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Will Teachers Shed Their First Amendment Rights At The Schoolhouse Gate?

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Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-*Garcetti* Jurisprudence

JONEL NEWMAN†

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.¹

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I. INTRODUCTION

Since the 1960s, educators have enjoyed a significant (if confusing) array of First Amendment privileges.² The confusion resulted from tensions between principles of academic freedom (both of the educator and the educational institution) and the public-employee-speech doctrine.³

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

2. See Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579 (1999); Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 313 (2007); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 1 (2001); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 637 (1999).

3. See discussion *infra* Part II.

The Supreme Court's 2006 decision in *Garcetti v. Ceballos*⁴ threw approximately forty years of First Amendment protections for educators into grave doubt.⁵ While *Garcetti* explicitly declined to address the unique situation of educators, at least with respect to academic freedom issues,⁶ the Eleventh Circuit lost no time in adapting the *Garcetti* reasoning to educational settings, however inexact the fit.⁷

This article begins by examining the various doctrinal threads that previously comprised First Amendment protections for educators, and then analyzes how *Garcetti* and the Eleventh Circuit's incorporation of *Garcetti* into its jurisprudence jeopardize important First Amendment rights in the educational setting. The article concludes with a proposal for re-thinking the Eleventh Circuit's First Amendment jurisprudence as it applies to educators.

II. PRE-GARCETTI FIRST AMENDMENT RIGHTS OF EDUCATORS IN THE ELEVENTH CIRCUIT

The First Amendment rights of educators spring from and are limited by several different sources. One source of such rights is the recognition that academic freedom is protected by the First Amendment in public education settings.⁸ The right of educators to First Amendment protection also stems from the public-forum⁹ and private-speaker¹⁰ doc-

4. 547 U.S. 410 (2006).

5. See, e.g., Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 209 (2008); Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1282 (2008).

6. *Garcetti*, 547 U.S. at 425 ("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.").

7. *D'Angelo v. Sch. Bd. of Polk County*, 497 F.3d 1203, 1208 (11th Cir. 2007); *Battle v. Bd. of Regents*, 468 F.3d 755, 760-61 (11th Cir. 2006).

8. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 581 (1972) (distinguishing between public and private schools and colleges and recognizing that First Amendment protects academic freedom of teachers in public institutions).

9. See *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.").

10. *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 815 (8th Cir. 2004) (schoolteacher's participation in afterschool religious group meetings on school property were "private speech" and thus not prohibited by Establishment Clause); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1050 (6th Cir. 2001) (schoolteacher's decision to bring speakers to class who presented information to students on the environmental benefits of industrial hemp constituted speech); *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991) ("Because of the special characteristics of a classroom environment . . . we distinguish between teachers' classroom

trines and, to some degree, is informed by student free-speech rights.¹¹ Educators' First Amendment rights have been limited by the educational institution's rights to determine its curriculum,¹² to inculcate community values in the young,¹³ and to act as a public employer in exercising workplace control.¹⁴ Each of these interests will be discussed below.

A. Academic Freedom in the Eleventh Circuit

1. FIRST AMENDMENT PROTECTION FOR A TEACHER'S ACADEMIC FREEDOM

The concept of academic freedom as a First Amendment right began appearing in Supreme Court jurisprudence in response to McCarthyism. In 1952 the Court decided *Adler v. Board of Education of the City of New York*,¹⁵ the first of a series of cases in which educators were subject to dismissal or discipline for failing to demonstrate fealty to the United States government by taking a loyalty oath or for belonging to "subversive" organizations. In *Adler*, Justices Douglas and Black failed to convince a majority of the Court that the academic freedom of New York public school teachers included the right to be free from government inquiry or intrusion into their memberships and associations, and that academic freedom was constitutionally protected by the First Amendment.¹⁶ The majority held that although educators "have the right under our law to assemble, speak, think and believe as they will. . . . they have no right to work for the State in the school system on their own terms."¹⁷ In reaching this conclusion the majority rather emphatically dismissed the idea that teachers (at least public elementary and secondary teachers) enjoy any individual academic freedom protected by

expression and teachers' expression in other situations that would not reasonably be perceived as school-sponsored.").

11. Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 79–87 (2008) (identifying split among the circuits over whether student-speech doctrine in *Hazelwood School District v. Kuhlmeier* applies to teachers, and arguing that *Hazelwood* should apply only to student speech cases).

12. *Edwards v. Aguillard*, 482 U.S. 578, 608 (1987) (Powell, J., concurring) ("the discretion of state and local authorities over public school curricula is broad"); *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007) ("The First Amendment is 'not a teacher license for uncontrolled expression at variance with established curricular content.'").

13. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 285 (1988) (acknowledging state's "undeniable, and undeniably vital, mandate to inculcate moral and political values" in the public education setting).

14. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

15. 342 U.S. 485 (1952).

16. *Id.* at 508–11 (Douglas, J., dissenting).

17. *Adler*, 342 U.S. at 492 (citing *Comm'n's Ass'n v. Douds*, 339 U.S. 382 (1950); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947)).

the First Amendment.¹⁸ The same year as *Adler*, the Court struck a similar loyalty oath applied to educators in *Wieman v. Updegraff*,¹⁹ but on the basis of due process rather than the First Amendment.²⁰

However, within only a few years, the Court began to recognize First Amendment protections for the academic freedom of teachers.²¹ First, in *Sweezy v. New Hampshire*,²² the Court accepted that Professor Sweezy's "right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through [a State] investigation."²³ The Court went on to hold that

there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.²⁴

Ten years later, in *Keyishian v. Board of Regents*,²⁵ the Court declared that

[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of

18. *Id.* at 493 ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct may properly be considered in determining fitness and loyalty. . . . [W]e know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."). The differences between the First Amendment freedoms of elementary and secondary teachers and those of college and university teachers are discussed later in this section. See *infra* discussion accompanying notes 27–46.

19. 344 U.S. 183 (1952).

20. In that case Justices Black, Douglas, and Frankfurter wrote concurrences that identified First Amendment issues as well as those of due process. *Id.* at 192–98.

21. "Academic freedom" qua expressive activity in the academy, and the academic freedom that is protected by the First Amendment are not synonymous. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *YALE L.J.* 251, 254–55 (1989) (claiming that "'academic freedom' means something different from 'constitutional academic freedom,'" and that "'academic freedom' as a non-legal term refer[s] to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance. . . . [while] the essence of constitutional academic freedom is the insulation of scholarship and liberal education from extramural political interference").

22. 354 U.S. 234 (1957).

23. *Id.* at 249–50 (emphasis added).

24. *Id.* at 250.

25. 385 U.S. 589 (1967).

orthodoxy over the classroom.²⁶

Sweezy and Keyishian were state university educators,²⁷ rather than elementary or secondary school teachers. Some First Amendment scholars argue that this makes a difference—that First Amendment protections for a teacher’s academic freedom do not extend to elementary and secondary school teachers.²⁸ Others, subscribing to Justice Douglas’s view in *Adler* that “[t]he public school is in most respects the cradle of our democracy,”²⁹ argue passionately that teachers in the K–12 public education system should enjoy academic freedom protected by the First Amendment.³⁰

The Eleventh Circuit was quick to recognize academic freedom as a

26. *Id.* at 603.

27. See *Sweezy*, 354 U.S. at 248 (“Two subjects arose upon which [Sweezy] refused to answer: his lectures at the University of New Hampshire, and his knowledge of the Progressive Party and its adherents.”); *Keyishian*, 385 U.S. at 592 (“Keyishian[,] an instructor in English” at the State University of New York, “refused to sign . . . a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York.” Because he refused to sign the certificate, “Keyishian’s one-year-term contract was not renewed.”).

28. See, e.g., Byrne, *supra* note 21, at 288 n.137 (dismissing academic freedom in the lower grades as “derivative,” and arguing that “academic freedom makes sense only for teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers”); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMENDMENT L. REV. 54, 67–68 (2008) (arguing that “neither teachers nor their students in elementary and secondary schools have First Amendment protection regarding curricular and pedagogical decisions . . . [but that c]lassroom speech in the university and professorial scholarship are high-value speech deserving maximum First Amendment protection”).

29. *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (Douglas, J., dissenting). Indeed, in his concurrence in *Wieman*, Justice Douglas expressed the view that, “[t]o regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.” *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Douglas, J., concurring) (emphasis added).

30. See, e.g., Daly, *supra* note 2, at 39–51; Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers To Determine What They Teach*, 124 U. PA. L. REV. 1293, 1294 (1976) (“This Article is devoted to an analysis of the theory . . . that public school teachers have a federal constitutional right to determine what they teach despite the contrary views of superiors vested with decision making authority under state law.”); Weiner, *supra* note 2, at 637 (“My argument is as follows: A teacher who is conveying either substantive knowledge about our system of government, or who is trying to inculcate its merit (even if through criticism), is conveying a message that deserves protection.”); Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right To Teach*, 65 N.Y.U. L. REV. 693, 732 (1990) (“Only when a school board can show decisively that a teacher’s speech would substantially disrupt the education process should the first amendment allow the school board to restrict the teacher’s expression.”); Emily Holmes Davis, Note, *Protecting the “Marketplace of Ideas”: The First Amendment and Public School Teachers’ Classroom Speech*, 3 FIRST AMENDMENT L. REV. 335, 336 (2005) (“The classroom is a unique ‘marketplace of ideas’ where future leaders learn through a vigorous exchange of different arguments and theories.”); Anne Gardner, Note, *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment*, 73 MO. L. REV. 213 (2008); Alison Lima, Note, *Shedding First Amendment Rights at the Classroom Door?: The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173 (2008).

First Amendment–protected right, and to do so in the K–12 setting. In 1970, only three years after *Keyishian*, then-Chief District Judge for the Northern District of Alabama, Frank Johnson (later of the Eleventh Circuit),³¹ decided *Parducci v. Rutland*.³²

Marilyn Parducci was a high school English teacher at Jefferson Davis High School in Montgomery. She assigned Kurt Vonnegut’s short story, *Welcome to the Monkey House*, to her eleventh-grade English class.³³ The School Board dismissed her “for assigning materials which had a ‘disruptive’ effect on the school” and for “insubordination.”³⁴ Citing *Keyishian*, *Sweezy*, and *Wieman*, Judge Johnson declared:

Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and to study is fundamental to a democratic society. . . . [T]he safeguards of the First Amendment will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers.³⁵

While Judge Johnson recognized that the First Amendment right of teachers was “not absolute,”³⁶ he fashioned a balancing test similar to that applied to the First Amendment rights of students by the Supreme Court in *Tinker v. Des Moines Independent Community School District*³⁷: The school should not restrict a teacher’s academic freedom in the classroom unless the teacher’s academic choices result in the assignment of “inappropriate reading” or create “a significant disruption to the educational processes of [the] school.”³⁸ The Fifth³⁹ and later the Elev-

31. Judge Johnson, who began his storied judicial career at only thirty-seven, was despised and ostracized in his native Montgomery, Alabama because of his principled decisions on civil rights cases. See generally John Lewis, *Reflections on Judge Frank M. Johnson, Jr.*, 109 YALE L.J. 1253 (2000). He later became one of the most admired jurists of the twentieth century. See generally JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS* (Doubleday 1992). He was awarded the Presidential Medal of Freedom by President Clinton in 1993. Burke Marshall, *In Remembrance of Judges Frank M. Johnson, Jr. and John Minor Wisdom*, 109 YALE L.J. 1207, 1209 n.4 (2000).

32. 316 F. Supp. 352 (M.D. Ala. 1970).

33. *Id.* at 353.

34. *Id.* at 354.

35. *Id.* at 355.

36. *Id.*

37. 393 U.S. 503 (1969). In *Tinker*, the Court struck the following balance: The school should not interfere with the First Amendment rights of students unless the conduct threatens to “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

38. *Parducci*, 316 F. Supp. at 356.

39. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the first opinion to be published by the Eleventh Circuit after the Fifth Circuit was divided into two

enth Circuit did not retreat from this holding in several subsequent decisions addressing the First Amendment rights of teachers and students.

In *Sterzing v. Fort Bend Independent School District*,⁴⁰ a Texas District Court relied on *Parducci* in holding that “[t]he freedom of speech of a teacher and a citizen of the United States must not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues in an eager but disciplined classroom.”⁴¹ Another Texas district court relied on *Parducci* in holding that “a teacher has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing, even though the subject matter may be controversial or sensitive.”⁴² An Eleventh Circuit student-speech decision, *Holloman v. Harland*,⁴³ adopted the reasoning in *Parducci* as its own in determining whether restrictions on a student’s speech run afoul of the First Amendment.⁴⁴

The *Parducci* decision has been widely recognized as one of a national trilogy of lower court cases establishing First Amendment protections for the academic freedom of teachers.⁴⁵ Thus, in this Circuit at least one line of cases recognizes a teacher’s right to academic freedom applied to educators in both the K–12 setting as well as those in public universities. Those rights are tempered by the legitimate interests of the school system in what would become known as institutional academic freedom, as discussed below.⁴⁶

circuits, adopted as binding precedent all cases decided in the Fifth Circuit prior to the close of business on September 30, 1981.

40. 376 F. Supp. 657 (S.D. Tex. 1972), *vacated and remanded on other grounds*, 496 F.2d 92 (5th Cir. 1974).

41. *Id.* at 661 & n.1.

42. *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302, 307 (E.D. Tex. 1979); *see also* *Kelleher v. Flawn*, 761 F.2d 1079, 1085 & n.3 (5th Cir. 1985) (leaving undisturbed lower court determinations, including *Parducci*, that there was constitutional protection for teacher’s in-class activities in the former Fifth Circuit); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (holding that a teacher’s classroom discussion is protected by the First Amendment).

43. 370 F.3d 1252 (11th Cir. 2004).

44. *Id.* at 1272. The Court observed that the district court in *Parducci* “correctly appl[ie]d our precedents.” The Eleventh Circuit also approved the holding in *Parducci* recognizing “that First Amendment freedoms in public schools, including a teacher’s right to academic freedom, could be constitutionally abridged under *Tinker* and *Burnside* only if there was a realistic threat that the conduct at issue would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’” *Id.* (quoting *Parducci v. Rutland*, 316 F. Supp. 352, 355 (M.D. Ala. 1970)).

45. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) and *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) (per curiam) complete the trilogy. *See* Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 911 & n.20 (2006); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 318–322 (1998).

46. *See* discussion *infra* Part II.A.2.

2. INSTITUTIONAL ACADEMIC FREEDOM

Beginning with Justice Powell's opinion in *Regents of the University of California v. Bakke*,⁴⁷ the Supreme Court began to recognize that certain choices made by educational institutions constituted academic freedom protected by the First Amendment.⁴⁸ This line of cases has become so significant that one scholar has concluded that, of late, "the Supreme Court's decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from government interference in the performance of core educational functions."⁴⁹ Affording such First Amendment rights to the educational institution is inevitably in tension with the individual educator's academic freedom.⁵⁰ In his dissent in *Adler*, Justice Frankfurter aptly described the tension between the right of the sovereign (in this case the educational institution) and the teacher as one of

the deepest interests of a democratic society: its right to self-preservation and ample scope for the individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests.⁵¹

The Eleventh Circuit has recognized the academy's First Amendment right to academic freedom, albeit without acknowledging the

47. 438 U.S. 265 (1978).

48. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* at 312.

49. Byrne, *supra* note 21, at 311; see also Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 817 (1982) ("Increasing governmental regulation of the nation's colleges and universities, especially at the federal level, has been decried as a serious threat to institutional autonomy, and the United States Supreme Court has recognized that academic freedom is protected by the first amendment."); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007) ("Universities are one especially strong example of a First Amendment institution . . . [that] play a special role in contributing to the broader world of social discourse we value under the First Amendment.").

50. See William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 215–17 (1999) (describing as "rival" views the question of whether teacher or institution has control over curriculum and arguing that a teacher's right to communicate the curriculum is subordinate to that of the educational institution).

51. *Adler v. Bd. of Educ.*, 342 U.S. 485, 504 (1952) (Frankfurter, J., dissenting); see also *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S. [589], 603 [1967]; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (opinion of Warren, C.J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Sweezy v. New Hampshire*, 354 U.S. [] at 263 (Frankfurter, J., concurring in result.)" (emphasis added).

inherent tensions between the rights of the academy and those of the individual academics. For example, in *Knight v. Alabama*,⁵² the Court declared that

[c]urricula design has historically been left to the university. One of the central tenets of academic freedom is the right to decide matters of course content. Such freedom is essential to guarantee the unimpeded exchange of ideas. It is not the duty of a federal court to dictate to a university the content of its curriculum; such decisions belong to the institution's faculty.⁵³

The Eleventh Circuit failed to acknowledge, however, that the academic choices made by the faculty and the institution itself may differ.⁵⁴

3. HAZELWOOD'S IMPACT

Complicating the inherent tensions between the academic freedom of teachers and the educational institution still further is the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*,⁵⁵ and the Eleventh Circuit's confused applications of that case to teachers. In *Hazelwood*, high school journalism students who wrote for the school newspaper challenged the school principal's censorship of newspaper articles dealing with the experiences of pregnant Hazelwood high-school students and the impact of divorce on students.⁵⁶ In determining that the principal's actions withstood First Amendment scrutiny, the Supreme Court distinguished between

a student's personal expression that happens to occur on the school premises . . . [and] school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. 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.⁵⁷

Hazelwood limited *Tinker*'s material-and-substantial-interference test for balancing the First Amendment rights of students against the interests of the school administration and authorized—in a curricular setting reasonably perceived to bear the imprimatur of the school—curtailment of student expression as long as it is “reasonably related to legitimate

52. 14 F.3d 1534 (11th Cir. 1994).

53. *Id.* at 1552 (quoting *Knight v. Alabama*, 787 F. Supp. 1030, 1333 (N.D. Ala. 1991)).

54. *See, e.g.*, *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher dismissed for assigning material disapproved of by the school board).

55. 484 U.S. 260 (1988).

56. *Id.* at 263–64.

57. *Id.* at 271.

pedagogical concerns.”⁵⁸

The circuit courts have split in their interpretations of *Hazelwood*, particularly about whether it permits suppression of speech based on viewpoint and whether and how the decision interacts with the academic freedom of teachers.⁵⁹ The Eleventh Circuit’s post-*Hazelwood* decisions make clear that the principles announced in *Hazelwood* apply to “school-sponsored expression that occurs in the context of a curricular activity *Hazelwood* controls all expression that (1) bears the imprimatur of the school, and (2) occurs in a curricular activity.”⁶⁰ But, in the Eleventh Circuit, “*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint.”⁶¹

The Eleventh Circuit has been less consistent in its consideration of how (if at all) *Hazelwood* applies to the classroom speech of teachers. In one instance it has applied what it perceives as *Hazelwood*’s “relatively lenient test for regulation of expression, which ‘may fairly be characterized as part of the school curriculum,’”⁶² to the classroom expression of teachers. In *Bishop v. Aronov*,⁶³ the Court applied the *Hazelwood* standard to a public university restricting a professor’s in-class references to his religious beliefs and his holding of after-class optional meetings “for his students and other interested persons wherein he lectured on and discussed ‘Evidences of God in Human Physiology.’”⁶⁴ While the Court was undoubtedly influenced by the university’s legitimate concerns about running afoul of the Establishment Clause,⁶⁵ in deciding in favor

58. *Id.* at 273.

59. Waldman, *supra* note 11, at 64.

60. *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1214 (11th Cir. 2004) (*per curiam*).

61. *Id.* at 1215; *see also* *Virgil v. Sch. Bd. of Columbia County*, 862 F.2d 1517, 1522–23 & n.8 (11th Cir. 1989) (applying *Hazelwood* and describing as a “constitutionally impermissible motive” a school board’s “opposition to the content of ideas expressed in the disputed materials”); *Searcey v. Harris*, 888 F.2d 1314, 1324–25 (11th Cir. 1989) (*Hazelwood* does not allow “educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis”); *cf.* *Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) (discussing a split “among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality.”).

62. *Virgil*, 862 F.2d at 1521 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). “Such regulation is permissible so long as it is ‘reasonably related to legitimate pedagogical concerns.’” *Id.*, 862 F.2d at 1521 (quoting *Hazelwood*, 484 U.S. at 273).

63. 926 F.2d 1066 (11th Cir. 1991).

64. *Id.* at 1068–69.

65. As the Court observed:

University policy does not prohibit faculty members from engaging in non-religious classroom speech involving personal views on other subjects. . . . There is no University policy attempting to control the statements of faculty members as long as they do their job. Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective.

Id. at 1069–70.

of the university administration the Court made sweeping statements that cast doubt upon the Eleventh Circuit's previous First Amendment protection for a teacher's academic freedom. Without so much as mentioning *Parducci*, *Sterzing*, or *Cooper*, and *Parducci*'s place in the Court's jurisprudence on academic freedom, the Court relied on a case from the Southern District of New York to state that "[t]he question becomes to what degree a school may control classroom instruction before touching the First Amendment rights of a teacher. 'Courts agree . . . that the school's administration may at least establish the parameters of focus and general subject matter of curriculum.'"⁶⁶ The Court then proceeded to abrogate its previous recognition of First Amendment protections for a teacher's academic freedom by concluding that despite "the invaluable role academic freedom plays in our public schools . . . we do not find support to conclude that academic freedom is an independent First Amendment right."⁶⁷

Notwithstanding the Eleventh Circuit's sweeping language in *Bishop*, its relevance has arguably been limited to its facts, i.e., to situations in which an educational institution curbs what it perceives as proselytizing by an individual teacher who claims academic freedom and/or free exercise as the justification for the behavior.⁶⁸ Indeed, the decision itself repeatedly cautions that it, like all First Amendment cases, is to be understood on its unique facts.⁶⁹ In light of the 1991 *Bishop* decision's disregard of Eleventh-Circuit precedent recognizing a teacher's First Amendment protected right to academic freedom,⁷⁰ and the Circuit's 2004 approving reference to *Parducci* in *Holloman v. Harland*,⁷¹ the holding in *Bishop* is properly limited to attempts by educators to inject religion into the public education setting.

None of this resolves the impact of *Hazelwood* on whatever First Amendment protections for academic freedom a teacher enjoys. Emily Gold Waldman has recently suggested that it is always inappropriate to

66. *Id.* at 1073 (quoting *Mahoney v. Hankin*, 593 F. Supp. 1171, 1174 (S.D.N.Y. 1984)).

67. *Id.* at 1075.

68. *See, e.g.*, *Braswell v. Bd. of Regents of the Univ. Sys. of Ga.*, 369 F. Supp. 2d 1362, 1367 (N.D. Ga. 2005) ("Here, as in *Bishop*, *Braswell*'s personal religious practice was not restricted. Rather, the University, walking the First Amendment tightrope, sought to prevent her from injecting religious practice into her cheerleading program.").

69. *E.g.*, *Bishop*, 926 F.2d at 1070 ("First amendment doctrines are manifold, and their diverse facts and analyses may reveal but one consistent truth with respect to the amendment—each case is decided on its own merits."); *id.* at 1074 ("[W]e see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech.") (quoting *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)).

70. *See supra* notes 32–42 and accompanying text.

71. 370 F.3d 1252, 1272 (11th Cir. 2004).

apply *Hazelwood*—a student-speech case—to teachers.⁷² Indeed, some Circuits have explicitly declined to extend the *Hazelwood* analysis to teacher speech, applying instead the balancing test enunciated in *Pickering v. Board of Education*,⁷³ discussed in Section II.B.⁷⁴ As argued below, the Eleventh Circuit should follow this guidance and recognize that *Hazelwood* does not provide a proper analytical framework for teacher speech.⁷⁵

B. *The Public-Employee-Speech Doctrine in the Eleventh Circuit*

The last of the threads woven into the confusing cloth of First Amendment protections for educators is the public-employee-speech doctrine that was first announced in *Pickering*,⁷⁶ and modified by *Connick v. Myers*.⁷⁷ Essential to an understanding of this doctrine, as it impacts educators, is the factual context in which each of the cases reached the Supreme Court.

1. *PICKERING V. BOARD OF EDUCATION*

Marvin Pickering was a public high-school teacher in Will County, Illinois. He was fired by the Board of Education after he wrote a letter to the editor of the local newspaper in connection with a “proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools.”⁷⁸ Pickering specifically noted that he was signing the letter “as a citizen, taxpayer and voter, not as a teacher.”⁷⁹ The Board found that “publication of the letter was ‘detrimental to the efficient operation and administration of the schools of the district’ and . . . that

72. Waldman, *supra* note 11, at 66 (arguing that “*Hazelwood*’s reach has been significantly overextended and that it should be applied only in student speech cases. *Hazelwood* was a student speech case, and its rationale and approach are uniquely suited to that context”).

73. 391 U.S. 563 (1968).

74. *See, e.g.,* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1055 n.7 (6th Cir. 2001) (rejecting the reasoning of other Circuits—including the Eleventh—applying *Hazelwood* to teacher speech and stating that “[t]he *Pickering* balancing analysis has been consistently applied to cases of teacher speech in this circuit. *See, e.g.,* *Bonnell*, 241 F.3d at 821 (applying *Pickering* to a college professor’s speech); *Leary*, 228 F.3d at 737–38 (applying *Pickering* to elementary school teachers’ speech). We see no reason to part from *Pickering* when deciding cases involving a teacher’s in-class speech . . .”) (citing *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001); *Leary v. Daeschner*, 228 F.3d 729 (6th Cir. 2000); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 373 (4th Cir. 1998) (en banc) (Luttig, J., concurring) (rejecting as inapplicable “*Hazelwood*’s test for evaluating restrictions on *student* speech *within* curricular activities into the entirely different context of *teacher* speech *through* the curriculum itself.”).

75. *See infra* discussion accompanying notes 76–124.

76. 391 U.S. 563 (1968).

77. 461 U.S. 138 (1983).

78. *Pickering*, 391 U.S. at 564.

79. *Id.* at 578.

'interests of the schools require[d] [his dismissal].'⁸⁰

Citing *Weiman* and *Keyishian*, the Supreme Court rejected the suggestion that public employment as a teacher could be conditioned on the teacher's relinquishing of First Amendment rights enjoyed by other citizens.⁸¹ The Court framed the problem as "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁸² In *Pickering's* case, the Court struck the balance in his favor, because it found that *Pickering* was commenting on a matter of general public interest⁸³ and that, since the statements were critical of the Board and the Superintendent, they were "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers" was presented.⁸⁴ As to the Board of Education's claim that *Pickering's* letter was "detrimental," the Court found that this improperly equated "the Board members' own interests with that of the schools."⁸⁵ Instead, the Court found that

an accusation that too much money is being spent on athletics by the administrators of the school system . . . cannot reasonably be regarded as *per se* detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between *Pickering* and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.⁸⁶

In its conclusion, the Court emphasized both the importance of debate on matters of public concern in our democracy and the unique circumstances of teachers in that debate.

[T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a

80. *Id.* at 564–65.

81. *Id.* at 568.

82. *Id.*

83. *Id.* at 571.

84. *Id.* at 569–70. "Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570.

85. *Id.* at 571.

86. *Id.*

community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.⁸⁷

In the years between *Pickering* and *Connick v. Myers*, the Supreme Court applied the *Pickering* balancing test to the free-speech rights of teachers three times, and on each occasion struck the balance in favor of the teacher.⁸⁸ In *Perry v. Sindermann*,⁸⁹ the Court concluded that "a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment."⁹⁰ The state college for which Sindermann worked claimed he was untenured and had no contractual right to renewal, but the Court held that "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim. [T]he nonrenewal . . . may not be predicated on his exercise of First and Fourteenth amendment rights."⁹¹ Next, in *Mt. Healthy City School District Board of Education v. Doyle*,⁹² the Court considered a public school teacher who was not rehired because he had relayed the content of his principal's memorandum about teacher dress to a local radio station. The Court determined that the teacher made a threshold showing of entitlement to First Amendment protection, which can only be rebutted by the Board proving by a preponderance of the evidence that it would have made the same decision absent the constitutionally protected speech.⁹³ Lastly, in *Givhan v. Western Line Consolidated School District*,⁹⁴ the Court concluded that the First Amendment protects a teacher's complaints and criticisms about the school district's allegedly racially discriminatory policies made privately to the principal.

2. *CONNICK V. MYERS*

Sheila Myers was not a teacher. She was an Assistant District Attorney in New Orleans. "She served at the pleasure of petitioner Harry

87. *Id.* at 571-72.

88. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (teacher's private complaint to principal); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282-87 (1977) (teacher's communication to radio station); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (teacher's public criticism of policies of Board of Regents).

89. 408 U.S. 593 (1972).

90. *Id.* at 598.

91. *Id.* at 597-98.

92. 429 U.S. 274 (1977).

93. *Id.* at 285-87.

94. 439 U.S. 410.

Connick,⁹⁵ the District Attorney for Orleans Parish.”⁹⁶ In 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. She opposed the transfer and expressed her view to several of her supervisors, including Connick, who urged her to accept the transfer. When her opposition was unavailing, she prepared a questionnaire “soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”⁹⁷ Myers distributed the questionnaire to fifteen assistant district attorneys. When Dennis Waldron, a first assistant district attorney, learned that Myers was distributing the survey he immediately phoned Connick and informed him that Myers was creating a “mini-insurrection” within the office.⁹⁸ Connick fired Myers and maintained that he did so “because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination.”⁹⁹

Myers sued, claiming that her termination was in violation of her constitutionally-protected right of free speech. Applying *Pickering*, the District Court of the Eastern District of Louisiana, and, on appeal, the Fifth Circuit, agreed. On review, the Supreme Court refined the *Pickering* balancing test and held that the lower courts had “erred in striking the balance for [Myers].”¹⁰⁰ Modifying the *Pickering* balancing test, the Court held that

when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.¹⁰¹

The Court then proceeded to offer guidance on how courts should determine whether an employee’s speech addresses a matter of public concern. It advised that this determination should be based on “the content,

95. “Harry Connick, Sr. was first elected District Attorney of New Orleans in 1973. He replaced the late Jim Garrison and held the office continuously until his retirement in 2003.” He is also a vocalist and bandleader and the father of the actor/musician Harry Connick, Jr. Harry Connick Sr.—A Biographical Sketch, <http://www.harry-connick.com> (follow “Biography” link) (last visited Apr. 11, 2009).

96. *Connick v. Myers*, 461 U.S. 138, 140 (1983).

97. *Id.* at 141.

98. *Id.*

99. *Id.*

100. *Id.* at 142.

101. *Id.* at 147. The Court was careful to point out that it did “not suggest, however, that Myers’ speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.” *Id.*

form, and context of a given statement, as revealed by the whole record."¹⁰² Applying this analysis to Myers's questionnaire, the Court determined that only the question inquiring about whether assistant district attorneys feel pressured to work in political campaigns on behalf of office-supported candidates presented a question of "public concern."¹⁰³ The Court cautioned:

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.¹⁰⁴

Thus, the Supreme Court struck the balance in *Connick's* favor, rather than in Myers's. Recognizing that the questionnaire did not impede Myers's ability to perform her job duties, the Court deferred to "Connick's judgment . . . that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."¹⁰⁵ However, the Court cautioned "that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."¹⁰⁶ Thus, had Myers's questionnaire focused more on political pressure and less on her internal office grievances, then the Court might well have struck the balance in her favor.

3. APPLICATION OF *PICKERING-CONNICK* IN THE ELEVENTH CIRCUIT

The Eleventh Circuit struggled with the meaning of *Pickering* as modified by *Connick*. In 1987, Judge Kravitch aptly described the "proper juxtaposition" of these cases as "somewhat unclear."¹⁰⁷ The Court issued a series of sometimes conflicting decisions before it

102. *Id.* at 147–48.

103. *Id.* at 149.

104. *Id.*

105. *Id.* at 151–52.

106. *Id.* at 152.

107. *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1556 (11th Cir. 1987) (referring to *Pickering*, *Connick*, and *Mt. Healthy*); see also Richard Hiers, *Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. FLA. J.L. & PUB. POL'Y 169, 256 (1993) ("The Eleventh Circuit experienced considerable difficulty in determining what *Connick* meant and how it should be applied.").

evolved a four part test to determine whether a public employer violates the free speech rights of its employees.

In *Leonard v. City of Columbus*,¹⁰⁸ the Court indicated that a public employee must *first* demonstrate that the allegedly protected speech was a substantial or motivating factor in the dismissal, *then* the court must apply the *Pickering* balancing test to determine whether the speech activity was protected, *then* defendant must show by a preponderance of the evidence that the adverse action would have occurred in the absence of the protected speech.¹⁰⁹ Next, in *Renfroe v. Kirkpatrick*,¹¹⁰ the Court indicated that the *first* step in assessing public-employee-free-speech claim is to determine whether speech relates to a matter of public concern.¹¹¹ In *Holley v. Seminole County School District*,¹¹² the Court, following *Mt. Healthy*, determined that once a plaintiff establishes that speech is protected, the burden shifts to the employer to show by a preponderance of the evidence that it would have taken the same action in absence of the protected activity.¹¹³ *Ferrara v. Mills*¹¹⁴ held that a public-employee plaintiff must first show that their speech was on a matter of public concern, then that their speech was a substantial or motivating factor in the employment decision. If both of these showings are made, then the courts should apply the *Pickering* balancing test to determine whether the adverse employment decision was “justified.”¹¹⁵

In *Eiland v. City of Montgomery*,¹¹⁶ the Eleventh Circuit departed from the reasoning of other circuits and determined that the *Pickering* balancing test is not employed to determine whether the speech is constitutionally protected. Rather, if the speech relates to a matter of public concern, the speech is constitutionally protected irrespective of any balancing of interests.¹¹⁷ The case of *Morales v. Stierheim*¹¹⁸ declared that a plaintiff must first show that the speech was on a matter of public concern,¹¹⁹ and that the statements were a substantial motivating factor in the public employer’s decision.¹²⁰ Once the employee has made this showing, then the *Pickering* balancing process is triggered and deter-

108. 705 F.2d 1299 (11th Cir. 1983).

109. *Id.* at 1303–04.

110. 722 F.2d 714 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984).

111. *Id.* at 715.

112. 755 F.2d 1492 (11th Cir. 1985).

113. *Id.* at 1500.

114. 781 F.2d 1508 (11th Cir. 1986).

115. *Id.* at 1512.

116. 797 F.2d 953 (11th Cir. 1986).

117. *Id.* at 957.

118. 848 F.2d 1145 (11th Cir. 1988), *cert. denied sub nom. Leon v. Avino*, 489 U.S. 1013 (1989).

119. *Id.* at 1148.

120. *Id.* at 1148 n.2.

mined by the following considerations: "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made."¹²¹

While none of the foregoing cases addressed the unique status of educators, the Eleventh Circuit considered this issue in *Kurtz v. Vickrey*.¹²² Kurtz was a public-university professor who claimed he was denied promotion to full professor because of his criticisms of the university and his participation in a lawsuit against it. Kurtz was critical of the university's failure to make salary information and how it was spending public funds available to the public. Kurtz argued that "too much money was being spent on 'window dressing' the university's physical plant, rather than on education itself."¹²³ Kurtz was also critical of the university president's personal management style.¹²⁴ He directed these criticisms primarily to the president (Vickrey). In addition, Kurtz participated in a lawsuit filed against the university by its educational association, which sought to compel the university to disclose its salary information and how it determined salary.¹²⁵ After Kurtz was denied promotion, he filed suit claiming the denial of promotion was based on his protected speech and his participation in the suit seeking disclosure of salary levels.¹²⁶

The district court dismissed the first component of Kurtz's claim because it found that "Kurtz's dialogue with Vickrey did not relate to matters of public concern."¹²⁷ In reviewing this decision, the Eleventh Circuit staked out its difference with other circuits in the interpretation of the *Pickering-Connick* line of cases:

Because of the ease with which any complaint about the management of government office could be termed a matter of public concern, some courts, in making such determinations, have focused on *Connick's* directive to consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee. See *Connick*, 461 U.S. at 147; *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987); *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). In *Terrell* the court stated that "the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment." *Id.* Concluding

121. *Id.* at 1149.

122. 855 F.2d 723 (11th Cir. 1988).

123. *Id.* at 725.

124. *Id.*

125. *Id.*

126. *Id.* at 726.

127. *Id.*

that the employee's speech, which consisted of scrutinizing notes and criticisms of his superior written in a notebook, was not a matter of public concern, the *Terrell* court relied upon the employee's lack of efforts to communicate the contents of the notebook to the public. *See also Gomez v. Texas Dep't of Mental Health*, 794 F.2d 1018, 1022 (5th Cir. 1986) ("Whatever the significance of Gomez'[s] speech . . . , he was not seeking to alert the public to any actual or potential wrongdoing or breach of the public trust. . . ."); *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (*Connick* "requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").¹²⁸

Relying on both *Connick* and *Givhan*, the Eleventh Circuit held that

[a]lthough an employee's efforts to communicate his or her concerns to the public are relevant to [determining whether] the employee's speech relates to a matter of public concern, focusing solely on such behavior, or on the employee's motivation, does not fully reflect the Supreme Court's directive that the content, form, and context of the speech must all be considered. The content of the speech is notably overlooked in such an analysis, although content is undoubtedly a material concern Moreover, such a focus overlooks the Court's holding in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979) that a public employee's freedom of speech is not sacrificed merely because the employee "arranges to communicate privately with his employer rather than to spread his views before the public."¹²⁹

The Eleventh Circuit then determined that Kurtz's "criticism of the university's spending priorities related to a matter of public concern."¹³⁰ The Court based its decision on the fact that "Kurtz's complaints were directed at matters beyond the scope of internal management. There is an indication that during the relevant period, the university was going through a 'financial crisis.' The financial failure of a state university certainly would be a matter of public concern."¹³¹

Having determined that Kurtz's speech addressed a matter of public concern, the Court proceeded to set forth the rudiments of what would eventually become the Eleventh Circuit's four-part *Pickering-Connick* analysis:

128. *Id.* at 727.

129. *Id.* (citation omitted).

130. *Id.* at 730 ("For instance, Kurtz complained about the proposed closing of a branch of the university. He also disagreed with the use of university funds to contribute to the purchase of a fire truck for the community.").

131. *Id.*

Once a plaintiff makes the threshold showing that the speech at issue relates to a matter of public concern, the court must turn to the three step process for reviewing an employee's claim of retaliation for engaging in constitutionally protected speech. First, the plaintiff must show that the speech at issue is accorded protection under the *Pickering* balancing test. Then, if causation is at issue, the remainder of the analytic framework set forth in *Mt. Healthy City Bd. of Education v. Doyle* must be applied.¹³²

This analytic framework would be refined in a series of cases¹³³ until 2005, when the Eleventh Circuit, in *Cook v. Gwinnett County School District*, clearly set forth its application of *Pickering-Connick* to public employees:

To strike the appropriate balance between the respective interests [of the public employee as speaker and the state as employer], we apply the four-step analysis set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989).

To prevail under this analysis, an employee must show that: (1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action. If an employee satisfies her burden on the first three steps, the burden then shifts to the employer to show by a preponderance of the evidence that it would have made the same decision even in the absence of the protected speech. The first two steps are questions of law; the final two steps are "questions of fact designed to determine whether the alleged adverse employment action was in retaliation for the protected speech."¹³⁴

Significantly, in an unpublished decision issued less than a year after *Cook* and shortly before the Supreme Court's decision in *Garcetti*, the Eleventh Circuit applied this analysis to an educator's speech rights.¹³⁵ Eddie Tucker was Coordinator of the Continuous Learning Center in the Talladega City school system. He sued after he was fired from his position, alleging, *inter alia*, that he was terminated because of statements he made "urging more hiring of minorities, and expressing his concern about the treatment of minority students."¹³⁶ The Eleventh

132. *Id.* at 730–31 (citations omitted).

133. *See, e.g., Anderson v. Burke County*, 239 F.3d 1216, 1219–20 (11th Cir. 2001); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565–66 (11th Cir. 1989).

134. *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir. 2005) (quoting *Anderson*, 239 F.3d at 1219–20) (citations omitted).

135. *Tucker v. Talladega City Schs.*, 171 F. App'x 289 (11th Cir. 2006).

136. *Id.* at 292.

Circuit first referenced its four-part “*Pickering/Connick* test,”¹³⁷ and had no trouble accepting the defendants’ concession that Tucker’s speech involved a matter of public concern or that Tucker’s free speech interests outweighed the defendant’s interests in the effective and efficient administration of the school, satisfying steps one and two of the Eleventh Circuit’s four-part test.¹³⁸ The Court then upheld—in an interlocutory appeal of the district court’s denial of defendant’s claim of qualified immunity—the district court’s determination that “a reasonable jury could find a causal connection between Tucker’s protected speech and his termination,” thus satisfying steps three and four of the four-part test.¹³⁹

The specific speech at issue in *Tucker*, as recounted by the Court, consisted of “statements Tucker made urging more hiring of minorities and expressing his concern about the treatment of minority students and students at the [school],”¹⁴⁰ filing complaints with the Department of Education’s Office of Civil Rights and the EEOC,¹⁴¹ criticizing the school “over which he presides” and “giving a poor impression of the school board.”¹⁴² As discussed below, the Eleventh Circuit’s view of this speech as within the First Amendment protected parameters for educators might have been radically different if the Court had considered the case only a few months later, after the *Garcetti* decision¹⁴³ was announced by the Supreme Court.¹⁴⁴

III. *GARCETTI V. CEBALLOS*¹⁴⁵

Richard Ceballos was an experienced deputy district attorney for the Los Angeles County District Attorney’s Office. He was working as a calendar deputy, which required him to exercise “certain supervisory

137. *Id.* at 292 (“[A]n employee must show that: ‘(1) the speech involved a matter of public concern; (2) the employee’s free speech interests outweighed the employer’s interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action.’ The burden then shifts to the employer to show (4) that it would have made the same decision even absent the protected speech. The first two factors are questions of law, commonly referred to as the *Pickering/Connick* test. The latter two are questions of fact that go to ‘whether the alleged adverse employment action was in retaliation for the protected speech.’”) (quoting *Cook*, 414 F.3d at 1318) (citations omitted).

138. *Id.*

139. *Id.* at 293. While conceding that Tucker had engaged in protected speech, which did not disrupt the operation of the school, the defendant had argued that it fired him for insubordination rather than in retaliation for the protected speech. *Id.* at 292.

140. *Id.*

141. *Id.* at 296.

142. *Id.* at 298.

143. *Tucker* was decided on March 20, 2006. *Garcetti* was argued on March 21, 2006 and the opinion was issued on May 30, 2006.

144. See discussion *infra* Part III.

145. 547 U.S. 410 (2006).

responsibilities over other lawyers.”¹⁴⁶ A defense attorney contacted Ceballos and asked him to review claimed inaccuracies in an affidavit used to obtain a critical search warrant. Ceballos did so, and determined the affidavit contained “serious misrepresentations.”¹⁴⁷ He spoke to the warrant affiant in the sheriff’s department, but was dissatisfied with the explanation. Ceballos then relayed his findings to his supervisors by a memo, which explained his concerns and recommended dismissal of the case. Eventually, a meeting was held between Ceballos, his supervisors, the warrant affiant, and others from the sheriff’s department. The meeting became “heated.” Thereafter, Ceballos’s supervisor decided to proceed with the prosecution in spite of Ceballos’s concerns.¹⁴⁸

Ceballos was called by the defense to testify in the trial court about his observations concerning the warrant.¹⁴⁹ Ceballos claimed that after these events the District Attorney retaliated against him by transferring and reassigning him and denying him a promotion. He alleged that the retaliation was based on his memo about the warrant and violated his First Amendment rights.¹⁵⁰

Relying on *Pickering* and *Connick* and its own case law interpreting those doctrines, the Ninth Circuit held that “Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment.”¹⁵¹ The Ninth Circuit determined that Ceballos’s memo, reciting what he viewed as governmental misconduct, was “inherently a matter of public concern.”¹⁵² The Ninth Circuit did not address whether the speech was made in Ceballos’s capacity as a citizen, relying on its own Circuit precedent which rejected the idea that “a public employee’s speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility.”¹⁵³ This Ninth Circuit precedent is similar to that of the pre-*Garcetti* Eleventh Circuit.¹⁵⁴

The Supreme Court rejected this determination. In the majority’s decision, authored by Justice Kennedy, the Court refocused the *Pickering*-

146. *Id.* at 413.

147. *Id.* at 414.

148. *Id.* at 414.

149. The trial court eventually rejected the challenge to the warrant. *Id.* at 414–15.

150. *Id.* at 415.

151. *Id.* (citing *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004)).

152. *Garcetti*, 547 U.S. at 416 (citing *Ceballos*, 361 F.3d at 1174).

153. *Garcetti*, 547 U.S. at 416 (citing *Ceballos*, 361 F.3d at 1174–75 and cases cited therein, including *Roth v. Veteran’s Admin.*, 856 F.2d 1401 (9th Cir. 1988)).

154. *E.g.*, *Tucker v. Talladega City Schs.*, 171 F. App’x 289, 292–93 (11th Cir. 2006) (finding that Tucker’s criticism of school over which he presided was protected by the First Amendment); *Kurtz v. Vickrey*, 855 F.2d 723, 730 (11th Cir. 1988) (finding that Kurtz’s dialogue with university president concerning managerial issues was protected by First Amendment).

ing—*Connick* inquiry by interjecting an additional threshold hurdle: In order to enjoy any First Amendment protection, the public employee must establish that the speech was made “as a citizen” and not as part of the employee’s job duties.¹⁵⁵ The Supreme Court thus reversed the Ninth Circuit’s extension of First Amendment protection to Ceballos because “his expressions were made pursuant to his duties as a calendar deputy. . . . [T]he fact that Ceballos spoke as a prosecutor fulfilling a [job] responsibility . . . distinguishes Ceballos’ case from those in which the First Amendment provides protection against discipline.”¹⁵⁶ The Court proceeded to announce a new bright-line test for the public-employee-free-speech doctrine: “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.”¹⁵⁷

The majority included in dicta a broad-sweeping and inaccurate reference to the government-speech doctrine without providing any further explanation or analysis:

Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”). Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.¹⁵⁸

Four Justices dissented from the Court’s holding.¹⁵⁹ Justice Souter, writing for three of them, was particularly troubled by the majority’s reference to the government-speech doctrine and how the holding (including the dicta about government speech) might adversely affect educators’ First Amendment freedoms. Referring to the government-

155. *Garcetti*, 547 U.S. at 418 (“*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”) (citations omitted).

156. *Id.* at 421.

157. *Id.*

158. *Id.* at 421–22.

159. Justices Stevens, Souter, Ginsburg and Breyer.

speech discussion as a “fallacy propounded by the county petitioners and the Federal Government as *amicus*,”¹⁶⁰ Justice Souter explained why the doctrine did not apply to this case and, indeed, applies to only a narrow spectrum of speech—“when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”¹⁶¹

Concerned about the potential dangers inherent in the majority’s dicta on this point, Justice Souter warned that this expansive interpretation of government speech “portends a bloated notion of controllable government speech going well beyond the circumstances of this case.”¹⁶² He was particularly worried that:

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.”¹⁶³

However, while the majority’s opinion does contain the sweeping

160. *Garcetti*, 547 U.S. at 436 (Souter, J., dissenting). The United States as Amicus Curiae suggested that in all cases of public-employee speech, “the government is entitled to control the content of the speech” because the government has “‘purchased’ the speech . . . through a grant of funding or payment of a salary.” Brief for the United States as Amicus Curiae Supporting Petitioners at 28, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1276045, at *20 (citing *Urofsky v. Gilmore*, 216 F.3d 401, 408 n.6 (4th Cir. 2000)). The county petitioners had similarly argued that all “job-required” speech by a government employee “by definition constitutes government speech.” Petitioners’ Brief on the Merits at 39, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1317482, at *31, *31–35. As explained *infra* in notes 164–67 and the accompanying text, the majority’s decision in *Garcetti* did not adopt such an extreme and categorical definition of government speech, and as a result its parameters remain somewhat undefined. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1436 (2001) (“[I]n all of the Court’s government speech decisions, the Court seems largely to be operating on an intuitive, even inchoate, sense of what government speech is.”).

161. *Id.* at 437 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). As Justice Souter explained,

the difference between this case and [government speaker cases] lies in the terms of the respective employees’ jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to “promote a particular policy” by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.

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

162. *Id.* at 438.

163. *Id.* at 438 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), as well as *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), as evidence of the Court’s approval of academic freedom as a right protected by the First Amendment). *But see Grutter*, 539 U.S. at 362–64 (Thomas, J., dissenting) (questioning the adoption of First Amendment protections for academic freedom and the scope of such protections).

dicta discussed above and aptly criticized by Justice Souter,¹⁶⁴ the decision also contains self-limiting language that must be carefully considered by the circuit courts going forward. The majority continued to recognize not only *Pickering* and *Connick* as good law, but also *Givhan*, stating that the fact that “Ceballos expressed his views inside his office, rather than publicly, is not dispositive [on the question of whether his speech was made pursuant to his official duties]. Employees in some cases may receive First Amendment protection for expressions made at work.”¹⁶⁵ The majority further noted that the fact that the memo “concerned the subject matter of Ceballos’ employment,” was nondispositive as to the “pursuant to official duties” question. Indeed, the majority referred to *Givhan* and teachers in general in noting that the “First Amendment protects some expressions related to the speaker’s job.”¹⁶⁶

In his conclusion, Justice Kennedy responded to the dissent’s concerns by noting that the parties in *Garcetti* had not disputed that Ceballos’s memo was written pursuant to his official employment duties and therefore the Court did not “articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate,”¹⁶⁷ but rejected Justice Souter’s suggestion in dissent

that employers can restrict employees’ rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an

164. The majority’s decision in *Garcetti* has also been widely criticized by academics. See, e.g., Erwin Chemerinsky, *The Rookie Year of the Roberts Court and A Look Ahead: Civil Rights*, 34 PEPP. L. REV. 535, 539 (2007) (*Garcetti* “is not only a loss of free speech rights for millions of government employees, but it is really a loss for the general public, who are much less likely to learn of government misconduct”); Martin Schwartz, *Eighteenth Annual Supreme Court Review: Section 1983 Civil Rights Litigation in the October 2005 Term*, 22 Touro L. REV. 1033, 1036–37 (2007) (*Garcetti* represents “a big setback” for section 1983 litigation); Kathryn B. Cooper, Note, *Garcetti v. Ceballos: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73 (2006) (generally criticizing the decision and preferring Souter’s dissent); Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759 (2007) (*Garcetti* is a particularly bad case for employees in national security, in part because they have few statutory protections). But see Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 213–15 (2008) (arguing that *Garcetti* actually benefits public-employee-speech rights).

165. *Garcetti*, 547 U.S. at 420 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)).

166. *Garcetti*, 547 U.S. at 421. The Court cited *Givhan*, 439 U.S. at 414, and *Pickering v. Board of Education*, 391 U.S. 563, 572 (1968) in noting that

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Garcetti, 547 U.S. at 421.

167. *Garcetti*, 547 U.S. at 424.

employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.¹⁶⁸

With respect to the academic freedom concerns of educators, the majority acknowledged that

[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. 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.¹⁶⁹

Thus, *Garcetti* has provided considerable room for the circuit courts to carve out, as they did after both *Pickering* and *Connick*, their unique and circuit-specific determinations of the import of *Garcetti*. This is especially true in the circuit courts' consideration of the First Amendment rights of educators after *Garcetti*.

IV. THE POST-GARCETTI ERA

Early interpretations of *Garcetti* in the lower courts have varied widely. For example, the circuits have split over whether the question of the capacity in which a public employee speaks should be submitted to the trier of fact.¹⁷⁰ The circuits have also diverged in their assessment of *Garcetti*'s impact and application in academic settings.¹⁷¹ Circuit inter-

168. *Id.* at 424–25.

169. *Id.* at 425.

170. *Compare* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1124–29 (9th Cir. 2008) (holding that the “determination [of] whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law,” and the “scope and content of a plaintiff’s job responsibilities . . . should be found by a trier of fact”), and Reilly v. City of Atlantic City, 532 F.3d 216, 227 (3d Cir. 2008) (whether speech is made within a particular plaintiff’s job duties is a “mixed question of fact and law”), with Charles v. Grief, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (the question of whether an employee’s speech is entitled to protection is a “legal conclusion properly decided by the court in summary judgment”), and Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202–03 (10th Cir. 2007) (all aspects of the inquiry into the protected status of speech, including whether the employee’s speech was pursuant to official duties, must be resolved by the district court and not the trier of fact), and Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (the question of whether a plaintiff has spoken as a citizen on a matter of public concern is a question of law for the court and not a question of fact for the jury).

171. *Compare* Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 478–79 (7th Cir. 2007) (*Garcetti* forecloses First Amendment claims of public school teachers teaching in their regularly assigned classes), with Lee v. York County Sch. Div., 484 F.3d 687, 694–95 n.11 (4th Cir. 2007) (declining to apply *Garcetti* to a case involving teacher’s speech in a classroom and instead continuing to apply *Pickering–Connick* and *Hazelwood*). See also Panse v. Eastwood, 303

pretations of what falls under *Garcetti*'s scope of "official duties" have also varied widely.¹⁷² The remainder of this article will focus on how the Eleventh Circuit has viewed *Garcetti* thus far and make recommendations for the Circuit's future reading of the case in harmony with its own prior precedent and recognition of the unique free speech concerns of educators.

A. *The Eleventh Circuit's Post-Garcetti Jurisprudence*

Over the last two years, the Eleventh Circuit has had several occasions to consider the impact of *Garcetti* on its First Amendment jurisprudence. At the time of this writing, the Court has issued a dozen significant decisions based on *Garcetti*.¹⁷³ Only one of these cases, the first—*Gilder-Lucas v. Elmore County Board of Education*¹⁷⁴—concerned the First Amendment rights of a teacher.¹⁷⁵ That unpublished

F. App'x 933, 934 (2d Cir. 2008) ("It is an open question in this Circuit whether *Garcetti* applies to classroom instruction."); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008) (interpreting *Garcetti* as leaving open the question of whether its reasoning should apply to the official duties of a coach of a high school football team); *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 18 (D.C. Cir. 2008) (determining that *Garcetti* leaves "undecided the many questions relating to the concept and breadth of academic freedom," and stating that "[p]rudence commands that we do the same").

172. *Compare* *Thomas v. City of Blanchard*, 548 F.3d 1317, 1324 (10th Cir. 2008) (city building inspector's complaint to law enforcement authorities about what he believed was a fraudulent certificate of occupancy "went well beyond his official responsibilities"), and *Posey*, 546 F.3d at 1129 (where school security employee wrote letter to school officials about inadequate safety and security at the school, there was a genuine issue of material fact about whether the letter was written as a private citizen), and *Freitag v. Ayers (Freitag I)*, 468 F.3d 528, 545 (9th Cir. 2006) (prison employee's complaints to state senator and to inspector general about sexual harassment in the prison workplace were made as a citizen rather than pursuant to her duties), and *Freitag v. Cal. Dep't of Corrs. (Freitag II)*, 289 F. App'x 146, 147 (9th Cir. 2008) (affirming the aforementioned holding of *Freitag I*), with *Tamayo v. Blagojevich*, 526 F.3d 1074, 1091–92 (7th Cir. 2008) (Illinois Gaming Board administrator who testified before the legislature about Governor Blagojevich's and other officials' interference with operations, "misuse of public funds, hiring unqualified personnel for unnecessary positions," and attempts to influence the outcome of various matters spoke pursuant to "official duties") (citing *Boyce v. Andrew*, 510 F.3d 1333, 1346–47 (11th Cir. 2007) for the proposition that "holding that social workers who complained to their supervisors and their union that the child welfare managers were overworked and endangering children had spoken as employees." *Tamayo*, 526 F.3d at 1091).

173. *Akins v. Fulton County*, 278 F. App'x 964 (11th Cir. 2008); *Burton v. City of Ormond Beach*, 301 F. App'x 848 (11th Cir. 2008); *Schuster v. Henry County*, 281 F. App'x 868 (11th Cir. 2008); *Shortz v. Auburn Univ.*, 274 F. App'x 859 (11th Cir. 2008); *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007); *D'Angelo v. Sch. Bd. of Polk County*, 497 F.3d 1203 (11th Cir. 2007); *Khan v. Fernandez-Rundle*, 287 F. App'x 50 (11th Cir. 2007); *Phillips v. City of Dawsonville*, 499 F.3d 1239 (11th Cir. 2007); *Vila v. Padrón*, 484 F.3d 1334 (11th Cir. 2007); *Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006); *Gilder-Lucas v. Elmore County Bd. of Educ.*, 186 F. App'x 885 (11th Cir. 2006); *Mitchell v. Hillsborough County*, 468 F.3d 1276 (11th Cir. 2006).

174. *Gilder-Lucas*, 186 F. App'x 885.

175. Two other Eleventh Circuit cases have addressed the First Amendment rights of high-ranking educators. See *D'Angelo*, 497 F.3d at 1205 (a high school principal); *Vila*, 484 F.3d at 1335 (vice president of a community college). Because the speech in these cases relates to the

decision was issued only a month after *Garcetti*; it contains little to no analysis concerning the capacity in which the teacher acted,¹⁷⁶ no discussion of whether educators enjoy any unique First Amendment rights, and no opinion as to the scope of those rights.¹⁷⁷ Therefore, in the Eleventh Circuit, the First Amendment rights of educators post-*Garcetti* remain to be determined, but may be hobbled by the exceptionally broad reading of *Garcetti* found in the Circuit's early interpretations outside the educational context.

In its decisions applying *Garcetti* thus far, the Eleventh Circuit has altogether ignored both the limiting language of the majority opinion discussed above¹⁷⁸ and much of its former precedent. Indeed, in at least two such cases, the Court's interpretation of *Garcetti*'s mandate resulted in a different result during the pendency of the litigation. In *Akins v. Fulton County* ("Akins I"),¹⁷⁹ the Eleventh Circuit, applying *Pickering* and *Connick*, ruled in favor of plaintiff purchasing and contracting employees who reported bidding and contracting irregularities, as well as work environment concerns, in a meeting with a Fulton County Commissioner and suffered adverse employment actions as a result.¹⁸⁰ The Eleventh Circuit reversed the district court's grant of summary judgment to the defendant, stating that

The right implicated in this case is certainly a constitutionally protected right, entitling Plaintiffs to a determination of whether Gates has impermissibly infringed that right. See *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989) (noting that "a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption").¹⁸¹

Unfortunately for the *Akins* plaintiffs, the Supreme Court's decision in *Garcetti* was announced while their case was pending before the district court on remand and the district court reinstated its grant of summary judgment on the basis of *Garcetti*.¹⁸² This time, the Eleventh Circuit affirmed the district court, disregarded its own precedent in *Bryson*, and expansively interpreted *Garcetti* to include virtually anything a public

administrative responsibilities of Vila and D'Angelo, they are not dispositive with respect to free-speech rights in an educational setting for the reasons discussed below. See *infra* discussion accompanying notes 192–203.

176. *Gilder-Lucas*, 186 F. App'x. at 887 ("Because the record reveals no genuine question about whether Gilder-Lucas responded to [her principal's] questionnaire pursuant to her duty as a junior varsity cheerleader sponsor rather than as a citizen, the district court correctly granted summary judgment against Gilder-Lucas's claim under the First Amendment.")

177. See *id.* at 886–87.

178. See *supra* text accompanying notes 154–68.

179. *Akins v. Fulton County (Akins I)*, 420 F.3d 1293 (11th Cir. 2005).

180. *Id.* at 1304.

181. *Id.* at 1300.

182. *Akins v. Fulton County (Akins II)*, 278 F. App'x 964, 966–67 (11th Cir. 2008).

employee might do on the job. Recognizing that Akins and other plaintiffs had no affirmative job duties requiring them to report these irregularities,¹⁸³ the Court manufactured a test never announced by the Supreme Court in *Garcetti*, which virtually every public employee is destined to fail: “the pithy inquiry here is not whether plaintiffs had an affirmative duty to report bid irregularities . . . but whether they made their statements to the commissioner as citizens who do not work for the government.”¹⁸⁴

The other post-*Garcetti* case that resulted in an about-face in defendant’s favor, *Khan v. Fernandez-Rundle*,¹⁸⁵ also expanded *Garcetti*’s reach further than the Supreme Court’s decision. In *Khan*, the Eleventh Circuit expressed the view that *Garcetti* should be interpreted to deny First Amendment protection whenever “the public employee [acts] as an agent of the government at the time of the relevant speech.”¹⁸⁶ The Court in *Khan* went on to embrace the most expansive possible construction of the government-speech-doctrine dicta in *Garcetti* discussed above,¹⁸⁷ and criticized so cogently by the *Garcetti* dissent.¹⁸⁸ In taking this position, the Eleventh Circuit remarked “[e]ven Justice Souter recognized this basis for the Court’s holding when he lamented in his dissenting opinion ‘the fallacy . . . that any statement made within the scope of public employment is (or should be treated as) the government’s own speech.’”¹⁸⁹ The Eleventh Circuit’s decision here elevates dicta from the majority opinion to a “basis for the Court’s holding” that dangerously threatens to expand the government-speech doctrine in the Eleventh Circuit. Like *Akins*, *Khan* holds that a public employee’s speech, even if unofficial, unenumerated, unexpected or unassigned, is sufficiently an “official duty” to eliminate the possibility of any First Amendment protection.¹⁹⁰ Indeed, in not a single case in which the question was contested did the Eleventh Circuit determine that a public employee’s

183. *Id.* at 970. *But cf.* *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

184. *Akins II*, 278 F. App’x at 971; *accord* *Burton v. City of Ormond Beach*, 301 Fed. App’x 848, 852 (11th Cir. 2008) (“[e]ssential is whether Burton made his statements . . . in the capacity of a citizen who did not work for the government”).

185. 287 F. App’x 50 (11th Cir. 2007).

186. *Id.* at 53.

187. See *supra* discussion accompanying notes 145–69.

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

189. *Khan*, 287 F. App’x at 53.

190. *Id.* at 52; see also *Shortz v. Auburn Univ.*, 274 F. App’x 859, 861 (11th Cir. 2008) (suggesting that speech “about” a public employee’s “official duties” is categorically unprotected); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007) (unenumerated job duty). *But see* *Garcetti*, 547 U.S. at 420–21 (recognizing that speech made at the workplace that concerns the subject matter of the employment may be protected by the First Amendment).

speech was outside of the employee's official duties.¹⁹¹

*Vila v. Padrón*¹⁹² is a good example of the Court's reluctance to find any public employee's speech protected by the First Amendment. Vila was the Vice President of External Affairs for Miami-Dade Community College. She objected to what she believed were a number of unethical or illegal actions by the College and its President, Padrón.¹⁹³ She reported an illegal contract to the College Provost, voiced concerns about hiring a negotiator at a meeting of the College Board, and informed the College's director of communications that it could not use College funds to illustrate a Trustee's daughter's poetry book.¹⁹⁴ After she had voiced concerns to many persons within the College and on its Board of Trustees, as well as to a former Trustee, her contract was not renewed.¹⁹⁵ Describing the "threshold question" as "whether Vila spoke as a citizen on a matter of public concern,"¹⁹⁶ the Court emphasized that most of Vila's concerns were communicated to Padrón, other College employees, or members of the Board of Trustees, and therefore concluded that these statements were part of her official job duties.¹⁹⁷ Vila's discussions about her concerns with the former Trustee were dismissed by the Court because she "sought his guidance as to what [she] should do," and therefore was speaking "as an employee upon matters of personal interest" instead of as a "citizen on a matter of public concern."¹⁹⁸

The Eleventh Circuit's most detailed analysis of *Garcetti*'s impact appears in *D'Angelo v. School Board of Polk County*.¹⁹⁹ In that case, a

191. In three cases where the parties agreed that the speech was outside the employee's official duties and thus, the question was uncontested, it was not protected for other reasons. *Schuster v. Henry County*, 281 F. App'x 868, 870 (11th Cir. 2008) (speech falls within the umbrella of responsibilities that the plaintiff identified as his job duties and is not entitled to First Amendment protection); *Battle v. Bd. of Regents.*, 468 F.3d 755, 761–62 (11th Cir. 2006) (because the plaintiff admitted that speech was made pursuant to her official employment responsibilities, her First Amendment retaliation claim must fail); *Mitchell v. Hillsborough County*, 468 F.3d 1276, 1283 n.17 (11th Cir. 2006) ("It is undisputed that Mitchell's speech . . . was neither speech as an employee about work-a-day matters, nor speech pursuant to his official duties," but finding that speech was not a matter of public concern).

192. 484 F.3d 1334 (11th Cir. 2007).

193. *Id.* at 1336.

194. *Id.* at 1336–37.

195. *Id.* at 1338.

196. *Id.* at 1339.

197. *Id.* But see *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)) ("That Ceballos expressed his views inside his office, rather than publicly, is not dispositive.").

198. *Vila*, 484 F.3d at 1340; see also *Boyce v. Andrew*, 510 F.3d 1333, 1339, 1346 (11th Cir. 2007) (where child protection workers warned of case overloads that endangered the lives of children in their care, the Court found that they primarily spoke as employees seeking to improve their work environment because they were overworked and overwhelmed; thus they spoke as government employees about their jobs and not as citizens, and had no First Amendment rights).

199. 497 F.3d 1203 (11th Cir. 2007).

high school principal, Michael D'Angelo, argued that he had been discharged in retaliation for his efforts to convert his school to a charter school. He met with teachers, consulted with principals of other schools, and held two faculty votes on the conversion. He claimed that his termination violated his rights to freedom of speech and association as protected by the First Amendment.²⁰⁰ While converting the school to charter status was clearly not one of his assigned job duties²⁰¹ (he was fired for these efforts, after all), the Eleventh Circuit nonetheless determined that these actions were undertaken as “official duties” because D'Angelo “admitted” that his number-one-job priority was to do whatever he could for the kids to succeed.²⁰² Significantly, however, the *D'Angelo* decision—alone thus far in the Court's post-*Garcetti* jurisprudence—does acknowledge and apply the limiting language of the *Garcetti* holding:

[W]e do not adopt the emphasis the district court placed on D'Angelo's use of school resources in his efforts to convert Kathleen High to charter status. Although D'Angelo often used school resources and spoke on school premises about charter conversion, we do not rely on that fact to conclude that D'Angelo did not speak as a citizen. As the Supreme Court explained in *Garcetti*, “[m]any citizens do much of their talking inside their respective workplaces.” We also do not rely on the fact that D'Angelo's speech might be construed as “concern[ing] the subject matter of [his] employment,” because that fact also “is nondispositive.”²⁰³

B. *Going Forward: Reconciling Educators' First Amendment Rights and Garcetti in the Eleventh Circuit*

The Eleventh Circuit's early expansive reading of the *Garcetti* decision to shield most of the speech made by public employees from First Amendment analysis must be carefully re-thought when applied in an educational setting. Contrary to the Seventh Circuit's determination in *Mayer v. Monroe County*,²⁰⁴ *Garcetti* does not foreclose First Amendment protection for the academic (classroom and scholarship) speech of educators. Indeed, the *Garcetti* majority explicitly declined to do so.²⁰⁵

In analyzing First Amendment protections for educators, the Eleventh Circuit should utilize the venerable test first enunciated by Judge Johnson in *Parducci*—a teacher's academic freedom should not be

200. *Id.* at 1205–06.

201. *Id.* at 1206.

202. *Id.*

203. *Id.* at 1211 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 420–21 (2006)) (citation omitted).

204. 474 F.3d 477, 478–79 (7th Cir. 2007).

205. *Garcetti*, 547 U.S. at 424–25.

infringed unless it creates a significant disruption to the educational process.²⁰⁶ This test is both essential to ensure academic freedom and is consistent with the weight of the Eleventh Circuit's precedent. The *Parducci* test can be refined and restated to roughly equate to the Eleventh Circuit's four-step *Pickering-Connick* analysis by recognizing a teacher's academic freedom as the functional equivalent of speech on an issue of public concern. Thus, an educator should enjoy First Amendment protection if: (1) the expression related to academic scholarship or classroom instruction, (2) the expression did not create a significant disruption to the educational process, (3) the expression played a substantial part in the adverse employment action, and (4) the employer would not have made the same decision in the absence of the protected expression.²⁰⁷

In analyzing the application of the First Amendment to academic freedom, the Eleventh Circuit should avoid any temptation to treat the speech as "governmental" simply because the educational institution pays the educator a salary. Teachers cannot—and thus far have not—been required to read from a government script in the Eleventh Circuit. A different result would portend serious consequences and truly threaten to "strangle the free mind at its source."²⁰⁸ This is one of the reasons that the *Hazelwood* "imprimatur of the school" test should not be applied to teachers in the same way that it has been to student speech. Although some of the problems inherent in applying *Hazelwood* to teachers' academic expression are mitigated by the Eleventh Circuit's steadfast holding that *Hazelwood* does not permit viewpoint discrimination, *Hazelwood's* reach should be limited to student expression.²⁰⁹

Support for this approach can be drawn from the limiting language of *Garcetti*. The argument for adopting a *Parducci/Pickering/Connick* approach to academic freedom issues is particularly compelling when *Garcetti's* limitations are considered in conjunction with the Eleventh Circuit's history of preserving the academic freedom of our teaching professionals under the First Amendment.

206. See *supra* notes 33–46 and accompanying text.

207. Cf. *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir. 2005).

208. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

209. See generally Waldman, *supra* note 11.