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Getting to Sometimes: Expanding Teachers' First Amendment Rights through Garcetti's Caveat

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NOTES

GETTING TO "SOMETIMES"[†]: EXPANDING TEACHERS' FIRST AMENDMENT RIGHTS THROUGH "*GARCETTI*'S CAVEAT"[‡]

INTRODUCTION

The Supreme Court has recognized that "education is perhaps the most important function of state and local governments."[1] Public schools[2] must "inculcat[e] fundamental values necessary [for] the maintenance of a democratic political system,"[3] while also developing "leaders . . . through wide exposure to [the] robust exchange of ideas."[4] Even though the fulfillment of these aims is primarily the province of state and local officials, public schools must not contravene the Constitution in the service of their educational missions.[5] The Court's "public schools jurisprudence"[6] has

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[†] Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (Stevens, J., dissenting) ("The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties' is 'Sometimes,' not 'Never.'") (internal citation omitted).

[‡] Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 343 (6th Cir. 2010).

[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] This Note uses the term "school" to denote educational institutions of the primary and secondary levels and "university" to represent those of higher learning. Similarly, for the purposes of this Note, "teacher" refers to educators in schools, whereas "professor" identifies their counterparts at universities.

[3] Ambach v. Norwick, 441 U.S. 68, 77 (1979).

[4] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

[5] David Fellman, *Introduction* to THE SUPREME COURT AND EDUCATION vii, vii–ix

established that the First Amendment requires school officials to accommodate some student speech in the process of educating the nation's youth.[7] Beyond the Court's 1968 declaration in *Tinker v. Des Moines Independent Community School District* that, like students, "teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[8] however, the Court has not provided school officials with any explicit guidance regarding the extent to which they must tolerate teachers' speech in the course of their instructional duties.[9]

To determine whether the Constitution protects teachers' classroom speech, then, the United States Courts of Appeals have looked to one or more analogous First Amendment perspectives.[10]

(David Fellman ed., 1969).

[6] James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1337 (2000).

[7] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (requiring a "legitimate pedagogical concern[ ]" for restrictions on "student speech in school-sponsored expressive activities"); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (permitting the punishment of "offensively lewd and indecent speech" in schools); *Tinker*, 393 U.S. at 514 (prohibiting school officials from disciplining students for their speech unless the speech could cause "a substantial disruption of or material interference with school activities"). For a discussion of these cases, see *infra* Part I.B.

[8] *Tinker*, 393 U.S. at 506.

[9] *See, e.g.*, Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1148 (9th Cir. 2001) ("Neither this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment."). *Compare* Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 229 (6th Cir. 2005) ("[T]he Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment."), *with id.* at 235 (Sutton, J., concurring) ("The Supreme Court has never held that the First Amendment applies to a teacher's classroom speech.).

This Note refers to this type of teacher speech as "classroom speech."

[10] Most courts and commentators have treated the judicial approach to this issue as a choice between two alternatives: the test for public-employee speech from the Supreme Court's decisions in Pickering v. Board of Education, 391 U.S. 563 (1968), and Connick v. Myers, 461 U.S. 138 (1983), and the test for school-sponsored student speech from *Hazelwood*. *See, e.g.*, Miles v. Denver Pub. Sch., 944 F.2d 773, 775–77 (10th Cir. 1991) (adopting the *Hazelwood* test to determine whether the First Amendment protected a teacher's classroom speech despite the district court's decision, and the parties' arguments, that the *Pickering-Connick* test applied); Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School Sponsored Speech*, 60 FLA. L. REV. 63, 79–80 (2008) (noting the circuit split between the Fourth, Fifth, Sixth, and Seventh Circuits, which apply *Pickering-Connick* to First Amendment retaliation cases involving teachers' classroom speech, and the First, Second, Eighth, Tenth, and Eleventh Circuits, which apply *Hazelwood*).

At least one court has described the availability of three analytical options: *Pickering-Connick*, *Hazelwood*, and the test for government speech from Rust v. Sullivan, 500 U.S. 173 (1991), and Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995). *See Cal. Teachers Ass'n*, 271 F.3d at 1448–49, 1449 n.6 (assuming *arguendo* that *Hazelwood* applied to teachers' use of languages other than English in the classroom instead of *Pickering-Connick* or *Rust-Rosenberger* because, in the court's opinion, "it appear[ed] to be more speech-protective than the two alternatives"); *see also Evans-Marshall*, 428 F.3d at 234–36 (Sutton, J., concurring) (recommending that the Sixth Circuit "re-examine its First Amendment

First, courts have viewed teachers as public employees and, applying the test that the Supreme Court first announced in *Pickering v. Board of Education*[11] and later refined in *Connick v. Myers*,[12] have balanced teachers' interests in speaking as citizens on matters of public concern against schools' interests in their ability to provide an education for their students.[13] Second, courts have seen schools as nonpublic fora with "special characteristics"[14] and, under *Hazelwood School District v. Kuhlmeier*,[15] have looked for the legitimate pedagogical concerns underlying schools' restrictions on teachers' classroom speech.[16] Third, at least one court has considered identifying the school itself, rather than the teacher, as the speaker, citing *Rust v. Sullivan*[17] and *Rosenberger v. Rector and Visitors of University of Virginia*[18] for the proposition that that school officials should have the ability to control the content of the educational message that their students receive.[19]

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jurisprudence in the context of in-class curricular speech" in light of the principles established in *Rust* and *Rosenberger*); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 64 (2008) (referring to the Fourth Circuit's characterization of the Third Circuit's use of *Rust* and *Rosenberger* to determine the protection that the Constitution affords teachers' classroom speech).

Courts and commentators have also found that the principle of academic freedom bears on the question. *See, e.g.*, Ward v. Hickey, 996 F.2d 448, 452–53 (1st Cir. 1993) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967), for the Supreme Court's discussion of the importance of the precise speech regulations in light of teachers' "vital First Amendment rights" in that marketplace of ideas that is the classroom and concluding that schools must not only have a legitimate pedagogical interest in restricting teachers' classroom speech but also must provide teachers with notice of prohibited speech); ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 204 (2009) ("The issue is also complicated by the notion of academic freedom, which although not explicitly a part of the First Amendment is nonetheless woven—often in a haphazard fashion—through analyses of an educator's right of expression."); Anne Gardner, Note, *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment*, 73 MO. L. REV. 213, 214 (2008) ("Among the circuit courts, teacher curricular speech is governed by three competing doctrines: public employee speech, student speech, and academic freedom.").

This Note considers all four of these precedential lines as First Amendment perspectives on the degree to which teachers' classroom speech warrants constitutional protection.

[11] 391 U.S. 563 (1968).

[12] 461 U.S. 138 (1983).

[13] *See, e.g.*, Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1055 (6th Cir. 2001) (holding that the First Amendment protected a teacher's decision to invite a speaker to address her class about the benefits of industrial hemp production).

[14] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[15] 484 U.S. 260 (1988).

[16] *See, e.g.*, Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994) (holding that the First Amendment did not protect a school board member's guest lecture that included "[d]epictions of bare-chested women").

[17] 500 U.S. 173 (1991).

[18] 515 U.S. 819 (1995).

[19] *See* Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 235–36 (6th Cir. 2005) (Sutton, J. concurring) (outlining a new direction for the Sixth Circuit's jurisprudence regarding the protection that the First Amendment affords to teachers' classroom speech); *cf.* Edwards v. Cal.

Finally, courts have also regarded teachers as First Amendment figures under *Keyishian v. Board of Regents*[20] and have considered the extent to which schools' right to "fix the curriculum"[21] must accommodate teachers' responsibility to expose students to the marketplace of ideas.[22]

The Supreme Court's 2006 decision in *Garcetti v. Ceballos*[23] "dramatically changed the [First Amendment] landscape"[24] from the first of these four perspectives. Instead of evaluating the nature of a public employee's speech and engaging in the "particularized balancing"[25] of the employee's interest in that speech against the public employer's interest in the efficient provision of its services, the *Garcetti* Court announced that the First Amendment offers no protection for a public employee's speech "made pursuant to . . . [that employee's] official responsibilities."[26] Because "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests,"[27] however, the Court qualified the scope of its holding, suggesting that the First Amendment may offer some protection to a public employee's speech related to "scholarship or teaching."[28]

Despite "*Garcetti*'s caveat,"[29] judicial responses to the decision in the circuit courts have been no more sensitive to teachers' First Amendment rights in the classroom, but rather have, on the whole, been more restrictive.[30] As a result, it is not surprising that one

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Univ. of Pa., 156 F.3d 488, 491–92 (3d Cir. 1998) (holding that a university, rather than a tenured professor, was the speaker with regard to the content of a course on educational technology).

[20] 385 U.S. 589 (1967).

[21] Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 371 (4th Cir. 1998) (en banc).

[22] *See, e.g.*, Ward v. Hickey, 996 F.2d 448, 452–53 (1st Cir. 1993) (allowing school officials to set the parameters of what teachers may communicate in the classroom, but requiring that teachers receive notice of prohibited expression); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) (refusing to "delineate the scope of academic freedom afforded to teachers under the First Amendment," but concluding that it does not "extend to [the choice of] curriculum or classroom management techniques in contravention of school policy or dictates"); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) ("Although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of the public school curricula.").

[23] 547 U.S. 410 (2006).

[24] Doucette v. Minocqua Hazelhurst & Lake Tomahawk Joint Sch. Dist., No. 07–cv–292–bbc, 2008 WL 2412988, at *1 (W.D. Wis. June 12, 2008).

[25] Connick v. Myers, 461 U.S. 138, 150 (1983).

[26] *Garcetti*, 547 U.S. at 424.

[27] *Id.* at 425.

[28] *Id.*

[29] Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 343 (6th Cir. 2010).

[30] *See, e.g.*, *id.* at 338–40 (holding that the First Amendment did not protect a high school English teacher's use of a novel that the school district had purchased for instructional

commentator has suggested that "*Garcetti* may ultimately prove the death knell for any meaningful First Amendment rights for [teachers'] classroom related communications."[31] In light of the limited extent of those rights before *Garcetti*, however, there is some consensus that *Garcetti's* "practical impact . . . may be minimal."[32]

While others have noted that *Garcetti* may be a reason for mild optimism,[33] this Note argues that *Garcetti* represents the best opportunity for the expansion of teachers' First Amendment rights in the classroom since *Tinker*'s pronouncement that respect for the constitutional rights of students and teachers is a mandatory component of the public school curriculum.[34] Through an examination of each of the four First Amendment perspectives on this issue, Part I of this Note explains the scope of teachers' rights to free expression in the classroom before *Garcetti*. Part II then discusses the *Garcetti* decision and the ways in which it has affected circuit courts' views of teachers' classroom speech. Analyzing the circuit courts' pre- and post-*Garcetti* jurisprudence, Part III of this Note argues that courts certainly could, and perhaps should, use *Garcetti*'s caveat to treat teachers' classroom speech in such way that respects teachers' role as servants not only of the public schools, but also the First Amendment.

I. TEACHERS' FIRST AMENDMENT RIGHTS IN THE CLASSROOM BEFORE *GARCETTI*

A. A Public Employee's Right to Free Expression in the Classroom

Before *Garcetti*, one First Amendment perspective that circuit courts used to determine whether the First Amendment protected a teacher's classroom speech adopted the Supreme Court's public-

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purposes); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 689 (4th Cir. 2007) (holding that a high school teacher's posting of material with religious themes on a classroom bulletin board did not warrant constitutional protection); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 478–80 (7th Cir. 2007) (holding that the First Amendment did not protect an elementary teacher's statement regarding her participation in demonstrations against the war in Iraq during a current-events lesson). For a discussion of these cases, see *infra* Part II.

[31] Hutchens, *supra* note 10, at 62.

[32] Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 225 (2008); *see also* Hutchens, *supra* note 10, at 62 ("[R]ecent years, with some exceptions, have already witnessed a general judicial resistance to First Amendment rights for teachers.").

[33] *See, e.g.*, DUPRE, *supra* note 10, at 226 ("The upshot is that after *Garcetti*, the extent of First Amendment protection—if it exists at all—is still a matter of speculation until the Court revisits the issue.").

[34] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

employee speech jurisprudence,[35] rooted in *Pickering v. Board of Education*[36] and *Connick v. Myers*.[37] In *Pickering*, the Supreme Court held that school officials violated Marvin Pickering's First Amendment rights when they discharged Pickering from his teaching position because of a letter that he sent to a local newspaper criticizing the school board and, in the process, announced a new test for evaluating whether a public employee's speech enjoys constitutional protection.[38] The Court stated that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[39] On the other hand, the Court recognized 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."[40] The Court, therefore, sought to find "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[41] Because the Court found that Pickering's criticism of school officials did not "impede[] the teacher's proper performance of his daily duties in the classroom or . . . interfere[] with the regular operation of the schools generally,"[42] it concluded that the school board's interest in restricting Pickering's speech was no greater than its interest in restricting the speech of an ordinary citizen and,

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[35] *See, e.g.*, Evans-Marshall v. Bd. of Educ., 428 F.3d 223 (6th Cir. 2005); Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036 (6th Cir. 2001); Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (en banc); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3d Cir. 1990); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989); Nicholson v. Bd. of Educ., 682 F.2d 858 (9th Cir. 1982); Gardner, *supra* note 10, at 220 ("Several appellate courts have applied the *Pickering* balancing test to teacher curricular speech."); Zachary Martin, Comment, *Public School Teachers' First Amendment Rights: In Danger in the Wake of "Bong Hits 4 Jesus,"* 57 CATH. U. L. REV. 1183, 1195 (2008) ("When dealing with the issue of whether a public school teacher's speech is constitutionally protected, several circuits have applied the rules established in *Pickering* and *Connick*.").

[36] 391 U.S. 563 (1968).

[37] 461 U.S. 138 (1983).

[38] *Pickering*, 391 U.S. 564–65, 568–70; *see also, e.g.*, Robert M. O'Neil, *Academic Speech in the Post*-Garcetti *Environment*, 7 FIRST AMEND. L. REV. 1, 4 (2008) (describing *Pickering* as "profoundly redefin[ing] the expressive rights of public employees"); Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1289 (2008) (describing *Pickering*'s place in "the pantheon of First Amendment jurisprudence").

[39] *Pickering*, 391 U.S. at 568.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 572–73.

consequently, that the board could not discipline Pickering for his speech without violating the First Amendment.[43]

Thirteen years later, in *Connick v. Myers*,[44] the Court clarified the application of *Pickering*'s balancing test.[45] In *Connick*, the Court held that the First Amendment did not protect a questionnaire that Shelia Myers, an assistant district attorney, distributed to her coworkers seeking their opinions about the district attorney and the policies of his office.[46] The Court emphasized the importance of the "public concern" dimension of the *Pickering* test and concluded that an evaluation of a public employer's interest in discharging an employee because of that employee's speech is only appropriate when the speech "can[] be fairly considered as relating to any matter of political, social, or other concern to the community."[47] Considering, then, the "content, form, and context" of Myers's questionnaire,[48] the Court found that one of the questions touched a matter of public concern because it sought information regarding any pressure that Myers's fellow attorneys may have felt to work on certain political campaigns, which the Court had previously recognized as a "coercion of belief in violation of fundamental constitutional rights"[49] and which was related to the "interest in this country that government service should depend upon meritorious performance rather than political service."[50] From this finding, the Court proceeded to balance Myers's limited interest in "an employee grievance concerning internal office policy"[51] against the district attorney's reasonable belief that the questionnaire would "disrupt the office, undermine his authority, and destroy close working relationships,"[52] concluding that the district attorney's interests were more significant and, therefore, that Myers's discharge did not violate the First Amendment.[53]

When circuit courts viewed teachers as public employees and applied *Pickering-Connick*'s two-part test, teachers' classroom speech received very little First Amendment protection.[54] The United States

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[43] *Id.*

[44] 461 U.S. 138 (1983).

[45] *See, e.g.*, Waldman, *supra* note 10, at 82 ("The Court continued to elucidate its approach [to public employees' First Amendment rights] in [*Connick*].").

[46] *Connick*, 461 U.S. at 140–41, 154.

[47] *Id.* at 146.

[48] *Id.* at 147–8.

[49] *Id.* at 149.

[50] *Id.*

[51] *Id.* at 154.

[52] *Id.*

[53] *Id.*

[54] *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998) (en banc) (holding that a high school drama teacher's selection of a play for her students to perform did not warrant First Amendment protection); Bradley v. Pittsburgh Bd. of Educ., 910

Court of Appeals for the Third Circuit's 1990 decision in *Bradley v. Pittsburgh Board of Education*[55] represents perhaps the firmest judicial rejection of a public employee's right to free expression in the classroom.[56] In *Bradley*, the Third Circuit held that school officials did not violate Diane Murray's First Amendment rights by prohibiting her use of Learnball, a classroom management technique that brings the excitement of sport into the classroom by engaging students in competitive educational exercises for extrinsic rewards.[57] Although it noted that *Pickering* does afford teachers the possibility of a constitutional safeguard for their speech, the court stated that this protection did not extend to teachers' expression in the classroom.[58] The Third Circuit offered no rationale of its own to support this conclusion,[59] but cited *Clark v. Holmes*,[60] a 1972 case in which the United States Court of Appeals for the Seventh Circuit held that a professor's emphasis on the subject of sex in a health survey course, in violation of his supervisors' direct instructions, failed, under

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F.2d 1172, 1176 (3d Cir. 1990) (holding that the First Amendment did not protect a high school teacher's use of an instructional method over school officials' objections); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (holding that the First Amendment did not protect a high school teacher's use of a nonapproved supplemental reading list in his world history course); Nicholson v. Bd. of Educ., 682 F.2d 858, 864–65 (9th Cir. 1982) (holding that the Constitution did not protect the encouragement that a high school journalism teacher gave to his students to publish articles on controversial topics). *But see* Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 231–32 (6th Cir. 2005) (holding that the district court's grant of the school district's motion to dismiss was erroneous because the First Amendment might protect a high school English teacher's alleged use of curricular materials that the school district had approved); Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1055 (6th Cir. 2001) (holding that the First Amendment protected a teacher's selection of a speaker to address her class about the benefits of industrial hemp production).

[55] 910 F.2d 1172 (3d Cir. 1990).

[56] *See, e.g.*, Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 599 (1999) (noting that, in *Bradley*, the Third Circuit held that "a teacher's in class speech was simply not protected by the First Amendment"); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 18 (2001) ("The Third Circuit . . . flatly stated [in *Bradley*] that classroom speech receives no protection under *Pickering*."); Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 436 (2009) ("[*Bradley*] indicates that the Third Circuit appears unwilling to extend any First Amendment protection to teacher expression that occurs inside the classroom.").

[57] *Bradley*, 910 F.2d at 1174–76. Murray also claimed that the school's ban on Learnball violated her right to academic freedom. *Id.* at 1175. For a discussion of this issue, see *infra* Part I.D.

For more on Learnball, see generally LEARNBALL FOR DISCIPLINE, WORK, ATTENDANCE, http://www.learnball.com (last visited June 1, 2012).

[58] *Bradley*, 910 F.2d at 1176.

[59] The court did, however, point to the fact that, at the time of its decision, "no court ha[d] found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." *Id.*

[60] *Id.* (citing Clark v. Holmes,474 F.2d 928 (7th Cir. 1972) (per curiam)).

Pickering, to warrant First Amendment protection.[61] As in *Clark*, Murray sought the right to use Learnball despite an express school policy,[62] but the Third Circuit did not limit its holding to those circumstances where a teacher's speech conflicts with an official prohibition.[63]

Other circuit courts have offered more explanation for their decisions to deny teachers' classroom speech First Amendment protection from the public-employee perspective, finding that such speech did not satisfy *Connick*'s "matter of public concern" requirement.[64] In *Kirkland v. Northside Independent School District*, the United States Court of Appeals for the Fifth Circuit held that the First Amendment did not protect Timothy Kirkland's use of an unapproved supplemental reading list in his world history course.[65] "With little difficulty,"[66] the Fifth Circuit found that Kirkland's reading list did not touch a matter of public concern because, if the use of the list was a response to a censorial administrative approval requirement as Kirkland claimed, he "never attended public meetings to register his opposition to [the school's] world history reading list . . . [or] announced to colleagues, superiors, or the public that the school-supplied list impinged on his right to speak freely."[67] The court further emphasized that "most significantly, [Kirkland] never afforded [the school] an opportunity to pass upon the merits of his list" and that he could not "remain mute and thereafter self-servingly label his conduct to be a matter of public concern."[68] Even though the *Kirkland* court described its "matter of public concern" analysis as "imprecise,"[69] it eschewed any consideration of the importance of the subject matter of the books on the reading list,[70] framing the list's use

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[61] *Clark*, 474 F.2d at 929–32.

[62] *Bradley*, 910 F.2d at 1174.

[63] *See supra* note 56.

[64] *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (en banc); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989).

[65] *Kirkland*, 890 F.2d at 795–96.

[66] *Id.* at 800.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 799.

[70] *Id.* at 798–99 ("[I]ssues do not rise to a level of 'public concern' by virtue of the speaker's interest in the subject matter; rather they achieve that protected status if the words or conduct are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district.") The court supported this subject-matter exclusion by quoting the Supreme Court's statement in *Connick* that "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case." *Id.* at 799 n.11 (quoting Connick v. Myers, 461 U.S. 138, 149 (1983)). *See* R. Weston Donehower, Note, Boring *Lessons: Defining the Limits of a Teacher's First Amendment Right to Speak Through the Curriculum*, 102 MICH. L. REV. 517, 523–24, 524 n.47 (2003) (citing *Kirkland* as an example of the analytical choice that some circuit courts

instead as a protest against an approval requirement for supplemental materials.[71]

Although the Fifth Circuit did not expressly state that *Kirkland* prevented teachers' classroom speech from qualifying as a "matter of public concern" under any circumstances,[72] the United States Court of Appeals for the Fourth Circuit certainly interpreted the case in that manner.[73] In *Boring v. Buncombe County Board of Education*,[74] the Fourth Circuit held that school officials did not violate the First Amendment when they transferred Margaret Boring to another high school due to her selection and production of the play *Independence*.[75] In finding that the play did not touch a matter of public concern, the court disregarded the production's themes of "family life, divorce, motherhood, and illegitimacy."[76] Rather, the court viewed Boring's selection of *Independence* as an assertion of her "right to participate in the makeup of the school curriculum"[77] and concluded that the conflict between Boring and her principal was "nothing more than an ordinary employment dispute."[78] Although the Fourth Circuit looked to *Kirkland* and found it to be "indistinguishable" from the case before it,[79] the court's "matter of public concern" analysis was quite different.[80] Whereas the *Kirkland*

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make to focus on the context of teachers' speech, "including the speaker's role, manner, audience, and motive," rather than the speech's content).

[71] *Kirkland*, 890 F.2d at 800.

[72] *See, e.g.*, Daly, *supra* note 56, at 18 (speculating that "the Fifth Circuit's analysis seems to have been driven by an underlying belief that the teacher's claims of censorship were an unpersuasive attempt to 'cloak his substandard job performance in [F]irst [A]mendment protection'") (quoting *Kirkland*, 890 F.2d at 800); Gee, *supra* note 56, at 435 (noting that the *Kirkland* court "limited its holding to situations where teachers refuse to implement curricula approved by school administrators"). *But see* Erica R. Salkin, *Caution in the Classroom: K–12 Teacher In-Class Speech, the Federal Courts, and* Garcetti, 15 COMM. L. & POL'Y 175, 184 (2010) ("The Fourth and Fifth Circuit Courts have made a blanket determination that curricula are not of public concern, as decisions regarding curricula have historically been in the hands of administrators and school boards.").

[73] *See* Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 369 (4th Cir. 1998) (en banc) ("In a case on facts so near to those in the case at hand as to be indistinguishable, the Fifth Circuit came to the conclusion we have just recited in [*Kirkland*].").

[74] 136 F.3d 364, 366–67 (4th Cir. 1998) (en banc).

[75] *Id.* at 366–67, 371.

[76] *See id.* at 378 (Motz, J., dissenting).

[77] *Id.* at 366 (majority opinion).

[78] *Id.* at 368.

[79] *See supra* note 73.

[80] *See Boring*, 136 F.3d at 368–69; *see also* Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of* Tinker*ing with Teachers' First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1303 (2009) ("While it is certainly easier to justify the restraint on teacher speech in *Kirkland*, in light of the generally understood rules on curricula that the teacher failed to follow, other instances of legal analysis applying these principles are less straight forward. Such was the case in [*Boring*]." The analyses in *Boring* and *Kirkland* are

court did not deny that teachers' classroom speech, under different circumstances, could be a matter of public concern,[81] *Boring* held that such speech could never satisfy that requirement.[82]

A focus on the subject matter of a teacher's classroom speech,[83] which neither the Fourth nor Fifth Circuits chose to do,[84] could, in fact, usher teachers' classroom speech past the "matter of public concern" threshold.[85] In *Cockrel v. Shelby County School District*,[86] the United States Court of Appeals for the Sixth Circuit held that the First Amendment protected Donna Cockrel's decision to invite Woody Harrelson to give presentations to her fifth-grade class on the environmental benefits of industrial hemp.[87] The court looked to *Connick*'s statement that "matters of public concern are those that can 'be fairly considered as relating to any matter of political, social, or other concern to the community'"[88] and found that "[t]here is no question that the issue of industrial hemp is a matter of great political and social concern to many citizens of Kentucky"[89] so as to "clearly come within the Supreme Court's understanding of speech touching matters of public concern."[90] The Sixth Circuit disagreed with the *Kirkland* and *Boring* decisions, stating that "the Fourth and Fifth Circuits have read the Supreme Court's language [in *Connick*] too broadly"[91] because their interpretation of the "matter of public concern" requirement would leave teachers' speech without constitutional protection "even if about an upcoming presidential election or the importance of our Bill of Rights."[92] From there, the

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identical, however, in their treatment of academic freedom. *See infra* Part I.D.

[81] *See supra* note 72 and accompanying text.

[82] *See, e.g.*, *Boring*, 136 F.3d at 380 (Motz, J., dissenting); Gee*, supra* note 56, at 421 n.92 ("[*Boring*] declared that all teacher speech deemed 'curricular' is not a public concern.").

[83] *See* Salkin, *supra* note 72, at 184 (describing the Sixth Circuit's "matter of public concern" analysis as hinging upon "what the content of [the teacher's] message might be"); Donehower, *supra* note 70, at 523, 523 n.46 (citing the Sixth Circuit's decision in *Cockrel* as an example of a lower court's focus on the speech's content in its "matter of public concern" inquiry); Vanessa A. Wernicke, Note, *Teachers' Speech Rights in the Classroom: An Analysis of* Cockrel v. Shelby County School District, 71 U. CIN. L. REV. 1471, 1472 (2003) ("Rather than focusing on the context in which the speech occurred, the court in *Cockrel* focused on the content of the speech to determine it to be protected under the First Amendment.").

[84] *See supra* notes 69–71, 76–78 and accompanying text.

[85] *See* Evans-Marshall v. Bd. of Educ., 428 F.3d 223 (6th Cir. 2005); Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036 (6th Cir. 2001). For a discussion of the *Evans-Marshall* decision, see *infra* Part I.C.

[86] 270 F.3d 1036 (6th Cir. 2001).

[87] *Id.* at 1055.

[88] *Id.* at 1050–51 (quoting Connick v. Myers, 461 U.S. 136, 146 (1983)).

[89] *Id.* at 1051.

[90] *Id.*

[91] *Id.* at 1052.

[92] *Id.* at 1051–52.

court found that the principal's prior approval of Harrelson's visits undermined what would otherwise have been the school's legitimate interest in preventing the disharmony in the workplace that resulted from the community's negative response to Harrelson and his message.[93]

Even if *Connick*'s "matter of public concern" requirement did not prevent a teacher's speech from garnering First Amendment protection, the interests of school officials in restricting the teacher's speech could outweigh the teacher's interest in that speech.[94] In *Nicholson v. Board of Education*,[95] the United States Court of Appeals for the Ninth Circuit held that school officials did not violate Don Nicholson's First Amendment rights when they dismissed him from his position as a high school journalism teacher for disregarding his principal's instructions and encouraging students to publish articles in the school newspaper on sensitive topics such as "minority unrest in the local community, . . . police-student relations[,] and . . . the school's treatment of the [F]ifth [A]mendment rights of students."[96] Citing the factors that the *Pickering* Court suggested could tip the balance of interests in the employer's favor,[97] the court found that Nicholson's activities did not warrant First Amendment protection because Nicholson's refusal to comply with his principal's instructions undermined their working relationship and some factual inaccuracies in the contentious articles upset his fellow teachers.[98]

B. A Teacher's Right to Free Expression in a Forum with "Special Characteristics"

In addition to determining the scope of teachers' speech rights in the classroom by framing teachers as public employees,[99] circuit courts also considered the Supreme Court's First Amendment jurisprudence specific to the public school environment.[100] The

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[93] *Id.* at 1054.

[94] *See, e.g.*, Nicholson v. Bd. of Educ., 682 F.2d 858 (9th Cir. 1982). The Ninth Circuit decided *Nicholson* before *Connick* and evaluated the teacher's claim by applying the *Pickering* balancing test without *Connick*'s "matter of public concern" inquiry. *See id.*

[95] 682 F.2d 858 (9th Cir. 1982).

[96] *Id.* at 861, 864–66.

[97] These factors include damage to the relationships that the teacher has with supervisors and coworkers, improper performance of the teacher's regular duties, and interference with the general operation of the school. *Id.* at 865 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 569–70, 572–73 (1968)).

[98] *Id.* at 865–66.

[99] *See supra* note 35 and accompanying text.

[100] *See, e.g.*, Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141 (9th Cir. 2001); Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719 (2d Cir. 1994); Ward v. Hickey, 996 F.2d 448

"famous trilogy"[101] of *Tinker v. Des Moines Independent School District*,[102] *Bethel School District v. Fraser*,[103] and *Hazelwood School District v. Kuhlmeier*,[104] defined this perspective. In *Tinker*, Supreme Court held that school officials violated the First Amendment rights of a group of students by suspending them for wearing black armbands to protest the war in Vietnam.[105] The Court stated that that "[n]either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[106] but also that these rights must accommodate "the special characteristics of the school environment."[107] To resolve the "problem [that] lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities,"[108] who have "comprehensive authority . . . to prescribe and control conduct in the schools,"[109] the Court prohibited school officials from restricting student speech in schools unless such speech would "'materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school' [or] . . . collid[e] with the rights of others."[110] Anything less, according to the Court, would transform schools into "enclaves of totalitarianism,"[111] which, rather than "educating the young for citizenship,"[112] would "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[113] Since the school officials made no showing that any disturbance was likely to, or did in fact, occur, the Court held that the school could not discipline the students for wearing the armbands.[114]

From *Tinker*, the Court extended school officials' authority to restrict student speech because of its effects in *Bethel School District*

(1st Cir. 1993); Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991); Webster v. New Lenox Sch. Dist., 917 F.2d 1004 (7th Cir. 1990).

[101] Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 166 (2009).

[102] 393 U.S. 503 (1969).

[103] 478 U.S. 675 (1986).

[104] 484 U.S. 260 (1988).

[105] *Tinker*, 393 U.S. at 514.

[106] *Id.* at 506.

[107] *Id.*

[108] *Id.* at 507.

[109] *Id.*

[110] *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[111] *Id.* at 511.

[112] *Id.* at 506 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[113] *Id.*

[114] *Id.* at 514.

v. Fraser.[115] In *Fraser*, the Court held that a school district did not violate a high school student's First Amendment rights by suspending him for giving a lewd speech during a school assembly.[116] As in *Tinker*,[117] the Court emphasized that the First Amendment does not have its full force in the school setting.[118] Furthermore, the Court identified "habits and manners of civility"[119] as a value "fundamental . . . to the maintenance of a democratic political system"[120] and, accordingly, an educational objective.[121] Because the Court defined the scope of this value to encompass "tolerance of divergent [and even unpopular] political and religious views"[122] as well as "the sensibilities of others"[123] and lewd speech in schools threatened to offend other impressionable students, it held that school officials could restrict such speech without violating the First Amendment.[124]

Just two years after *Fraser*, in *Hazelwood School District v. Kuhlmeier*,[125] the Supreme Court set a new constitutional standard for "educators' authority over [student expression in] school-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."[126] In *Hazelwood*, the Court held that a high school principal's decision to remove two articles, one discussing pregnancy and the other dealing with divorce, from the school newspaper did not violate student journalists' First Amendment rights.[127] The Court found that the newspaper was not a public forum because the school designated the newspaper to be "a supervised learning experience for journalism students,"[128] not a platform for "'indiscriminate use' by its student reporters and editors, or by the student body generally."[129] Consequently, rather than allowing school officials to restrict student speech that is not lewd or indecent only when it threatened to cause a significant disruption or

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[115] 478 U.S. 675 (1986).
[116] *Id.* at 685.
[117] *See supra* note 107 and accompanying text.
[118] *Fraser*, 478 U.S. at 682.
[119] *Id.* at 681 (quotation omitted).
[120] *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 684–85.
[125] 484 U.S. 260 (1988).
[126] *Id.* at 271, 273.
[127] *Id.* at 276.
[128] *Id.* at 270.
[129] *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

disturbance,[130] the Court permitted educators to "control . . . the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[131] Under this test, the Court concluded that the principal's censorship of the articles was reasonable in light of the risk that the articles posed for the invasion of the privacy of the individuals that the stories described.[132]

Despite at least one court's assessment that a focus on teachers' speech in light of the special characteristics of the school environment "appears to be more speech-protective" than viewing teachers as public employees,[133] before *Garcetti* no circuit court that adopted this perspective found that the First Amendment protected a teacher's classroom speech.[134] While no court adopted the Third Circuit's position in *Bradley* that teachers' classroom speech was not eligible for classroom protection under any circumstances,[135] the judicial sensitivity to the unique environment in schools resulted in the denial of First Amendment protection for such speech for reasons that courts did not consider from the public-employee perspective.[136] For instance, in *Miles v. Denver Public Schools*,[137] the United States Court of Appeals for the Tenth Circuit rejected John Miles's claim

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[130] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[131] *Hazelwood*, 484 U.S. at 273.

[132] *Id.* at 276.

[133] *See* Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141 (9th Cir. 2001). It is important to note that at the time of the Ninth Circuit's statement, no circuit court had held a teacher's classroom speech warranted First Amendment protection under the public employee perspective.

[134] *See, e.g.*, Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001) (holding that the First Amendment did not protect teachers' use of languages other than English in the classroom); Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 734 (8th Cir. 1998) (holding that school officials did not violate the First Amendment by terminating a teacher for allowing her high school students to use profanity in their creative writing); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994) (holding that the First Amendment did not protect a school board member's guest lecture that included "[d]epictions of bare-chested women"); Ward v. Hickey, 996 F.2d 448, 450, 452–53 (1st Cir. 1993) (holding that the First Amendment did not protect a teacher's discussion of aborting fetuses with Down's Syndrome in her ninth-grade biology class); Miles v. Denver Pub. Sch., 944 F.2d 773–74, 778–89 (10th Cir. 1991) (holding that a teacher's comments on a rumor regarding students' sexual activity on the school's tennis courts during his ninth-grade government class did not warrant constitutional protection); Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1008 (7th Cir. 1990) (holding that a school board's prohibition on a high school social studies teacher's discussion of creationism in class did not violate the teacher's First Amendment rights).

[135] *See supra* note 82 and accompanying text.

[136] *See, e.g.*, *Miles*, 944 F.2d 773; *Silano*, 42 F.3d at 721, 724 (holding that a school board's censure of a guest lecturer's presentation on the "persistence of vision phenomenon" to a high school mathematics class that included images of topless women did not violate the lecturer's First Amendment rights, in part, because school officials had a legitimate interest in "condemning [the lecturer's] poor judgment").

[137] 944 F.2d 773 (10th Cir. 1991).

that school officials violated his First Amendment rights by reprimanding him for commenting on a rumor regarding students' sexual activity on the school's tennis courts during his ninth-grade government class.[138] Relying on *Hazelwood*, the court concluded that the classroom was not a public forum and that a teacher's classroom speech "b[ore] the imprimatur of the school."[139] From there, the court recognized that the school had a legitimate pedagogical interest in "preventing [the teacher] from using his position of authority to confirm an unsubstantiated rumor[,] . . . ensuring that teacher employees exhibit professionalism and sound judgment[,] . . . [and] providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers."[140] Whereas the Ninth Circuit denied First Amendment protection to the journalism teacher in *Nicholson* because of the problems that his speech caused for the teacher's relationship with his principal and fellow teachers,[141] the Tenth Circuit denied constitutional protection to Miles's speech because of its effects on students and the community's perception of the school.[142]

Just as teachers' decisions to speak contrary to school policy transformed their classroom speech into an "ordinary employment dispute"[143] under *Pickering-Connick*,[144] *Hazelwood*'s "legitimate public concern" standard did not yield First Amendment protection for teachers' classroom speech that violated school officials' guidelines, although the judicial inquiry did involve at least some consideration of the schools' reasons for the speech restriction.[145] In *Lacks v. Ferguson Reorganized School District*,[146] for example, the United States Court of Appeals for the Eighth Circuit held that Cecilia Lacks's termination for allowing her high school students to use profanity in their creative writing did not violate the First Amendment.[147] Citing *Fraser*'s pronouncement that schools are responsible for "teaching students the boundaries of socially

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[138] *Id.* at 774–75, 778–79.

[139] *Id.* at 776.

[140] *Id.* at 778.

[141] *See supra* note 98 and accompanying text.

[142] *Miles*, 944 F.2d 773.

[143] Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989).

[144] *See id.* at 799.

[145] *See, e.g.*, Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998); *see also* Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1005–06, 1008 (7th Cir. 1990) (holding that a school board's prohibition on a high school social studies teacher's discussion of creationism in class did not violate the teacher's First Amendment rights because school officials had an "important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations").

[146] 147 F.3d 718 (8th Cir. 1998).

[147] *Id.* at 724.

appropriate behavior,"[148] the court found that the school board had a legitimate pedagogical concern in its "flat prohibition on profanity in the classroom."[149]

Whereas the importance of the content of teachers' classroom speech earned it First Amendment protection in at least two cases when courts treated teachers as public employees,[150] the potential significance of the subject matter of teachers' speech did not even enter the judicial calculus in determining what constituted a school's legitimate pedagogical concern.[151] For instance, in *Ward v. Hickey*,[152] the United States Court of Appeals for the First Circuit held that the First Amendment did not protect Toby Klang Ward's discussion of aborting fetuses with Down's Syndrome in her ninth-grade biology class.[153] Considering "educators[' ability to] . . . limit the content of school-sponsored speech as long as the limitations are 'reasonably related to legitimate pedagogical concerns,'"[154] the court reasoned that the school's decision not to renew Ward's contract because of her instructional choice was appropriate in light of the "age and sophistication of [her] students."[155] Unlike the Sixth Circuit in *Cockrel*,[156] the court did not consider, and Ward did not argue, that the political and social relevance of the topic made it appropriate for discussion in class.[157]

C. A Teacher's Right to Free Expression in the Classroom When the School Speaks

The third First Amendment perspective that influenced at least one court's consideration of teachers' First Amendment rights to free expression in the classroom before *Garcetti* identifies the school itself, or perhaps, more properly, school officials or the local board of education, as the speaker rather than the teacher.[158] This approach

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[148] *Id.* (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986)).

[149] *Id.*

[150] *See* Evans-Marshall v. Bd. of Educ., 428 F.3d 223 (6th Cir. 2005); Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036 (6th Cir. 2001).

[151] *See, e.g.*, Ward v. Hickey, 996 F.2d 448 (1st Cir 1993); *see also* Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 721, 723 (2d Cir. 1994) (holding that a school board's censure of a guest lecturer's presentation on the "persistence of vision phenomenon" to a high school mathematics class that included images of topless women did not violate the lecturer's First Amendment rights, in part, because the use of the images themselves were "unnecessary").

[152] 996 F.2d 448 (1st Cir. 1993).

[153] *Id.* at 450.

[154] *Id.* at 453 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

[155] *Id.* at 453–54.

[156] *See supra* notes 86–93 and accompanying text.

[157] *See Ward*, 996 F.2d at 454.

[158] *See, e.g.*, Evans-Marshall v. Bd. of Educ, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J.,

arose out of the Supreme Court's decisions in *Rust v. Sullivan*[159] and *Rosenberger v. Rector and Visitors of the University of Virginia*.[160] In *Rust*, the Court upheld a federal regulation that prohibited health care providers who accepted federal funding for family-planning services from offering any services that might lead to abortion, including counseling and referrals.[161] The Court emphasized that "the government 'may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'"[162] Further, the Court announced that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time, funding an alternative program which seeks to deal with the problem in another way."[163] Because the regulations were consistent with the purpose and scope of the federal grant, the Court held that they did not violate the health care providers' First Amendment rights, noting that "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."[164]

The Supreme Court clarified *Rust*'s reach in *Rosenberger v. Rectors of Virginia*.[165] In *Rosenberger*, the Court held that the University of Virginia violated the First Amendment rights of students in a campus organization that published a magazine with a Christian viewpoint by declining to authorize payment of the group's

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concurring) ("The school district bears responsibility for [a teacher's classroom speech], and for First Amendment purposes it therefore is the speaker and it therefore has the right to retain control of the speech—or more precisely, to retain control over what is being taught in the classroom."); *cf.* Brown v. Armenti, 247 F.3d 69, 74–75 (3d. Cir. 2001) (holding that a university did not violate a professor's First Amendment rights by changing one of the professor's assigned grades because "in the classroom, the university was the speaker and the professor was he agent of the university for First Amendment purposes"); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d. Cir. 1998) (holding that a university did not violate a professor's First Amendment rights by prescribing the curricular materials that he could use because "the University was acting as a speaker and was entitled to make content-based choices").

[159] 500 U.S. 173 (1991).

[160] 515 U.S. 819 (1995).

[161] *Rust*, 500 U.S. at 192–94.

[162] *Id.* at 192–93(quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

[163] *Id.* at 193.

[164] *Id.* at 194.

[165] 515 U.S. 819 (1995). *See also* Emily White Kirsch, Note, *First Amendment Protection of Teachers' Instructional Speech: Extending* Rust v. Sullivan *to Ensure that Teachers Do Not Distort the Government's Message*, 58 CLE. ST. L. REV. 185, 199 (2010) (describing *Rosenberger* as "[o]ne of the most notable cases where *Rust* was applied").

printing bill from the university's student activities fund.[166] The Court stated that "[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[167] The University's restriction on the distribution of student activities funds to student groups that espoused a religious perspective, according to the Court, was impermissible because it did not involve the university's own speech or an attempt to promote a message that university endorsed, but rather was an instance of viewpoint discrimination against "private persons whose speech it facilitate[d]."[168]

Although the choice to view schools as speakers through *Rust* and *Rosenberger* did not command a majority of any circuit court before *Garcetti*,[169] at least one judge believed that courts should adopt this First Amendment perspective and hold that teachers' classroom speech warrants no constitutional protection.[170] In *Evans-Marshall v. Board of Education*,[171] the Sixth Circuit held that the First Amendment protected Shelly Evans-Marshall's use of the novels *Siddhartha*, *Fahrenheit* 451, and *To Kill a Mockingbird* and the movie *Romeo + Juliet* in her high school English class because the "main themes of the work[s] . . . [such as] race and justice in the American South . . . [are] matter[s] of public concern"[172] and the school board's purchase and approval of the materials "undercut[] the interest[] of [school officials] in controlling the workplace."[173] In a concurring opinion, Judge Sutton agreed with the majority in that the Sixth Circuit's precedent, mostly notably *Cockrel*, compelled a finding in favor of Evans-Marshall.[174] On the other hand, Judge

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[166] *Rosenberger*, 515 U.S. at 825–27, 837.

[167] *Id.* at 833.

[168] *Id.* at 834.

[169] *But cf.* Brown v. Armenti, 247 F.3d 69, 74–75 (3d. Cir. 2001) (holding that a university did not violate a professor's First Amendment rights by changing one of the professor's assigned grades because "in the classroom, the university was the speaker and the professor was he agent of the university for First Amendment purposes"); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d. Cir. 1998) (holding that a university did not violate a professor's First Amendment rights by prescribing the curricular materials that he could use because "the University was acting as a speaker and was entitled to make content-based choices").

[170] *See* Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring) ("The Supreme Court has never held that the First Amendment applies to a teacher's classroom speech, and there is good reason to think that it would not do so.").

[171] 428 F.3d 223 (6th Cir. 2005).

[172] *Id.* at 226–27, 231.

[173] *Id.* at 231.

[174] *See id.* at 234 (Sutton, J., concurring) ("Given our case law, the path that Judge Cole has taken in resolving this dispute is the path that has been charted for us.").

Sutton suggested that "[w]hen Evans-Marshall asked her students to read [*To Kill a Mockingbird*, *Siddhartha*, and *Fahrenheit 451*], it was not her speech that was at issue but the school district's."[175] According to Judge Sutton, "[t]he school district bears responsibility for the speech, and for First Amendment purposes it therefore is the speaker and it therefore has the right to retain control of the speech—or, more precisely, to retain control over what is being taught in the classroom."[176]

D. A First Amendment Figure's Right to Free Expression in the Classroom

The final First Amendment perspective that circuit courts considered prior to *Garcetti* in evaluating the degree to which the Constitution protected teachers' classroom speech framed teachers as First Amendment figures.[177] To determine the constitutional effects of the Supreme Court's treatment of academic freedom on teachers' classroom speech, circuit courts looked primarily to *Sweezy v. New Hampshire,*[178] *Keyishian v. Board of Regents*,[179] and *Regents of the University of California v. Bakke*.[180] In *Sweezy*, a plurality of the Supreme Court held that a professor's conviction for contempt after refusing to cooperate with the Attorney General's investigation pursuant to the New Hampshire Subversive Activities Act of 1951 violated the Due Process Clause.[181] Though the plurality had high praise for academic freedom,[182] circuit courts took more guidance from Justice Frankfurter's concurrence,[183] which declared that:

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[175] *Id.*

[176] *Id.* at 235.

[177] *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (en banc); Ward v. Hickey, 996 F.2d 448, 452–53 (1st Cir. 1993); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3d Cir. 1990); Kirkland v. Northside Indep. Sch. Dist., 890 F.3d 794 (5th Cir. 1989). *But see* Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991).

[178] 354 U.S. 234 (1957) (plurality opinion).

[179] 385 U.S. 589 (1967).

[180] 438 U.S. 265 (1978).

[181] *Sweezy*, 354 U.S. at 236–46, 254–55 (plurality opinion).

[182] *Id.* at 250 ("The essentiality of freedom in the community of American universities is almost self-evident. No one 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. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.").

[183] *See, e.g.*, Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 237 (6th Cir. 2005) (Sutton, J., concurring) (citing *Sweezy*, 354 U.S. at 255 (Frankfurter, J., concurring)); Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991) (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J.,

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation . . . [and] in which . . . 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.[184]

Ten years after *Sweezy*, the Supreme Court's decision in *Keyishian v. Board of Regents*[185] provided an "ardent tribute to academic freedom . . . [that] validated the idea that [the value] was something that courts and the Constitution must nurture."[186] In *Keyishian*, the Court invalidated a New York law requiring loyalty oaths of all employees in public higher education, finding the law to be impermissibly vague.[187] The court stated that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned"[188] and dubbed academic freedom "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[189] Unlike the Court's praise for academic freedom in *Sweezy*,[190] which emphasized the importance of a university's independence, the Court's rhetoric in *Keyishian* focused on the value of recognizing teachers' First Amendment rights.[191]

After *Keyishian*, the Court's next significant endorsement of academic freedom did not come until 1967[192] in *Regents of the University of California v. Bakke*.[193] In *Bakke*, the Court held that the special admissions program of the University of California at Davis's Medical School violated the Equal Protection Clause.[194] Despite the Court's holding invalidating the admissions program, Justice Powell's

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concurring); *see also* JOAN DELFATTORE, KNOWLEDGE IN THE MAKING: ACADEMIC FREEDOM AND FREE SPEECH IN AMERICA'S SCHOOLS AND UNIVERSITIES 225 (2010) ("By far the most significant reference to academic freedom in *Sweezy* appears in Frankfurter's concurrence.").

[184] *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–11 (Witwatersrand University Press 1957)).

[185] 385 U.S. 589 (1967).

[186] DUPRE, *supra* note 10, at 219.

[187] *Keyishian*, 385 U.S. at 595–96, 603–04.

[188] *Id.* at 603

[189] *Id.*

[190] *See supra* notes 174, 176 and accompanying text.

[191] *E.g.*, JOAN DELFATTORE, KNOWLEDGE IN THE MAKING: ACADEMIC FREEDOM AND FREE SPEECH IN AMERICA'S SCHOOLS AND UNIVERSITIES 225 (2010).

[192] *See* DUPRE, *supra* note 10, at 221 (noting the waning of the Court's concern for academic freedom after the Red Scare).

[193] 438 U.S. 265 (1978).

[194] *Id.* at 271 (opinion of Powell, J.)

opinion, relying on both *Sweezy* and *Keyishian*, recognized that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[195] This "constitutional interest[],"[196] according to Justice Powell, made the university's aim of admitting those students who would "contribute the most to the 'robust exchange of ideas'"[197] a "goal that is of paramount importance."[198]

Though the Supreme Court's decisions have left contours of academic freedom uncertain,[199] only one circuit court before *Garcetti* expressly denied the possibility that this "special concern of the First Amendment"[200] includes teachers' classroom speech within its scope.[201] In *Miles*, the Tenth Circuit rejected the teacher's argument that school officials violated his "[F]irst [A]mendment academic freedom rights."[202] Citing *Bakke*, the court noted that "[t]he Supreme Court has recognized a university's institutional right to academic freedom,"[203] but stated that it could not find enough precedential support for extending this right to an individual teacher.[204] Even so, the Tenth Circuit noted that the school district's restriction on the teacher's classroom speech "simply [did] not threaten to 'cast a pall of orthodoxy over the classroom.'"[205]

Most circuit courts acknowledged that teachers' classroom speech implicates academic freedom, but this recognition rarely affected the ability of school officials to restrict such speech from either the public-employee or school-environment perspective.[206] In *Bradley, Boring*, and *Kirkland*, the Third, Fourth, and Fifth Circuits,

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[195] *Id.* at 312.

[196] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

[197] *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)

[198] *Id.*

[199] *See, e.g.*, ERIC BARENDT, ACADEMIC FREEDOM AND THE LAW 174 (2010) ("It is . . . not entirely clear whether . . . constitutional [academic] freedom is concerned solely with the institutional autonomy of universities or whether it also protects, in some contexts, individual professors and teachers."); DUPRE, *supra* note 10, at 206 ("Scholars and commentators have written volumes about the contours (or lack thereof) of the elusive concept of academic freedom, in confusing and overwhelming variety.").

[200] *Bakke*, 438 U.S. at 265 (opinion of Powell, J.).

[201] *See* Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991); *accord*. Evans-Marshall v. Bd. of Educ., 428 F.3d 228, 237–38 (Sutton, J., concurring) (suggesting that a recognition of teachers' academic freedom "risks transforming many employment disputes into First Amendment retaliation claims"). For a discussion of the *Miles* case, see *supra* notes 137–42 and accompanying text.

[202] *Miles*, 944 F.2d at 779.

[203] *Id.*

[204] *Id.*

[205] *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[206] *But see* Evans-Marshall v. Bd. of Educ., 428 F.3d 228, 237–38 (Sutton, J., concurring) (suggesting that a recognition of teachers' academic freedom "risks transforming many employment disputes into First Amendment retaliation claims").

respectively, noted that *Keyishian*'s notion of academic freedom provided some degree of First Amendment protection for teachers, but stated that it did not grant teachers the right to contravene the official curriculum.[207] The First Circuit's decision in *Ward* represents perhaps the most influence that supplemental focus on teachers as First Amendment figures had on teachers' rights to free expression in the classroom.[208] While permitting school officials to restrict teachers' classroom speech, due to the unique environment in schools, out of any legitimate pedagogical concern, the *Ward* court, in light of *Keyishian*, required schools to provide teachers with notice of official restrictions on such speech.[209]

II. *GARCETTI* AND ITS EFFECTS ON TEACHERS' CONSTITUTIONAL RIGHTS IN THE CLASSROOM

In *Garcetti v. Ceballos*,[210] the Supreme Court rejected the First Amendment retaliation claim of Richard Ceballos, a deputy district attorney, and, in the process, shifted its public employee speech jurisprudence so as to create a "categorical exclusion . . . [for] First Amendment protection against official retaliation for things said on the job."[211] Ceballos's claim stemmed from his investigation of a defense attorney's complaint regarding misrepresentations in an affidavit that police used to obtain a search warrant.[212] Finding that the affidavit contained certain inaccuracies, Ceballos informed his supervisors and prepared a disposition memorandum recommending

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[207] *See* Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 369 (4th. Cir. 1998) (en banc) (quoting Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989)) ("Although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula."); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d. Cir. 1990) ("In this case we do not delineate the scope of academic freedom afforded to teachers under the First Amendment rights. . . . However, no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates."); *Kirkland*, 890 F.2d at 800–02 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized by our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula. . . . Our decision should not be misconstrued as suggesting that a teacher's creativity is incompatible with the [F]irst [A]mendment, nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy'").

[208] *See* Ward v. Hickey, 996 F.2d 448, 452 (1st. Cir. 1993). For a discussion of this case, see *supra* notes 152–57 and accompanying text.

[209] *Ward*, 996 F2d at 452. *Cf.* Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 723 (8th Cir. 1998) (applying *Ward*'s notice requirement to evaluate whether the First Amendment protected a teacher's classroom speech and noting that it was "satisfied that [the teacher] was provided with enough notice by the school board that profanity was not to be allowed in her classroom" without expressly adopting the requirement).

[210] 547 U.S. 410 (2006).

[211] *Id.* at 434 (Souter, J., dissenting).

[212] *Id.* at 413–14 (majority opinion).

the dismissal of the case.[213] Despite Ceballos's recommendation, the case continued and the defense attorney called Ceballos to testify about the affidavit.[214] After this series of events, Ceballos claimed that his supervisors retaliated against him by reassigning him to a different position, transferring him to another courthouse, and denying him a promotion.[215]

In determining that the First Amendment did not protect Ceballos's speech, the Court emphasized the importance of a public employer's ability to control the words and actions of its employees in order to ensure "the efficient provision of public services,"[216] 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 communication from employer discipline."[217] As a result of *Garcetti*, a public employee's speech must be not "pursuant to [that employee's] official duties"[218] and on a matter of public concern in order to be eligible for First Amendment protection.[219]

Justice Souter dissented from the majority's opinion, expressing his concerns that the categorical exclusion from First Amendment protection of public employees' speech in the course of their employment duties could "imperil . . . academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[220] The majority was careful to acknowledge Justice Souter's concern, stating that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests."[221] In light of this recognition, the Court made it clear that *Garcetti*'s application to "a case involving speech related to scholarship or teaching" was uncertain.[222]

Despite *Garcetti*'s caveat, in *Mayer v. Monroe County Community School Corporation*,[223] the first post-*Garcetti* case involving a teacher's classroom speech to reach a circuit court,[224] the Seventh

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[213] *Id.* at 414.

[214] *Id.* at 414–15.

[215] *Id.* at 415.

[216] *Id.* at 418.

[217] *Id.* at 421.

[218] *Id.*

[219] *Id.* It must also, of course, survive *Pickering*'s balancing inquiry in order to receive constitutional protection. See *supra* notes 38–43 and accompanying text.

[220] *Garcetti*, 547 U.S. at 438 (Souter, J. dissenting) (quoting the majority opinion).

[221] *Id.* at 425 (majority opinion).

[222] *Id.*

[223] 474 F.3d 477 (7th Cir. 2007).

[224] *See, e.g.*, McCarthy & Eckes, *supra* note 32, at 224; Waldman, *supra* note 10, at 85.

Circuit applied *Garcetti* to deny the teacher's expression constitutional protection. The court held that school officials did not violate Deborah Mayer's First Amendment rights by terminating her for telling her elementary school students about her participation in political demonstrations against the war in Iraq during a current-events lesson.[225] Because the teacher conceded that the lesson was part of her official duties, the court stated that "if *Garcetti* supplies the rule of decision, then the school district prevails without further ado."[226] The court also dismissed the teacher's argument that academic freedom exempted her speech from *Garcetti*'s reach, finding that "[c]hildren who attend school because they must ought not be subject to teachers' idiosyncratic perspectives"[227] but noting that "[h]ow much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* . . . and need not be resolved today."[228]

Unlike the Seventh Circuit, the Fourth Circuit accepted the Supreme Court's invitation to refrain from applying *Garcetti* to a case involving classroom speech when it faced the issue in *Lee v. York County School Division*.[229] In *Lee*, the court held that the First Amendment did not protect the materials with religious themes that William Lee posted on a bulletin board in his high school Spanish classroom.[230] The court analyzed Lee's claim from the public-employee perspective, but decided not to apply *Garcetti* because "[t]he [Supreme] Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching."[231] Under a *Pickering-Connick* analysis, then, following the path that its *Boring* decision established,[232] once the Fourth Circuit determined that the teacher's speech was "curricular in nature"[233] because the bulletin board materials "[bore] the imprimatur of . . . [the school] and . . . were designed to impart particular knowledge to the students,"[234] the court's conclusion that Lee's complaint not a matter of public concern and, therefore, "nothing more than an ordinary employment dispute" followed.[235]

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[225] *Mayer*, 474 F.3d at 480.
[226] *Id.* at 479.
[227] *Id.*
[228] *Id.* at 480.
[229] 484 F.3d 687 (4th Cir. 2007).
[230] *Id.* at 700.
[231] *Id.* at 694 n.11.
[232] *See supra* text accompanying notes 72–81.
[233] *Lee*, 484 F.3d at 697.
[234] *Id.*
[235] *Id.* at 700.

Whereas the teachers in *Lee* and *Mayer* may not have lost First Amendment protection for their speech as a result of the Fourth and Seventh Circuits' responses to *Garcetti*,[236] the teacher at the center of the Sixth Circuit's decision in *Evans-Marshall v. Board of Education*[237] certainly did.[238] In *Evans-Marshall*, Shelly Evans-Marshall appealed the district court's grant of summary judgment in favor of the school board and its finding that the First Amendment did not protect her use of the novel *Siddhartha* in her high school English class.[239] The court followed its *Cockrel* decision in determining that the teacher's speech touched a matter of public concern because the novel's topic was "'of . . . concern to the community.'"[240] Further, the court pointed to the school board's purchase of *Siddhartha* as a factor that tipped the *Pickering* balancing inquiry in Evans-Marshall's favor.[241] Notwithstanding these findings, the Sixth Circuit concluded that *Garcetti* made them "beside the point."[242] Rejecting the teacher's argument that *Garcetti* should not apply, the court looked to Justice Souter's dissent in limiting the scope of *Garcetti*'s caveat to teachers at public colleges and universities.[243] For the Sixth Circuit, "[t]he concept of 'academic freedom' . . . does not readily apply to in-class curricular speech at the high school level"[244] because "[a]s a cultural and a legal principle, academic freedom 'was conceived and implemented in the university' out of concern for 'teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers.'"[245]

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[236] The Fourth Circuit's response to *Garcetti* involved the same approach that the court used prior to *Garcetti*: *Boring*'s categorical denial of constitutional protection to teachers' classroom speech. *See supra* note 82 and accompanying text.

Before *Garcetti*, the Seventh Circuit used *Hazelwood* to evaluate the constitutional protection that teachers' classroom speech warranted. *See* Webster v. New Lenox Sch. Dist., 917 F.2d 1004 (7th Cir. 1990); Gee, *supra* note 56, at 438–39. This approach has not yet granted teachers' classroom speech First Amendment protection in any circuit court. *See supra* notes 133–34 and accompanying text.

[237] 624 F.3d 332 (6th Cir. 2010).

[238] *See id.* at 338–40.

[239] *Id.* at 335–37. For a discussion of this case in the Sixth Circuit on the school district's appeal of the district court's denial of its motion to dismiss, see *supra* notes 169–76 and accompanying text.

[240] *Evans-Marshall*, 624 F.3d. at 338 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

[241] *Id.* at 339–40.

[242] *Id.* at 340.

[243] *Id.* at 343.

[244] *Id.*

[245] *Id.* at 343–44 (quoting J. Peter Bryne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251, 288 n.137 (1989)).

III. THE PROMISE OF *GARCETTI*'S CAVEAT

Garcetti suggests that viewing teachers as public employees is the proper First Amendment perspective from which to begin an analysis of the protection that the First Amendment affords teachers' classroom speech.[246] Despite the obvious circuit split between those courts approaching this issue from the public-employee perspective and those adopting the school-environment perspective,[247] not a single justice in *Garcetti* intimated that *Hazelwood* provided the more appropriate legal standard for teachers' classroom speech.[248] It may be fair to read Justice Souter's concern that *Garcetti* would leave "the teaching of a public university professor"[249] well "beyond the pale of the First Amendment"[250] to signal nothing more the appropriateness of treating professors' First Amendment retaliation claims through the public-employee framework. The majority's response, however, 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"[251] suggests, at least on its face, that the public-employee perspective is the most suitable lens through which to evaluate the First Amendment claims of professors and teachers alike.[252]

In the few cases involving teachers' First Amendment rights in the classroom that have reached the circuit courts since *Garcetti*, it is clear that courts have received this signal.[253] The most significant judicial recognition of *Garcetti*'s endorsement of the public-employee perspective came in *Mayer*.[254] Rather than searching for the legitimate pedagogical concern behind the school district's restriction on the teacher's speech as it did in *Webster v. New Lenox School District*,[255]

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[246] *But cf.* Salkin, *supra* note 72, at 199 ("Based on the few cases that have been settled, however, it is fair to say that the split between those circuits that endorse the *Pickering-Connick* standard for such speech and those that apply *Hazelwood* is not only far from resolved, but further fractured by the addition of those who embrace *Garcetti*.")

[247] *See, e.g.*, Waldman, *supra* note 10, at 79–80.

[248] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[249] *Id.* at 438 (Souter, J., dissenting).

[250] *Id.*

[251] *Id.* at 425 (majority opinion).

[252] *Cf.* DUPRE, *supra* note 10, at 226. ("Thus the Court suggested that educators may have more First Amendment protection for on-the-job speech than other government employees.").

[253] *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477 (2007); *cf.* Panse v. Eastwood, 303 F. App'x. 933, 935 (2d Cir. 2008) (deciding not to reject *Garcetti* in favor of *Hazelwood*, but rather holding that a teacher's classroom speech would fail to warrant First Amendment protection under either standard).

[254] *See, e.g.*, Gee, *supra* note 56, at 438–39 (noting that the Seventh Circuit applied *Garcetti* in *Mayer* "[w]ithout mentioning that it had applied *Hazelwood* in the past").

[255] 917 F.2d 1004, 1005–06, 1008 (7th Cir. 1990) (holding that a school board's

the Seventh Circuit simply stated that *Garcetti* compelled the finding that the teacher's classroom speech warranted no constitutional protection.[256] The court did cite *Webster* for the proposition teachers "[do] not have a constitutional right to introduce [their] own views on the subject but must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on that subject matter,"[257] but did so as part of its reasoning for rejecting Mayer's argument that the principles of academic freedom should exempt her from *Garcetti*'s conclusion.[258]

The Seventh Circuit's shift is significant because, if there are grounds to make an exception for teachers' classroom speech under *Garcetti*'s caveat, then the public-employee perspective holds more potential for such speech to receive First Amendment protection than either a judicial focus on the special school environment or the message that the school district seeks to convey.[259] Even though teachers have failed to pass both *Connick*'s "matter of public concern" threshold and *Pickering*'s balancing inquiry in their attempts to gain constitutional protection for their classroom speech,[260] viewing teachers as public employees is the only First Amendment perspective that has led to constitutional protection for teachers' classroom speech.[261] A focus on the school environment has led courts to find that schools have a legitimate pedagogical concern in restricting teachers' speech for a number of reasons,[262] even if the speech does no more than reflect the teacher's "poor judgment."[263] Furthermore, if a court views the schools, rather than teachers, as speakers, then schools can restrict teachers' speech for no reason other than their disagreement with its message.[264]

Of course, after *Garcetti*, determining whether the First Amendment protects teachers' classroom speech from the public-employee perspective only matters if courts also recognize that teachers are First Amendment figures. *Garcetti*'s caveat owes its

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prohibition on a high school social studies teacher's discussion of creationism in class did not violate the teacher's First Amendment rights because school officials had an "important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations").

[256] *Mayer*, 474 F.3d at 479.

[257] *Id.*

[258] *See id.*

[259] *See supra* Parts I.A–C.

[260] *See supra* Part I.A.

[261] See supra Part I.

[262] *See supra* Part I.B.

[263] *See supra* note 136.

[264] See supra Part I.C.

existence to the "constitutional interests"[265] associated with academic freedom.[266] If teachers have no stake in academic freedom, therefore, *Garcetti* should apply, and courts should deny First Amendment protection to teachers' classroom speech as succinctly as the Seventh Circuit did in *Mayer*.[267] While it is possible that the Supreme Court was only hesitant to apply *Garcetti* to "case[s] involving speech related to scholarship or teaching" in the university environment,[268] the majority's language does not compel this conclusion.[269] Furthermore, most circuit courts that have addressed this issue have suggested that teachers have some interest in academic freedom.[270]

Even though academic freedom's application to teachers may be uncertain,[271] *Garcetti*'s context—a dispute between an employer and an employee—makes it clear that the Supreme Court does not consider academic freedom to be a constitutional value that only universities enjoy.[272] The Sixth Circuit's decision in *Evans-Marshall* demonstrates that at least one circuit court has misunderstood this message.[273] After applying *Garcetti* and finding that the First Amendment did not protect the teacher's speech,[274] the *Evans-Marshall* court added that the teacher could not "sidestep"[275] *Garcetti* by invoking academic freedom because "[t]he concept of 'academic freedom' . . . does not readily apply to in-class curricular speech at the high school level."[276] If the Sixth Circuit had stopped here, its conclusion would be consistent with one reading of *Garcetti*'s caveat, but the court went on to state that "'it is the educational institution that has a right to academic freedom, not the individual teacher.'"[277]

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[265] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

[266] *See id.*

[267] *See supra* notes 225–26 and accompanying text.

[268] *Garcetti*, 547 U.S. at 425.

[269] *See id.*; *see also* Evans-Marshall v. Bd. of Educ., No. 3:03cv091, 2008 WL 2987174, at *8 (S.D. Ohio July 30, 2008) ("It is important to note that while Justice Souter's concern were specifically directed to the university setting (focusing on the teachings of 'public university professors' and academic freedoms found in 'public colleges and universities'), the majority's language is far broader in that it pertains to 'speech related to scholarship or teaching.'")

[270] *See supra* notes 206–07 and accompanying text.

[271] *See supra* note 199.

[272] In arguing for an institutional conception of academic freedom, J. Peter Byrne has criticized commentators for suggesting that the Supreme Court's academic freedom jurisprudence "would eventually provide extensive protection for the academic judgments of individual faculty against interference by university administrators." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* YALE L.J. 251, 301 (1989). This, however, is the only context in which academic freedom would provide grounds for exempting professors and teachers from *Garcetti*.

[273] *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332 (6th Cir. 2010).

[274] *See supra* notes 239–45 and accompanying text.

[275] *Evans-Marshall*, 624 F.3d at 343.

[276] *Id.*

[277] *Id.* at 344 (quoting Borden v. Sch. Dist., 523 F.3d 153, 172 n.14 (3d Cir. 2008)).

This statement fundamentally misconstrues the role of academic freedom in *Garcetti*.[278] While the Sixth Circuit may be correct in noting that, ultimately, academic freedom does not "insulate a teacher's curricular and pedagogical choices from the school board's oversight,"[279] *Garcetti* suggests that it is, in fact, an individual right to some degree.[280]

The Fourth Circuit has also failed to recognize the significance of academic freedom in *Garcetti*.[281] In *Lee*, the court chose not to apply *Garcetti* because "[t]he [Supreme] Court explicitly did not decide whether [its] analysis would apply in the same manner to a case involving speech related to teaching."[282] The *Lee* court did not, however, cite academic freedom as the reason for this decision.[283] Since the Supreme Court couched *Garcetti*'s caveat in the principle of academic freedom,[284] the Fourth Circuit should have conditioned its disregard of *Garcetii* on the recognition of that constitutional value. It is possible, however, that the Fourth Circuit, in relying on its decision in *Boring* for guidance in evaluating a teacher's classroom speech from the public-employee perspective,[285] impliedly acknowledged that academic freedom offered some degree of constitutional protection for teachers' speech.[286] Even if the court impliedly recognized that teachers are First Amendment figures, however, the court failed to consider how academic freedom would affect the *Pickering-Connick* calculus.[287]

The role of academic freedom in the *Pickering-Connick* analysis is an issue that circuit courts have not addressed when determining the protection that the Constitution affords teachers' classroom speech after *Garcetti*,[288] but one that *Garcetti* raises. Prior to *Garcetti*, courts that viewed teachers as public employees did not factor academic freedom into their *Pickering-Connick* analyses.[289] This may have been appropriate, but *Garcetti* indicates that this "constitutional interest[]"[290] could affect the public-employee speech analysis

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[278] *See supra* note 272 and accompanying text.

[279] *Evans-Marshall*, 624 F.3d at 344.

[280] *See supra* note 272 and accompanying text.

[281] *See* Lee v. York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

[282] *Id.* at 694 n.11.

[283] *See id.*

[284] *Garcetti*, 547 U.S. at 425.

[285] *See Lee*, 484 F.3d at 696–700.

[286] *See supra* note 207 and accompanying text.

[287] *See Lee*, 484 F.3d 687.

[288] *See, e.g.*, Evans-Marshall v. Bd. Of Educ., 624 F.3d 332 (6th Cir. 2010); Panse v. Eastwood, 303 F. App'x. 933, 935 (2d Cir. 2008); *Lee*, 484 F.3d 687; Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007).

[289] *See* supra note 207 and accompanying text.

[290] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

directly.[291] If circuit courts choose to exempt teachers' classroom speech through *Garcetti*'s caveat and apply *Pickering-Connick* to determine whether such speech warrants First Amendment protection, not only should they recognize that academic freedom is the basis for doing so, but courts should also consider it as part of the "content, form, and context"[292] of teachers' speech for purposes of *Connick*'s "matter of public concern" threshold. Some courts have refused to recognize the content of teachers' classroom speech for this purpose, focusing instead on the rights that teachers assert through their speech.[293] *Garcetti* provides a reason to add academic freedom to the rights that teachers may assert through their classroom speech.[294] The effect of such an acknowledgement may make teachers' classroom speech a matter of public concern per se, but if a per se rule against such speech existed prior to *Garcetti*,[295] there seems to be no reason why one cannot exist in its favor in light of *Garcetti*'s caveat.

CONCLUSION

It is impossible to deny that circuit courts, on the whole, have not afforded teachers' classroom speech First Amendment protection.[296] Furthermore, before *Garcetti* the Supreme Court was not particularly interested in resolving the circuit split regarding the appropriate constitutional standard to apply to the issue,[297] and the Court has been no more receptive to petitions for writ of certiorari involving teachers' classroom speech after *Garcetti*.[298] Despite this, *Garcetti*'s caveat provides an avenue for lower courts to find that the Constitution protects teachers' classroom speech.[299] If circuit courts have not denied that the principle of academic freedom may apply to teachers,[300] then they have grounds to avoid *Garcetti*'s categorical conclusion and apply the *Pickering-Connick* test to determine

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[291] *See id.*

[292] Connick v. Myers, 461 U.S. 138, 147–48 (1983).

[293] *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 366 (4th Cir. 1998) (en banc) (describing the teacher's speech as an expression of a "right to participate in the makeup of the school curriculum").

[294] *See Garcetti*, 547 U.S. at 425.

[295] *See supra* note 82 and accompanying text.

[296] See supra Part I.

[297] *See, e.g.*, Shelby Cnty. Sch. Dist. v. Cockrel, 537 U.S. 8113 (2002); Lacks v. Ferguson-Florissant Reorganized Sch. Dist., 526 U.S. 1012 (1999); Boring v. Buncombe Cnty. Bd. of Educ., 525 U.S. 813 (1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 515 U.S. 1160 (1995); Kirkland v. Northside Indep. Sch. Dist., 496 U.S. 926 (1990).

[298] *See* Lee v. York Cnty. Sch. Div., 552 U.S. 950 (2007); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 552 U.S. 823 (2007).

[299] *See supra* Part III.

[300] *See supra* notes 206–09 and accompanying text. *But see supra* notes 199–205 and accompanying text.

whether teachers' classroom speech warrants First Amendment protection.[301] Considering a teacher's right to academic freedom in the *Pickering-Connick* analysis would increase teachers' odds of making it past *Connick*'s "matter of public concern" threshold. While this would likely result in greater First Amendment protection for teachers' classroom speech, *Pickering*'s balancing inquiry would ensure that schools are still able to "inculcat[e] fundamental values necessary [for] the maintenance of a democratic political system"[302] without preventing teachers from contributing to the development of "leaders . . . through wide exposure to [the] robust exchange of ideas."[303]

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[301] *Cf.* Lee v York Cnty. Sch. Div., 484 F.3d 687, 694–95, 695 n.11 (4th Cir. 2007) (applying *Pickering-Connick* to determine whether the Constitution protected a teacher's classroom speech instead of *Garcetti* without any acknowledgement of the teacher's academic freedom).

[302] Ambach v. Norwick, 441 U.S. 68, 77 (1979).

[303] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

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