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NOTE

THE FIRST AMENDMENT IN THE PUBLIC SCHOOL CLASSROOM: A COGNITIVE THEORY APPROACH

Rosina E. Mummolo†

INTRODUCTION

The public classroom presents a unique set of First Amendment concerns. There, the teacher, a government employee, speaks to an audience comprised solely of students. Despite the concerns that flow from this particular speaker-audience dynamic, the Supreme Court has stated that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] However, courts have long wrestled with—or apparently disregarded—this

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

poetic maxim when confronting the realities of the present day public classroom and the First Amendment protection that ought to be afforded to educators therein. Indeed, the First Amendment should not provide an impenetrable shield enabling public educators to vocalize any radical idea before their students—especially in light of their rather unique functions in the worlds of primary, secondary, and higher education. However, the nature of teachers' duties necessarily implicates their First Amendment rights, which should not be relinquished simply because of their status as educators for the state.[2]

Courts have struggled with the appropriate First Amendment protection to afford public educators exercising their duties as government employees.[3] The most recent court to address the issue, the Ninth Circuit in *Demers v. Austin*, examined whether a public university professor asserted a viable First Amendment retaliation claim following his dismissal after circulating a book to his students that criticized certain university policies.[4] The Ninth Circuit discussed what has long perplexed courts—the appropriate standard to apply to determine if the public university professor engaged in speech and conduct shielded by the First Amendment.[5] Although the court ultimately found that the appellant, Demers, did not assert a viable First Amendment retaliation claim, it applied the more flexible balancing test that is not endorsed by all sister circuits.[6] In doing so, the *Demers* court reflected upon the sensitivity of such claims, noting, "Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate."[7] Additionally, the Ninth Circuit acknowledged that courts should hesitate before making content-based judgments on speech restrictions an educational institution can impose because such action may inappropriately convey the idea that courts "know

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2 *See id.* at 506.

3 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that when public employees speak "pursuant to their official duties," they are not granted the First Amendment protection of ordinary citizens); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (stressing that a balance must be reached between the interests of public employees to "comment[ ] upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs").

4 *See* Demers v. Austin, 746 F.3d 402, 407 (9th Cir. 2014).

5 *See id.* at 406. Specifically, the court examined the appropriate standard to apply to academic speech, that pronounced by the Supreme Court in *Pickering* or in *Garcetti*. *See id.* at 410–12.

6 The court ultimately held that *Pickering* provides the correct test to apply in instances concerning academic speech. The court concluded that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed pursuant to the official duties of a teacher and professor." *Id.* at 412 (internal quotation marks omitted).

7 *Id.* at 413.

better than the institution itself the nature and strength of [the institution's] legitimate interests."[8]

The *Demers* decision highlights the ongoing debate regarding the appropriate test to apply when determining whether a public educator's speech ought to be shielded by the First Amendment.[9] Although this Note will examine the common rationales courts apply when severely restricting public educators' speech, it will also analyze the issue through the perspective of cognitive development theory. This alternative perspective assesses the cognitive and moral growth of children and adolescents, which leads to a more informed analysis of the appropriate standard for First Amendment restrictions in the public classroom. For although the teacher's role in the public classroom raises distinct First Amendment concerns, analyzing these issues from the perspective of the student audience assists in determining a standard that will promote the effectiveness of public education, while allowing for the flexibility to adequately restrict or protect educators' classroom speech depending on the circumstances.

I
BACKGROUND

The Ninth Circuit's decision in *Demers v. Austin* provides the most recent reflection on the difficulties encountered and confusion expressed by courts regarding whether public educators' classroom speech may receive First Amendment protection.[10] Fully appreciating the complexities of the issues specific to educators' speech in the public classroom requires a background of the relevant Supreme Court precedent guiding the circuit courts' decisions in this area of First Amendment protection, for this ambiguous precedent highlights the cause for confusion and inconsistent results rendered.[11]

A. The Emergence of the *Pickering* Balancing Test

In *Pickering v. Board of Education of Township High School*, the Supreme Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[12] The case concerned Pickering, a public

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8 *Id.*

9 *See, e.g.*, *id.* at 411 (describing the nature of academic speech and how it may not fall under *Garcetti*).

10 *See id.*

11 This Note focuses on the classroom speech of public school teachers and university professors, and the cases examined in this Part primarily reflect that focus. However, in some circumstances, cases pertaining to nonclassroom speech have been included for the purposes of illustrating the standard applied by circuits that have not confronted the issue in a classroom-speech context.

12 391 U.S. 563, 574 (1968).

high school teacher who was dismissed by the district's board of education after writing and publishing a letter in the town newspaper criticizing a proposed education tax increase.[13] At Pickering's board review of the dismissal, the board stated that the letter contained falsities that harmed the reputation of the school's administration, which would create controversy among teachers, administrators, and the district's residents.[14] The Illinois court then reviewed the proceeding to determine if the board's findings were supported by factual evidence, and ultimately rejected Pickering's claim that the First Amendment protected the content of his letter.[15]

However, the Supreme Court discussed that the findings of the board, which the Supreme Court of Illinois affirmed, rested on a premise that the Court had "unequivocally rejected" in prior rulings.[16] The Court emphasized that whether the school needed additional funds, as proponents of the proposed tax increase purported, qualified as "a matter of legitimate public concern," where teachers would "most likely . . . have informed and definite opinions," making it "essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[17] Additionally, the Court noted that Pickering's statements did not impede the "proper performance of his daily duties in the classroom."[18] Thus, the Court enunciated what has since been referred to as the "*Pickering* test," which courts subsequently applied when examining whether the First Amendment ought to shield a public employer's speech. The test requires "arriv[ing] 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."[19] Although the facts of *Pickering* pertained to the education context, courts have applied the *Pickering* balancing test as a barometer in measuring First Amendment protection concerning any public sector employee's speech.[20]

The Court subsequently modified the *Pickering* test in *Connick v. Myers*, where it held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of

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13 *Id.* at 563, 566–67.

14 *Id.* at 567.

15 *Id.*

16 *Id.* at 568.

17 *Id.* at 571–72.

18 *Id.* at 572–73.

19 *Id.* at 568.

20 *See, e.g.*, Diaz-Bigio v. Santini, 652 F.3d 45, 51–53 (1st Cir. 2011) (applying *Pickering* to city officials' speech); Piscottano v. Murphy, 511 F.3d 247, 268–69 (2d Cir. 2007) (state correctional employees); Reuland v. Hynes, 460 F.3d 409, 413–15 (2d Cir. 2006) (district attorneys).

> 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.[21]

Connick more clearly defined what constitutes matters of public concern under *Pickering*,[22] but aside from this clarifying effect, it did not substantively change the already well-established balancing test.[23]

B. *Garcetti*-Incited Confusion

Following the Court's decision in *Pickering*, courts applied the balancing test to issues concerning public employees' speech in a variety of sectors.[24] In relation to education, courts applied the *Pickering* test to both classroom and nonclassroom speech, often adding *Connick* as an additional factor in the analysis.[25] Notably, while courts have long been reluctant in granting First Amendment protection to educators' statements, the *Pickering* balancing test does not indiscriminately strip educators of First Amendment protection.[26]

However, confusion among the circuits developed following the Court's decision in *Garcetti v. Ceballos*, which held that when public employees "make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[27] The case involved Ceballos, a deputy district attorney, who authored a memorandum expressing his concerns about inaccuracies in an affidavit about a case on the docket.[28] Despite Ceballos expressing his belief that the court should dismiss

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21 461 U.S. 138, 147 (1983). The Court did not mention whether this additional prong would apply in the analysis of education-related speech. However, several circuits have added this additional prong on the traditional *Pickering* balancing test. *See e.g.*, Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 337–38 (6th Cir. 2010); Adams v. Trs. of Univ. of N.C.-Wilmington, 640 F.3d 550, 560 (4th Cir. 2011); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694–95 (4th Cir. 2007).

22 *See* JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-*Garcetti *Jurisprudence*, 63 U. MIAMI L. REV. 761, 775–77 (2009) *Connick*, 461 U.S. at 147–48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . .").

23 *See supra* note 21.

24 *See supra* note 20.

25 *See, e.g.*, *Evans-Marshall*, 624 F.3d at 337–38; *Adams,* 640 F.3d at 560; *Lee*, 484 F.3d at 693–95.

26 *Compare* Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 229 (6th Cir. 2005) ("Of great[ ] relevance is that the Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment."), *with id.* at 235 (Sutton, J., concurring) ("The Supreme Court has never held that the First Amendment applies to a teacher's classroom speech, and there is good reason to think that it would not do so.").

27 547 U.S. 410, 421 (2006).

28 *Id.* at 413–14.

the case, it nonetheless proceeded to trial shortly thereafter.[29] Ceballos claimed that following a series of contentious communications between himself and others in the sheriff's department concerning the case, he faced retaliation in the workplace, and he ultimately brought his action to federal district court.[30] The district court held that the First Amendment did not protect the memorandum that Ceballos authored, while the Court of Appeals for the Ninth Circuit reversed—finding that the First Amendment shielded the memorandum's contents.[31] In so doing, the Ninth Circuit applied the *Pickering* balancing test, finding that the memorandum qualified as a "matter of public concern," but did not address whether Ceballos made the statement in his capacity as a citizen.[32] Nonetheless, the Ninth Circuit held that Ceballos's interest in this speech outweighed his employer's interests because his employer neglected to identify any disruptions in the efficiency of the workplace stemming from Ceballos's memorandum and the communications in question.[33]

The Supreme Court, however, took an approach different from that of the Ninth Circuit. The Court clarified the two prongs of the *Pickering* balancing test, which entail first determining whether the employee spoke as a citizen on a matter of public concern, and second, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[34] In clarifying the prongs of *Pickering*, the Court also acknowledged that a government employer may exercise discretion in restricting employees' speech, but such restrictions "must be directed at speech that has some potential to affect the entity's operations."[35] The Court noted that in the case at hand, Ceballos authored the memorandum whilst speaking as an employee fulfilling his duties.[36] The Court introduced a new test, departing from *Pickering*, and held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[37] The Court justified this departure from the traditional *Pickering* analysis by emphasizing that Ceballos authored the memorandum pursuant to his duties as an employee and that "[r]estricting speech that owes

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29 *Id.* at 414.
30 *Id.* at 414–15.
31 *Id.* at 415.
32 *Id.* at 416 (quoting Garcetti v. Ceballos, 361 F.3d 1168, 1174 (9th Circ. 2004)) (internal quotation marks omitted).
33 *Id.*
34 *Id.* at 418.
35 *Id.*
36 *Id.* at 421.
37 *Id.*

its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[38]

Importantly, however, the Court noted that the *Garcetti* test may not necessarily apply in an education context, for "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for" in that case at issue.[39] Thus, the Court explicitly refrained from deciding whether the *Garcetti* holding would apply in an education setting.[40] In his dissent, Justice Stevens emphasized that in an education context, whether or not a teacher's speech is made pursuant to job duties should be immaterial when deciding whether the First Amendment protects the speech.[41] Justice Souter further elaborated upon this issue and bluntly expressed the concerns the majority briefly addressed:

> 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.[42]

Thus, *Garcetti* left unanswered the pertinent question of whether its holding would apply to issues concerning education-related speech and public educators, inducing confusion and uncertainty among the circuits.

C. Inconsistent Responses to *Garcetti*

The *Garcetti* holding has led to inconsistencies and apparent confusion among the circuit courts regarding the appropriate test to apply in the context of public teachers' and professors' classroom speech.[43] This Note will next examine the different approaches taken by the circuit courts, because fully appreciating the appropriateness of applying the *Pickering* balancing test rather than the restrictive *Garcetti* test in this context requires examining the circuit courts' expressed preferences and rationales for either *Garcetti* or *Pickering*. In some instances this requires examining education-related speech more

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38 *Id.* at 421–22.

39 *Id.* at 425.

40 *Id.*

41 *Id.* at 427 (Stevens, J., dissenting) (noting that "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description").

42 *Id.* at 438 (Souter, J., dissenting) (internal quotation marks omitted).

43 *See, e.g.*, Panse v. Eastwood, 303 F. App'x 933, 935 (2d Cir. 2008); Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 333 (6th Cir. 2010).

broadly, beyond that specific to the classroom, for some circuits have yet to examine such a scenario after *Garcetti*.

Despite the reservation of the Supreme Court in *Garcetti*, the Third Circuit explicitly endorsed the *Garcetti* test in the context of education speech by applying it to a scenario in which a tenured professor brought a First Amendment retaliation claim against his university-employer following his dismissal.[44] He contended that the university retaliated against him for speaking in support of a student at a disciplinary hearing and for objecting to the selection of the university president.[45] In evaluating the merits of the professor's claim, the Third Circuit applied the *Garcetti* test and found that the professor, while assisting a student at a disciplinary hearing, did not speak as a citizen but rather within his "official duty" as a university professor.[46] However, the court made the same acknowledgement as the *Garcetti* Court that "scholarship or classroom instruction" may present different constitutional concerns.[47] Although the Third Circuit expressed confusion regarding whether *Pickering* would be preferred to *Garcetti* in the classroom context, it nonetheless refrained from considering whether to apply *Pickering* in that specific education-related instance.[48]

Some circuits have transitioned from ambivalence regarding the appropriate standard to explicit endorsement of *Garcetti* over *Pickering*. The Second Circuit initially refrained from answering the question of whether *Garcetti* or *Pickering* would apply to teachers' speech,[49] but it has since applied the *Garcetti* test without discussing the potential relevance of *Pickering* in its analysis.[50] The Seventh Circuit has similarly favored the *Garcetti* test after wavering between the appropriate test to apply in several holdings.[51] The court initially expressed that "[*Garcetti*] is not directly relevant to our problem," when examining a public university instructor's speech made during class to her stu-

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44 *See Gorum*, 561 F.3d at 183, 185.

45 *Id.* at 183.

46 *Id.* at 186–87.

47 *Id.* at 186 (internal quotation marks omitted).

48 *Id.* at 186, 187 n.6.

49 *See* Panse v. Eastwood, 303 F. App'x 933, 934–35 (2d Cir. 2008) (noting that in a case concerning a public teacher's classroom speech, "[i]t is an open question in this Circuit whether *Garcetti* applies to classroom instruction. . . . But we need not resolve the issue . . . because [appellant] does not raise this issue on appeal and his claim would fail regardless of the standard").

50 *See* Massaro v. N.Y.C. Dep't of Educ., 481 F. App'x 653, 654–56 (2d Cir. 2012) (holding that the First Amendment did not protect a public school teacher's comments concerning her belief that the classroom was unsanitary because she spoke as an employee and not as a private citizen).

51 *See, e.g.*, Renken v. Gregory, 541 F.3d 769, 773–75 (7th Cir. 2008); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006).

dents.[52] The Seventh Circuit then evaded the question of which test to apply in a case concerning the classroom speech of a public school teacher who advocated her viewpoint on an antiwar demonstration to her students.[53] The court held that "the [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system," again failing to endorse one test over the other, although applying stringency comparable to that characteristic of *Garcetti*.[54] The Seventh Circuit later replaced this initial ambivalence with full endorsement of *Garcetti*.[55] This transition occurred in a case examining whether First Amendment protection should extend to a public university professor's criticism and complaints of the university's proposed use of grant funds.[56] The court applied *Garcetti*, determining that the professor spoke in his capacity as a public employee rather than a private citizen and therefore was not afforded First Amendment protection.[57] The court refrained from discussing whether *Pickering* would even apply in that context.[58]

While the Second and Seventh Circuits have transitioned from ambivalence to explicit endorsement of *Garcetti*,[59] examining related cases in other circuits further reveals the pervasive confusion the two standards cause. For instance, several circuits have added *Garcetti* as an additional prong on the traditional *Pickering* analysis—an approach the *Garcetti* opinion itself does not suggest.[60] The Sixth Circuit applied *Garcetti* as an additional prong on the *Pickering* balancing test, noting that the potential *Garcetti* exception would not apply to the plaintiff, a high school teacher, because "[s]he is not a teacher at a public college or university and thus falls outside of the group the [*Garcetti*] dissent wished to protect."[61] This interpretation of *Garcetti*

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52 *Piggee*, 464 F.3d at 672 (acknowledging that *Garcetti* was not directly on point in the analysis of teaching-related speech but failing to explicitly adopt *Pickering*).

53 *See Mayer*, 474 F.3d at 478.

54 *Id.* at 480. Notwithstanding the court's evasion of endorsing either *Garcetti* or *Pickering*, the opinion offers insight into the special considerations that are implicated by a teacher's speech in the public primary and secondary school setting, given the "fact that the pupils are a captive audience." *Id.* at 479.

55 *See Renken*, 541 F.3d at 774–75.

56 *Id.* at 770.

57 *Id.* at 773–75.

58 *See generally id.* (no discussion of *Pickering*).

59 *See* Massaro v. N.Y.C. Dep't of Educ., 481 F. App'x 653, 654 (2d Cir. 2012); *Renken*, 541 F.3d at 774.

60 *See, e.g.*, Duvall v. Putnam City Sch. Dist., 530 F. App'x 804, 813 (10th Cir. 2013); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 333 (6th Cir. 2010); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 nn.10–11 (4th Cir. 2007).

61 *Evans-Marshall*, 624 F.3d at 343 (internal quotation marks omitted). The Sixth Circuit's opinion regarding the appropriateness of *Garcetti* under such circumstances overlooks the *Garcetti* majority's unresolved question of whether its holding would apply in an

effectively eliminates First Amendment protection for the educator-speaker, albeit under the guise of applying the more flexible *Pickering* standard. In certain instances, the Fourth and Tenth Circuits appear to have adopted a similar approach by claiming to apply the *Pickering* test, justifying this action by noting that the *Garcetti* Court "explicitly did not decide" whether that test would apply in teaching-related speech, but in actuality substantially altering the standard *Pickering* balancing.[62]

However, several circuits have enthusiastically adopted the *Pickering* test, explicitly rejecting the stifling *Garcetti* test in the context of public educators' speech.[63] While the Fourth Circuit previously applied an altered form of the *Pickering* test, which evaded the *Garcetti* issue, it more recently opted for explicit endorsement of *Pickering*. The Fourth Circuit declined to extend *Garcetti*'s reach in a case concerning a public university professor's speech—*Adams v. Trustees of the University of North Carolina–Wilmington*.[64] The court emphasized that "[t]he plain language of *Garcetti* . . . explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play."[65] This "clear reservation" prompted the Fourth Circuit to apply the *Pickering* test in areas concerning scholarship and teaching.[66] The Ninth Circuit, in its recent decision in *Demers v. Austen*, has likewise abandoned the restrictive *Garcetti* test in favor of *Pickering* balancing in this context.[67] The court offered an extensive discussion of the appropriateness of endorsing

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education context, as well as Justice Souter's condemnation of such a practice. *See* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006); *id.* at 427–30 (Souter, J., dissenting).

62 *Lee*, 484 F.3d at 694. This case concerned a high school teacher who brought a First Amendment retaliation claim against the school board after he was told to remove the materials posted on the classroom bulletin board. Although the court stated it applied *Pickering*, the first step in its analysis was determining whether the speech in question was curricular in nature. *Id.* at 698. The court folded this preliminary analysis into the first prong of the traditional *Pickering* analysis, stating that "when a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of whether her speech involves a matter of public concern is dependent on whether or not the speech is curricular." *Id.* at 697. No other court seems to have interpreted *Pickering* in the same manner, further reflecting the inconsistences between the circuit courts on this issue. *See also Duvall*, 530 F. App'x at 813 (applying the "*Pickering/Garcetti*" test to determine whether the First Amendment protects a public school special-education teacher's speech to her supervisors).

63 *See, e.g.*, Demers v. Austin, 746 F.3d 402, 407 (9th Cir. 2014); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 563 (4th Cir. 2011).

64 *Adams*, 640 F.3d at 563. This approach can be distinguished from the Fourth Circuit's analysis in *Lee*, 484 F.3d at 694, although the court did not address the rationale behind its changed analysis. *See supra* note 62.

65 *Adams*, 640 F.3d at 563.

66 *Id.* at 562.

67 *See Demers*, 746 F.3d at 406. Although the court noted that Demers's speech was made pursuant to his official duties as a university professor, the speech nonetheless fell within the *Garcetti* exception. *Id.* at 410–11.

Pickering over *Garcetti*, ultimately concluding that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[68] Moreover, the court did not limit its holding to higher education, but did note that "the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor."[69]

The *Demers* decision offers a reflective analysis on the appropriateness of the *Pickering* balancing test and thereby highlights the extreme differences in the tests and analyses applied by other circuits when confronting comparable issues. This Note will assess the appropriate test to apply when determining whether First Amendment protection should be afforded to the classroom speech of public school teachers and public university professors. First, it will reject the application of *Garcetti* because the test effectively eliminates any possibility of the First Amendment protecting a public educator's classroom speech. This Note will then argue that *Pickering* is the appropriate test to apply, especially when analyzing the Supreme Court's expressed concerns for youthful student audiences, the desire to preserve academic freedom in universities, and the insight provided by cognitive theorists concerning the abilities of children and adolescents at different levels of education. Examining this issue through the lens of cognitive and moral development theory reveals that the *Pickering* balancing test allows for a more flexible approach to First Amendment protection by reflecting the content of the speech and the level of the students' education, while also preserving courts' expressed desires and concerns regarding public education. Additionally, this approach accounts for an important facet thus far ignored by the courts—the cognitive abilities of the audience.

II
Rejecting the Applicability of *Garcetti* in Issues of Education-Related Speech

Notwithstanding the actions of the Second and Seventh Circuits,[70] courts should resist the improper expansion of the *Garcetti*

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68 *Id.* at 411. Interestingly, the Ninth Circuit previously applied the confusing standard endorsed by the Sixth Circuit, adding *Garcetti* as an additional prong on the traditional *Pickering* analysis. The case involved a public school math teacher who posted banners in his classroom with patriotic expressions and the word "God," and the Ninth Circuit ultimately found the speech to be unprotected by the First Amendment. *See* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 957–58 (9th Cir. 2011).

69 *Demers*, 746 F.3d at 413.

70 *See supra* notes 49–54 and accompanying text. Additionally, whether applying *Garcetti* as the sole test or as an additional prong of the *Pickering* or *Pickering-Connick*

holding to issues concerning education-related speech.[71] Indeed, the *Garcetti* decision has been regarded as one that "may ultimately prove the death knell for any meaningful First Amendment rights for classroom related communications made by teachers."[72] In addition to the *Garcetti* majority's express reservation of such an extension, Justice Souter raises legitimate arguments in his dissent concerning such misapplications of the majority's opinion and the potential adverse effects of the *Garcetti* analysis.[73] Moreover, criticism of *Garcetti*'s application in the context of education exists at both the primary and secondary levels[74] and in higher education.[75] Notably, while the *Pickering* test imposes a rather stringent standard for granting First Amendment protection to an educator's speech, regardless of whether it pertains to classroom speech or academic speech in a different setting, it does not totally eliminate the educator's path of recourse.[76] In contrast, disregarding the explicit reservation of the *Garcetti* Court by extending its holding to the academic context would likely eviscerate any remnants of First Amendment protection for public educators.[77] Indeed,

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analysis, either approach will create the same result, making either approach equally inappropriate.

71 *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006).

> 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.

Id. at 425.

The Court's acknowledgment that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" implicates these constitutional concerns. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

72 Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 62 (2008).

73 *See Garcetti*, 547 U.S. at 436–38 (Souter, J., dissenting).

74 *See* ROBERT C. POST, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM 90 (2012) ("In the context of secondary schools, *Garcetti* has been interpreted to deny all academic freedom in the classroom because a school system does not regulate teachers' speech as much as it *hires* that speech." (internal quotation marks omitted)).

75 Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 165 (2009) ("When it comes to pure content-based regulation of scholarship and teaching in a university environment, application of *Garcetti* is . . . problematic. Research and publication are undeniably within job responsibilities in the broadest sense.").

76 *See* Hutchens, *supra* note 72, at 62 (acknowledging that recent years have evidenced a general judicial resistance to granting First Amendment rights for teachers, but noting that "courts have not uniformly agreed that teachers do not possess some kind of First Amendment rights for in-class speech").

77 Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 967 (9th Cir. 2011) ("[W]e think it beyond possibility for fairminded dispute that the 'scope and content of [the teacher's] job responsibilities' did not include speaking to his class in his classroom during class hours." (quoting *Garcetti*, 547 U.S. at 424)); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 675 (7th Cir. 2006) ("Classroom or instructional speech, in short, is inevitably speech that

it is difficult to envision a scenario in which public educators speaking in their classroom could make statements *not* "pursuant to their official duties,"[78] for the speech would not exist without an educator's employment as a teacher, whose duties are carried out in the classroom.

In response to the inappropriate extension of *Garcetti*, several scholars have offered alternative approaches to resolve the issue of determining when educators should be afforded First Amendment protection for academic speech.[79] Although criticism of *Garcetti*'s application to education-related speech exists, the proposed alternatives fail to substantially consider the impact of such speech on the student audience. Thus, the following section argues that the *Pickering* balancing test provides courts with a more appropriate framework to determine whether to grant public educators First Amendment protection for classroom speech. The rationale for this proposal rests in reconciling courts' expressed concerns regarding student audiences and institutional goals of public education with cognitive and moral development theories.

A. Appropriateness of *Pickering* Balancing in Primary and Secondary Education

1. *Identifying Judicially Recognized Goals of Mandatory Education and Related Concerns for Public Schools*

A key tenant of the *Pickering* analysis requires determining whether the speech, which must be on a matter of public concern, promotes the efficiency of the public services the public entity performs.[80] However, the "public service" performed by public education is neither singular nor easily articulable. The "public services" and thus goals of public primary and secondary education include, but are

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is part of the instructor's official duties, even though at the same time the instructor's freedom to express her views . . . [is] protected.").

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

79 *See, e.g.*, Newman, *supra* note 22, at 792 (offering an alternative to *Garcetti* where the First Amendment would protect the teacher's expression if it did not create a disruption to the educational process); Emily G. Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 119, 123 (2008) (arguing that a sliding-scale approach should be applied).

80 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). For the purposes of this Note, the speech in question will refer to classroom-based speech, which may be curricular or noncurricular. Courts have held that a teacher may not control or dictate his or her curricula, and in such cases there lacks a matter of public concern. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989); *see also* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 342 (6th Cir. 2010) ("[T]he First Amendment does not protect primary and secondary school teachers' in-class curricular speech . . . ."). However, this ideology necessarily does not apply to instances where First Amendment concerns arise from an educator teaching in a methodology that adheres to the curriculum but nonetheless implicates First Amendment concerns.

not limited to, imparting knowledge deemed valuable.[81] Indeed, several courts have recognized properly educating youth as a rather straightforward goal of public primary and secondary schools.[82] The very existence of statewide curricula and the pervasiveness of standardized tests in primary and secondary school are evidence that a principal purpose of public schools is to impart a baseline level of knowledge to students.[83]

Additionally, in the primary and secondary school years, courts have identified that the purpose of education extends to teaching moral and societal values.[84] Courts have recognized the tension between enabling a teacher to impart values while also remaining sensitive to the impressionable nature of children given the unique setting of compulsory education.[85] Despite the difficulties this aspect of education creates, several scholars have argued that an integral purpose of lower education is value inculcation and preparing children for entering society.[86] Public schools "traditionally have viewed instilling the young with societal values as a significant part of the schools' educa-

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81 *See, e.g.*, Cal. Educ. Code §§ 51210, 51220 (2006) (mandating specific areas of study for primary and secondary school); Mass. Gen. Laws Ann. ch. 69, § 1D (2009) (requiring the Board of Education to establish "standards [that] shall cover grades kindergarten through twelve and shall clearly set forth the skills, competencies and knowledge expected to be possessed by all students at the conclusion of individual grades or clusters of grades"); Tex. Educ. Code Ann. § 28.001 (West 2014) (declaring that the state Board of Education "shall require all students to demonstrate the knowledge and skills necessary to read, write, compute, problem solve, think critically, apply technology, and communicate across all subject areas").

82 *See, e.g.*, Lee v. York Cnty. Sch. Div., 484 F.3d 687, 695 (4th Cir. 2007) ("Put simply, our school systems are responsible for adequately and properly educating our youth. A school board carrying out this vital responsibility is entitled to some enhanced control over expressions within its classrooms . . . ."); Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 237 (6th Cir. 2005) ("[A] structured curriculum permits [a] school to advance its educational mission . . . .").

83 *See* Address by Arne Duncan, States Will Lead the Way Toward Reform (June 14, 2009), *available at* http://www.ed.gov/news/speeches/states-will-lead-way-toward-reform. Former secretary of education Arne Duncan declared that the new standards for schools must be limited to "the essential knowledge and skills" students need and that "new tests [must] measure whether students are meeting those standards." *Id.*

84 *See, e.g.*, Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 99 (3d Cir. 2009); Coles ex rel. Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 377 (6th Cir. 1999).

85 *Compare Busch*, 567 F.3d at 99 (explaining that in public school "attendance is compulsory and moral and social values are being developed along with basic learning skills," and that "[i]n seeking to address that tension, elementary school administrators and teachers should be given latitude within a range of reasonableness related to preserving the school's educational goals"), *with Coles*, 171 F.3d at 377 (explaining that "students are young, impressionable, and compelled to attend public schools").

86 *See, e.g.*, Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 320 (1980) ("[W]e must not overlook the fact that schools influence the quantity and quality of that debate both by transmitting values . . . and also by transmitting important skills and knowledge . . . .").

tional mission,"[87] and have been regarded as "the cradle of our democracy."[88]

Given the aspirations of public primary and secondary education, courts not infrequently take the perspective that teachers are simply hired speakers who convey knowledge the school district prescribes.[89] Several courts have acknowledged that teachers' expression is their "stock in trade, the commodity [they] sell[ ] to [their] employer in exchange for a salary."[90] Similarly, it has been acknowledged that the teacher acts as "a proxy for the School District, and the School District may choose both how its students are taught and what its students are taught," to accomplish the goals prescribed in curricula and imparting societal values.[91] This opinion that public school teachers may be regarded as "agent[s] of the state"[92] in the context of mandatory education with clearly defined goals necessarily impacts the views that courts have of the teacher's day-to-day role in the classroom.[93]

The combined nature of the mandatory primary education system, the clear mission of its schools, and the age of its students, creates a particularly sensitive environment for monitoring teachers' classroom speech. Indeed, courts often express the viewpoint that teachers are merely paid mouthpieces and that "pupils are a captive audience . . . [and] must ought not be subject to teachers' idiosyncratic perspectives."[94] The "position of trust and authority" bestowed upon teachers implicates certain First Amendment worries given their frequent interaction with "impressionable young minds."[95]

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87 Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1343 (1976).

88 Hutchens, *supra* note 72, at 56 (quoting Alder v. Bd. of Educ., 342 U.S. 485, 509–10 (1952) (Douglas, J., dissenting)). *See also* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 76 (2002) (noting the "vital need to create an informed and educated citizenry in a democratic society, in which the citizens act as the ultimate governors"); *Coles*, 171 F.3d at 377 (recognizing that courts too have recognized that "public schools are particularly important to the maintenance of a democratic, pluralistic society").

89 *See e.g.*, Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

90 *Id.*; *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 967 (9th Cir. 2011) (noting that the First Amendment does not protect speech that owes its existence to the speaker's employment as a teacher); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2010) (indicating that a school board hires the speech of teachers and thus retains authority to regulate that speech).

91 Hutchens, *supra* note 72, at 52–53 (quoting Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 172 (3d Cir. 2008)).

92 Redish & Finnerty, *supra* note 88, at 82.

93 Goldstein, *supra* note 87, at 1297 ("The teacher's role is to convey these truths rather than to create new wisdom.").

94 *Mayer*, 474 F.3d at 479.

95 *Johnson*, 658 F.3d at 968; *see also* Lee v. York Cnty. Sch. Div., 484 F.3d 687, 695–96 (2007) (acknowledging that because of the special responsibilities of school systems, they are entitled to "enhanced control over expressions within [their] classrooms, so that [they]

However, while idealistically the teacher may merely act as a mouthpiece, strictly adhering to the enumerated goals defined by the school district, in reality, effective teaching does not lend itself to such rigidity. This disjunction misinterprets the profound influence that teachers have over students when imparting both practical and moral knowledge.[96] While courts do not hesitate to view teachers as paid speech, scholars have asserted that teachers have a "special task" of fostering "open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion," which can be achieved only when teachers themselves act as "exemplars of open-mindedness and free inquiry."[97] This view of teaching calls into question the rationale that achieving the goals of mandatory public education necessarily requires greater classroom speech restrictions. One must reconcile this view of teaching with the purported notion that young children comprise an impressionable, captive audience, necessitating greater restrictions on teachers' speech or—in the case of *Garcetti*—eliminating any such protection. Moreover, courts have yet to address whether this concern may differ between primary and secondary education—further calling the rationale into question. However, analyzing these issues through the lens of cognitive and moral development theory helps illuminate and evaluate the validity of these concerns. This viewpoint reveals the importance of applying *Pickering* balancing rather than *Garcetti*, for the *Pickering* test would allow courts to address their expressed concerns pertaining to this speaker-audience dynamic while also accounting for the abilities of students at different levels of schooling.

2. *Assessing the Validity of These Concerns Under Cognitive and Moral Development Theory*

As previously discussed, courts are faced with the difficult task of enabling schools to achieve the expressed goals of public education, which entail imparting both moral values and pertinent knowledge, while also remaining mindful of the concern that students are a captive audience.[98] However, the legitimacy of this concern ought to be examined, for it necessarily impacts the appropriate standard to apply

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can 'assure . . . that readers or listeners are not exposed to material that may be inappropriate for their level of maturity'" (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988))). Such concerns are not merely limited to the confines of the school board in dictating curricula, but rather become a community concern. *See Evans-Marshall*, 624 F.3d at 342 ("[P]arents long have demanded that school boards control the curriculum and the ways of teaching it to their impressionable children.").

96 *See* CHANGES IN TEACHERS' MORAL ROLE: FROM PASSIVE OBSERVERS TO MORAL AND DEMOCRATIC LEADERS 16 (Dorit Alt & Roni Reingold eds., 2012).

97 Hutchens, *supra* note 72, at 56–57 (quoting Wieman v. Updegraff, 344 U.S. 183, 196–97 (1952) (Frankfurter, J., concurring)).

98 *See supra* Part II.A.1.

regarding First Amendment issues and, ultimately, the amount of protection teachers should receive for their classroom speech. When examining this issue through a perspective grounded in theories of cognitive and moral development, it becomes apparent that while such concerns are somewhat legitimate in younger years, as children progress through several years of schooling these concerns become less warranted.[99] Informing the analysis of First Amendment standards for public educators' speech with this perspective reveals that *Pickering* provides an appropriate standard that enables schools to achieve their educational goals without stifling teachers' speech.

Firstly, the extent to which children are a captive audience may involve some legitimate concerns that relate to what young students ought not be exposed to in the classroom. For instance, one theory of cognitive development, social learning theory, emphasizes that children learn through observation,[100] which may create concerns similar to those identified by courts.[101] Under the view of this theory, children learn through observing others, models, who ideally are perceived as having prestige and power, such as teachers.[102] Children learn new skills, alter their behavior, and change the frequency of previously learned behavior through imitating models.[103] Moreover, children can learn from models academic skills as well as moral values—the two most strongly expressed goals of public education during the years of mandatory schooling.[104] Additionally, given the empirical support for this theory, it raises particular concerns that teachers, as potential adult models, ought to pay particular attention to behaviors they demonstrate to their students and refrain from modeling inappropriate behaviors.[105] However, although teachers may serve as likely models under this theory, in order for children to model their behavior certain conditions must be met; thus, the teachers' status alone does not always mean that children will imitate their behavior.[106] Although this theory somewhat aligns with courts' expressed

99 *See infra* notes 115–20 and accompanying text.

100 Albert Bandura's theory of social cognition emphasizes observational learning, wherein children learn behaviors from others, namely models, whom children observe and then imitate. R. MURRAY THOMAS, COMPARING THEORIES OF CHILD DEVELOPMENT 150–52 (Michele Sordi ed., 6th ed. 2005).

101 *See supra* notes 94–95.

102 JEANNE ELLIS ORMROD, HUMAN LEARNING 128 (6th ed. 2012).

103 *Id.* at 127.

104 *Id.* at 130–31.

105 *Id.* at 145–46.

106 *See id.* at 132–33. Stating that a teacher's position of status in the classroom will unquestionably lead to modeling would oversimplify the complexities of this cognitive theory. For a child to model another's behavior, certain conditions must be satisfied. Specifically, the child must attend to the model, retain the observed behavior, reproduce this behavior, and lastly, be motivated to do so. *See generally id.* at 133–35 (detailing the requirements for effective modeling).

concern of children being a captive audience, the legitimacy that this theory provides to these expressed concerns ought not be overstated. Moreover, this theory does not fully address the captive audience issue because it fails to describe the progression of cognitive development, a perspective that helps evaluate whether these concerns remain throughout all years of education.[107]

An additional theory of cognitive development that provides insight into the cognitive and moral growth of children, focusing on the developmental trajectory, further assists in determining whether the same "captive audience" concerns are warranted in both primary and secondary education. Jean Piaget's theory of cognitive development examines the logical reasoning processes children become capable of at different ages.[108] An analysis of cognitive development across the years of mandatory education becomes crucial in examining what standard courts should apply and the protection teachers' classroom speech ought to receive under the First Amendment, for courts have conflated the concerns of primary school children with those of secondary school children.[109] Cognitive development theory defines specific stages that correspond to ages in which children achieve certain cognitive feats.[110] Namely, Piaget marked the ages of approximately seven- to eleven years as the concrete-operational stage, wherein children more rapidly acquire operations, a term used to refer to specific mental actions, and are capable of thinking more logically about tangible objects.[111] At this stage, children also begin to realize that others do not necessarily share their own perspectives.[112] However, despite the cognitive gains evidenced in this age group, which correspond to the later years of elementary school education, this stage of cognitive development is also marked by limitations.[113] Children at

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107 *See* THOMAS, *supra* note 100, at 163.

108 *See e.g.*, ORMROD, *supra* note 102, at 309. Bandura's theory of social cognition, which provides empirical and theoretical insight into some of the courts' voiced concerns, fails to provide insight into children's developmental trajectory. *See* THOMAS, *supra* note 100, at 163. On the other hand, Piaget's theory examines cognitive advances, including thinking and perceiving, from infancy through adolescence. *See* DAVID R. SHAFFER, SOCIAL AND PERSONALITY DEVELOPMENT 51 (6th ed. 2009). Although the stages discussed in Piaget's theory begin in infancy, for purposes of this Note the most relevant stages are those corresponding with the ages of primary and secondary school students.

109 *See, e.g.*, Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007) ("[T]he [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.").

110 *See* SHAFFER, *supra* note 108, at 51.

111 *See id.* at 52, 60. Piaget's theory was constructed around children's successful completion of mental tasks at certain ages, which mark progress in cognitive development. Although the specific ages have received some criticism, they nonetheless represent average ages at which the cognitive achievements occur and have received empirical support.

112 *See* ORMROD, *supra* note 102, at 313.

113 *Id.* at 317.

this age still have difficulty applying logical operations to hypothetical ideas and abstract concepts—thus sometimes lacking the ability to "easily distinguish between logic and reality."[114] With this in mind, perhaps the concerns that courts express concerning primary school children may apply to children in the age range identified by Piaget's formal operational stage, but to a slightly lesser extent.

However, the final stage of cognitive development in Piaget's theory, the formal operational stage, is the stage in which children can consider conditions of problems, develop hypotheses, and consider what may logically occur following certain events.[115] Whereas prior to adolescence, children remain bound to their perceptions of the real world, they now can understand theories and combine ideas to solve problems, and their thought processes become more adult-like in nature.[116] This stage not only has practical implications for the classroom goals of imparting knowledge[117] but also for the development of personal thoughts. Adolescents in the formal operational stage can more readily imagine alternatives to realities, which may make them more inquisitive.[118] This is in contrast to children, who "tend to accept the world as it is and to heed the dictates of authority figures."[119] The stark differences in the cognitive capabilities of children and adolescents in these two stages strongly suggest that the primary concern that courts have for enforcing stricter restraints on teachers' classroom speech in the years of primary education do not apply in secondary school. In adolescence, individuals no longer readily take as true the messages authority figures convey, thereby weakening the contention that students are a captive audience that may be indoctrinated by teachers' claims that fall outside of a school-prescribed curriculum.[120]

Although cognitive development theory has yet to play a role in the discussion of First Amendment restraints on teachers' classroom speech, the theory has nonetheless influenced educational decisions that affect children. For instance, awareness of children's cognitive deficiencies during certain ages has influenced curriculum sequencing and guided decisions regarding topic placement for grade

114 *Id.*
115 *See* THOMAS *supra* note 100, at 208.
116 *See id.* at 209.
117 *See id.* at 216–19.
118 *See* SHAFFER, *supra* note 108, at 63.
119 *See id.* at 63.
120 *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) ("But if indoctrination is likely, the power should be reposed in [the elected school board] rather than tenured teachers.").

levels.[121] However, cognitive development theory also provides a compelling argument that courts have yet to address for applying *Pickering* when determining whether a public educator's speech ought to receive First Amendment protection. *Pickering* involves a balancing of the efficiency of the public service the school provides with the interest of the teacher's speech[122]—such balancing could enable courts to account for the cognitive differences between children in primary and secondary school, where the abilities of the students are quite different. Additionally, the efficiency of the services the school offers at differing grade levels would necessarily implicate the effectiveness of a teacher's practice in imparting knowledge to students in the appropriate manner. While the courts express concern for the students being captive audiences at both primary and secondary schooling levels,[123] this rationale is misguided given that the capabilities of students in these different age groups are distinct. Especially in the later stages of cognitive development, which emerge at adolescence, the concerns that courts have cited for limiting a teacher's freedom of expression do not carry as much weight. Indeed, to promote these cognitive advances, a "teacher is expected to achieve a proper balance between actively guiding or directing children's thinking patterns and providing opportunities for children to explore by themselves,"[124] which creates the risk that such a practice may conflict with the notion that teachers' expression is simply a "stock in trade, the commodity [they] sell[ ] to [their] employer in exchange for a salary."[125] Teachers should be able to encourage such exploration and critical thinking in these years, albeit within the constructs of the school district's curriculum, without overly fearing First Amendment retaliation.

B. Arguing for *Pickering* Balancing at the University Level

Just as cognitive development theory and the analysis of institutional goals demonstrate the appropriateness of applying *Pickering* balancing at the public primary and secondary levels of education, a parallel analysis reveals the same in the context of public university education. Applying *Pickering* at the public university level aligns with preserving academic freedom and accomplishing the institutional

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121 *See* THOMAS, *supra* note 100, at 217–19. Specifically, curriculum developers who have examined the cognitive skills that children in certain age groups achieve use the theory to guide the structure of age-appropriate curricula.

122 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

123 *See, e.g.*, *Mayer*, 474 F.3d at 480.

124 THOMAS, *supra* note 100, at 220.

125 *Mayer*, 474 F.3d at 479; *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 967 (9th Cir. 2011) (noting that if the teacher's speech owes its existence to the speaker being a teacher, there is no First Amendment protection); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2011) (indicating that a school board can be viewed to have hired the speech of a teacher).

goals of higher education—promoting inquiry and furthering developments in academia.[126] As with speech in primary and secondary education, evaluating the issue through the lens of cognitive and moral development theory strengthens the argument for applying the *Pickering* test to classroom speech of public university professors, for it allows for more flexibility by examining cognitive and moral capabilities of students of this age group.

1. *Examining Institutional Goals and Preserving Academic Freedom in Higher Education*

While courts express concerns about subjecting impressionable minds at the public primary and secondary levels of education to material that deviates from the institution's prescribed goals,[127] these specific institutional goals are absent in the context of higher education. Rather, the Supreme Court has explicitly acknowledged the value of preserving academic freedom at the university level.[128] Academic freedom has been defined as "a non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance."[129] The Supreme Court has held preserving academic freedom in high regard, emphasizing that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[130] Indeed, the Court has noted that the "government should be extremely reticent to tread" on academic freedom.[131]

This strong interest in safeguarding academic freedom in universities closely aligns with courts' expressed institutional goals of pro-

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126 *See infra* Part II.B.1.

127 *See supra* Part II.A.1.

128 *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1986); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

129 *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 255 (1989). Byrne argues that academic freedom should be reserved for rights needed to preserve "the unique functions of the university, particularly the goals of disinterested scholarship and teaching." *Id.* at 262.

130 *Bakke*, 438 U.S. at 312.

131 *Sweezy*, 354 U.S. at 250. Some courts have held that academic freedom applies to the academic institution, not to the individual professor. *See* Urofsky v. Gilmore, 216 F.3d 401, 411 (4th Cir. 2000) (holding that professors do not have academic freedom and that the "Supreme Court, to the extent that it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs"). However, the Supreme Court seems to have not refrained from applying academic freedom principles to individual professors. *See Ewing*, 474 U.S. at 226 n.12 (emphasizing that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself" (citations omitted)).

moting inquiry and discovery at this level of education.[132] In elaborating upon the importance of preserving academic freedom, the Supreme Court in *Sweezy v. New Hampshire* emphasized, "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[133] This high regard for academic freedom[134] distinguishes the institutional purpose of university education from that of primary and secondary education.[135]

The liberal approach of university education, which is based on questioning truths rather than merely inculcating knowledge in students, provides a compelling argument for abandoning the application of *Garcetti* in higher education on this facet alone. Although the administration at public universities, like school districts, retains the authority to prescribe the institution's curriculum,[136] university education aims to develop in students the ability to address opposing opinions and to form distinctly individual viewpoints.[137] In relating this interest in preserving academic freedom to First Amendment claims by educators, *Garcetti* imposes an additional hurdle on academic freedom at the university level.[138] While the tension between academic freedom and the rigidity of the *Garcetti* test supports discarding the test for classroom speech at the university level of education, examin-

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132 *Sweezy*, 354 U.S. at 250.

133 *Id.*

134 While the concepts of academic freedom, some argue, should not be limited to university education, for the purposes of this Note it will be treated as a characteristic that is unique to the university given the scholarly disagreement and the courts' failure to inform the matter.

135 *See* McCauley v. Univ. of the V.I., 618 F.3d 232, 243 (3d Cir. 2010) ("The pedagogical missions of public universities and public elementary and high schools are undeniably different. While both seek to impart knowledge, the former encourages inquiry and challenging *a priori* assumptions whereas the latter prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world.").

136 *See* Tepper & White, *supra* note 75, at 164.

137 Byrne, *supra* note 129, at 337.

> [T]ruth is discovered through research and inquiry, that there are no revealed truths or dogmas that are not subject to question through research. Equally important is the concept that the function of education is to open the minds of the students, a function best accomplished by bombarding students with all conceivable ideas, from which they may discern truth, if it exists, by and for themselves.

Goldstein, *supra* note 87, at 1342.

138 *See* Tepper & White, *supra* note 75, at 165, 171 (addressing that applying *Garcetti* to the university environment is problematic because "[r]esearch and publication are undeniably within job responsibilities in the broadest sense" and "faculty members ordinarily must conduct research and publish scholarly works . . . [to] further a core function of the university: knowledge creation").

ing the cognitive and moral development typical of students of this age bolsters this argument.

2. *Aligning the Preservation of Academic Freedom with Cognitive and Moral Development Theory*

Unlike the concerns that courts express in the context of primary and secondary education, in the context of higher education, courts aim to preserve academic freedom and promote academic inquiry.[139] Just as analyzing cognitive and moral development theory bolstered the argument for applying *Pickering* in lower education, it similarly enlightens the analysis for higher education. Of particular relevance, in the most advanced stage of cognitive development, the formal operational stage, thinking becomes more abstract and individuals can form logical hypotheses—an ability that continues to develop throughout adulthood.[140] Moreover, this ability fortifies and becomes more complex through individual experiences.[141] This developing logical ability also corresponds closely to a later stage of moral development—the autonomous level.[142] At this stage, a person "tries to identify universal moral values that are valid, regardless of what authority or group subscribes to the values," thereby developing a personal compass of morality.[143] Additionally, research has shown that those who receive higher education reason more complexly about moral issues, suggesting that higher education exposes individuals to diverse perspectives that further cognitive and moral growth.[144] Ultimately, through exposure to diverse perspectives, individuals begin to define right and wrong based on their own abstract ethical principles and to assess the strength of the positions of others.[145]

The transition of moral development from a rules-based approach, wherein the individual accepts authoritarian rules and laws, to one of a more inquisitive nature, supports courts' strong desire to promote and preserve academic freedom in public universities. Universities aim to encourage inquiry in order to advance the individual's

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139 *See supra* Part II.B.1.

140 ORMROD, *supra* note 102, at 317–18 (recognizing that the formal operational stage begins at adolescence and abstract thinking develops through this time). *See also* THOMAS, *supra* note 100, at 209.

141 *See* THOMAS, *supra* note 100, at 209.

142 *See id.* at 432. The autonomous level of moral development is also referred to as the postconventional or principled level. Another relevant feature of this stage of moral development includes thinking of laws as expressing the majority's will, but nonetheless recognizing that laws may unjustly compromise human rights, leading the individual to challenge them.

143 *Id.*

144 *See* SHAFFER, *supra* note 108, at 355.

145 *See id.* at 354–55.

ability[146] to contribute to society as well as for the institution to further developments in academia.[147] Applying *Pickering* when addressing issues of public university professors' classroom speech would encourage both of these missions and promote the cognitive and moral development of university students themselves.

In examining the elements of *Pickering* balancing in a university context, promoting the efficiency of the public university necessarily requires encouraging the promotion of academic freedom, which can be achieved by exposing students to different viewpoints. Professors must stimulate discussion among students and present a variety of opinions, which achieves goals at both the individual and institutional levels by furthering academic inquiry and potentially leading to discoveries that contribute to society. Although the public university still retains the power to prescribe the curricula,[148] university professors ought to be given greater latitude when adhering to these curricula by promoting the primary function of the university itself, forming ideas that contribute to academia. Promoting these institutional goals while simultaneously refraining from imposing overly broad limits on professors' speech certainly poses a challenge—but *Pickering* balancing allows for such considerations. On the other hand, *Garcetti* does not similarly permit considerations of academic freedom or the institutional goal of further developing the abilities of students because any speech made by professors "pursuant to their official duties" will be devoid of First Amendment protection.[149] Thus, the test eviscerates any protection that the First Amendment may grant professors furthering such academic inquiries within the university classroom, making *Pickering* the more appropriate alternative.

CONCLUSION

Since the Supreme Court's ruling in *Garcetti*, courts have struggled with deciding which standard to apply regarding public educators' classroom speech, which has resulted in confusion and inconsistencies. The *Garcetti* Court explicitly reserved the question of whether its stringent, inflexible standard would apply in the education context, causing some courts to take this reservation as reason enough to apply *Pickering*, while others have disregarded the reservation altogether.[150] Some courts have engaged in a thoughtful deliberation on this issue, most recently in *Demers v. Austen*, and concluded that *Picker-*

146 *See* McCauley v. Univ. of the V.I., 618 F.3d 232, 243 (3d Cir. 2010).

147 Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1986). *See supra* note 131.

148 *See supra* note 136 and accompanying text.

149 547 U.S. 410, 426 (2006).

150 *See supra* Part I.C.

ing provides the appropriate test.[151] However, these discussions neglect an informative perspective in the analysis—the cognitive and moral development of students across primary, secondary, and higher education. Indeed, examining the differences between the institutional goals of primary, secondary, and higher public education and comparing how these goals are best achieved in light of the cognitive and moral development of students has yet to influence the decision regarding which test to apply. This multidisciplinary approach enhances the analysis for several reasons—it allows for an evaluation of the validity of the courts' expressed concerns for primary and secondary students as a captive audience and bolsters the claims regarding universities as encouraging academic freedom. This insight supports the appropriateness of adopting the *Pickering* test, which implicitly allows for consideration of these realities. Determining whether an educator's speech impairs the efficiency of the public service, being the school or university, requires assessing how the institution is achieving its goals in the classroom, which varies depending on the level of education and students' abilities. Moreover, the *Pickering* test would still permit courts to examine the speech in question harshly, as has been the practice even prior to *Garcetti*. However, this novel approach to the *Pickering* test would still provide a potential avenue of recourse for educators who believe that their First Amendment rights have been violated while performing their duties as public educators within the classroom.

151 *See* Demers v. Austen, 746 F.3d 402, 412 (9th Cir. 2014); *supra* notes 4–10.