A Benign Prior Restraint Rule for Public School Classroom Speech

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Scott R. Bauries*

The classroom is perhaps the most vexing speech location in all of First Amendment law. The doctrine of the First Amendment has generally regarded the classroom as a nonpublic, or closed, forum for the purposes of both student and teacher speech,1 but that same doctrine has developed completely different sets of protection for these two categories of speakers.2 The doctrine that has developed in the classroom goes beyond the doctrine that normally governs other closed or nonpublic forums, where at least viewpoint discrimination is not generally permitted.3

The law of the classroom allows for restrictions on the speech—both its content and its viewpoint—of both teachers and students. Whether, and how, these restrictions apply depends in both cases on an initial

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1 There is, of course, a substantial amount of dispute over this question. See, e.g., Alan Brownstein, The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free-Speech Cases Involving School-Sponsored Activities, 42 U.C. DAVIS L. REV. 717 (2009) (recognizing, but rejecting, the characterization and arguing for the alternative of the “nonforum” for the classroom and the overall school); Alexis Zouhary, The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting, 83 NOTRE DAME L. REV. 2227 (2007-2008) (making the point that both schools and school classrooms are generally considered to be closed forums). For the purposes of this brief article, I do not attempt to resolve these disputes. Rather, I fit the Garcetti, Tinker, and Hazelwood decisions into their natural forum categories, with Garcetti and Hazelwood representing closed forums and Tinker, due to its protections against both content and viewpoint discrimination, representing a limited public forum, limited to certain participants (students).

2 See infra, sections on teachers and students as speakers under the First Amendment.

3 See, e.g., Emily Gold Waldman, Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech, 60 FLA. L. REV. 63, 66 (2008) (stating that the “question is not whether Hazelwood permits viewpoint discrimination, but when”) (emphasis in original); Brownstein, supra note 1 at 722 (“In a nonpublic forum, viewpoint-discriminatory speech regulations receive strict scrutiny while content-neutral and content-discriminatory regulations are evaluated under a lenient reasonableness standard of review”).
categorical determination of whether the speech occurred as part of a classroom or co-curricular lesson or activity. For student speech, if this is so, then *Hazelwood School District v. Kuhlmeier* treats the speech as having occurred in a closed forum, allowing for regulation of both its content and viewpoint based on “legitimate pedagogical concerns.” For teacher speech, if this is so, then *Garcetti v. Ceballos* leaves the speech completely outside the reach of the First Amendment, regardless of its content or viewpoint. Put another way, the categorical determination that speech occurred in the classroom or in a co-curricular activity leads to strong deference to the school in the case of student speech, and total deference to the school in the case of teacher speech.

Neither system of protections (or the lack thereof) adequately respects the individual expressive interests that animate the educational process, nor do they seriously engage with the inherently expressive and discretionary nature of the educational process, and neither will be able to be perfected any time soon. But the unfairness inherent in both sets of doctrine could be mitigated through a slight adjustment—limiting their application to prior restraints on speech. For speech that brings some sort of punishment or consequence on the speaker after the fact, the First Amendment has workable rules that are far superior to those that currently govern such speech in the classroom. For speech that the government wishes to suppress before it is made or published, however, the doctrines governing both teacher and student speech pose no serious speech autonomy or marketplace of ideas problems that are not outweighed by the importance of effective and efficient operation of public schools for all.

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Accordingly, this Article advances the claim that the First Amendment doctrines that apply to the classroom should adopt a benign prior restraint rule.\(^7\) In the case of teacher classroom speech, the *Garcetti* rule should apply where the government’s action in interfering with the speech constitutes a prior restraint—the First Amendment should not reach such interference. In cases where a teacher first speaks and then is later punished for that speech, however, basic notions of due process and the dangers of arbitrary governmental decision making are far more pressing, and the *Pickering*\(^8\) balance should be applied.

In the case of student speech, the *Hazelwood* rule is well-suited to the prior restraint of classroom speech because it encourages the government to lay out its legitimate pedagogical justifications for restraint in advance. But as with teacher speech, punishing student speech only after it is made or published gives rise to significant autonomy interests, due process interests, and marketplace of ideas concerns. Thus, this sort of interference should have to contend with the more demanding standard articulated in *Tinker v. Des Moines Independent Community School District*.\(^9\)

As this Article will show, this proposed rule distinguishing between prior restraints and later punishments is not a far step from either the *Garcetti* decision or the *Hazelwood* decision. Working within the categorical structure of the existing cases, it would also introduce a meaningful limit on the tendency of government administrators (and sometimes teachers) to act arbitrarily against ideas that they themselves disfavor, or more importantly, that powerful voices in the community disfavor.

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\(^7\) I refer to this proposed rule as “benign” to distinguish it from the traditional idea of the public censor on publishers as a prior restraint, which gave rise to the First Amendment’s speech protections in the first place. *See, e.g.*, Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 57 (1984).

\(^8\) Setting up a prior restraint requirement as a way to better protect speech is, of course, counter-intuitive, given this history, but it works because the entire doctrine of the First Amendment as relates to public school classrooms is also counter-intuitive.

\(^9\) *Tinker* allows regulation of student speech based on the less deferential requirement of “material and substantial disrupt[ion]” of the learning environment, a standard that applies to both content and viewpoint discrimination. *Id.* at 513-14.
The Classroom and the First Amendment

It has been said many times by many observers that education is a pervasively expressive activity. But the public school classroom is also, paradoxically, a place of restricted expressive rights. The reasons are complex. Below, I elucidate them, beginning with the place of the speech—the classroom—and then moving to the identities of the speakers—the teachers and students. As will become clear, the justifications for reduced First Amendment protections for both teachers and students are strong, but the current doctrine has privileged these justifications too much, resulting in doctrine that is both unthinking and needlessly detrimental to the discourse of the classroom.

The Classroom as a Speech Forum

The Supreme Court has, over the years, developed a set of doctrinal restrictions on the basic right of speakers to speak without interference from the government. This basic right might be thought of as the right to express oneself anywhere, anytime, in any manner, and on any topic, completely free from restriction of any kind. It is plausible to say that, under this baseline right, the Government’s sole role as to the expression of individuals and legal entities is to remain completely disinterested.

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11 See, e.g., Settle v. Dickson County School Bd., 53 F.3d 152, 155 (6th Cir. 1995) (“Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum”).

12 This section derives substantially from an earlier work of mine laying the same foundation. See Scott R. Bauries, Academic Freedom: An Ordinary Concern of the First Amendment, 83 MISS. L.J. 677 (2014). For ease of reading, quotation marks and block quotations of this work have been avoided.

13 As any student of the First Amendment would quickly realize, this “baseline right” is purely hypothetical because the doctrine of the First Amendment consists entirely of limitations on it, and has since the beginning. See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any
have in the past described the principle that governs this baseline role as the “neutrality principle.” The Supreme Court’s most recent full articulation of this principle came in the majority’s opinion in *Citizens United v. Federal Election Commission*.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

The neutrality principle is the bedrock of all First Amendment protection. Governmental discrimination against speakers with particular viewpoints on favored topics, or against all speakers on disfavored topics, or against particular speakers or classes of speakers

manner that may be desired”); Cox v. New Hampshire, 312 U.S. 569, 574 (1941). Nevertheless, it is necessary to begin by deconstructing these limitations to reveal what they limit, and then to continue by reconstructing the limits, that we might better understand where each fits within the First Amendment superstructure.


16 Id. at 312 (citing United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000)).

17 Id. at 312-13 (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)).

18 Id. at 340-41; see also Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 Hastings Const. L.Q. 131, 133 (2010) (“*Citizens United* radically affirmed the principle that the First Amendment must be neutral as between different speakers, holding that even corporate speech (at least on political matters) is fully protected by the First Amendment and cannot be subject to increased regulation merely because of its corporate authorship”).

regardless of topic, all presumptively violate the First Amendment.\textsuperscript{20}

But in practice, a strict neutrality principle is difficult to uphold in every case, or even in most cases. Under the baseline expressive right and the baseline responsibility of government to remain completely disinterested in expression, the potential problems become obvious. The classic objection asks what we should do when someone shouts “Fire!” in a crowded theater, causing a panic and possibly injury and death.\textsuperscript{21} Other classical critiques ask what we should do about speech that falsely defames the reputation of another, or speech that defrauds, or speech that puts another in reasonable fear for his life or safety. These questions and many others have caused the doctrine of the First Amendment to develop mostly as a set of limitations on the baseline right to speak however, whenever, and wherever one pleases, expressing whatever viewpoint one has on whatever topic one might choose to address. Indeed, it is plausible to say that the baseline right is largely hypothetical, and it is the limitations on this hypothetical basic right that make up the entire doctrine of the First Amendment.

These doctrines of limitations in expressive rights break down under three analytical categories—content-based exemptions, government role analysis, and forum analysis.

Content-based Exemptions

The simplest of these doctrines of limitation are the various content-based categorical exemptions from First Amendment protection that the courts have constructed over time.\textsuperscript{22} Harry Kalven referred to the theory underlying these exemptions as the “two-level theory,” owing to the fact that exemptions are typically created due to a determination by the Court

\textsuperscript{20} See Karst, supra note 14, at 40 (criticizing Alexander Meiklejohn’s value-based theory of the First Amendment and stating, “A vital public forum requires a principle of equal liberty of expression that is broad, protecting speakers as well as ideas”). This presumptive protection can be overcome, but the government must meet a very demanding burden to overcome it. See, e.g., Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2417 n.1 (1996) (introducing the general rule that content- or viewpoint-based restrictions imposed on speech by the government, acting in its sovereign capacity, must overcome strict scrutiny).

\textsuperscript{21} Schenck v. United States, 249 U.S. 47, 52 (1919) (opinion of Holmes, J., for the Court) (“The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic”).

\textsuperscript{22} See Bauries & Schach, supra note 10, at n.5 (collecting cases establishing the various low-value speech exceptions).
that the exempted content constitutes “low-value” speech.\textsuperscript{23} These exemptions today include such speech categories as “true threats,”\textsuperscript{24} “obscenity,”\textsuperscript{25} “fighting words,”\textsuperscript{26} “incitement of imminent lawless activity,”\textsuperscript{27} and several others.\textsuperscript{28}

These categories of speech content have been judicially deemed to be of such low value to the public discourse that they qualify for reduced, or even no, First Amendment protection. Inside schools, the categories apply, but courts do not often find it necessary to discuss them due to the other standards that apply to all speech in schools, as discussed below.

Government Role Analysis

Government role analysis asks what role the government occupies toward a speaker when it acts to suppress or punish that speaker’s speech. Familiar roles that the Court has recognized include government-as-employer; government-as-patron; government-as-proprietor; and more recently, government-as-speaker.\textsuperscript{29} Each of these roles entitles the government’s interests to greater initial weight in an \textit{ex ante} balancing of interests than these interests would receive in some cases if \textit{ex post} balancing were used.

For example, when the government acts as a patron of the arts, which it does primarily through the funding of grants, it must have the power to discriminate between works of art or proposed works of art as to their quality.\textsuperscript{30} Arts funding is limited, and it does not serve the public interest to fund art projects that are of low quality or impact. But in order to direct

\textsuperscript{23} Harry Kalven, Jr., \textit{The Metaphysics of the Law of Obscenity}, 1960 \textit{SUP. CT. REV.} 1, 10 (1960).
\textsuperscript{24} \textit{E.g.}, Virginia v. Black, 538 U.S. 343 (2003).
\textsuperscript{25} \textit{E.g.}, Miller v. California, 413 U.S 15 (1973).
\textsuperscript{26} \textit{E.g.}, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
\textsuperscript{27} \textit{E.g.}, Brandenburg v. Ohio, 395 U.S. 444 (1969).
\textsuperscript{28} \textit{See} Bauries & Schach, \textit{supra} note 10.
\textsuperscript{30} \textit{See} PAUL HORWITZ, \textit{FIRST AMENDMENT INSTITUTIONS} 61 (2013) (describing arts funding as one of the “snares” inherent in an “acontextual” approach to the First Amendment).
limited public funding to projects of high value, the government must make a determination—one based on content—as to which of two competing works or proposed works is of higher quality.\textsuperscript{31}

One government role that has particular significance to the issues discussed in this Article is the role of “government-as-employer.”\textsuperscript{32} When the government acts as an employer, it must maintain a certain level of control over its workplace, both to protect the quality of the services it offers to the public and to ensure that its employees do not violate the rights of private individuals. When the government is an employer in certain of its workplaces, it inevitably employs people, such as attorneys, teachers, professors, and press secretaries, who “speak” for a living.

Pickering \textit{v. Board of Education},\textsuperscript{33} the leading case on public employee speech rights, illustrates the case-by-case approach. In \textit{Pickering}, a local Board of Education dismissed a teacher after he sent a letter to a newspaper criticizing the Board’s prior handling of proposals to increase the Board’s revenues.\textsuperscript{34} The Board determined that the letter was “detrimental to the efficient operation and administration of the schools of the district” and that these interests justified his dismissal.\textsuperscript{35} The Court held the dismissal unconstitutional, holding that, absent substantial justification, “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”\textsuperscript{36} The Court engaged in a balancing of the interests of the Board as an employer and the interests of Mr. Pickering as a participant in public debate. The Court ultimately concluded that the Board could state no interest sufficient to overcome the interest of Mr. Pickering in participating as an ordinary citizen in an important public discussion.

In 1983, the Supreme Court modified \textit{Pickering} through its decision in Connick \textit{v. Myers},\textsuperscript{37} holding that a public employee’s internal questionnaire, circulated among her co-employees, was unprotected

\begin{itemize}
\item \textsuperscript{31} See Nat’l Endowment for Arts \textit{v. Finley}, 524 U.S. 569, 587-88 (1998) (“Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake”).
\item \textsuperscript{32} See, e.g., Areen, \textit{supra} note 30, at 990-91 (describing this role).
\item \textsuperscript{34} \textit{Pickering}, 391 U.S. at 564.
\item \textsuperscript{35} \textit{Id}. at 564-565 (citations omitted).
\item \textsuperscript{36} \textit{Id}. at 574.
\item \textsuperscript{37} 461 U.S. 138 (1983).
\end{itemize}
speech, due to its nature as a personal employee grievance, rather than a matter of public concern, and also due to its negative impact on office operations and efficiency. After Connick, a court facing a First Amendment retaliation claim is required to engage in a threshold inquiry, which requires the court, prior to engaging in the Pickering balancing test, to first ascertain whether the employee’s speech addressed a matter of public concern. If the answer to this question is “no,” then the speech is unprotected. If the answer is “yes,” then the court proceeds to the Pickering balancing test, but this threshold determination of public concern precedes the Pickering test in all cases.

Following Pickering and Connick, the Court entertained few public employee First Amendment retaliation claims. However, one significant pre-Connick case, Givhan v. Western Line Consolidated School District, further clarified that neither the place nor the target of the speech in question is dispositive when determining whether the speech is protected. In Givhan, the Court held that an employee’s internal complaints to her principal about possible race discrimination in personnel decisions at her school site were protected speech. Thus, the fact that speech on a matter of public concern is made while an employee is at work, to a superior, or otherwise through internal channels (rather than through a public medium), does not render the speech unprotected.

Most observers saw Connick as a tilting of the Pickering balance in favor of employers, but the basic protection for public employee speech remained. This was the state of public employee First Amendment law when Chief Justice Roberts took the gavel—a general protection of the speech of public employees on matters of public concern against retaliation, subject to override where employer interests outweigh the

38 Id. at 150-54.
40 Id. at 858.
41 Id. at 861.
43 Id. at 415-16.
45 Indeed, the Court added one more significant precedent a few years after Connick, Rankin v. McPherson, recognizing an expansive definition of “matter of public concern.” See Rankin v. McPherson, 483 U.S. 378, 381, 385 (1987) (holding that a public employee’s expression of hope that the failed shooters of President Reagan in 1981 “get him” if they were to try again was speech on a matter of public concern).
interests of the employee in speaking and the public in receiving the message.

One of the Roberts Court’s earliest decisions, *Garcetti v. Ceballos* was what many consider to be a radical departure from the *Pickering* regime, even as limited by *Connick* and *Mt. Healthy*. Like *Connick*, *Garcetti* did not involve an academic employee. Ceballos, the plaintiff, was a “calendar deputy” for the Los Angeles District Attorney’s Office. Consistent with his responsibilities in this role, at the urging of defense counsel in a pending case, Ceballos examined a search warrant that had been obtained against the defense counsel’s client.

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

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

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47 *Id.* at 413.
48 *Id.* at 413-15.
49 *Id.* at 414.
50 *Id.*
51 *Id.* at 415.
52 *Id.*
53 *Id.*
54 See *id.* 420-26.
55 *Id.* at 415.
We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.\(^56\)

The \textit{Garcetti} Court’s choice to adopt a categorical rule excluding certain speech from First Amendment protection has drawn fervent criticism. Multiple legal commentators have critiqued the decision on the grounds that it is unthinkingly formalistic.\(^57\) These critiques center upon the Court’s adoption of a threshold categorical rule to precede, and in some cases preclude, the interest balancing that would otherwise be conducted in cases alleging First Amendment retaliation.\(^58\) Commentators generally contend that a categorical rule is inappropriate in the context of the First Amendment,\(^59\) and that any such rule is likely to render

\(^{56}\) \textit{Id.} at 421.

\(^{57}\) See, e.g., Secunda, \textit{Right-Privilege, supra} note 6, at 912; Secunda, \textit{Federal Employees, supra} note 6, at 123 (“Consistent with Justice Stevens’ dissent in \textit{Garcetti}, I reject the dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both.”); Charles W. “Rocky” Rhodes, \textit{Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism}, 15 WM. & MARY \textit{BILLS Rts. J.} 1173, 1174, 1192 (2007).

\(^{58}\) Sources cited \textit{supra} note 57.

\(^{59}\) \textit{Garcetti} was not the first case in which the Supreme Court set down a categorical rule creating an exemption from First Amendment scrutiny. Under the current understanding of the First Amendment, there are several such exemptions, each of which describes a category of speech that does not qualify for First Amendment protection. See, e.g., \textit{Virginia v. Black}, 538 U.S. 343 (2003) (true threats); \textit{Miller v. California}, 413 U.S 15 (1973) (obscenity); \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568 (1942) (fighting words); \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969) (incitement to imminent lawless activity); \textit{N.Y. Times v. Sullivan}, 376 U.S. 254 (1964) (defamation, including a modified, but still categorical, exception if the subject is a public figure); see also \textit{New York v. Ferber}, 458 U.S. 747 (1982) (child pornography). \textit{But see Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002) (striking down portions of the federal statute criminalizing child pornography, 18 U.S.C. § 2256, as overly broad). In addition to these categories, several speech-related acts have been criminalized or have formed the basis of tort liability in the states with little resulting First Amendment scrutiny. See, e.g., ERWIN CHEMERINSKY, \textsc{Constitutional Law: Principles and Policies} 1078-91 (4th ed. 2011) (discussing defamation together with privacy torts and intentional infliction of emotional distress). Professor Sheldon Nahmod has pointed out that each of these categories is based on the content of the speech and its intrinsic value, rather than the identity of the speaker, and that the \textit{Garcetti} exemption presents a departure from traditional First Amendment principles. Sheldon H. Nahmod, \textit{Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos}, 42 U. \textsc{Rich. L. Rev.} 561, 570-71 (2008).
unprotected speech that ought to be protected, considering the purposes of the First Amendment. This is a familiar critique of formalist rules, but one commentator has pointed out that the decision is likely to lead to results contrary even to the professed values of formalist judging—namely the fostering of predictability and the cabining of the influence of ideology in the judicial process. Indeed, many courts applying Garcetti have over-read the case to deny First Amendment protection of any kind to speech simply made during the course of a public employee’s employment, or speech related to a public employee’s employment. These rulings have caused many to conclude that Garcetti was wrongly decided, and have been used as support for more general critiques of the formalism of the Roberts Court.

The Pickering-Garcetti line of precedent recognizes that the government must be able to exercise some control over the speech of its employees who are hired to speak, and Garcetti held that the government may exercise total control where the speech is made “pursuant to official duties.” As is true in the context of categorical exemption from the First Amendment’s protection, this line of precedent inherently lessens, and in some cases completely eliminates, the government’s duty of neutrality toward speech and speakers.

Another government role that is particularly important to this Article’s analysis might best be described as “government as educator.” In its role as the provider of public education to the vast majority of school-age children in the country, the government may restrict the speech of students

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61 Rhodes, supra note 57, at 1193.
62 See Bauries & Schach, supra note 10 (documenting the broadening of the Garcetti categorical exemption in lower court decision making).
63 Rhodes, supra note 57, at 1174; Secunda, Federal Employees, supra note 6, at 117; Norton, supra note 60, at 83; Nahmod, supra note 60, at 54.
64 Secunda, Right-Privilege, supra note 6, at 911.
66 See generally Zouhary, supra note 1, at 2254-55 (explaining the speech-restrictive privileges the government obtains when it steps into its role as educator). Judith Areen uses this term to describe a proposed reconceptualization of state governments as higher education providers. Areen, supra note 29. Here, I am using the term more broadly to reflect the substantial body of case law that governs student speech in public schools and classrooms.
to protect its ability to accomplish its public duty to educate.\textsuperscript{67}

For example, even the political speech of students may conceivably be limited in schools if it causes or portends a material and substantial disruption of the learning environment. This rule comes out of the seminal case of \textit{Tinker v. Des Moines Independent Community School District}.\textsuperscript{68} In \textit{Tinker}, several students wore black armbands to protest the Vietnam War, and they were punished as a result. Uttering those famous words that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”\textsuperscript{69} the Supreme Court held that student speech may be suppressed based on its content or viewpoint only if such speech “materially and substantially disrupt[s] the work and discipline of the school.”\textsuperscript{70}

Based on \textit{Tinker} and subsequent student speech decisions, the Court permits school administrators to suppress speech in schools that is lewd or outside the bounds of decorum.\textsuperscript{71} The Court has even approved a school administration’s ability to limit student speech outside the physical limits of the school grounds where it was evident to the Court that the speech occurred at a “school sponsored function.”\textsuperscript{72} But these cases presented scenarios that convinced the Court that disrupting the learning environment was inevitable where speech conflicted with or urged the rejection of school rules of behavior—a debatable case surely, but one within the \textit{Tinker} standard nonetheless. So, in most of their interactions outside the classroom, students enjoy capacious, but not unlimited, First Amendment protections, and administrators must steer widely around any prohibitions on political or other speech based on its content or viewpoint unless they can convincingly predict a material and substantial disruption

\begin{footnotesize}
\textsuperscript{67} Zouhary, \textit{supra} note 2, at 2254-55.


\textsuperscript{69} Id. at 506.

\textsuperscript{70} \textit{Id.} at 513-14. The Court also mentioned “colliding with the rights of others” as a potential basis for suppression. \textit{Id.} at 513 (\textit{quoting} Burnside v. Byars, 363 F. 2d 744, 749 (5th Cir. 1966)). Many commentators, and some courts, have treated this concern as being a “second prong” of the \textit{Tinker} test, justifying speech suppression even where no substantial disruption to learning happens or is reasonably predictable, if the speech in question is found to “collide with the rights of others.” Whatever that vague phrase may mean, there was no plausible argument in \textit{Tinker} that the rights of other students were being interfered with, and no Supreme Court case since has rested its approval of a restriction of student speech on that ground, so the sometimes-alleged “second prong” of \textit{Tinker} was likely an aside or a way of restating the “substantial interference” rule, rather than a separate dimension of the Court’s test.

\textsuperscript{71} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

\textsuperscript{72} See Morse v. Frederick, 551 U.S. 393, 401-02 (2007).
\end{footnotesize}
to the school environment.

As to speech within the classroom or in furtherance of co-curricular activities such as student newspapers, a different set of rules applies. The foundational case in this area, Hazelwood v. Kuhlmeier, held that public school officials may censor student speech by removing certain items from student newspapers published as part of school journalism classes, provided that such removal or censoring is done to serve “legitimate pedagogical concerns.” The Court justified this rule based in part on forum analysis. The Court reasoned that, rather than being a designated public forum for student expression, the school newspaper was part of the school’s curriculum, and therefore was a closed or nonpublic forum, in which speech could be subjected to restrictions reasonable in light of the purposes of the forum.

Because Hazelwood was decided in the context of the censoring of a school newspaper, it is reasonable to ask what the case has to do with student speech in the non-journalism class. However, the Court’s framing of its holding makes clear that it was working under the assumption that classroom speech could be restricted in the same way. Drawing a connection between the co-curricular newspaper activity at issue in Hazelwood and the classroom, the Court developed its “legitimate pedagogical justification test” as uniquely suited to, and reasonable in light of, the delivery of the school’s curriculum:

These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

So, the Court, assuming that speech made in the classroom would be part of the school’s curriculum, then extended the analysis to activities which might not occur in the classroom, but which would “carry the imprimatur of the school.” By drawing this connection, the Court made it clear that both the classroom and certain co-curricular activities carry with them the

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74 Id. at 267 (citations omitted) (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 n.7, 47 (1983)).
75 Id. at 270.
76 Id. at 270-71.
“imprimatur of the school,” and that speech can therefore be restricted in both environments based on “legitimate pedagogical concerns.”

Forum Analysis

Some of the roles the government may assume are straightforward, while other roles have multiple levels of complexity. The greatest complexity in the doctrine results when the government assumes the role of the owner or manager of property, what we might term, “government-as-proprietor.” In this role, the government, like any property owner or controller, must sometimes exercise control over who may access a certain piece of property and what such persons may do once on the property. This necessity has spawned a truly byzantine web of doctrinal rules, collectively placed under the label “forum analysis,” which determine the extent to which government may suppress or control speech or speakers on its own property, or on property within its control.

The basic distinctions break down into four categories of forums: the traditional public forum, the designated public forum, the limited public forum, and the closed or non-public forum. A traditional public forum is a government-owned space, such as a public park, a beach, or a sidewalk, which has traditionally been “held in trust for the public” and has been freely used by speakers to proclaim things to the public. In such a forum, no content or viewpoint discrimination is allowed unless the

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77 See Waldman, supra note 4 (outlining the application of Hazelwood to student speech in the classroom). Incidentally, Prof. Waldman’s article does an excellent job of disentangling what was then a confusing web of applications of Hazelwood to all sorts of speech, including the speech of teachers. As this Article demonstrates, Garcetti likely subsumes any prior caselaw applying Hazelwood to teacher speech, so Prof. Waldman was quite prescient in arguing for a return to Hazelwood as purely a student speech case, as it is treated here. See Waldman, supra note 3.

78 See, e.g., Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied”).

government can defend such a restriction as necessary to achieve a compelling government interest, but the government may adopt reasonable “time, place, and manner” restrictions, so long as such restrictions are reasonable in light of the expressive interests of speakers and listeners.\(^80\)

For a piece of government property to be a traditional public forum, it must have been used by the public historically for the purpose of speech.\(^81\) For all other government property, the government has the baseline right of exclusion that all property owners have. But the government can also designate a piece of its property that has not traditionally been used for speech as being open for that use. This latter type of forum is called a “designated” or “open” forum, and it places the same restrictions on government as the traditional public forum as to the regulation of speech by its content or viewpoint.\(^82\)

The other two categories grant the government more power to restrict speech, and these categories are the most relevant to the topic of classroom speech. Just as the government may designate a piece of its property to be open to speech, it may also designate that property to be open only for a particular category of speech topics or a particular class of speakers. If so, then the forum is termed a “limited public forum.”\(^83\) A school board meeting, for example, might be designated a limited public forum for discussion of property tax rates, or a publicly owned auditorium might be designated a limited public forum for the presentation of candidate debates for an upcoming election. Lyrissa Lidsky offers a succinct explanation of the general rules that apply in this type of forum:

When the State decides to open a public forum but limits it to certain speakers and topics, the State’s establishment of forum parameters is constitutional, so long as the parameters are reasonable and viewpoint neutral. When the State applies the forum criteria and excludes a speaker based on the subject matter of his speech, the exclusion need only be “reasonable in light of the purposes served by

\(^{80}\) *Id.* at 1982. Of course, as with many rights-based limitations on government power, the government can surmount the prohibition on its regulation of speech in a public forum even based on content by satisfying the demanding “strict scrutiny” test, which requires that the government establish a compelling government interest in regulating the speech and that the regulation in question is narrowly tailored to the government’s interest. *Id.*

\(^{81}\) *Id.*

\(^{82}\) *Id.* at 1984.

\(^{83}\) *Id.* at 1984-85.
the forum” and viewpoint neutral, though there is some indication that the Court may be especially stringent in examining viewpoint neutrality if religious viewpoints are involved. Finally, when a State opens a public forum but excludes a speaker whose speech obviously falls within the subject matter constraints of the forum, the exclusion is subject to strict scrutiny.  

Finally, a closed or non-public forum is a similar piece of property that the government has not opened up to the public for debate on any topic. In such a forum, the government-as-property-owner’s power to select and exclude speakers is paramount, and the government may exclude most speakers and even most potential listeners, as long as such exclusions are reasonable in light of the purpose of the forum, and as long as it does not exclude them on the grounds that it disfavors their viewpoints.  
The leading case recognizing such a closed forum is *Perry Education Association v. Perry Local Educators’ Association*, in which the Court held the faculty mail system to be closed to a rival teacher’s union, even though it was opened to communications from the then-current bargaining representative.  

Intuitively, the classroom most appropriately fits within the concept of the closed or nonpublic forum, because it is well accepted that the government need not permit any speakers within the classroom other than the students, teachers, and school personnel who generally occupy it. But, as to both teachers and students as speakers, the classroom manifestly does not follow the rules of that forum. To understand why, we must examine the different doctrinal limitations that apply in the classroom to teachers and students as speakers.

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84 *Id.* at 1988-89 (internal citations omitted).
85 *Id.* at 1989.
87 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (comparing the student newspaper at issue in that case with the classroom and justifying content and viewpoint restrictions based on “legitimate pedagogical concerns” in both).
88 Contrariwise, the overall school environment (hallways, athletic fields, etc.) outside of class and co-curricular activities operates more like a limited public forum, limited to certain participants, but not to certain topics of conversation or viewpoints. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
The Teacher as a First Amendment Speaker

Teachers and administrators are simultaneously: 1) Employees, who often must speak to fulfill their contractual employment duties; (2) Citizens, who may speak responsibly on matters of public concern; and 3) Embodiments of “the State,” which the Constitution disables from acting to limit the rights of the other participants in the marketplace of ideas. Like all public employees, public school teachers maintain their basic constitutional rights despite their status as government employees. Under the “unconstitutional conditions” doctrine, a public entity may not condition the provision of a public benefit—including public employment—on one’s relinquishment of a constitutional right.

Nevertheless, courts have permitted the government, acting in its role as employer, to limit public educational employees’ speech that would otherwise be protected in a non-employment setting. In most cases, these limitations have sought to protect interests similar to those served by limits on student speech, often centering on concerns of pedagogical effectiveness and school managerial interests. Until recently, such limitations have largely emerged through case-by-case analysis, rather than through categorical rules. However, the Court’s recent decision in Garcetti, discussed above, introduced the categorical rule completely excluding job-required speech from the First Amendment’s protections,

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90 See id. at 93 (discussing the “state action” doctrine in schools).
91 See, e.g., Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (holding that a public university cannot condition employment as a professor on the professor’s signing of a “Loyalty Oath”); Kathleen A. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1415 (1989) (outlining the state of the “unconstitutional conditions” doctrine). But see Secunda, Right-Privilege, supra note 6, at 912 (arguing that the Supreme Court’s line of decisions in Pickering, Connick, and Garcetti have weakened the unconstitutional conditions doctrine to the point of near obliteration).
92 See Williams v. Dallas Ind. Sch. Dist., 480 F.3d 689, 690-691 (5th Cir. 2007); Mayer v. Monroe Cnty. Cnty. Sch. Co., 474 F.3d 477 (7th Cir. 2007); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192 (5th Cir. 2007).
93 See, e.g., Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 370 (4th Cir. 1998) (“We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum”); see also Lawrence Rosenthal, The Emerging First Amendment Law of Managerial Prerogative, 77 FORDHAM L. REV. 33 (2008) (arguing that Garcetti is the latest in a series of Supreme Court decisions elevating “managerial prerogative” to constitutional status).
regardless of its content or viewpoint.\textsuperscript{94}

Read on its own literal terms, the \textit{Garcetti} rule would plainly bring within its ambit all of the pedagogical and scholarly academic speech of public school teachers. Speaking of the analogous case of public university professors, Justice Souter pointed out in his dissent:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to . . . official duties.”\textsuperscript{95}

In response to Justice Souter’s concerns about the teaching and scholarship of higher education academics, Justice Kennedy hedged:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.\textsuperscript{96}

Nevertheless, whatever Justice Kennedy meant in response to Justice Souter’s concern, it is clear that the terms of the \textit{Garcetti} exclusion apply squarely to the expression of public school teachers in the classroom. Teachers in the classroom, at least while delivering curricular content, managing student behavior, and responding to questions about the material, \textit{always} speak “pursuant to their official duties.”

The \textit{Garcetti} rule, recall, does not contain any exception for the suppression or punishment of speech based on its content or even its viewpoint. If it is speech made pursuant to an official duty to speak, it is categorically unprotected. This means that the classroom, at least for teachers, lacks the protections of even a closed or nonpublic forum (the

\textsuperscript{94} See \textit{supra} notes 46-65 (discussing \textit{Garcetti}).


\textsuperscript{96} \textit{Id.} at 425.
forum category it is typically assumed to occupy) because even a closed or nonpublic forum requires that excluding or silencing a speaker due to disagreement with his viewpoint be justified by strict scrutiny. In fact, teacher speech in the classroom occupies a status equivalent to “low-value” speech, such as speech inciting a riot, or child pornography, which also receive no protection, regardless of viewpoint. Based on this reading, then, it would seem that, rather than a closed or nonpublic forum, the classroom is a zone of no protection when it comes to teacher speech.

As an illustration, in Mayer v. Monroe County Community School Corporation, the Seventh Circuit heard the case of a probationary elementary school teacher whose contract was not renewed after she answered a question from a student in her class. In a current events lesson, Mayer was discussing political protests. In response to a student’s question whether Mayer had personally participated in a political demonstration, Mayer said that she did honk her car horn when passing a placard that read “Honk for Peace” during the second Iraq War.

After the school district declined to renew her contract, Mayer sued for retaliation, citing this in-class expression as the basis. During the course of the suit, Mayer stipulated that speaking on current events was one of her official duties, and she rested her hopes entirely on the principles of academic freedom in seeking the First Amendment’s protection. This stipulation made the Seventh Circuit’s decision on the threshold question easy—if speaking to her students on the topic of current events was one of her official duties, then her statements made during the current events lesson in question constituted speech “pursuant to” such duties. However, Mayer contended that the Garcetti rule does not control

97 See, e.g., Chemerinsky, supra note 19, at 57.
98 See Bauries & Schach, supra note 10, at 358, n.5.
99 Professor Alan Brownstein proposes and defends the new concept of the “nonforum” as the category that should govern speech in schools and at school-sponsored functions. See Brownstein, supra note 1. This proposed new forum category, which immunizes speech from any judicial review, governs student, rather than teacher, speech, but it is analogous to the complete lack of protection for teacher classroom speech under current doctrine.
100 474 F.3d 477 (7th Cir. 2007).
101 Mayer, 474 F.3d 478.
102 Id. at 479. Based on the Seventh Circuit’s traditional approach to the topic and the lack of helpful precedent from the Supreme Court, see generally Bauries, supra note 12, Ms. Mayer’s legal strategy to rely on academic freedom was likely a mistake, and a better approach would have been to contest the compulsory nature of her current events lesson.
103 Id. at 480.
classroom speech.\textsuperscript{104}

The court rejected this contention. The Seventh Circuit has historically held that classroom teachers do not have the freedom to choose instructional materials or deliver instruction in ways conflicting with the wishes of their supervisors.\textsuperscript{105} Building from this existing rule, the court explained that “the school system does not ‘regulate’ teachers’ speech as much as it \textit{hires} that speech.”\textsuperscript{106} The court described a teacher’s classroom speech as a “commodity” that the teacher “sells” to the school district, and explained that, as such, a teacher of history may not contradict his district’s wishes by engaging in revisionist instruction, and a teacher of math may not elect on her own to teach calculus instead of trigonometry.\textsuperscript{107} The court also pointed out that, unlike in most employee speech cases, K-12 teachers address their speech to a captive audience, a fact which necessitates that curricular and pedagogical decisional authority rest with those who may be voted out of office for poor decisions.\textsuperscript{108}

Similarly, in \textit{Evans-Marshall v. Board of Education},\textsuperscript{109} the Sixth Circuit considered the claim of a high school English teacher who had experienced negative reactions—first from the community, then from the Board of Education, and finally from her principal—regarding her book choices and the pedagogical strategies that she used in relation to the books.\textsuperscript{110} Ultimately, the Board voted unanimously not to renew the teacher’s contract, and the teacher sued, alleging unconstitutional interference with and retaliation for her exercise of an alleged right “to select books and methods of instruction for use in the classroom without interference from public officials.”\textsuperscript{111} When the case reached the Sixth Circuit, the court rejected the plaintiff’s argument that \textit{Garcetti} should not

\begin{footnotesize}
\textsuperscript{104} \textit{Id.} at 479.
\textsuperscript{105} \textit{See id.} (citing \textit{Webster v. New Lenox Sch. Dist. No. 122}, 917 F.2d 1004 (7th Cir. 1990) (holding that a classroom teacher did not possess a right to teach his students that the Earth was thousands, rather than billions, of years old).
\textsuperscript{106} \textit{Id.} (emphasis in original).
\textsuperscript{107} \textit{Id.} (“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 \textit{Moby-Dick} in a literature class can’t use \textit{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”).
\textsuperscript{108} \textit{Id.} at 479-80.
\textsuperscript{109} 428 F.3d 223 (6th Cir. 2010).
\textsuperscript{110} \textit{Id.} at 223-26.
\textsuperscript{111} \textit{Id.} at 223.
\end{footnotesize}
be held applicable because of the Supreme Court’s failure to squarely address the issue.\textsuperscript{112} The court acknowledged that the exchange between Justice Kennedy and Justice Souter in the \textit{Garcetti} opinion left open the application of the \textit{Garcetti} rule to certain academic speech, but that K-12 classroom teaching is not among this speech.\textsuperscript{113} The court ultimately held that classroom teaching and expressive pedagogical choices, as speech made “pursuant to official duties,” are unprotected under the First Amendment.\textsuperscript{114}

\textit{The Student as a First Amendment Speaker}

Students are certainly citizens with speech rights, but they are also public charges, such that their speech rights may be limited for their own protection, as well as for the protection of other students engaged in the educational process alongside them.\textsuperscript{115} It is a familiar axiom that students do not completely “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{116} Nevertheless, as discussed above, First Amendment doctrine holds that student speech in public educational settings does not demand the same constitutional protections that similar speech made in open public forums would require.\textsuperscript{117}

As discussed above, it is most plausible that, due to the Court’s categorical determination that curricular activities, including activities in the classroom, are part of a closed or nonpublic forum, \textit{Hazelwood}, rather

\textsuperscript{112} \textit{Id.} at 233-34.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 230.
\textsuperscript{115} See, e.g., Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247 (11th Cir. 2003) (“Although public school students’ First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve”); CAMBRON-MCCABE, MCCARTHY, & THOMAS, supra note 89, at 94-107 (discussing student rights to free expression). Prof. Brownstein calls into question this “reduced rights” paradigm, and he is correct as he frames the comparison—which is one between adult speech in closed forums and student speech outside the classroom in school or at school-sponsored functions. See Brownstein, \textit{supra} note 1, at 729-42. But in the classroom, where the speech of students can clearly be restricted based on its viewpoint even absent a “compelling government interest” and “narrowly tailored means,” students certainly have less expansive rights than adults do in any forum they might occupy, even a closed forum.
\textsuperscript{117} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); Morse v. Frederick, 551 U.S. 393, 396-397 (2007).
than *Tinker*, governs student expression in the classroom. Within this paradigm, since the *Hazelwood* case was decided, commentators have puzzled over whether the Court intended to approve viewpoint discrimination by schools and school officials in curricular settings. A close reading of the decision, including the way the majority chose to frame its holding, as well as the evidence at issue in the case, make the contrary case difficult to support.\(^\text{118}\)

Based on the facts before the Court, the way in which the Court developed its holding, and the most natural implications of the ruling, it is clear that the *Hazelwood* rule allows for viewpoint discrimination. Most basically, this rule construed this way simply makes sense. A teacher cannot be compelled to allow a student, during an open class discussion of World War II, to deliver a Holocaust denial diatribe, for example, even though telling him to sit down and shut up would qualify as classic viewpoint discrimination.\(^\text{119}\) If the *Hazelwood* rule would not permit that sort of censorship, then what rule would? The student in this hypothetical is participating in an open class discussion, so his expression of his viewpoint cannot be said to be materially and substantially disruptive of the learning environment, in the *Tinker* sense. Indeed, his contribution, though disturbing and manifestly incorrect, is on point, providing the teacher with one of those “teachable moments” that engage the dialectical classroom process. He also offers his own unvarnished opinion, so his expression cannot be plausibly characterized as “government speech.”\(^\text{120}\)

The *Hazelwood* rule is all that remains that might allow for the teacher to simply tell the student he is not permitted to express such an opinion on this point—an action that is perfectly defensible, and may be quite

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\(^{118}\) See Zouhary, *supra* note 1, at 2252-53 (outlining several reasons, including the text of the Court’s holding, that *Hazelwood* authorized viewpoint discrimination); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 186 (2007) (concluding that *Hazelwood*’s language compels this conclusion); Samuel P. Jordan, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1556 (2003) (“If a constitutional exception permitting restrictions on student points of view is not compelled by *Hazelwood*, it is at least arguably consistent with a fair reading of the decision”).

\(^{119}\) See Waldman, *supra* note 3, at 66 (“The real question is not whether *Hazelwood* permits viewpoint discrimination, but when”) (emphasis in original); see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (holding that governmental restrictions on speech and speakers in even closed forums must be “viewpoint-neutral”).

\(^{120}\) Brownstein, *supra* note 1, at 751. When expression is considered to be the government’s own expression, the general prohibition against content and viewpoint discrimination does not apply. See, e.g., Rust v. Sullivan, 500 U.S. 173, 193 (1991).
necessary, from a pedagogical standpoint to prevent the other students from becoming sympathetic to an idea that has no empirical or historical support, or at least to teach students to distinguish between historical facts and unfounded conspiracy theories.

Other than this common sense reading, vital elements of *Hazelwood* itself indicate that the Court knew it was approving a rule that would allow for viewpoint discrimination for pedagogical reasons. For example, the viewpoint discrimination question came up frequently at oral argument.\(^{121}\) Justice Scalia engaged in a lengthy interrogation of the plaintiffs’ counsel as to how a school might be able to maintain a newspaper at all with any editorial discretion if viewpoint discrimination were prohibited.\(^{122}\) The dissent also focused on it as a stated concern.\(^{123}\) That the majority opinion did not specifically approve viewpoint discrimination may have been a matter of cobbling together a majority.\(^{124}\)

Nevertheless, Justice White’s illustrative list of the speech a school could legitimately suppress under the Court’s rule ought to have laid to rest any doubts about viewpoint discrimination in the classroom:

Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play disassociate itself, not only from speech that would “substantially interfere with its work or impinge upon the rights of other students,” but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. . . . In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared

\(^{121}\) Zouhary, *supra* note 1, at 2242-44.

\(^{122}\) *Id.* at 2243 (quoting Transcript of Oral Argument at 21, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (statement of Scalia, J.)).

\(^{123}\) *Id.* at 2241-43.

\(^{124}\) *Id.* at 2244.
values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.\textsuperscript{125}

Several of these items clearly involve the school selecting between differing viewpoints, and most of them plausibly could involve such choosing under the right circumstances.

The classroom speech cases decided since \textit{Hazelwood}, most of which involve student religious speech, also bear out this interpretation. For example, in \textit{Peck v. Baldwinsville Central School District}, students were given an assignment to create a poster illustrating ways in which the environment could be protected. One student chose to include prayer as one of these ways, and her poster contained a picture of Jesus Christ. The school chose to display her poster, but to obscure the picture of Jesus. The Second Circuit held that the school had a “legitimate pedagogical interest” in preventing the impression that the school was sponsoring religion, and upheld the censorship.\textsuperscript{126}

Similarly, in \textit{C.H. ex rel. Z.H. v. Oliva},\textsuperscript{127} the Third Circuit held that it was permissible for a school to censor a student’s religious viewpoints expressed in two school assignments. One was a poster assignment asking students to represent things they were thankful for (the student listed “Jesus” among those things), and the other was a class reading assignment to bring in a story from home to read to the other students (the student brought in the story of Jacob and Esau from the Old Testament). In both cases, the school was permitted to remove the student’s references to religious content and expressions of his religious viewpoint from the view and hearing of the other students.

But, if viewpoint discrimination as to classroom and other curricular speech is indeed permitted under \textit{Hazelwood}, then we should consider whether the \textit{Hazelwood} rule should be the final word, or whether the apparent confusion about viewpoint discrimination has prevented us from developing rules of application for \textit{Hazelwood} that would value First Amendment interests more, while protecting school interests as they require. The commentators and courts rejecting the reading of \textit{Hazelwood} outlined above do so mainly because they are concerned about the marketplace of ideas, both as a valuable thing in and of itself and as a

\textsuperscript{125} \textit{Hazelwood}, 484 U.S. at 271-72.
teaching model for students learning to be democratic citizens.\textsuperscript{128} The traditional prescription for speech that expresses an indefensible viewpoint encourages “more speech.”\textsuperscript{129} In this view, carving out classroom and curricular speech as a unique category of speech that does not benefit from the prohibition against viewpoint discrimination is unwise and counter to the general principles of the First Amendment.\textsuperscript{130}

However, the First Amendment is riddled with categories of speech that receive no protection, even from viewpoint discrimination. Low-value speech,\textsuperscript{131} the job-required speech of public employees,\textsuperscript{132} and government speech\textsuperscript{133} are all categories of speech that do not observe the rule against viewpoint discrimination. Even pure political speech expressed in a traditional public forum can be suppressed based on its viewpoint if the government can meet the strict scrutiny standard.\textsuperscript{134} So, while the presumptive prohibition against viewpoint discrimination is real, it is by no means an immutable command of the First Amendment, and the failure to observe it in the classroom, and in school activities that mimic the classroom, is both defensible under \textit{Hazelwood} and \textit{Garcetti} and pedagogically inevitable in large-scale public schooling environments.

\textit{The Limits of the Current Doctrine}

The real question, then, is whether \textit{Hazelwood} should be the entirety of speech doctrine for students in the classroom, and whether \textit{Garcetti} should be the entirety of speech doctrine for teachers in the classroom. While \textit{Hazelwood} itself seems to refute the proponents of a strong prohibition against viewpoint discrimination in the classroom, they are certainly correct that students being educated in a democratic society should be able

\textsuperscript{130} Hazelwood, 484 U.S. at 288 (Brennan, J., dissenting).
\textsuperscript{131} See \textit{supra} notes 23-28 and accompanying text (discussing low-value speech).
\textsuperscript{132} See \textit{supra} notes 46-65 and accompanying text (discussing public employee speech doctrine and the \textit{Garcetti} rule).
\textsuperscript{133} See \textit{supra} note 120 and accompanying text (discussing government speech).
\textsuperscript{134} See, e.g., Legal Services Corp. v. Velazquez, 531 U.S. 533, 553 (2001) (Scalia, J., dissenting) (referring to the Court’s government-speech holding in \textit{Rust v. Sullivan}, stating, “This was not, we said, the type of ‘discrimination’ on the basis of viewpoint’ that triggers strict scrutiny because the ‘decision not to subsidize the exercise of a fundamental right does not infringe the right’”) (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991) (internal quotation marks omitted)).
to benefit from acting in a democratic fashion, part of which involves offering and defending opinions and debating ideas. *Hazelwood* shows us that schools have a legitimate interest in taking some ideas and some matters of debate off the table, but that does not mean that schools and school officials have been given license to act without any responsibility. Similar to the speech of teachers, the speech of students in the classroom and in co-curricular activities does require some breathing space, even acknowledging the strong interests of schools in saying which “ideas” are “false.”

Below, I outline a slight alteration to the doctrines of classroom speech, which is justified (as are the restrictive protections that prevail in schools) by the unique culturally inculcative and custodial conditions of the school environment, but which balances both control and freedom in a way superior to current doctrine. The rule I propose works within the categorical structure of current First Amendment doctrine, but without creating any new or unwieldy categories. It also works within a reasonable interpretation of the two prevailing cases that currently govern speech in the classroom, *Garcetti* and *Hazelwood*, as well as their classroom speech progeny, so implementing it does not require any action from the Supreme Court to overrule those cases. We might describe the proposed rule as a rule of “benign prior restraint.”

**Developing a Workable Classroom Speech Doctrine**

*Living Within the Categorical Approach*

The First Amendment’s basic right (a general speech right which can be limited only based on a justification that would pass strict scrutiny) is decidedly standard-based, but each of the exceptions and augmentations to it introduces some element of categorical analysis. As others have pointed out, this tendency to think of speech as a set of categories negatively impacts the marketplace of ideas. Nevertheless, we are far along that road now, and it makes the most sense at this point to attempt to derive doctrine that can work within the categorical approach, at least until the next shift occurs in the Court’s thinking.

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135 *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas”).

136 *See, e.g.*, Nahmod, *supra* note 59.
Accordingly, a successful approach to classroom speech must work within the categorical approach. Below, I outline a small modification to the doctrines surrounding the classroom speech of both teachers and students. This modification might be termed a rule of “benign prior restraint.” I propose to make the standard of protection depend on whether the school or school official’s action in regulating such speech takes the form of a prior restraint or a purely post-speech punishment. This rule can be derived from the language of Garcetti, Hazelwood, and their progeny, and it comports well with the need to categorically balance the legitimate interests of schools and school officials in enforcing a certain curricular orthodoxy with the legitimate interests of both teachers and students as members of a democratic society, while also preventing undue restraint on the expressive interests of teachers and students as individual speakers.

A Benign Prior Restraint Rule for Classroom Speech

Many scholars and courts have attempted, both before and since Garcetti and Hazelwood, to find a way to construct the doctrine of the First Amendment to allow legitimate debate and commentary in classrooms, where, after all, teachers should be modeling what it means to be a participant in a democratic republic; while also leaving copious space for the legitimate regulation of classroom content by those we have—by vote or delegation—placed in charge of the administration of our schools and their curriculum. In the next section, I review two representative efforts before moving on to my own proposal, which draws substantially from these accounts.

Benign Prior Restraint and the Classroom Speech of Teachers.

In recent years, numerous commentators have attempted to flesh out a workable doctrine of public school teacher speech protection.\textsuperscript{137} Of these, two accounts in particular stand out as well-argued and defensible under

current standards—one authored prior to the Court’s decision in *Garcetti* and the other authored a few years after it. Like the rule proposed in this article, both of these accounts propose that we make speech protections for teachers depend in part on concepts of prior notice.

Beginning with the former, Professor Kevin Welner, perhaps predicting the eventual development of a *Garcetti*-type rule in the Supreme Court, advanced the claim in 2003 that the punishment of teacher speech made in the classroom should depend on elements of notice.138 Because Welner’s paper was authored pre-*Garcetti*, it is understandable that, in the main, it states an alternative to the “superficial” applications of *Hazelwood* to teacher classroom speech offered by some courts at that time.139 Accordingly, even on its own terms, it requires some reconsideration and augmentation in light of the much more stringent *Garcetti* complete exclusion of the job-required speech of teachers from the protection of the First Amendment.

Welner’s approach to notice takes as its main unit of analysis the teacher seeking to make methodological or pedagogical decisions—decisions as to how to deliver course content. The *Hazelwood* progeny cases that Welner critiques fail to protect these teachers’ discretion because that discretion is nearly always overridden by the discretion of the school administrators in establishing the curriculum of the school. Welner’s idea is that the teacher’s discretion should be overridden in this way only if the school is the type that explicitly treats its teachers as “ministerial” employees who are not empowered to exercise pedagogical discretion.140 Absent such a policy, Welner argues, teachers should have the presumptive right to exercise their professional discretion in how they deliver their lessons.

There is an obvious appeal to Welner’s proposed approach. A presumption that teachers are imbued with pedagogical discretion, rebutted only though a pre-communicated policy to the contrary, would be a useful rule. But today, it would seem that *Garcetti* would stand in the way of such a presumption, at least as applied to the selection of curricular materials and the delivery of the actual lesson. It is hard to imagine that teachers have any First Amendment claim to discretion over these matters after *Garcetti*. As the Sixth Circuit stated in reluctantly applying *Garcetti*...
to the book selection decisions of a high school English teacher:

As with any other individual in the community, [the teacher] had no more free-speech right to dictate the school’s curriculum than she had to obtain a platform—a teaching position—in the first instance for communicating her preferred list of books and teaching methods. ‘[N]o relevant analogue’ exists between her in-class curricular speech and speech by private citizens.\(^\text{141}\)

This is true, the court said, “even if it otherwise appears (at least on summary judgment) that the school administrators treated her shabbily.”\(^\text{142}\)

However, even under this post-*Garcetti* framework, it is not inevitable that a teacher cannot ever be a First Amendment speaker in the classroom, for example, when she speaks in ways that do not constitute delivering an actual lesson or selecting curricular materials. And even under *Garcetti*, the court is required to engage in a searching review of what the employee’s “official duties” actually were, remaining skeptical of overly broad job descriptions and policy manuals. Accordingly, some room remains for a notice-based approach to the application of *Garcetti* that draws from Welner’s prescient work.

In a well-argued, post-*Garcetti* student note, Kimberly Gee develops a proposed rule that depends on prior notice, as well. Despite her note having been authored post-*Garcetti*, however, Gee’s proposal also works entirely within the *Hazelwood* teacher speech paradigm. Gee proposes, as part of what she terms a “modified *Hazelwood* test,” that we allow the application of the *Hazelwood* “legitimate pedagogical interest” test to govern teacher speech only where the school or district has predetermined that the classroom is a “closed forum.”\(^\text{143}\) And even in such circumstances, “teachers should not be disciplined for violating regulations, even if they are reasonably related to legitimate pedagogical concerns, when the schools fail to put them on notice that such regulations exist and apply to the conduct at hand.”\(^\text{144}\) Gee’s proposal has significant merit, as it balances the liberty interests of teachers with the power interests of government educational authorities and attempts to find a way

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\(^\text{142}\) Id. at 340.
\(^\text{144}\) Id. at 452.
to allow both interests to operate within their legitimate space. However, a few problems exist that counsel a different approach.

First, Gee gives somewhat short shrift to the importance of *Garcetti* to the classroom speech rights of teachers. Based on the reticence of the federal courts in applying *Pickering*’s “matter of public concern” prong to classroom speech, along with the Seventh Circuit’s then-recent decision in *Mayer* applying *Garcetti* to classroom speech, Gee concludes that a *Hazelwood*-based approach, rather than *Garcetti*, would govern any First Amendment question in the classroom, at least where the district or school treats the classroom as a closed forum.¹⁴⁵

But this conclusion elides the clear rule stated in *Garcetti* that public employees cannot claim First Amendment protection for any speech they utter “pursuant to official duties.” ¹⁴⁶ Although *dicta* in the *Garcetti* decision disclaims any intent on the Court’s part to address the rule’s application to academic speech,¹⁴⁷ the *Garcetti* rule nevertheless squarely applies to classroom speech on its own terms. A teacher’s classroom speech is certainly speech made “pursuant to official duties.” No persuasive case has yet been made that teachers are not speaking “pursuant to official duties” when they teach, so any distinguishing of *Garcetti* in the context of the classroom must rely on some sort of special constitutional status that teachers hold. Although there exists some common perception that this is so, the Supreme Court has never so held, and it is not likely to so hold in the future.¹⁴⁸

Gee makes an admirable effort to identify a special constitutional status for teachers that would counsel against applying *Pickering* (and by extension, *Garcetti*) to classroom speech, arguing:

*Pickering*’s division of speech into public and private realms makes sense for general government employees, given the authority of the state, as an employer, to ensure the efficiency of services provided through its employees. However, teachers are unlike other state employees in that

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¹⁴⁵ *Id.* at 442.

¹⁴⁶ *Garcetti* v. Ceballos, 547 U.S. 410, 428 (2006); *see also* Evans-Marshall, 624 F.3d at 332 (reluctantly concluding that this application is the unavoidable result of *Garcetti*).

¹⁴⁷ *Garcetti*, 547 U.S. at 428.

¹⁴⁸ *Cf.* Bauries, *supra* note 12 (exhaustively reviewing the First Amendment caselaw and showing that the Supreme Court has never issued a decision that relied on the existence of a special right of academic freedom that exists only for public academic employees, and that the recent decision of the Ninth Circuit purporting to carve out such a right in the *Garcetti* context contradicts the underlying doctrinal structure of the First Amendment).
their employment as educators is always a matter of public concern. Other government employees are not asked to teach lessons that are sufficiently creative to hold students’ attention while adhering to state mandated educational guidelines, to foster an environment where students are excited about learning, or to introduce students to a world of diverse people, customs, values, and ideas. The Pickering test has not been tailored to address the particular necessities of teaching. The classroom truly is a *sui generis* environment, and courts that apply Pickering to in-class teacher speech cases effectively ignore teachers’ unique role in society, to the disservice of everyone with an interest in the public school system.\(^{149}\)

But are these distinctions really of much constitutional significance? And are they even real distinctions? First, is the employment of any other class of public employees not a “matter of public concern”? We constantly debate efficiency and effectiveness in government, and that debate impacts the employment of every person whose livelihood depends on public funding and public needs. That teachers are among the more sympathetic public employees, and among the more familiar to the average citizen, does not necessarily make their jobs any more a matter of public concern than, say, the typical firefighter or police officer.

Second, it is not clear why the specific job duties of teachers should counsel for a different approach or a special set of rights under the First Amendment, as compared with the duties of other public employees. Gee argues that teaching is expressive and creative work, and that the expression in question is governed by publicly derived goals, limits, and expectations, as well as by the discretion of the teacher, but so are lawyering, auditing, speech writing, and leading tour groups in our national parks, all of which are done by public employees, and all of which involve some discretion on the part of the employee in framing the expression. Right or wrong, the Garcetti rule says that, when a public employee speaks pursuant to an official duty, it makes no difference whether the employee’s speech resulted from reasonable expressive choices—only whether it was made pursuant to an official duty to speak matters. As to this point, it is hard to see why teachers should be treated any differently, and cases decided since the publication of Gee’s note

\(^{149}\) Gee, *supra* note 143, at 250-52.
confirm this conclusion. Nevertheless, it is certainly true that the classroom work environment differs from the work environment of most public employees in that it is not only expressive, but also often spontaneous. Good teachers look for “teachable moments” and may adjust their speech on the fly in response to such moments based on their own professional judgment. Just as it would be unfair to judge the action of a police officer which turns out later to have been a violation of the Constitution based on a standard of which the officer could not have been aware at the time, it would be the height of unfairness to revoke a teacher’s First Amendment protections because the teacher uttered speech that later was determined to be in conflict with a job duty of which the teacher could not have been precisely aware at the time. So, both Welner and Gee are certainly correct that the proper approach should be based on elements of notice (or at least constructive notice), and that ex post facto “official duties” not to speak should not be the basis for regulating teacher classroom speech.

But to succeed, any solution must work within the categorical approach to employee speech that the Supreme Court obviously favors and shows no sign of jettisoning. If a teacher cannot claim First Amendment protection over speech she utters “pursuant to [her] official duties,” then what is necessary to bring speech under this standard? Even in Garcetti, the Court indicated (also in response to the concerns of a dissenter) that the test for whether speech was made pursuant to official duties should not be a wooden one, and should be attentive to an employer’s bad-faith or pretextual designations of speech as being with the job duties of an employee. Courts since then have been especially suspicious of post hoc justifications for regulating public employee speech, as such post hoc justifications presumptively come from a place of rationalizing an otherwise unconstitutional decision, rather than from a place of effectively

150 See, e.g., Evans-Marshall v. Bd. of Educ., 624 F.3d 332 (2010) (applying Garcetti to the classroom reading selections of a teacher). The Evans-Marshall decision also shows that the landscape for teachers was not monolithic prior to Garcetti. In fact, the Sixth Circuit, which issued the Evans-Marshall decision, was before that decision the most protective circuit in the federal system of teacher classroom speech, applying an unadorned Pickering test to it. See, e.g., Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001).
151 See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (holding that a police officer cannot be held liable for a constitutional violation under 42 U.S.C. § 1983 absent clearly established law barring the conduct at issue, of which a reasonable officer in his shoes would have been aware).
152 Bauries, supra note 12, at 721.
and efficiently regulating a public workplace.\textsuperscript{154}

This attentiveness to bad-faith, pretextual, and post hoc designation of duties related to speech counsels in favor of the kinds of notice-based approaches favored by both Welner and Gee; but the Court’s consistent favoring of categorical approaches to speech also counsels in favor of working within that paradigm. As discussed above, as a constitutional matter, teachers are really no different from other public employees, many of whom fulfill roles that pervasively concern the public and many of whom perform expressive work on behalf of public entities, while also exercising discretion regarding that work. But we may say that it is well within the rule of \textit{Garcetti} to require courts to identify a specific set of employment duties (not general expectations) that governed a teacher’s speech on the date in question in the suit before applying the \textit{Garcetti} exclusion, and to exhibit a healthy and searching skepticism as to any showing that an employer-defendant makes on such grounds.

If this is the case, then it is only a small step, and one entirely within the parameters of the \textit{Garcetti} rule, to require that a public educational employer be able to show that, at the time of the speech in question, there was either a written policy, an oral directive, or a provable general understanding among employees, that the speech in question was prohibited. If this is the case, then the \textit{Garcetti} exclusion should apply. If not, then the court should revert to the \textit{Pickering} analysis.

Although reasonable minds may dispute whether a public employee can speak simultaneously as a citizen and as an employee pursuant to a job duty,\textsuperscript{155} the Court has resolved this question in favor of employees’ being able to occupy only one of these roles at a time when expressing themselves. But that does not mean that when a public employee speaks—even on the job—every word uttered is uttered pursuant to an official duty. Different jobs require—and prohibit—different amounts and kinds of speech, and the \textit{Garcetti} rule acknowledges this fact.

Indeed, the \textit{Garcetti} Court cited approvingly and reaffirmed \textit{Givhan v.}

\textsuperscript{154} See Lane v. Franks, 134 S. Ct. 2369 (2014) (rejecting the attempts of the State of Alabama to include testifying in court as part of the plaintiff’s official duties when testifying was something he did only on one occasion and was not part of his ordinary duties); Adams v. UNC-Wilmington, 640 F.3d 550 (2011) (rejecting the attempts of the university to include popular writings and commentary of a professor within that professor’s official duties because the professor was not employed to write such materials, and when he did, he always did so in his private capacity).

\textsuperscript{155} See Secunda, \textit{Right-Privilege}, supra note 6, at 912-13; Secunda, \textit{Federal Employees}, supra note 6, at 123; Rhodes, supra note 57, at 1174.
Western Line Consolidated School District,156 a case in which a unanimous Court held to be protected under the First Amendment a school guidance counselor’s complaints during the work day to her superiors regarding alleged racial bias that she had perceived in hiring at the school.157 Although Ms. Givhan spoke at work, during work hours, and to her superiors about work-related matters, her speech was protected because it embraced a matter of public concern.

The Garcetti Court did not see fit to overrule that decision on the way to stating its holding; rather, it used Givhan as a foil to show a contrast with the plaintiff, Ceballos’, expression, which took the form of a legal memorandum authored by an attorney employed in part to author legal memoranda. The natural implication of this use of Givhan is that not everything that one says at work or even about work is said to be pursuant to one’s official duties, even if one is employed in an expressive role, as every school guidance counselor certainly is. Therefore, every potential Garcetti case requires courts to distinguish between job-required or job-prohibited speech on one hand, and speech made while at work, but not required or prohibited by a job duty on the other hand.

In the classroom, this task is fairly simple, but certainly not pro forma. Although it would be useful to have data on this point, it is safe to assume that the vast majority of public school teacher expression in the classroom involves delivering content based on the approved school curriculum and the materials purchased in support of it; managing student behavior; and responding to student questions relating to the course material. As to these matters, it is obvious that Garcetti would govern because every public school teacher is specifically employed to deliver the approved curricular content using the approved curricular materials, and is expected to manage student behavior and respond to student questions about the material. But that sort of expression is also certainly not the only classroom expression in which a teacher engages. And more importantly, it is not always clear to a teacher in the classroom just what the approved curriculum requires him to say or not say, or just what the expectations of his school, district or profession allow him to say while managing student behavior, or just which questions from students he may answer and how she may or may not frame such an answer.

Because much of what is said in the classroom is difficult to connect to the specific requirements and prohibitions of the job, courts should tread carefully when seeking to employ Garcetti’s “pursuant to official duties”

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157 See Garcetti, 547 U.S. at 420-21 (citing Givhan, 439 U.S. at 414).
test, and it would be helpful to have a way to distinguish between job-required or job-prohibited speech and other speech made in the classroom that comports with the overall categorical structure of First Amendment jurisprudence. In prior work, a co-author and I advanced the claim that, given the narrowness of the Court’s holding and the care with which Justice Kennedy distinguished Ceballos’ speech from that of the plaintiffs in Pickering and Givhan, the Garcetti “pursuant to official duties” test should not be satisfied unless, at the time of the challenged expression, the employee in question would have been legitimately subject to discipline under his employment contract for failing to speak.\textsuperscript{158} But it became clear to me after the publication of that work that this test, while useful, can only take the courts so far. For example, it would not have worked as intended in the case of Ms. Mayer, who was disciplined for answering a student’s question on her own participation in protests. That discipline was upheld under the Garcetti test because the district claimed that, in effect, a requirement not to answer that question was an official, expressive duty of Mayer’s job.\textsuperscript{159}

In other words, the flaw in my past work on this topic was in failing to recognize that a duty not to speak, in many cases, \textit{is} the “official duty” that the district claims the employee spoke “pursuant to.” Thus, the test I articulated in my past work needs an update, and that update should also address other types of unarticulated purported “duties” to speak in a certain way that serve as post hoc justifications in some cases for retaliatory punishments.\textsuperscript{160} The work of the courts since Garcetti was decided, including the Supreme Court, provides a way forward.

In particular, the case of Lane v. Franks, decided in 2014, illustrates that the Court views the Garcetti rule as narrow and limited to facts that are very similar to the facts of Garcetti. Lane involved the trial testimony of a former community college administrator who had discovered that one of his subordinates was illegally drawing a paycheck from his federally-funded program without doing much, if any, work.\textsuperscript{161} He fired the subordinate, who was (unfortunately for Lane) an influential sitting member of the Alabama Legislature, and she allegedly vowed retaliation. After Lane testified against her in a federal criminal trial, that promised retaliation allegedly came when everyone in his department was laid off, and all were rehired thereafter except Lane.

\textsuperscript{158} See Bauries & Schach, supra note 10.
\textsuperscript{159} See Mayer v. Monroe, 474 F.3d 477 (7th Cir. 2007).
\textsuperscript{160} See Evans-Marshall v. Board of Educ., 624 F.3d 332 (6th Cir. 2011).
\textsuperscript{161} Lane v. Franks, 134 S. Ct. 2369, 2375 (2014).
In the First Amendment retaliation case that resulted, Lane claimed that he had been fired in direct retaliation for his testimony. The Eleventh Circuit held that Lane’s testimony was speech made “pursuant to [Lane’s] official duties” because (drawing from an unfortunate dictum in Justice Kennedy’s \textit{Garcetti} opinion) it “owed its existence” to Lane’s public employment.\footnote{Lane v. Franks, 523 Fed. App’x 709, 711 (11th Cir. 2013) (citing \textit{Garcetti} for the “owe[d] its existence” quote in support). My prior work has identified this dictum, along with a few others, as introducing regrettable ambiguity to the \textit{Garcetti} rule, and muddying the waters sufficiently to allow a great deal of mischief in the lower courts. \textit{See generally} Bauries & Schach, supra note 10.} The Supreme Court unanimously reversed.\footnote{\textit{Lane}, 134 S. Ct. at 2369.}

In rejecting the holding of the Eleventh Circuit, the Court easily concluded, both in its main opinion and in a more concise concurring opinion authored by Justice Thomas, that testifying truthfully in a judicial proceeding was not even arguably one of Lane’s “ordinary job responsibilities” as a community college administrator.\footnote{Id. at 2375.} The Court also forcefully rejected the Eleventh Circuit’s “but for” test, which was based on the “owes its existence” dictum from \textit{Garcetti},\footnote{See \textit{Lane}, 523 Fed. App’x at 711.} explaining that no party had suggested that Lane’s job required him to testify in criminal trials.\footnote{\textit{Lane}, 134 S. Ct. at 2379.}

The interesting aspect of \textit{Lane}, as compared with \textit{Garcetti}, is the introduction of the word “ordinary” to the words “official duties” or “job responsibilities” expressed within the \textit{Garcetti} holding.\footnote{I am indebted to Professors Brenda Kallio and Richard Geisel for drawing my attention to the Court’s repeated use of this word during their presentation of their work-in-progress, \textit{Exploring the Boundaries of First Amendment Protection for Expressions on Matters of Public Concern by School Personnel}, at the Annual Meeting of the Education Law Association in 2014.} As at least one circuit court has recognized the addition of this adjective, which the Court’s main opinion repeated nine times, and which even the brief concurrence of Justice Thomas repeated another three times, and that it was likely deliberate, and most plausibly clarifies the truly narrow nature of the \textit{Garcetti} exclusion.\footnote{\textit{See}Mpoy v. Rhee, 758 F.3d 285, 295 (D.C. Cir. 2014) (“In particular, the use of the adjective “ordinary”—which the court repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by \textit{Garcetti”).}}

In \textit{Lane}, the use of this phrasing obviously was meant to highlight that Lane was not hired as a “professional witness.” He was an educational...
administrator whose duty to testify arose only as a result of circumstances that could not have been predicted. “Ordinarily,” in other words, he would not have had any official duty to testify, so his expression in offering his testimony remained protected from post hoc punishment.

Applied to the classroom context, this clarified conception of the *Garcetti* exclusion suggests that prior restraint can serve a benign role in relation to teacher classroom speech. Under this approach, teachers performing their “ordinary” teaching duties—delivering lessons, communicating with students about the course material, selecting readings, etc.—would be acting “pursuant to [their] ordinary job responsibilities” in the overwhelming majority of cases. But in cases such as *Mayer*, where a teacher speaks in the classroom spontaneously on a topic that is ancillary to her delivery of the curriculum or management of student behavior, the *Garcetti* exclusion should apply unless she was given a specific prior directive *not* to engage in such speech, or there existed a prior norm of prohibition that would have been known to a teacher in her circumstances.

Benign Prior Restraint and the Classroom Speech of Students.

In the student speech context, the categorical rule functions differently from the categorical rule in the teacher speech context. Under *Garcetti*, the categorical rule exists to completely remove from the First Amendment’s protection speech that would otherwise be within its protection due to its source—the ordinary job duties of the employee. However, under the student speech precedent, *Hazelwood v. Kuhlmeier*, the categorical rule exists to determine the First Amendment forum within which student speech exists.

*Tinker v. Des Moines* and its “materially and substantially disrupts” test applies presumptively to student speech within schools. Courts therefore presumptively treat schools as limited public forums, limited by the speakers who are allowed to participate (students and teachers), but limited in what may be discussed only based on the prevention or cessation of material and substantial disruption to the school’s operations. But *Hazelwood* places an important limitation on that presumptive classification—where the speech in question occurs in furtherance of a curricular or co-curricular activity that “bears the imprimatur of the school” (i.e., is required or authorized by it), school officials may regulate the speech as long as the regulation in question is “reasonably related to

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legitimate pedagogical concerns.” Because the classroom is always a curricular venue that bears the school’s imprimatur, courts generally apply the Hazelwood test to the classroom speech of students, and such application certainly comports with the Hazelwood decision.

But here again, the Hazelwood test would seem to cross the line from reasonable in light of school realities, to unreasonable and unfair, where it is applied in a post hoc manner to silence speech that, while not falling under any prior restraint in state, district, school, or classroom policy, happens to offend the individual teacher, the administration, other students, or some member of the public. Not all student speech—even all student speech uttered in the classroom—deserves to be placed into the Hazelwood category. For example, the plaintiffs in Tinker did not remove their armbands when they entered the classroom, and the various plaintiffs in the many T-shirt cases that have worked their way through the appellate courts under the Tinker framework have not done so either (until they were forced to, that is). Yet, their speech was either protected or unprotected based on the disruption it caused or did not cause (or that it was likely to cause or not cause), not whether the school had “legitimate

170 See, e.g., Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 277 (3d Cir. 2003) (relying on Hazelwood in upholding a teacher’s confiscation of pencils that a student sought to distribute during a classroom holiday party because they contained a religious message); Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155-56 (6th Cir. 1995) (relying on Hazelwood in upholding a teacher’s grade of “zero” to a student who responded to the teacher’s directive to propose a paper topic by proposing the life of Jesus of Nazareth); id. at 155 (“Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere’’); see also S.G. ex rel. A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3d Cir. 2003) (holding that suspension of a kindergarten student for saying “I’m going to shoot you” while pointing his fingers at other students during a “cops and robbers” game at recess was “a legitimate decision related to reasonable pedagogical concerns and therefore did not violate [the student’s] First Amendment rights”).

171 See supra, notes 74-78 and accompanying text (discussing the Hazelwood Court’s assumption that its standard would apply in the classroom).

172 See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966) (“After being in their schools for varying lengths of time, each plaintiff was sent home by school officials for violating the regulation prohibiting the wearing of arm bands on school premises”).

pedagogical concerns” in regulating it. Thus, merely entering the classroom does not have the effect of transforming the student speech forum—only the additional element of curricular content does.

Thus, in working within the categorical structure of student speech doctrine, an adapted rule should address the appropriate cases for treating student classroom speech as though it occurred within the closed curricular forum that permits even viewpoint discrimination, or the more open non-curricular school forum that looks skeptically at restrictions based on both viewpoint and content. Although the student classroom speech context does not have the benefit of a recent Supreme Court decision leaning in the direction of Lane’s “ordinary job responsibilities” formulation, it is possible to derive directly from Hazelwood a similar formulation, and as in the case of teacher classroom speech, this formulation suggests that a prior restraint rule can serve a benign role as to student classroom speech.

In particular, Justice White’s reference, in various forms, to the ideas that the newspaper at issue in Hazelwood was a “regular classroom activity,” and that the teacher of the Journalism II course ordinarily exercised supervision over both the content and the format of the articles in the publication, suggests that concepts of notice were embedded within the Court’s decision. Put another way, the exercise of editorial control over the class’s newspaper by school officials was not new or surprising, even though the students objected to how that editorial control was exercised in the particular case.

Contrast this with a hypothetical counterfactual. Say the students working on the paper are instead discussing and brainstorming the idea of doing a student pregnancy story, and a student sitting nearby who recently had a miscarriage overhears the discussion and becomes very upset. Reacting to the upset student’s complaint, the teacher sends the speaking students to the principal’s office, where they are disciplined for creating a “hostile work environment.” Because the speech occurs within the classroom—a quintessential curricular environment—and it is in relation to curricular goals—selecting story ideas for the upcoming issue—it would seem that applying the deferential Hazelwood test would seem

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174 See, e.g., Defoe, 625 F.3d at 332 (applying Tinker); Boroff, 220 F.3d at 468-69 (same).
176 See, e.g., id. at 268-69.
177 See id. at 269 (“Respondents’ assertion that they had believed that they could publish ‘practically anything’ in Spectrum was therefore dismissed by the District Court as simply ‘not credible’”).
proper here. But without notice that the mere discussion of teen pregnancy would violate the teacher’s behavioral expectations and lead to discipline, the punishment of the students would seem unfair.

Nevertheless, the current approach among at least some of the federal courts to student classroom speech would apply Hazelwood to this hypothetical because of the obviously curricular nature of the student speech. Under these cases, the fact that the speech occurred in the classroom and in connection with a curricular activity such as a writing assignment or class discussion would be enough to settle the categorical forum question, leading to the application of a more deferential (and therefore less speech-protective) standard. Such application arguably would undermine the reasoning of Hazelwood itself, which, recall, placed importance on the “regular” nature of the official monitoring of content and expression on the newspaper.

A better approach to the categorical forum question would ask whether the speech in question would have been perceived by the student speakers (or hypothetical, reasonable students standing in their shoes) as falling within some restriction or prohibition deriving from the teacher’s or the school’s curricular or pedagogical goals or expectations (including student behavioral expectations). Any such inquiry would have to depend, at least in part, on whether the speech in question was explicitly prohibited by a written school or classroom policy, or whether similar speech had led to discipline for other students in the past. Absent such elements of notice, courts should review the school’s disciplining of the speakers under the less deferential (and therefore more speech-protective) Tinker standard, as a small number of decisions have thus far.

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179 See, e.g., W. v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) (upholding school discipline against a student for drawing a Confederate flag in class, an action that directly conflicted with the school’s then-recently-adopted “Racial Harassment and Intimidation” policy).
180 See e.g., Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 985 (11th Cir. 2007) (relying on Tinker in upholding the 10-day suspension of a high school student who wrote in a personal notebook in class about her “dream” of shooting her teacher, on the grounds that the writing “created an appreciable risk of disrupting [the school] in a way that, regrettably, is not a matter of mere speculation or paranoia”); Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist., 2013 WL 3148272, at *7 & n.7 (E.D. Mich. June 19, 2013) (rejecting the application of Hazelwood to student classroom speech critical of homosexuality as part of a debate on gay rights and stating, “When it comes to pure student speech, such as the speech at issue here, Tinker provides the framework for assessing whether a particular speech restriction comports with the constitutional guarantee of free speech”).
Conclusion

The augmentation of existing First Amendment standards proposed here does not seek to remake the landscape of First Amendment doctrine in the classroom. Nor does it seek to alter the largely categorical approach to speech protections that exists throughout the First Amendment, and that clearly draws the support of most of the current Supreme Court. Rather, working within the categorical structure that the Supreme Court has erected through its decisions in *Garcetti* and *Hazelwood*, the proposal set forth in this article makes the case for appending a limited notice element to the categorical inquiry that precedes judicial application of the least speech protective standards that apply to student and teacher speech.

These least protective standards have in several cases been seen as applicable generally to speech made in the classroom environment, without regard to any notice that the speakers in question might have had that their targeted speech would have been subject to discipline or regulation. Correcting this lack of notice through a benign rule requiring prior restraints as a precursor to the application of the completely deferential *Garcetti* “official duties” exclusion and the very deferential *Hazelwood* “legitimate pedagogical concern” test would not solve all of the problems inherent in those decisions or satisfy their many critics, but would impose an element of fairness on their application to the ad hoc punishment and suppression of speech made by teachers and students—the main participants in the vital and ongoing dialog of the public school classroom.

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181 See, e.g., Bauries, supra note 12, at 721 (demonstrating that even the dissenters to *Garcetti*, in proposing their contrary ways of resolving the case, proposed categorical rules of decision).