Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees

Neal H. Hutchens
Barry University

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Constitutional Law Commons, and the First Amendment Commons
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol97/iss1/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Silence at the Schoolhouse Gate:  
The Diminishing First Amendment Rights of Public School Employees

Neal H. Hutchens¹

INTRODUCTION

The Supreme Court's statement that along with students, teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"² is an often discussed premise in federal court decisions.³ But, the ever increasing reality is that teachers, along with administrators and other staff in public schools, increasingly possess diminished protection under the First Amendment.⁴ Garcetti v. Ceballos,⁵ which dealt with the First Amendment speech rights of all public employees,⁶ marks the erosion of First Amendment rights for public school administrators and staff and may curtail the First Amendment rights of

¹ Assistant Professor of Law, Barry University School of Law; J.D. 2002, University of Alabama School of Law; Ph.D. in Education Policy, University of Maryland, 2007. As a former legal intern to the U.S. Department of Education's Office of the General Counsel and having served previously as a legislative fellow to the U.S. Senate's Committee on Health, Education, Labor, and Pensions, the author has long been immersed in education law and policy. He would like to thank Megan Bittakis and Heather Kolinsky for their comments and suggestions on this Article.

² Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.").

³ See, e.g., Lee v. York County Sch. Div., 484 F.3d 687, 693 (4th Cir. 2007), cert. denied, 128 S. Ct. 387 (2007); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1009 (9th Cir. 2000); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993).

⁴ See generally Donald F. Uerling, Academic Freedom in K–12 Education, 79 Neb. L. Rev. 956 (2000) (discussing how despite some early decisions supportive of academic freedom for teachers, courts have generally, with some exceptions, upheld the authority of school officials to control the classroom communications of teachers); Kevin G. Welner, Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools, 50 UCLA L. Rev. 959 (2003) (noting how more recent legal decisions have often tended to deny or severely restrict First Amendment rights for teachers).


In *Garcetti*, the Supreme Court held that when a public employee makes statements as part of his or her official duties, then such statements are not considered protected speech for purposes of the First Amendment.\(^7\) In relation to teachers, at least one federal circuit court has relied on the decision to deny teachers any meaningful First Amendment speech rights based on communications made in the classroom.\(^8\) Following that decision, public elementary and secondary education employees\(^9\) now face an environment with no First Amendment protections for communications made in performing various professional duties, including classroom–related communications by teachers.

This Article examines the current state of speech rights of public elementary and secondary school employees, especially in relation to the impact of *Garcetti*. Part I provides an overview of the *Garcetti* decision, and Part II reviews selected post-*Garcetti* decisions dealing with First Amendment claims by public school administrators and teachers. Part III considers some of the negative aspects that may result when the *Garcetti* standards are applied to communications by public education employees. *Garcetti* additionally raises questions regarding whether public school teachers possess any special First Amendment rights for in–class related speech, including any rights grounded in academic freedom. In Part IV, the Article provides an overview of the unsettled legal status of constitutional protections for individual academic freedom and looks specifically at the legal standards courts have applied to evaluate in–class communications by teachers. The Article concludes with several suggestions to provide legal protection under certain circumstances to communications made by public elementary and secondary teachers and administrators.

I. *Garcetti v. Ceballos*

A. Background and Procedural History

In *Garcetti*, a deputy district attorney, Richard Ceballos, recommended dismissal of a criminal case based on alleged misrepresentations in an affidavit used to obtain a search warrant.\(^10\) Ceballos, who exercised certain supervisory duties, was contacted by a defense attorney seeking to have the case reviewed. Ceballos then made the recommendation for dismissal.

---

7 *Garcetti*, 547 U.S. at 421.

8 Mayer v. Monroe County Cmty. Sch., 474 F.3d 477, 480 (7th Cir. 2007) (stating "...Mayer’s current–events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly"), cert. denied, 128 S.Ct. 160 (2007).

9 Id. Though not the focus of this Article, the *Garcetti* decision also impacts higher education administrators at public colleges and universities and, potentially, speech by college and university faculty members as well.

10 *Garcetti*, 547 U.S. at 414.
after visiting the location described in the affidavit and determining that the affidavit contained "serious misrepresentations." In addition to discussing his concerns with supervisors, Ceballos wrote a memorandum recommending dismissal of the case. Despite his concerns, Ceballos's supervisors refused to dismiss the case. During a hearing concerning the search warrant, the defense questioned Ceballos, who revealed his views on the affidavit. In a lawsuit, Ceballos claimed that his superiors retaliated against him because of the incident, including changing his duties and transferring him to another courthouse. Among his claims, he argued that his communications and expressions relating to the memorandum qualified for First Amendment protection. The district court granted summary judgment against Ceballos, stating that the memorandum did not represent protected speech, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the memorandum did in fact contain protected speech.

B. Supreme Court's Majority Opinion

The Supreme Court reversed the Ninth Circuit, concluding that Ceballos made the expressions pursuant to carrying out his official duties and, therefore, his expressions did not constitute protected speech for purposes of the First Amendment. Justice Kennedy's majority opinion, relying on *Pickering v. Board of Education* as the starting point for analysis, noted that public employees do not automatically surrender all their First Amendment rights. The opinion discussed how *Pickering* and its progeny had developed two inquiries courts must follow in evaluating the constitutional speech claims of public employees. First, courts must determine if the employee spoke as a private citizen on a matter of public concern. If he or she is not addressing a matter of public concern, "the employee has no First Amendment cause of action based on his or her
employer's reaction to the speech.” If speaking on a matter of public concern, the employee may or may not enjoy First Amendment protection, depending on “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”

The majority opinion stated that allowing restrictions on the speech of public employees stemmed from the need for government employers to exert significant control over their employees' actions and to ensure efficiency in providing services. For this proposition, the opinion looked to support from Connick v. Myers, which stated that governmental entities and offices could not function properly “if every employment decision became a constitutional matter.” Justice Kennedy also added that public employees often occupy positions of trust and that their speaking out can interfere with the implementation or carrying out of governmental policies or functions or both.

Turning to Ceballos's claims, Justice Kennedy first noted that Ceballos was not automatically denied protection for making his expressions at work as opposed to making them publicly. The opinion pointed out that many public employees engage in speech in the workplace, and simply excluding speech on a workplace/non-workplace distinction did not comport with the goal of treating public employees as private citizens. Instead, the “controlling factor” for the majority was that Ceballos made his expressions pursuant to carrying out his duties as a deputy district attorney. According to the opinion, the Court held “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.”

23 Id.
24 Id.
25 Id.
26 Connick v. Myers, 461 U.S. 138 (1983). In Connick, the Supreme Court held that an assistant district attorney did not possess First Amendment protection for distributing a questionnaire seeking the opinion of other assistant district attorneys regarding their views on office policies and practices. Id. at 154.
27 Id. at 143.
28 Garcetti, 547 U.S. at 419. The majority acknowledged the “considerable significance” of “[e]xposing governmental inefficiency and misconduct,” but noted a “powerful network of legislative enactments” such as whistle-blower laws and labor codes that protect public employees “seek[ing] to expose wrongdoing.” Id. at 425. The opinion stated that additional constitutional provisions other than the First Amendment or criminal and civil laws also might serve as safeguards to prevent or address official wrongdoing. Id. at 425–26.
29 Id. at 420.
30 Id. at 420–21.
31 Id. at 421.
32 Id.
Writing for the majority, Justice Kennedy mentioned two topics that were not fully addressed in the decision. First, the opinion refused to put forth any "comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate." But, the majority warned that public employers could not impermissibly restrict employees’ First Amendment rights with “excessively broad job descriptions.” Second, the majority opinion merely touched on Justice Souter’s concern regarding the application of the Garcetti standards to higher education and the potential threat to academic freedom. On this point Justice Kennedy wrote, “[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 employee-speech doctrine.” He stated, however, that this issue was not before the Court in the present case.

C. Dissenting Opinions

The three dissenting opinions in Garcetti all depicted the majority’s approach as doctrinaire, because it failed to permit constitutional protections even in exceptional circumstances for communications made by public employees in performing their job duties. Justices Stevens and Souter both looked to the values at stake in the Court’s decision in Givhan v. Western Line Consolidated School District in arguing against the bright-line rule announced by the majority. Givhan involved complaints by a teacher to a principal concerning racial discrimination in a school's hiring practices. Though the speech was not made to the general public, as in Pickering, the Court determined that Givhan’s speech merited First Amendment protection. In commenting on Givhan’s relevance to Ceballos’s claims, Justice Stevens stated, “[o]ur silence as to whether or not her speech was made pursuant to her job duties demonstrates that

33 Id. at 424.
34 Id.
35 Id. at 425.
36 Id.
37 Id.
38 Id. at 426 (Stevens, J., dissenting) (stating that only “[s]ometimes,” but not “[n]ever,” should the First Amendment protect speech by employees made pursuant to the employee’s official duties); id. at 428 (Souter, J., dissenting) (arguing that “addressing official wrongdoing and threats to health and safety” can trump the interests of public employers); id. at 446 (Breyer, J., dissenting) (stating that at times the “special demand for constitutional protection of the speech at issue” may override the interests of government as employer).
40 Garcetti, 547 U.S. at 427 (Stevens, J., dissenting); id. at 429 (Souter, J., dissenting).
41 Givhan, 439 U.S. at 413.
42 Id. at 413–14.
the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.\(^43\) Justice Stevens also criticized the majority's rule on the grounds that it discouraged employees from taking their concerns to superiors because of the fear of retaliation.\(^44\)

Also looking to \textit{Givhan}, Justice Souter discussed that the majority's holding meant that while the teacher in that case would still have received constitutional protection, the school's personnel officer would not, a distinction he described as odd.\(^45\) Justice Souter argued that the majority offered no reasonable rationale for its outright rejection of the possibility of any First Amendment protection for the expressions of public employees in carrying out their official duties.\(^46\) Instead, he contended that a modified \textit{Pickering} analysis provided a better approach to evaluate First Amendment claims made by public employees in performing their duties.\(^47\) The opinion stated that while governmental employers possessed a strong interest related to employee speech made in the course of employment, "addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy."\(^48\) In addition to the "value to an individual of speaking on public matters,"\(^49\) Justice Souter argued that a more important reason for providing constitutional protection in certain instances for communications made in carrying out employment duties dealt with the "value to the public of receiving the opinions and information that a public employee may disclose."\(^50\) Justice Souter also warned that employers, contrary to the admonishment in the majority opinion, would in fact respond to the decision by creating broad job descriptions. Turning again to the facts from the \textit{Givhan} case, he wrote as follows:

Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.\(^51\)

\(^{43}\) \textit{Garcetti}, 547 U.S. at 427 (Stevens, J., dissenting).
\(^{44}\) \textit{Id.} at 427.
\(^{45}\) \textit{Id.} at 430 (Souter, J., dissenting).
\(^{46}\) \textit{Id.}
\(^{47}\) \textit{Id.} at 434-35.
\(^{48}\) \textit{Id.} at 428.
\(^{49}\) \textit{Id.}
\(^{50}\) \textit{Id.} at 429.
\(^{51}\) \textit{Id.} at 431 n.2 (Souter, J., dissenting).
A key critique offered by Justice Souter centered on the fact that the standard announced by the majority always equated communications made by a public employee in the course of carrying out his or her job duties to "the government's own speech." He argued that the majority failed to acknowledge that "not everyone working for the government . . . is hired to speak from a government manifesto." For this point he relied on Legal Services Corp. v. Velazquez, a case in which the Supreme Court invalidated a provision that limited arguments legal services attorneys could make on behalf of clients. Justice Souter, criticizing what he viewed as the sweeping nature of the opinion, stated that the majority's rule appeared "spacious enough to include even the teaching of a public university professor, and [he had] to hope that [the] majority [did] not mean to imperil First Amendment protection of academic freedom in public colleges and universities." As noted earlier, the majority acknowledged this concern as potentially implicating other constitutional considerations but stated that such a situation was not before the Court in the current case.

Justice Breyer's dissenting opinion argued that while the majority's standard excluded speech even in exceptional circumstances, Justice Souter's approach would not sufficiently screen out cases in which courts should not engage in a Pickering analysis. Instead, Justice Breyer contended that "[w]here professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented." Under the facts presented in Garcetti, he felt that such a situation existed because attorneys have a professional duty to speak out on certain issues and that prosecutors bear a constitutional duty to provide certain evidence to the defense. As another example, Justice Breyer discussed how a prison doctor might bear a similar constitutional duty to communicate dangerous conditions for prisoners. Though advocating a less permissive standard than that preferred by Justice Souter, the opinion still argued for a constitutional safety valve that would provide public employees First Amendment protection in exceptional circumstances for communications made while performing their job duties.

52 Id. at 436.
53 Id. at 437.
55 Id. at 536–37.
56 Garcetti, U.S. at 438.
57 Id. at 425 (majority opinion).
58 Id. at 446 (Breyer, J., dissenting).
59 Id. at 448.
60 Id. at 447.
61 Id. at 446–47.
62 Id. at 447.
II. POST—GARCETTI DECISIONS AND ELEMENTARY AND SECONDARY
PUBLIC EDUCATION EMPLOYEES

Employees at public elementary and secondary schools have already begun feeling the impact of the *Garcetti* decision. First Amendment claims by administrators and other non-teacher employees are now subject to an evaluation of whether or not the communications took place in the course of carrying out employment duties. The extent to which *Garcetti* should apply to the in-class speech of teachers remains uncertain, but at least one court has applied the opinion to this type of communication.

A. Administrators

Courts have not hesitated to apply the standards of *Garcetti* to First Amendment claims by school administrators and other staff. In these cases, a key issue was what constitutes the scope of employment for purposes of applying *Garcetti*. In *Williams v. Dallas Independent School District*, for instance, the Fifth Circuit determined that the scope of employment includes more than just officially assigned duties. The case dealt with claims by Williams, a former head football coach and athletic director, who alleged that his removal from both positions and the non-renewal of his teaching contract stemmed from communications he made in memoranda questioning the handling of athletic funds at the high school where he worked.

The district court held that Williams’s communications dealt with internal employment matters rather than issues of public concern and therefore received no First Amendment protection. In a per curium opinion, the circuit court again held for the school district, but on the basis of the *Garcetti* decision. According to that opinion, Williams was speaking in the course of carrying out his official job duties and was not protected by the First Amendment. The opinion stated, "[e]ven if the speech is of great social importance, it is not protected by the *First Amendment* so long as it was made pursuant to the worker's official duties."

Noting that *Garcetti* did not define when an employee speaks pursuant to his or her official duties, the court analyzed whether Williams’s

63 Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007).
64 Id. at 693–94.
65 Id. at 690–91. The school's office manager and principal were eventually placed on administrative leave pending an investigation of their handling of the athletic funds. Id. at 691.
66 Id. at 691.
67 Id. at 692–94.
68 Id. at 694.
69 Id. at 692 (emphasis in original).
memoranda constituted part of his duties. The opinion discussed how the school district conceded that athletic directors and coaches were not required to submit memoranda concerning athletic accounts. Considering *Givhan, Connick, Pickering* and lower federal court decisions decided since *Garcetti*, the circuit court stated that "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." The court characterized Williams's seeking information about athletic funds as necessary for carrying out his duties as athletic director, such as paying for tournament fees and purchasing athletic equipment. Thus, though the memoranda were not required as part of Williams's employment tasks, the court determined that he wrote them as part of carrying out his employment duties as athletic director.

Similar to the *Williams* decision, a Florida case in the Eleventh Circuit rejected claims by a high school principal, D'Angelo, that he was impermissibly dismissed from his position in part because he advocated the conversion of his school to charter status. The court rejected arguments that in his efforts to convert the high school, D'Angelo spoke at least in part as a private citizen because of a general concern for the school's status. The opinion stated that, like the attorney in *Garcetti*, the principal spoke as part of his official duties, thus ending the inquiry as to whether D'Angelo was acting within the scope of his duties as a public employee.

While speech made pursuant to fulfilling employment duties may encompass more than specifically mandated job duties, courts have placed limits on what constitutes speech made within the course of carrying out employment duties, even if involving school-related issues. In *Casey v. West Las Vegas Independent School District*, a school superintendent sued following her non-renewal and alleged that the school board retaliated against her for raising numerous irregularities regarding certain activities,

---

70 *Id.* at 692–94.
71 *Id.* at 693.
72 *Id.*
73 *Id.* at 694.
74 *Id.*
75 D'Angelo v. Sch. Bd., 497 F.3d 1203 (11th Cir. 2007).
76 *Id.* at 1210.
77 *Id.* at 1211. The principal also admitted that he undertook the speech as part of his employment obligations related to maintaining and improving the school environment. For another case discussing a principal's employment duties, see *Cavazos v. Edgewood Independent School District*, 210 Fed. App'x. 414 (5th Cir. 2006) (per curiam), a case in which a principal claimed that she was assigned to another school for pursuing disciplinary action against a student who was the son of a member of the school board. *Id.* at 415. With very brief analysis, the Fifth Circuit looked to *Garcetti* to hold that the principal's disciplining the student and reporting the actions to school officials "clearly" fell within the principal's official duties. *Id.*
78 *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007).
including discrepancies with the district’s Head Start program and the state’s Open Meetings Act.\textsuperscript{79}

As superintendent of schools, Casey was the executive director of the district’s Head Start, a program that faced the loss of funding at the time of her appointment as superintendent.\textsuperscript{80} She implemented reforms that satisfied a federal oversight panel so that the district could continue to receive funding.\textsuperscript{81} As part of the ongoing oversight of the program, Casey became concerned that as many as half of the families enrolled in the program had incomes that made them ineligible to participate.\textsuperscript{82} She relayed her concerns to board members, but was at various times instructed to leave the issue alone.\textsuperscript{83} Casey believed, however, that as the program’s executive director she had a duty to make sure the issue was reported to federal officials.\textsuperscript{84} Eventually, the school district was forced to refund more than half a million dollars to the federal government.\textsuperscript{85}

Besides the Head Start irregularities, Casey also informed the board that she believed it was violating the state’s Open Meetings Act.\textsuperscript{86} The board did not heed the warnings, and Casey reported the issue to the state’s Attorney General, who concluded that the board had violated state law and ordered corrective measures.\textsuperscript{87} Casey also warned the board that it was in violation of numerous other federal and state laws.\textsuperscript{88} The school board first demoted Casey from superintendent to assistant superintendent and then declined to renew her contract for continuing employment with the school district.\textsuperscript{89} She claimed that the dismissal infringed on protected First Amendment rights.\textsuperscript{90}

In evaluating the former superintendent’s claims, the court considered the communications made regarding the Head Start program and the Open Meetings Act.\textsuperscript{91} In evaluating the communications regarding the Head Start program, the court considered the significance of communications

\textsuperscript{79} Id. at 1326–27.
\textsuperscript{80} Id. at 1325–26.
\textsuperscript{81} Id. at 1326.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 1327.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 1329. Between the hearing of the case by the District Court and the Circuit Court, the \textit{Garcetti} decision was issued. The superintendent conceded that some matters, such as communications regarding hiring practices, were not protected communications based on \textit{Garcetti}. Id. at 1325.
made directly to the school board members and to federal authorities.\textsuperscript{92} In relation to the communications to school board members regarding Head Start, the court stated that the superintendent acted within her duty of advising the district how to maintain compliance with federal laws and policies.\textsuperscript{93} Consequently, the court held that these communications occurred in the course of Casey performing her employment duties.\textsuperscript{94}

Considering the issue separately, the court also held that the communications to federal officials took place while Casey exercised her employment duties.\textsuperscript{95} The court discussed and Casey conceded that her position as executive director required her to report programmatic irregularities or face legal responsibility.\textsuperscript{96} While acknowledging that the information was of public importance, the court focused on the legal duty of the executive officer.\textsuperscript{97} The court concluded that Casey's communications were "more akin to that of a senior executive acting pursuant to official duties than to that of an ordinary citizen speaking on his or her own time; accordingly, Ms. Casey cannot meet her burden here and avoid the heavy barrier erected by the Supreme Court in \textit{Garcetti} to the satisfaction of \textit{Pickering}'s first prong."\textsuperscript{98}

The court determined, however, that the superintendent's comments to the state's Attorney General regarding the Open Meetings Act fell outside the scope of Casey's employment duties.\textsuperscript{99} Rather than seeking to advise the board, the superintendent made the complaint to the Attorney General because she had lost confidence in the board.\textsuperscript{100} The court also explained that, unlike her duties with the Head Start program, Casey did not possess any official employment or legal obligation to report non-compliance with the Open Meetings Act to state officials.\textsuperscript{101} Accordingly, Casey's communications to the state's Attorney General fell outside the scope of her employment duties.\textsuperscript{102}

At least one court has taken the approach that, despite a seeming connection with one's employment duties, an administrator could also communicate as a private citizen on a matter of public concern. In \textit{Cioffi}
v. Averill Park Central School District Board of Education, a high school's athletic director and director of physical education, Cioffi, sued claiming his position was eliminated in response to his criticisms of the school's football coach and hazing incidents involving football players. As a result of the elimination, Cioffi wrote a letter to the district's superintendent, critical of the school's football coach's actions and the district's investigation of serious hazing among football players. After the school board moved to eliminate the position of athletic director, Cioffi held a press conference stating that he believed the board acted in retribution for his criticisms of the football coach and the hazing. At the press conference, the athletic director stated that his primary concern was the health and safety of the athletes, a point he had made to school officials in his previous communications.

In analyzing Cioffi's First Amendment claims, the court noted the pending decision in Garcetti. According to the opinion, the decision would not affect the present case, however, because Cioffi was not speaking only as an employee carrying out his official duties but also as a private citizen. Although the contention was later rejected by the court, the school district argued that in the letter he wrote and at the press conference he held, Cioffi spoke regarding "personal matters" because his main concern was keeping his job. The court determined that he was also speaking as a private citizen, noting that Cioffi described his main concern as the health and safety of the students. The Cioffi court allowed for the possibility that one may act in the scope of one's employment but at the same time undertake additional activities as a private citizen; such activities may bear a connection to one's employment but not necessarily be a part of a person's job activities.

It is interesting to contrast the outcome in Cioffi with the other cases discussed. It seems a reasonable assumption that as athletic director Cioffi's employment duties should include concern with the health and safety of athletes. However, given the apparent cover-up of a serious hazing incident in Cioffi, the court may have been reluctant to deny First Amendment protection to an individual seeking to protect students. While

---

104 Id. at 160. The hazing was not of a minor nature. One student told Cioffi of an incident in which he was pinned on the floor by other players who rubbed their genitals over his face. Id. at 161.
105 Id. The hazing incidents eventually resulted in negative publicity and in the arrest of multiple students and teachers after the hazing victim filed a criminal complaint. Id.
106 Id.
107 Id.
108 Id. at 167 n.3.
109 Id. at 165.
110 Id. at 167 n.3.
the court held that the athletic director spoke as a private citizen in Cioffi, it represents somewhat of a stretch to conclude that he was not acting within the scope of employment in his communication with the school board. The court seemed to include, in addition to the press conference, the letter as a communication on a matter of public concern. While it is not too difficult to view the press conference as being independent of the athletic director's duties, the letter to district officials appears more in line with the official duties of an athletic director. Furthermore, the majority opinion in Garcetti made clear that private motivations do not remove an issue from the scope of employment duties. The district attorney in Garcetti, for instance, likely may have been motivated by personal interest related to ensuring fairness in a criminal prosecution, but this personal interest did not determine whether an activity fell within the scope of employment.

The Cioffi decision indicates that in particularly troubling cases courts may use the scope of authority analysis as an avenue to provide public employees with some First Amendment rights. It also demonstrates the folly of not providing, especially in exceptional cases, constitutional protection to public education employees who communicate in good faith to protect the health and safety of students but are denied First Amendment protection simply based on the fact that the communication occurred within the course of carrying out one's job duties. This standard causes even more concern when claimants can demonstrate that their superiors did not take action when informed of a problem.

As Justice Stevens warned, the Garcetti decision potentially creates an incentive for employees to circumvent the chain of authority and to make concerns publicly known to clarify that they are clearly acting as private citizens, which could actually have an adverse impact on employment relations. Perhaps even more likely is that employees will be more timid in speaking out, especially when superiors fail to respond. This is a troubling state of affairs since the public benefits from having public employees expose wrongdoing, especially in egregious situations such as that in the Cioffi case.

The Casey holding highlights another of the troubling aspects of the Garcetti decision. Based on the facts considered by the court in Casey, the superintendent was stuck between a school board that was unresponsive to reported problems with the district's Head Start program and her legal

---

111 The press conference can be viewed as somewhat analogous to the letter drafted by the teacher in Pickering.


113 Id. The Court stated that it was "immaterial whether . . . [Ceballos] experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction." Id.

114 Id. at 427. Acting clearly as a private citizen outside the scope of one's employment duties would of course create at least the potential for First Amendment protection.
obligations under federal law to report certain issues to federal officials. A duty to report under federal law served as a key element to deny Casey First Amendment protection for the communications she made regarding the Head Start program. Thus, even though Casey had alerted the board to problems and it took no action, she was denied constitutional protections for her communications because she was following the appropriate course of action. The decision demonstrates how the bright-line rule announced in *Garcetti* may fail to protect public employees acting to protect the public's interests and to comply with federal and state laws.

Given the limits that *Garcetti* places on the First Amendment rights of administrators and staff, states and school boards may want to consider implementing strategies or polices that protect communications by employees in certain instances, such as non-retaliation policies, anonymous reporting mechanisms, or both. School districts should consider that a lack of protections could mean that employees either may not come forward with troubling information or may initially seek to bypass superiors when communicating concerns due to a fear of retaliation.

**B. Teachers**

Just as with administrators, application of the *Garcetti* standards has also arisen in relation to communications made by teachers. In *Mayer v. Monroe County Community Corp.*,115 a probationary schoolteacher, Mayer, filed suit after she was not renewed for a subsequent year and claimed that her dismissal occurred because of personal political views offered in a current-events lesson.116 The district court granted summary judgment for the school district and a panel for the Seventh Circuit affirmed.117 Taking Mayer's allegations as true for purposes of summary judgment review, the panel considered if First Amendment protection attached to the teacher saying, in response to a question about her personal involvement in political demonstrations, that when passing a protest against the nation's military actions in Iraq, she honked at a sign that read, "'Honk for Peace.'"118 Following complaints from some parents over the lesson, the principal directed teachers not to take sides in politically controversial subjects.119 Mayer claimed that the incident resulted in her dismissal.120

The district court concluded that Mayer spoke on an issue of public concern, which meant the possibility of First Amendment protection

---

115 Mayer v. Monroe County Cmty. Corp., 474 F.3d 477 (7th Cir. 2007).
116 Id. at 478.
117 Id.
118 Id.
119 Id.
120 Id.
existed. Using a *Pickering* balancing approach, the court determined, however, that Mayer's speech interests were secondary to that of her employer. On appeal, Mayer contended that the court erred in its application of the *Pickering* factors, and she raised the issue that "principles of academic freedom" prohibited applying the *Garcetti* standards to the classroom. The school board countered that Mayer's speech enjoyed no First Amendment protection since it occurred pursuant to carrying out her official duties.

Writing for the panel, Judge Easterbrook's opinion rejected Mayer's claims. He noted previous Seventh Circuit cases articulating that "public-school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority)." Judge Easterbrook stated that teachers should be viewed as conduits of approved speech in the classroom:

> [T]he school system does not "regulate" teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.

The opinion described the case presented as easier than *Garcetti* because of this conception of teachers as essentially hiring out their speech in exchange for pay. While the court acknowledged that it was an open question how much *Garcetti* might apply to scholarly activities in higher education, the court did not consider any sort of academic freedom rights that might exist for elementary and secondary teachers, even in a restricted form. The captive nature of the classroom was also used to bolster the court's position that school officials should be able to control and limit completely

---

121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 479.
125 *Id.* at 478.
126 *Id.* at 480.
127 *Id.* at 479.
128 *Id.*
129 *Id.*
130 *Id.* at 480.
the speech of teachers in the classroom. According to the opinion, the compulsory nature of public education made elected officials the preferred arbiters of content in the classroom rather than making students subject to their “teachers’ idiosyncratic perspectives.”

The federal district court in *Panse v. Eastwood* followed a similar approach to that taken in *Mayer* regarding scope of employment. In *Panse*, the court considered, based on the teacher’s version of facts, whether any protection should be afforded to statements regarding the importance of having a portfolio of nude sketches when competing for art scholarships and the art teacher’s thoughts of perhaps starting a school where students who obtained parental consent could produce such sketches. Looking to *Garcetti*, the opinion stated that the teacher made the comments in connection with carrying out his official duties and, thus, the communications did not qualify for First Amendment protection. Discussing the definition of employment duties, the court stated that “[t]he official duties of high school teachers certainly encompass not only the formal lessons of the subject curriculum, but also include, at a minimum, broader classroom discussions about the assigned subject, as well as topics such as whether and how to pursue future educational opportunities in that subject area.”

In contrast to the Seventh Circuit’s approach in *Mayer*, the Third Circuit has not applied *Garcetti* to the classroom speech of teachers, though its standard also denies First Amendment protections to numerous communications by teachers and similarly situated individuals such as coaches. In *Borden v. School District*, a head football coach asserted the right “to engage in the silent acts of bowing his head during the team’s pre-meal grace and taking a knee with his team during a locker-room prayer.” The coach had taken these actions after he was disallowed from leading his players in prayer. Among his claims, the football coach argued that not letting him engage in these expressive acts implicated several constitutional rights, including his free speech rights and those rights grounded in academic freedom.

---

131 Id.
133 Id. at *3–4.
134 Id. at *12–13.
135 Id. at *12 (citing *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007)).
137 Id. at 158.
138 Id. at 159–60. Previously, the coach received instructions to refrain from engaging in several prayer activities with the football team, including leading prayers. Id.
139 Id. at 168.
As part of its analysis, the court applied the *Pickering-Connick* standard to the coach's speech, determining that the acts did not relate to a matter of public concern. At one point, the court stated that uncertainty existed regarding the application of the *Garcetti* standards in an "educational context," but if applied the coach would be deemed to have acted pursuant to fulfilling his official duties. The court held that the coach's assertions that his actions sought to promote unity while increasing team moral and showing respect for the players' prayers were "personal to Borden and his team and are not matters of public concern."

Regarding the coach's academic freedom claims, the opinion analyzed whether the expressive acts qualified as "in-class conduct," which circuit decisions had held were unprotected by the First Amendment. The court stated that "to determine if the teacher's conduct is considered in-class conduct we must determine whether the teacher is engaging in one of the 'four essential freedoms' that constitute academic freedom." If engaged in one of these areas, the teacher's in-class conduct is not protected. Previous decisions had concluded that choice of teaching methods, use of particular classroom management techniques, and grade assignment all constituted in-class conduct. The court noted that with the coach's pedagogic reasoning for his expressive conduct, "he is acting as a proxy for the School District, and the School District may choose both how its students are taught and what its students are taught."

The court in *Caruso v. Massapequa Union Free School District* also did not automatically assume that *Garcetti* applies to all speech by teachers. In *Caruso*, a probationary teacher claimed constructive discharge based on her open support of George Bush for president, including making comments to students and having a picture of Bush in her classroom. According to the plaintiff's version of the facts, which the court assumed as true for purposes of the decision, the principal stated that she would not receive

---

140 *Id.* at 168–69.
141 *Id.* at 171 n.13.
142 *Id.* at 169.
143 *Id.* at 172.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
149 *Id.* at 382–83.
150 *Id.* at 380–81. The school district's version of events stated that the teacher was instructed to either remove the photograph or include a picture of John Kerry. *Id.* The district stated that it directed the teacher to do so because a mock election for students was pending and the school district did not want to impart the impression that one candidate was favored over another. *Id.*
tenure and advised her to resign before an unfavorable promotion decision took place.\textsuperscript{151}

The court refused to grant summary judgment while noting that the determination of scope of employment duties does not always represent an easy task.\textsuperscript{152} Caruso also mentioned that the \textit{Garcetti} majority stated that other constitutional provisions might limit applying \textit{Garcetti} to classroom communication or to scholarship.\textsuperscript{153} Caruso made clear that the determination of specific factual issues required resolution before determining whether or not the plaintiff made her comments in the context of carrying out her official duties.\textsuperscript{154} Unlike in \textit{Mayer}, the \textit{Caruso} court was open to the concept that elementary and secondary teachers may enjoy some First Amendment right to academic freedom and that \textit{Garcetti} may be limited in its application to teachers.

The approach taken by the \textit{Caruso} court recognizes a more cautious approach than that taken in \textit{Mayer} concerning whether \textit{Garcetti} should apply to in-class speech by teachers. While school officials may extensively regulate the speech of teachers, the court in \textit{Caruso} raises the point that teachers may not be denied all First Amendment protection for in-class speech.\textsuperscript{155} In contrast, the \textit{Mayer} court interpreted the teacher's communications as covered by the standards announced in \textit{Garcetti}.\textsuperscript{156} Use of this standard meant that school officials could discipline the teacher for violating a prohibition on in-class political speech even when enactment of the district-wide rule occurred after the teacher had already made her comments.\textsuperscript{157} In denying any First Amendment protection for in-class speech, the \textit{Mayer} opinion stated that teachers do not possess an independent right to impose personal curriculum choices on students;\textsuperscript{158} but, based on the facts as considered by the court, the teacher did not disregard school policy, and her contract was not renewed only after her answer to a student question drew complaints from some parents.

The \textit{Mayer} decision shows that applying \textit{Garcetti} to in-class speech means that teachers may not enjoy even minimal First Amendment protection for communications made in the classroom, including the right to receive adequate notice that a category of speech is prohibited. However, the differing approaches in the cases discussed in this section demonstrate that it remains unsettled whether \textit{Garcetti} should apply to the in-class speech of teachers. One potential basis for First Amendment protection for in-class speech...

\textsuperscript{151} Id. at 380-84.
\textsuperscript{152} Id. at 382-84.
\textsuperscript{153} Id. at 383 (quoting \textit{Garcetti} v. Ceballos, 547 U.S. 410, 425 (2006)).
\textsuperscript{154} Caruso v. Massapequa Union Free Sch. Dist., 478 F. Supp. 2d at 384.
\textsuperscript{155} Id. at 383-84.
\textsuperscript{156} Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).
\textsuperscript{157} Id. at 478-80.
\textsuperscript{158} Id. at 479-80.
speech by teachers is judicial recognition of modest rights for teachers under concepts related to academic freedom.

Despite this potential basis of First Amendment protection, even a very restricted form of academic freedom for elementary and secondary teachers faces significant legal hurdles. Notably, in addition to the reluctance by several courts to accept the applicability of academic freedom to elementary and secondary teachers, academic freedom for faculty members in higher education currently rests in a constitutional bog. Consideration of any right of academic freedom for elementary and secondary teachers, even in a limited form, benefits from an understanding of the ambiguous legal status of individual academic freedom in higher education. Resolution of the issue of constitutional protection for individual academic freedom for college and university faculty members may ultimately impact whether or not elementary and secondary teachers possess a somewhat analogous, though more restricted, protection for their in-class speech. Accordingly, Part III generally considers individual academic freedom, with an emphasis on higher education, before focusing in Part IV on the in-class speech of elementary and secondary teachers and any First Amendment protections that might exist.

III. INDIVIDUAL ACADEMIC FREEDOM

Individual academic freedom represents a much discussed and heavily contested legal doctrine, even in higher education. This section outlines some of the ongoing issues regarding recognition of academic freedom by the Supreme Court, where much discussion and dispute has centered on college and university professors. While often considered a cornerstone of higher education, constitutional protection for the academic freedom of individual professors has engendered significant debate. At least one federal court has taken the position that if academic freedom exists as a distinct constitutional concept at all, then the constitutional protections exist for the institution rather than for the individual scholar.


A. Academic Freedom as a Constitutional Concern of the Supreme Court

Academic freedom first received attention by the Supreme Court in a dissenting opinion by Justice Douglas in Adler v. Board of Education. The case dealt with the validity of a state law that, among its proscribed activities, prohibited employment of any individual identified as a member of an organization designated as subversive in a public education institution. The majority held that the state had a legitimate interest in excluding from school employment those individuals who supported or were members of organizations that supported the unlawful overthrow of the government.

But, Justice Douglas's dissent argued, "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher." Describing the public school as the "cradle of our democracy," Justice Douglas argued that the law threatened to "raise havoc with academic freedom" by turning schools into places of distrust and spying instead of an arena for the open exchange of ideas.

In the same year that Adler was decided, the Supreme Court refused to uphold an Oklahoma law requiring state employees to take loyalty oaths that they had not belonged to organizations designated communist or subversive in the previous five years. The Supreme Court of Oklahoma construed the act to include individuals who had been unaware that a group to which they belonged sought to promote illegal or subversive goals. In reviewing the decision, the U.S. Supreme Court held that it was impermissible to punish individuals who had unknowingly belonged to an organization with subversive aims. In a concurring opinion, Justice Frankfurter, much as Justice Douglas had done in his dissent in Adler, discussed the importance of protecting the First Amendment rights of educators at all levels:

To regard teachers—especially in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public

162 Id. at 489-90. The law was known as the Feinberg Law. Id. at 487.
163 Id. at 493-96.
164 Id. at 508 (Douglas, J., dissenting).
165 Id.
166 Id. at 509-10.
168 Id. at 189-90.
169 Id. at 190-91.
opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power.170

The decision in Sweezy v. New Hampshire171 represented another significant moment for the development of academic freedom as a constitutional concern. Sweezy dealt with an individual refusing to answer questions from the New Hampshire Attorney General's office relating to lectures given by him at a state university.172 In a concurring opinion, Justice Frankfurter stated that protecting inquiry at universities is of vital importance to the nation's interest and that governmental intrusion into the affairs of colleges and universities should be minimized.173 According to Justice Frankfurter, to allow unfettered inquiry, "[p]olitical power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."174 Quoting from a statement by scholars in South Africa, the opinion defined the four essential freedoms of the university as the freedom of a university to decide "who may teach, what may be taught," the method of teaching, and who shall be admitted.175

With the decision in Keyishian v. Board of Regents,176 constitutional protection for academic freedom became incorporated into a majority opinion. In the decision, the Supreme Court once again dealt with the New York law addressing membership in subversive organizations that it

170 Id. at 196–97 (Frankfurter, J., concurring).
172 Id. at 243.
173 Id. at 261–62 (Frankfurter, J., concurring).
174 Id. at 262.
175 Id. at 262–63.
had considered in *Adler*. A majority of the Court invalidated the standards that it had previously approved in *Adler* requiring employees to submit statements that they did not belong to subversive organizations such as the Communist Party. The majority opinion stated that in *Adler* the Court had not considered if the reporting requirements proved impermissibly vague and that "pertinent constitutional doctrines have since [Adler] rejected the premises" relied upon by the majority in that case. While acknowledging the state's interest in preventing "subversion" in students based on the activities of teachers and professors, the opinion discussed the importance of protecting constitutional rights of free speech, press and assembly, which also included protecting the right of educators to engage in unfettered intellectual inquiry. In a well-known passage, the majority stated, "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom therefore is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." The opinion, turning to *Sweezy* for support, emphasized that academic freedom served to protect open debate and discourse in society.

The Supreme Court has periodically continued to sound the connection between academic freedom and the First Amendment. In *Grutter v. Bollinger*, for example, the Court relied in part on principles of academic freedom to permit the use of race as one factor in higher education admissions. Yet, the legal landscape regarding constitutional protection for academic freedom remains far from clear, especially in relation to First Amendment protections for individual scholars versus those vested in institutions. Courts and legal commentators have expressed differing stances regarding the degree to which the First Amendment protects academic freedom at the individual level. The cases discussed below demonstrate that courts disagree considerably over constitutional protection for individual academic freedom, even when dealing with college and university professors.

---

177 *Id.* at 593.
178 *Id.* at 609–10.
179 *Id.* at 595.
180 *Id.* at 602–03.
181 *Id.* at 603.
182 *Id.*
184 *Id.* at 334–35.
185 *See supra* note 159.
B. Lower Federal Courts and Individual Academic Freedom

Debate over individual academic freedom in higher education extends so far that at least one federal circuit court has concluded that academic freedom, if a recognized constitutional doctrine at all, exists only at the institutional level. In Urofsky v. Gilmore, the Fourth Circuit held that faculty members at public colleges and universities enjoy no other First Amendment protections than those available to other public employees. Sitting en banc, the court considered, among other issues, whether a state law that prohibited state employees from accessing sexually explicit material on computers owned or leased by the state violated the First Amendment rights of professors employed at public universities. The professors argued that the law prohibited them from engaging in legitimate research activities protected by academic freedom under the First Amendment.

Foreshadowing the decision in Garcetti, the court stated that since the speech at issue took place in relation to employees "carrying out employment duties," the law did not regulate the speech of the employees as private citizens, thus removing the need for any sort of Pickering–Connick analysis. According to the court's opinion, the state sought to regulate speech by employees in relation to carrying out their job duties as opposed to their speech made as private citizens. Turning to whether any sort of constitutional protection for individual academic freedom shielded the professors, the majority described academic freedom as an ambiguous concept applied unevenly by courts. The court stated, "[o]ur review of the law ... leads us to conclude that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors ...." According to the opinion, "[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self–governance in academic affairs."

Other courts have cited Urofsky approvingly or followed a similar approach to evaluate individual academic freedom claims. For example,

187 Id. at 415.
188 Id. at 404.
189 Id. at 405–06.
190 Id. at 409.
191 Id.
192 Id. at 410.
193 Id. at 412.
194 See, e.g., Johnshon–Kurek v. Abu–Abasi, 423 F.3d 590, 593 (6th Cir. 2005) (holding that university officials could direct an adjunct professor to provide more detailed information regarding the steps required to satisfy course requirements to students who had received the
the Third Circuit has taken a negative view of First Amendment rights of public college and university professors, at least in relation to classroom activities. In Brown v. Armenti, the court stated that it had held in Edwards v. California University of Pennsylvania that "in the classroom, the university was the speaker and the professor was the agent of the University for First Amendment purposes." Relying on Edwards, the court determined that grading fell under the institution's right to determine how a course is taught and did not implicate any First Amendment rights of the professor.

The approach taken by courts in such cases as Urofsky and Brown has certainly not been accepted by all courts. Piarowski v. Prairie State College involved the placement of an exhibition of a professor's artwork that was sexual in nature. In that case, Judge Posner's opinion for the Seventh Circuit acknowledged the "equivocal" nature of academic freedom: "It is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy . . . ." The court, though permitting the relocation of a sexually explicit art exhibit by institutional officials, stated that the university and the professor both possessed interests in the location of the display.

In direct contrast to the Brown decision generally, and its treatment of grades specifically, the Sixth Circuit in Parate v. Isibor held that a professor did communicate for First Amendment purposes in assigning a grade. Looking to Judge Posner's opinion in Piarowski, the court discussed that both the university and a professor may raise academic freedom concerns under the First Amendment. The court described a grade assignment as a form of symbolic speech. Describing the professor's role in assigning grades as involving the "professional judgment" of the faculty member, the court in Parate hit a much different chord than that heard in Brown.

---

196 Edwards v. Cal. Univ. of Pa., 156 F.3d 488 (3d Cir. 1998).
197 Brown, 247 F.3d at 74.
198 Id. at 75.
199 Piarowski v. Prairie State Coll., 759 F.2d 625, 626–29 (7th Cir. 1985).
200 Id. at 629.
201 Id. at 629–30.
202 Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).
203 Id. at 827.
204 Id. at 826–27.
205 Id. at 827.
206 Id. at 828.
which described professors as not speaking for First Amendment purposes in the classroom.\textsuperscript{207}

\textit{Silva v. University of New Hampshire} provides another example of a court refusing to give unfettered discretion to university officials regarding control over the classroom.\textsuperscript{208} In \textit{Silva}, the court held that a tenured professor who consistently used sexual analogies to teach technical writing and engaged in other behavior and communications deemed to violate the school's sexual harassment policy was impermissibly disciplined by the school.\textsuperscript{209} While "recognizing that 'academic freedom [is not] a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution,'"\textsuperscript{210} the court held that the school's sexual harassment policy as applied to the professor's in-class speech violated principles of academic freedom.\textsuperscript{211} The court also rejected the university's arguments that the professor did not speak on matters of public concern, stating that "[i]t is a fundamental tenet of First Amendment jurisprudence that the preservation of academic freedom is a matter of public concern."\textsuperscript{212} The court defined "public concern" not just to focus on the specific content of the professor's comments, but on the general importance of protecting speech by professors.\textsuperscript{213}

These cases illustrate the legal uncertainty regarding constitutional protection of individual academic freedom in public higher education, suggesting a high legal burden for establishing any degree of First Amendment rights for elementary and secondary teachers. If the Urofsky approach prevails,\textsuperscript{214} then speech by faculty members at public colleges and universities would fall under the standards announced in \textit{Garcetti}. Ultimate determination of the rights of faculty members at public colleges and universities may play some role in influencing whether or not public school elementary and secondary teachers also possess some form of First Amendment protection. With the general discussion of individual academic freedom providing context, the article now turns to how courts have treated First Amendment claims by teachers.

\textsuperscript{207} Brown v. Armenti, 247 F.3d 69, 74 (3d Cir. 2001).
\textsuperscript{208} Silva v. Univ. of N.H., 888 F. Supp. 293 (D.N.H. 1994).
\textsuperscript{209} Id. at 314.
\textsuperscript{210} Id. (quoting Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972)).
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 315.
\textsuperscript{213} Id. at 315-16.
\textsuperscript{214} Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000). It is important to keep in mind, however, that academic freedom at colleges and universities also rests strongly on professional standards, including and especially the tenure system, to protect individual academic freedom. For a discussion of academic freedom as a professional value in higher education, see Byrne, supra note 159, at 272-88.
IV. IN-CLASS RELATED SPEECH OF ELEMENTARY AND SECONDARY TEACHERS

It remains undetermined whether elementary and secondary public school teachers are subject to the Garcia standards for speech related to curriculum or pedagogy or both.215 As shown by the Mayer decision, some lower federal courts stand poised to apply the Garcia standards to the communications of teachers.216 Under this approach, teachers' communications to students, especially occurring during class, would appear to constitute a part of fulfilling employment duties. Even speech made outside of class to students, such as in the hall between classes, during the lunch period or perhaps even after school, would often appear to encompass speech made pursuant to carrying out one's employment duties as a teacher.

While Garcia may ultimately prove the death knell for any meaningful First Amendment rights for classroom related communications made by teachers, recent years, with some exceptions, have already witnessed a general judicial resistance to First Amendment rights for teachers.217 Still, courts have not uniformly agreed that teachers do not possess some kind of First Amendment rights for in-class speech. In particular, certain courts have demonstrated sympathy to the idea that teachers should receive some form of notice that an area of speech has been prohibited by school officials.218

Some courts have flatly refused to acknowledge that elementary and secondary teachers enjoy any independent First Amendment rights regarding issues related to classroom matters or any kind of individual academic freedom. The Third Circuit, for example, considered a case in which a teacher claimed a First Amendment right under principles of academic freedom to use a particular classroom management system.219 The court stated that it did not have to define the scope of academic freedom

215 It is worth noting that some speech by teachers would not relate to in-class speech and in these instances teachers would be subject to similar standards as administrators. Courts would engage in an analysis of whether the teacher was speaking as a private citizen or engaged in performing job duties. In these instances, teachers could be viewed as performing job functions with administrative qualities, such as assisting with the front office, helping to direct traffic, or working at school functions such as athletic events. In these cases, schools and teachers may dispute what constitutes a teacher's employment duties outside the classroom. The Givhan case provides an example of speech by a teacher speaking as a citizen to complain about discriminatory hiring practices at the school and speech by a teacher that would still be protected, even under the standards of Garcia. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 412-13 (1979).

216 See supra Part II-B.

217 See supra note 3 and accompanying text.

218 See Uerling, supra note 4, at 963.

but concluded that "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." The decision went on to acknowledge, "Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." The Tenth Circuit followed a similar approach in rejecting that comments made to students in a class by a teacher merited First Amendment protection. While noting that at least one federal court had recognized a university professor's right to individual academic freedom, the court stated that those cases did not support the argument that such a right exists for secondary teachers.

Not all courts, as pointed out in some of the cases discussed below, have denied that teachers are without any First Amendment rights for in-class related speech. Even if not casting First Amendment rights as explicitly grounded in academic freedom, these courts have determined that teachers enjoy at least minimal First Amendment protection for in-class speech. Along with disagreement over whether teachers possess some degree of First Amendment rights for classroom communications or other closely related duties such as those involving coaching academic or athletic teams, courts also have differed on the correct legal standards to analyze speech claims by teachers. As the following sections discuss, a fault line has developed among courts regarding whether or not *Hazelwood* or *Pickering–Connick* standards should apply to speech by teachers related to the classroom or made in working with students in closely related capacities.

**A. (Tinker)–Hazelwood versus Pickering–Connick to Assess In-Class Speech**

Courts have divided over whether to apply the standards derived from *Hazelwood* (or *Tinker–Hazelwood*) or from the *Pickering–Connick* line of cases to the in-class related speech of teachers. One circuit case identified the First, Second, Seventh, Eighth, and Tenth Circuits as using *Hazelwood* to
analyze claims involving “teacher’s instructional speech,”226 and categorized the Fourth, Fifth, and Ninth Circuits as using the Pickering–Connick line of cases to evaluate speech by teachers.227 The Ninth Circuit has also been identified as holding that speech by teachers is that of the government and does not receive First Amendment protection.228 The Third Circuit has been characterized as using the Pickering–Connick line of cases229 as well as an alternative standard based on the Supreme Court’s decisions230 in Rust v. Sullivan231 and Rosenberger v. University of Virginia.232

1. Hazelwood Standards to Evaluate Teachers’ In-Class Speech.—In Hazelwood School District v. Kuhlmeier,233 the Supreme Court held that school officials could place conditions on school-sponsored speech as “long as their actions are reasonably related to legitimate pedagogical concerns.”234 The case dealt with the authority of a school principal to censor articles in a school-sponsored newspaper.235 Though the case centered on student speech, the majority stated that in the context of school-sponsored speech these limitations could be applied to teachers and “other members of the school community.”236 The Court stated that public school facilities “may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities” for use as a forum.237 The opinion stressed that unlike in Tinker v. Des Moines Independent Community

---

226 Chiras, 432 F.3d at 617 n.29; see also Daly, supra note 225, at 16–17.
227 Chiras, 432 F.3d at 617 n.29; see also Daly, supra note 225, at 16–17.
228 Lee v. York County Sch. Div., 418 F. Supp. 2d 816, 821 n.5 (E.D. Va. 2006) (citing Cal. Teachers Ass’n v. Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001)). In Downs v. Los Angeles Unified School District, the Ninth Circuit dealt with a teacher placing materials on a bulletin board to object to a school district’s support of Gay and Lesbian Awareness Month. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1005 (9th Cir. 2000). In response to materials posted on other school bulletin boards, the teacher posted materials on a bulletin board across from his classroom with material meant to challenge support for Gay and Lesbian Awareness Month. Id. The court stated that cases such as Hazelwood dealing with school sponsorship of others speaking was not involved “because it is a case of the government itself speaking.” Id. at 1011. Designating the bulletin boards as speech by the district meant that the school could make content-based choices and did not have to allow dissenting views. Id. at 1011–12.
229 Daly, supra note 225, at 16 n. 83 (citing Bradley v. Pitt. Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990)).
230 Lee, 418 F. Supp. 2d at 821 n.5.
234 Id. at 273.
235 Id. at 263. One story dealt with students at the school who were pregnant and another dealt with how divorce had affected students attending the school. Id.
236 Id. at 267.
237 Id. (quoting Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n., 460 U.S. 37, 47 (1983)).
School District,238 which dealt with independent speech by students that was non-school sponsored,239 the case before the Court dealt with student speech sponsored by the school.240 In this context, educators possessed the authority to determine appropriate content standards.241 Also noting the need to leave educational decisions to educational officials rather than to the courts, the opinion stated that First Amendment concerns are implicated only when a decision has no "valid educational purpose."242

While the Court in Hazelwood stated that Tinker dealt with non-school sponsored speech, the Tinker decision also has loomed in the background as courts have dealt with teachers claiming independent speech rights.243 Tinker dealt with school officials attempting to prohibit students from wearing black armbands to protest the Vietnam War and to show their support for a truce to hostilities.244 When school officials learned of the plan, a policy was adopted that prohibited the wearing of armbands and permitted the suspension of students until returning to school without an armband.245 At the outset of its analysis, the Court stated that though "applied in light of the special characteristics of the school environment, [First Amendment rights] are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."246

Describing this assertion as unremarkable and consistent with almost fifty years of precedent, the majority characterized the school policy as infringing on "'pure speech'" that in no way affected the "work of the schools or the rights of other students."247 The majority held that to prohibit expression the school had to demonstrate a disruption to the learning process rather than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."248 The Court discussed that schools are not meant to operate as "enclaves of totalitarianism."249 The majority in Tinker referred to the Keyishian decision and how schools serve as a "marketplace of ideas," including the premise that promoting speech has implications both inside and outside of the classroom.250

---

239 Id. at 505–06.
241 Id. at 273.
242 Id.
245 Id. at 504.
246 Id. at 506.
247 Id. at 508.
248 Id. at 509.
249 Id. at 511.
250 Id. at 512.
An obvious reason for the attraction of *Hazelwood* as appropriate in evaluating teachers' speech claims is because the case involved communications involving some degree of school participation or sponsorship. The Tenth Circuit, for instance, as shown in *Miles v. Denver Public Schools*, has used this sponsorship rationale as a basis to evaluate teacher speech using *Hazelwood*. The court declined to apply *Pickering* because that case dealt with the school as an employer rather than as an educator and was concerned with permitting public employees to comment on matters of public concern.

In *Miles*, the court also stated that no reason existed to distinguish between speech by students or teachers in applying the principles of *Hazelwood*. The case dealt with communications by a teacher, Miles, to students that the quality of the school had declined over the years, using a rumor about two students “‘making out’” on school grounds to illustrate his assertions. As a result of the statements regarding the rumor, the teacher was placed on administrative leave for four days during a school investigation and had a letter of reprimand placed in his personnel file. Using *Hazelwood*, the court concluded that the school had a legitimate pedagogical justification for the actions taken against the teacher, stating that the administrative leave afforded time for school officials to investigate the incident and the letter served to discourage Miles from making comments in the future that might “reflect negatively on individual members of the student body.”

Other courts have used *Hazelwood* to permit school officials to exert substantial control over the in-class speech of teachers. Using *Hazelwood* as a basis for the authority of school officials to control teachers' classroom speech, the First Circuit has stated that a regulation is permissible if it is “(1) ... reasonably related to a legitimate pedagogical concern ... and (2) the school provided the teacher with notice of what conduct was prohibited.” The Seventh Circuit, applying the *Tinker-Hazelwood* standards to determine that school boards are “not free to fire teachers for every random comment in the classroom,” expressed in the same opinion that “there are only limited constitutional constraints on the form and content of decisions of local school boards acting within the bounds of their statutory powers.”

These judicial statements, like those in the *Miles* case, illustrate that *Hazelwood* has often served as a basis for substantially restricting...
teachers' First Amendment rights in the classroom. Still, *Hazelwood*, mandating that school officials are prohibited from acting without any legitimate pedagogical reason in restricting teachers' in-class speech and potentially requiring that teachers receive some degree of notice that a speech category or topic is prohibited, may provide limited protection for in-class speech. Nevertheless, the degree of protection afforded by courts to teachers under *Hazelwood* generally stands far removed from the kinds of speech protections associated with academic freedom. Instead, courts have generally relied on *Hazelwood* as a means to emphasize the authority of school authorities to control teachers' in-class speech.

2. Pickering-Connick Standards to Evaluate Teachers' In-Class Speech.—As noted in the discussion of the *Garcetti* majority opinion in Part I-B, under the *Pickering-Connick* standards courts first consider whether the public employee is engaging in speech on a matter of public concern. If the employee is not speaking on a matter of public concern, then the employee's speech lacks First Amendment protection. If the employee is speaking on a matter of public concern, courts then determine whether the interests of the public employer trump any First Amendment protections otherwise possessed by the employee. *Garcetti*, of course, added a threshold question that asks whether the public employee has spoken pursuant to carrying out his or her employment duties. However, as discussed in Part II-B, courts are not in unison that this threshold inquiry should apply to teachers. Courts also differ as to whether in-class related speech that deals with curriculum constitutes a matter of public concern.

As shown in Sixth Circuit cases, treating curricular related speech as a matter of public concern permits some degree of First Amendment protection for in-class speech. In *Evans-Marshall v. Board of Education*, the Sixth Circuit considered a challenge to a teacher's non-renewal that was grounded in the First Amendment. The teacher, who had previously received satisfactory to outstanding ratings on performance evaluations, became a target of protest from parents concerned about what was perceived as inappropriate materials used in-class.

During the course of the complaints against the teacher, the principal stated in front of the school's other English teachers that Evans-Marshall was "on the 'hot-seat'" because of parental complaints at a school board
meeting over the teacher's use of the book *Siddhartha*.\textsuperscript{265} In one of his formal reviews of Evans-Marshall, the principal instructed the teacher to clear "[a]ny material containing graphic violence, sexual themes, profanity, suicide and alcohol" with the English department's chairs.\textsuperscript{266} For the first time, the principal also recorded negative comments concerning Evans-Marshall's teaching.\textsuperscript{267}

In response to statements in the formal evaluation that the teacher should clear certain content with the department's chairs, the teacher responded that novels used in her class\textsuperscript{268} had been approved by the school board.\textsuperscript{269} At one point during the school year, the teacher also showed a movie, *Romeo+Juliet*, rated PG-13, a film adaptation of Shakespeare's play.\textsuperscript{270} The teacher received another formal review with additional negative comments, with the principal stating that problems previously identified had not been addressed sufficiently to merit a teaching contract for the following school year.\textsuperscript{271} Eventually, the school board approved the recommendation of the district's superintendent not to renew Evans-Marshall, who challenged that the non-renewal stemmed from her "curricular and pedagogical choices" in violation of her First Amendment rights.\textsuperscript{272}

In analyzing Evans-Marshall's claims, the Sixth Circuit applied the *Pickering* standards to evaluate a teacher's First Amendment claims for in-class speech.\textsuperscript{273} The court first looked to see if the teacher commented upon an issue of public concern and, if so, the inquiry then turned to whether the school had a sufficient reason to take an adverse action against the teacher.\textsuperscript{274} The court discussed that the Sixth Circuit had determined that speech constituted a public concern as long as it was related to "political, social or other community concerns."\textsuperscript{275} The opinion addressed that the Supreme Court had never designated classroom communications as speech for First Amendment purposes, but it had also "never removed in-class speech from its presumptive place within the ambit of the First

\textsuperscript{265} Id. at 226.
\textsuperscript{266} Id. at 227.
\textsuperscript{267} Id. at 226–27.
\textsuperscript{268} The novels were *Fahrenheit 451*, *To Kill a Mockingbird*, and *Siddhartha*. Id. at 227.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id. at 228.
\textsuperscript{274} Id. at 228–29.
\textsuperscript{275} Id. at 229 (quoting Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2002)). In *Cockrel*, the court held that a teacher's selection of a guest speaker constituted speech and that the teacher's speech touched on a matter of public concern protected under the *Pickering* balance test. *Cockrel*, 270 F.3d at 1048–55. The teacher invited a speaker on several occasions to talk to students about the uses of industrial hemp, which though not used to produce marijuana, was banned in Kentucky. Id. at 1042.
Amendment." The court cited both Tinker and Keyishian for support that teachers are not bereft of First Amendment rights in the classroom, noting that teachers are not required to relinquish their First Amendment rights and that schools are meant to serve as a marketplace of ideas. According to the opinion, "The assumption that the [Supreme] Court would draw a distinction between the schoolhouse gate and the doors of the classroom is counterintuitive."

Using the Pickering standards, the court determined that the teacher's selections of the novels and movie involved speech that dealt with matters of public concern. The Sixth Circuit, noting that both books and movies constituted speech, stated that "assignment by a public school teacher of protected materials is itself 'speech' within the meaning of the First Amendment." After determining that the teacher's selection of the books and the movie constituted speech, the opinion, assuming that the teacher taught the main themes presented in the works, stated that issues presented in the assigned materials clearly related to matters of public concern.

Moving to the balancing portion of the Pickering-Connick standards, the court concluded that, based on the facts alleged by the plaintiff, it was inappropriate to grant a motion to dismiss. Evans-Marshall claimed that the school board had in fact given approval to use the books in question; the court stated, "We have previously concluded that the prior approval of controversial speech by the school or the Board undercuts the interests of the state in controlling the workplace." She also alleged that teachers were not required to obtain permission to show a movie rated PG-13. The court held that "[s]uch allegations are sufficient to establish protected First Amendment activity under the Pickering test, at least for the purposes of a motion to dismiss."

In contrast, other circuits have designated speech related to curricular issues as not a matter of public concern. In Boring v. Buncombe County Board of Education, for instance, the Fourth Circuit considered the First Amendment issues as not a matter of public concern.

---

276 Evans-Marshall, 428 F.3d at 229.
277 Id.
278 Id.
279 Id. at 231.
280 Id. at 230.
281 Id. at 230-31 ("For instance, in teaching To Kill a Mockingbird, it is reasonable to infer that Evans-Marshall taught the themes of race and justice in the American South. Such content is clearly a matter of public concern. . . . The same can be said of the other disputed works: spirituality (Siddhartha), the intersection of love and politics (Romeo + Juliet), and, of course, government censorship of books (Fahrenheit 451)."").
282 Id. at 231.
283 Id.
284 Id. at 232.
285 Id.
Amendment right of a teacher to select a play for students to perform at a drama competition that contained mature subject matter. The teacher claimed that she was impermissibly transferred based on allowing students to act in the play. Relying on Connick and a Fifth Circuit decision, the court adopted the position that speech related to curriculum does not relate to a matter of a public concern. In discussing curriculum, the opinion turned to a dictionary definition and the Supreme Court's Hazelwood opinion to determine that the curriculum consists of more than just speech occurring in the classroom. Based on this inclusive definition of curriculum, the court determined the play constituted curricular speech, which meant that selection of the play was not a matter of public concern and was "nothing more than an ordinary employment dispute." For good measure, the court asserted that even if the teacher enjoyed some degree of First Amendment protection, which it believed she did not, the school had demonstrated a legitimate pedagogical interest in wanting to shield the students from the subject matter of the play.

B. In-Class Speech by Teachers Post Garcetti

It remains uncertain whether the standards set forth in Garcetti will ultimately apply to the speech of teachers. The Mayer court did not hesitate to apply Garcetti, but not all courts, including those using the Pickering-Connick standards, have concluded that Garcetti applies. In Lee v. York County School Division, the Fourth Circuit considered a post-Garcetti case involving a teacher challenging the removal of items from bulletin boards in his classroom. The court, looking to the Boring decision and

286 Boring v. Buncombe County Bd. of Educ. 136 F.3d 364, 366 (4th Cir. 1998). A scene from the play was also performed for a class at the school where the teacher taught, and students were required to have parental permission to view the scene. Id.

287 Id. at 367.

288 Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 795 (5th Cir. 1989). In the case the Fifth Circuit considered a challenge by a high school history teacher that he was dismissed for including books contained on a supplemental reading list that were not approved by school officials. Id. The court determined that the teacher's supplemental reading list did not constitute a matter of public concern and noted that he had not spoken out publically against the board's supplemental reading list policy or complained to colleagues. Id. at 800.

289 Boring, 136 F.3d at 368–69.

290 Id. at 367–68. Daly, supra note 225, has criticized this dual use of Hazelwood and Pickering-Connick to evaluate First Amendment claims by teachers.

291 Boring, 136 F.3d at 368.

292 Id.

293 Id. at 370.

294 Mayer v. Monroe County Cnty. Sch., 474 F.3d 477, 479 (7th Cir. 2007).

295 Lee v. York County Sch. Div., 484 F.3d 687, 689 (4th Cir. 2007). The school's principal removed several items from a Spanish teacher's bulletin board that the principal considered
its reliance on *Pickering-Connick*, determined that curricular speech was at issue and there existed no matter of public concern that qualified to receive First Amendment protection. While the court relied on *Boring* and its standards derived from the *Pickering-Connick* strand of cases, the court did not apply *Garcetti* to the case, stating instead that it remained uncertain whether the decision applied to the speech of teachers.

For courts using the *Pickering-Connick* standards, the impact of applying *Garcetti* to teachers' in-class speech relates to whether such speech may constitute a matter of public concern. The *Garcetti* decision would appear to make a minimal difference for courts that already deny protections to teachers for in-class speech by automatically designating these communications as not a matter of public concern. Further, as shown by the *Boring* decision, curriculum or in-class related speech encompasses more than communications taking place in the classroom. *Garcetti* could further erode protections for courts excluding curricular speech as constituting a matter of public concern in the area of non-curricular communications occurring outside the classroom but still deemed to have occurred in the context of carrying out employment duties, such as talking to students in the hall between classes or on school trips. In contrast to those courts not permitting in-class related speech to rise to a level of public concern, applying the *Garcetti* standards to evaluate teachers' speech claims would reduce the potential First Amendment protections that the Sixth Circuit has provided to in-class related speech. Under *Garcetti*, there would no longer be an analysis regarding whether in-class communications raised a matter of public concern, because such speech would appear to take place pursuant to fulfilling one's employment duties.

For courts using a *Hazelwood* approach to evaluate in-class related speech, using the *Garcetti* standards could limit the First Amendment protections for teachers under certain circumstances. While courts using *Hazelwood* to evaluate teachers' speech have often left control over in-class speech to the discretion of school officials, this standard has served as a basis to require prior notice to teachers that certain areas of speech

---

296 *Id.* at 694.
297 *Id.* at 695 n.11.
298 *Boring*, 136 F.3d at 368.
are prohibited. Hazelwood also requires that schools have some sort of legitimate pedagogical reason for restricting teachers' speech. While not necessarily providing extensive protections for communications by teachers, the Hazelwood approach has provided a legal framework resulting in at least minimal First Amendment protections for in-class related speech. Evaluating teachers' in-class speech using Garcetti would erase even this modest level of First Amendment protection.

C. Competing Views of Teachers' In-Class Speech

As courts continue to consider the appropriate legal standards to evaluate in-class or curricular-related speech by teachers, especially in the wake of the Garcetti decision, a basic issue that arises involves the appropriate role of school officials, especially school boards, in regulating teachers' in-class speech. Should teachers, from a First Amendment perspective, ever engage in independent in-class speech, or should they simply function as speech proxies for state and local school boards? Kevin G. Welner divides debates over First Amendment rights for teachers on the basis of competing camps. One camp conceives of teachers and schools "as a vehicle for teaching American youth shared values and norms." Conversely, "[t]he other prominent perspective sees the school as a marketplace of ideas." As Welner discusses, these competing viewpoints create ideological and, at times, judicial fault lines concerning whether or not teachers merit some degree of First Amendment protection for in-class related speech. The Mayer and Evans-Marshall decisions highlight this disparate conception of the role of teachers and learning at the elementary and secondary levels. The Evans-Marshall court looked to Tinker and Keyishian to support the view that teachers, in addition to helping inculcate values, also play an independent role in helping students develop into critical thinkers capable of meaningful participation in a democratic society. For the Mayer court, a key and reasonable concern focused on teachers seeking to impose their completely personal views and values on students in a captive classroom, one caused by the compulsory nature of elementary and secondary education. The court could point to an elected school board as providing a sort of democratic vetting process for the information that students are required to receive.

Arguing from a marketplace of ideas perspective, Karen Daly proposes the protection of speech by teachers as a way to counterbalance the power

299 Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993).
300 Welner, supra note 4, at 965.
301 Id.
302 Id. at 966.
304 Mayer v. Monroe County Cnty. Sch., 474 F.3d 477, 479–80 (7th Cir. 2007).
of school boards and to prevent them "from monopolizing speech in public schools, potentially creating the 'pall of orthodoxy' condemned by the Supreme Court." \textsuperscript{305} She argues that standards drawn from either \textit{Pickering} or \textit{Hazelwood} currently applied by courts are inadequate to evaluate the First Amendment rights of teachers. \textsuperscript{306} Daly contends that courts should engage in a balancing test using principles derived from \textit{Hazelwood}, but providing more protection for teachers than courts have previously recognized. \textsuperscript{307}

In advocating for greater First Amendment rights for teachers, Daly discusses that courts should also consider the right of students to receive information. \textsuperscript{308} While this position has obtained uneven legal traction, \textsuperscript{309} supporters can look to \textit{Board of Education v. Pico}, where the Supreme Court limited the authority of school board members to remove certain works from a school library. \textsuperscript{310} The Court discussed that "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." \textsuperscript{311} Rather than grounding the decision in the academic freedom of teachers or librarians, the opinion discussed the importance of the right of individuals to receive information. \textsuperscript{312} The Court also underscored that the library involves the voluntary choice of books rather than materials assigned in a compulsory course. \textsuperscript{313} The Court rejected that school officials enjoyed "unfettered" authority over the school library, but did acknowledge that school officials enjoy substantial discretion in control of school libraries so long as that authority is not "exercised in a narrowly partisan or political manner." \textsuperscript{314}

While authors such as Daly and Welner argue for greater First Amendment protection for teachers, the general trend has been for courts to restrict First Amendment rights for teachers. Courts often view the political process, in the form of elected school boards, as the preferred

\textsuperscript{305} Daly, \textit{supra} note 225, at 46.

\textsuperscript{306} Id. at 6–16.

\textsuperscript{307} Id. at 52–62.

\textsuperscript{308} Id. at 31–38.

\textsuperscript{309} See, for example, \textit{Zykan v. Warsaw Community School Corp.}, where the court, though acknowledging the right of secondary students to receive information as a constitutional interest, rejected that students have a right to contest censoring of books and non-renewal of English teachers. \textit{Zykan v. Warsaw Cmty. Sch. Corp}, 631 F.2d 1300, 1304–05 (7th Cir. 1980); see also Daly, \textit{supra} note 225, at 33.


\textsuperscript{311} Id. at 868.

\textsuperscript{312} Id. at 866–67.

\textsuperscript{313} Id. at 869.

\textsuperscript{314} Id. at 853 (emphasis added). The Court may have also been influenced by the fact that the board initially established a committee to review the books and then went against the committee’s recommendation. \textit{Id.} at 857–58.
method to determine curriculum in elementary and secondary schools. As in Mayer, courts also often point to the compulsory nature of education as a reason for leaving curricular and pedagogical decisions to elected school boards. Unlike a university student who voluntarily chooses to take classes at a particular institution or from particular professors, public elementary and secondary students do not engage in such voluntary choice. The compulsory nature of education means that rather than the choices of individual teachers, the democratic political process is preferable to determining what messages students receive. As discussed by Welner, the Supreme Court has recognized as well the authority of schools, within certain limits, to inculcate values in students as opposed to being focused on serving as a marketplace of ideas. A significant function of elementary and secondary schools recognized by courts is to impart values, and strong advocates of control over teacher speech contend, with some merit, that the views and values presented in the classroom should not be left to the idiosyncratic whims of individual teachers.

The problem with the rhetoric in a case like Mayer concerning the need for school officials to be able to control teachers’ in-class speech is equating even modest First Amendment protections for teachers with potential chaos in the curriculum. Even courts sympathetic to teachers’ speech have recognized the dominant role of school boards in determining curricular and pedagogical matters. Accordingly, schools are not facing a problem of elementary and secondary teachers armed with extensive First Amendment academic freedoms running amok in the classroom and disregarding the approved curriculum. Instead, the reality confronting courts, and schools for that matter, involves whether teachers should be bereft of even limited First Amendment protections for in-class speech.

Potentially, the Garcetti decision may mark the final chapter in a general trend towards the dissolution of First Amendment rights for public school teachers. Garcetti may most adversely and seemingly unfairly affect the limited rights of teachers by eliminating any kind of requirement that some notice be given that a certain speech topic is prohibited. In evaluating the First Amendment standards that should apply to teachers’ in-class speech, courts need to look beyond simple rhetoric that casts democratically elected school boards versus individualistic teachers seeking to impose their views

315 See, e.g., Mayer v. Monroe County Cmty. Sch., 474 F.3d 477, 479–80 (7th Cir. 2007); see also Welner, supra note 4, at 967–72.
316 Welner, supra note 4, at 975–80.
317 See, e.g., Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (stating “[t]hrough varying tests courts have afforded schools great deference in regulating classroom speech”).
318 In Evans–Marshall, for example, the court did not challenge the authority of school officials to regulate the in-class speech of teachers, but denied a motion to dismiss in part based on allegations by the teacher that the school district had in fact already approved the novels used by the teacher and had not required prior approval to show PG–13 films. Evans–Marshall v. Bd. of Educ., 428 F.3d 223, 231–32 (6th Cir. 2005).
and values on captive students. As discussed in this Article, even those courts that are sympathetic to teachers' speech rights consistently recognize the authority of school boards and officials to determine curricular standards and to regulate teachers' in-class communications. One pressing issue facing courts concerns the existing modest limits on the authority of school officials, including restrictions on the discretion to discipline teachers for in-class speech that has not been prohibited or for speech that is related to the selection of district-approved novels or movies. Far from a battle for control over the classroom between the school board and its teachers, courts, in considering applying *Garcetti* to teachers' classroom speech, must decide whether teachers merit modest First Amendment protection for in-class communications, namely some kind of reasonable notice that certain categories of speech are prohibited.

**Conclusion**

In sweeping away from the purview of the First Amendment a whole category of public employee speech relating to performing one's employment duties, the *Garcetti* decision enacted a legal standard that maximizes the authority of government as employer. This standard is troubling in a public school context in several respects. By providing no exceptions, even for special circumstances, the *Garcetti* opinion means that a public school employee may be disciplined for sounding the alarm in situations where financial fraud exists or, most importantly, where the well-being of students is at stake. The uneven protections afforded under state whistleblower statutes means that teachers may or may not be able to look to such laws as an alternative means of protection in reporting official misconduct or wrongdoing. As shown in *Casey*, another problem with *Garcetti* is that employees may be subject to discipline for complying with statutory reporting requirements, a possibility that is as bewildering as it is troubling. Instead of communicating with supervisors, employees may look to circumvent the official channels of communication or remain entirely silent, often to the detriment of students and the community, in order to avoid the risk of retaliation.

Because of the benefit of hearing the views and concerns of employees, school districts may want to enact internal whistleblower policies or develop other mechanisms that permit employees to communicate concerns without fear of retaliation. Organizations that represent school administrators or

---


320 See supra Part II–A.

321 Though beyond the focus of this Article, it may be desirable to include provisions in state and federal education laws that prohibit retaliation against employees engaging in communication to comply with reporting requirements.
teachers or both may likewise want to explore ways to provide assistance for school employees on how, when warranted, to communicate concerns to the larger community without relinquishing all claims to protection under the First Amendment. The facts from a case like Cioffi\textsuperscript{322} highlight that at times the public benefits from the speech of teachers and administrators, especially when seeking to protect students and garner attention from school supervisors and boards who have become disengaged from important matters. In exceptional circumstances, such as when the health or well-being of students is at issue, school districts should not default to an unsound legal standard that does not promote good educational policy or outcomes.

It remains undetermined if \textit{Garcetti} applies to the in-class speech of teachers. The case may stand as the final stage in the loss of First Amendment rights for teachers’ in-class related communications. Rather than marking a stark contrast between the authority of school boards and unfettered First Amendment rights for teachers, applying \textit{Garcetti} to teachers’ speech would mean that public elementary and secondary teachers would be denied even the slight to moderate First Amendment protections for in-class speech that some courts have provided. Courts may want to give serious consideration to the desirability of treating teachers, who communicate on a variety of topics with numerous students and often must speak in an extemporaneous fashion, as serving only as the speech proxies for school boards. Instead, courts should engage in a realistic assessment of the types of communications engaged in by teachers and the modest consequences that might result from providing limited First Amendment protections for their in-class speech. The reality is that rather than causing unreasonable discretion for teachers to control speech in their classrooms, sensible First Amendment protections for teachers’ in-class communications would result in minimal safeguards to protect educators from arbitrary discipline or retaliation.

\textit{Garcetti} marks a significant, some would say troubling, decision in sweeping away communications made by public employees pursuant to fulfilling their employment duties from the purview of the First Amendment, and public school employees especially may feel the full brunt of this bright-line rule. States and school districts may want to examine the negative consequences that could result from overreliance on this decision. In exceptional circumstances, common sense suggests the desirability of making sure that school employees are not deterred from communicating legitimate, good faith concerns. After \textit{Garcetti} states and individual school districts should make sure that adequate safeguards exist to protect at least certain communications by public school employees. With teachers’ in-class speech, courts should consider that modest First

\textsuperscript{322} See \textit{supra} Part II-A.
Amendment protections are far removed from causing school boards to relinquish their control over the curriculum and what takes place in the classroom. The \textit{Garcetti} standards may hamper beneficial speech by public education employees, and courts and school officials should carefully consider the costs of denying public school employees some form of protection for speech made pursuant to fulfilling their teaching or other employment duties.