possible application of *Garcetti* to academic freedom at all educational levels, I maintain that it makes sense to reason normatively from the purposes of education in a democracy, as refracted through the Constitution and the First Amendment, to conclusions about the scope of a teacher's academic freedom. It follows from this approach that the First Amendment doctrines for public employee speech and government speech articulated in *Garcetti* must not be unthinkingly applied to teacher classroom speech and professorial scholarship. Rather, the First Amendment protection to be afforded teacher classroom speech and professorial scholarship must take account of the purposes of elementary, secondary and higher education in a democracy. Applying the rationale of *Garcetti* to the classroom speech of elementary and secondary teachers is normatively sound and would, moreover, not change pre-*Garcetti* First Amendment outcomes. In marked contrast, professorial academic freedom should be

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79. As to professorial speech and non-scholarly writing *outside of the classroom*, a subject outside the scope of this Article, consider Principle No. 3 of the AAUP Statement, *supra* note 61, at 3-4, which states:

When [college and university teachers] *speak or write as citizens*, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations . . . [so] they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

(emphasis added). Interestingly, then, the AAUP's normative distinction between the speech of the professor as teacher and scholar on the one hand, and the speech of the professor as *citizen* on the other, turned out to be significant for First Amendment purposes 65 years (!) later in *Garcetti*. Note that under the AAUP's approach, there nevertheless may be "extramural utterances of the teacher [that] raise grave doubts concerning the teacher's fitness for his or her position . . . ." AAUP statement, *supra* note 61, at 4.

off-limits to *Garcetti*'s rationale. Categorical balancing is far too blunt an instrument to use in determining the scope of professorial academic freedom. University classroom speech and professorial scholarship, unique kinds of high value speech, merit maximum First Amendment protection as befits their extraordinary contribution to democracy.