

Winter 2008

Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes be Protected by the First Amendment

Anne Gardner

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Anne Gardner, *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes be Protected by the First Amendment*, 73 Mo. L. REV. (2008)

Available at: <https://scholarship.law.missouri.edu/mlr/vol73/iss1/8>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment

Public education is a unique societal institution because education, although it is supposed to transmit widely accepted cultural norms and values to children, is a process through which the child develops as an individual and grows into a mature and discerning adult.¹

I. INTRODUCTION

Deb Mayer taught a multi-age fourth, fifth, and sixth grade classroom in a college town in the middle of Indiana.² Using the magazine, *Time for Kids*, Ms. Mayer taught a school approved unit on the Iraq war.³ An age appropriate conversation ensued in which Ms. Mayer facilitated the students' discussion of war and the possible alternatives – including peace.⁴ A student asked Ms. Mayer if she had ever done anything to support peace.⁵ Ms. Mayer responded, “[w]hen I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their signs say, ‘[h]onk for peace.’”⁶ Ms. Mayer was “ultimately discharged” because of her classroom discussion.⁷

David Chila-Nakai read *Hockey Fever in Gogan Falls*⁸ with his elementary school classroom.⁹ After reading the part of the book that discussed the disparity in uniforms between two teams, Mr. Chila-Nakai facilitated a classroom discussion of “how people position each other in classist ways based on the clothes [they] wear[.]”¹⁰ The discussion grew into a classroom curricular

1. William B. Senhauser, *Education and the Court: The Supreme Court's Education Ideology*, 40 VAND. L. REV. 939, 942 (1987).

2. Brief for the Plaintiff-Appellant Deborah A. Mayer at 6, *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (No. 06-1993), 2006 WL 2024105.

3. *Id.* at 4.

4. *Id.* at 4-5.

5. *Id.*

6. *Id.*

7. *Id.* at 6.

8. R.J. CHILDERHOSE, *HOCKEY FEVER IN GOGAN FALLS* (1973) (out of print).

9. David Chila-Nakai, *Re-Thinking My Classroom: A Nike Story*, SCHOOL TALK, (National Council of Teachers of English, Urbana, Ill.), Apr. 2001, at 3, available at <http://www.bazmakaz.com/vasquezhome/books/ST%20CL%20April01.pdf>.

10. *Id.*

project involving Nike, fair wages, and child labor.¹¹ Students participated in inquiry projects; a guest speaker spoke to the class about the “treatment of factor workers in Third World countries.”¹² Mr. Chila-Nakai found his “role in the classroom [] blurred; [he] was both a resource and a learner.” He shared his teaching experience in an education journal and celebrated “how the classroom could offer space for conversations using the daily texts that students meet at school.”¹³

The difference between the above scenarios lies mainly in the outcome. Ms. Mayer lost her job for her classroom speech. Mr. Chila-Nakia was lauded in an education journal for using an exemplary teaching methodology. Everyday in elementary and secondary classrooms throughout the United States, teachers facilitate active engagement in activities that promote democratic¹⁴ ways of thinking. While such teaching has a strong pedagogical basis, it is unlikely that most courts would constitutionally protect the teacher’s speech.

II. OVERVIEW

This note will examine the legal basis and educational framework for First Amendment protection of classroom speech. The Supreme Court of the United States has not directly addressed the constitutional issues implicated in teacher classroom speech. As a result, the circuit courts are split in the application of an appropriate analysis.¹⁵ In most circuits, teacher curricular speech is not protected speech.¹⁶ Among the circuit courts, teacher curricular speech is governed by three competing doctrines: public employee speech, student speech, and academic freedom.¹⁷ While the Fourth, Fifth, Sixth, and Seventh Circuits have applied the *Pickering* public employee analysis,¹⁸ the First, Second, Eighth, and Tenth Circuits have expanded the *Hazelwood* student speech analysis to include teacher curricular speech.¹⁹ While the teacher, as

11. *Id.*

12. *Id.* at 3-4.

13. *Id.* at 4.

14. The United States is a representative democracy. The word democracy is used throughout this paper because it is the democratic process (even through representative government) that is at stake.

15. *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (detailing the split in the circuit courts).

16. See discussion *infra* Parts III.B, IV.B, V.B.

17. See *infra* Parts III.B, IV.B, V.B.

18. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799 (5th Cir. 1989); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998); *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001).

19. *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722 (2d Cir. 1994); *Lacks v. Fergu-*

speaker, is a public employee, the public employee speech doctrine does not fully account for additional protections that may exist within the classroom, nor does it fully account for the distinction between the government as employer and the government as sovereign provider of education. However, to analogize teacher speech with student speech disregards the different roles of students and teachers within the school environment.

It is unclear whether academic freedom protections alluded to by the Supreme Court apply to elementary and secondary classrooms.²⁰ Although the Supreme Court has applied the public employee speech doctrine to elementary and secondary teachers, the Court has applied the academic freedom doctrine almost exclusively to university professors and their institutions.²¹ Some circuit courts have based their decisions on academic freedom, but those decisions have laid dormant for over thirty years, ignored (but not explicitly overruled) as those circuits have applied the public employee or student speech doctrine to curricular speech.

This note argues that teacher curricular speech occupies a unique position among protected speech, not fully accounted for by any of the doctrines currently employed. This argument is grounded in the educational and philosophical purpose of education and the methods by which that purpose can be achieved.

III. PUBLIC EMPLOYEE SPEECH DOCTRINE

A. *Supreme Court Jurisprudence*

The *Pickering* balancing test serves as the basis for the current employee speech doctrine.²² In *Pickering v. Board of Education of Township High*

son Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775 (10th Cir. 1991). The Ninth Circuit has, at different times, employed both tests. Compare *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 865 (9th Cir. 1982), with *Cal. Teachers Ass'n*, 271 F.3d at 1149.

20. See discussion *infra* Part V.

21. See discussion *infra* Part V.A.

22. For the first half of the 20th century, the Supreme Court allowed public employers to place limitations on their employees regardless of the violation of their constitutional freedoms. An oft quoted maxim is the 1892 statement by Justice Holmes (then on the Supreme Judicial Court of Massachusetts) that “[t]he [policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). Beginning in the 1950s, however, the court began to strike down restrictions that limited public employees’ ability to participate in public affairs. See *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Cramp v. Bd. of Pub. Instruction of Orange County*, 368 U.S. 278 (1961); *Cafeteria and Restaurant Workers Union, Local 473 v. McEroy*, 367 U.S. 886 (1961); *Scales v. U.S.*, 367 U.S. 203 (1961); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589

School District 205, the Supreme Court developed a two-part threshold test used to analyze whether the First Amendment protected public employee speech.²³ The test has been applied to both teachers and other public employees.²⁴ For over a decade, the Court elaborated on the threshold portion²⁵ of the test in teacher, as public employee, cases. Then, in 1983 in *Connick v. Myers*,²⁶ the Court began to develop the contours of the balancing part²⁷ of the test. However, no Supreme Court case has applied the new contours of the balancing test to teachers as public employees. Most recently, in *Garcetti v. Ceballos*,²⁸ the Court distinguished employees speaking pursuant to their employment duties as non-citizens for purposes of First Amendment protection.

In *Pickering*, the Township Board of Education dismissed Marvin Pickering from his teaching position for writing to a local newspaper to express his criticism of the school board and the superintendent.²⁹ Pickering argued that his dismissal violated his First Amendment constitutional right; the School Board claimed that they could legally dismiss Pickering under Illinois Statute.³⁰

The Supreme Court first articulated that the First Amendment did apply to public employees, and then it established a two-part test to determine the circumstances under which a public employee's speech qualified for First Amendment protections.³¹ In the first part of the test, the employee must establish that his speech addresses "matters of public concern."³² If this public concern threshold is met, the Court proceeds to balance the government's interest (as employer) and the speaker's interest (as citizen).³³ In this second part of the test, the burden shifts to the government employer to show that its

(1967). The Court recognized that citizens should not have to make the choice of being a citizen or an employee.

23. 391 U.S. 563, 568 (1968).

24. *Id.*

25. In the first prong of the test the Court must determine whether the speech is a "matter[] of public concern." *Id.*

26. 461 U.S. 138 (1983).

27. In the second part of the test, the public employees' first amendment rights are balanced against the rights of the government as employer. *Pickering*, 391 U.S. at 568.

28. 126 S. Ct. 1951 (2006).

29. *Pickering*, 391 U.S. at 566.

30. *Id.* at 564-65.

31. *Id.* at 568.

32. *Id.* The importance of the matters of public concern comes from the idea that "free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72.

33. *Id.* at 573.

interests “in promoting the efficiency of [its] public services” outweighs the employee’s free speech right.³⁴

In *Pickering*, the Court first determined that a teacher writing to the local newspaper about a bond issue is a citizen speaking on a matter of public concern.³⁵ Then the Court struck the government/citizen balance in favor of *Pickering* because the letter did not interfere with his daily duties or disrupt the school generally; it held that the statute and the dismissal were in violation of *Pickering*’s First Amendment rights.³⁶

In the 1970s, the Supreme Court clarified the “matter of public concern” part of the *Pickering* balancing test in several cases also involving teacher speech.³⁷ The Court recognized that a teacher’s participation in public argument about a university’s status was a matter of public concern.³⁸ A teacher’s communication with a radio station about a school memorandum regarding the relationship between teacher dress and public support of school bond issues also qualified as a matter of public concern.³⁹ The Court held that even when a teacher expressed her views in a private meeting with a principal, she was entitled to First Amendment protections and her statements about the school’s racially discriminatory policies involved a matter of public concern.⁴⁰ In each of these cases, the Court held that the balance clearly tipped in favor of the teacher’s rights.

In the 1980s, the Supreme Court articulated the circumstances in which the balancing part of the test might not fall in the public employee’s favor.⁴¹ In *Connick*, the Court examined a case in which an assistant district attorney was terminated after circulating a questionnaire among fellow employees.⁴² In analyzing the case, the Court first established that Myers’ question about whether employees felt pressure to work on political campaigns addressed a matter of public concern.⁴³ However, when applying the balancing part of the

34. *Id.* at 568. Factors employed in the balancing test address workplace disruption – interference with “proper performance of his daily duties” or “interfere[nce] with the regular operation” of the business are noted. *Id.* at 572-73.

35. *Id.* at 571-72.

36. *Id.* at 572-73.

37. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

38. *Perry*, 408 U.S. at 598. This included the teacher testifying before the Texas legislature. *Id.*

39. *Mt. Healthy*, 429 U.S. at 282, 284.

40. *Givhan*, 439 U.S. at 415-16.

41. See *Connick v. Myers*, 461 U.S. 138 (1983).

42. *Id.* at 140-41.

43. *Id.* at 148-149. Although it passed the threshold test, the court characterized the questionnaire as more of an “employee grievance concerning internal office policy.” *Id.* at 154. In this case, nearly everything had to do with the em-

test, the Court concluded that Myers' method of giving her questionnaire in the office constituted an adequate disruption of the workplace, tipping the balance in favor of the government employer's interest.⁴⁴

Although the cases involving the threshold prong of the test involved teachers as public employees, teachers were not the subject of any of the cases that elaborated on the balancing prong of the test. These cases often gave more weight to the government as employer.⁴⁵ The Court has emphasized the distinction between decisions made by the government as employer and as sovereign, concluding that upon review of constitutional public employee speech issues, "the government as employer indeed has far broader powers than does the government as sovereign."⁴⁶

In 2006, the Court articulated a new distinction in the public employee speech doctrine.⁴⁷ When Los Angeles County Calendar Deputy Richard Ceballos wrote a memo in his workplace urging the dismissal of a case, he experienced "retaliatory employment actions."⁴⁸ With Justice Kennedy writing for the majority, the Court distinguished Ceballos's speech as written "pursuant to his duties" and not as a citizen.⁴⁹ The Court held that speech made pursuant to official duties does not qualify as protected speech because the speaker is not acting as a citizen for First Amendment purposes.⁵⁰ Thus, the Court did not even apply *Pickering*, which only governs speech by citizens.

Justice Stevens, Justice Souter (joined by Justice Stevens and Justice Ginsburg), and Justice Breyer filed dissenting opinions in the case. Justice Stevens argued that the distinction between citizen and employee was never part of the Court's employee speech jurisprudence and such distinction should not affect the speakers protected status.⁵¹ Justice Stevens also noted

ployee/employer relationship – thus the court reasonably decided that the government acted as employer, not sovereign in making the employment decision. *Id.* at 147-54.

44. *Id.* at 154.

45. *See Rankin v. McPherson*, 483 U.S. 378 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994).

46. *Waters*, 511 U.S. at 671. Because the government as employer has broader rights to limit speech, the public employee acting as employee has less rights than the public citizen. *Id.* at 672-75.

47. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

48. *Id.* at 1955-56.

49. *Id.* at 1960. The Court reiterated that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 1958.

50. *Id.* at 1960. The Court noted that the fact that Ceballos' expression was inside of the office (as opposed to in public) was not dispositive because First Amendment protections sometimes apply to "expressions made at work." *Id.* at 1959. The Court also noted that the fact that the memo "concerned the subject matter of Ceballos' employment" was also not dispositive because "some expressions related to the speaker's job" are also protected by the First Amendment. *Id.*

51. *Id.* at 1963 (Stevens, J., dissenting).

the inconsistency of the *Garcetti* decision with the Court's unanimous decision in *Givhan v. Western Line Consolidated School District*.⁵² In *Givhan*, the Court held that the First Amendment protected a teacher's free speech while expressing herself *during the school day in her principal's office*.⁵³ The Court made no reference to "whether or not her speech was made pursuant to her job duties" because it was "immaterial."⁵⁴

Justice Souter also recognized the contradiction between the Court's holdings in *Garcetti* and *Givhan*.⁵⁵ He explained that to distinguish between *Givhan*'s and *Ceballos*' speech, the Court had, with "no adequate justification," drawn an arbitrary distinction between what is and is not within "the scope of . . . job responsibilities."⁵⁶ Justice Souter argued instead for an adapted *Pickering* test, where the government's interest as employer would prevail when the employee is speaking pursuant to their job duties except when the subject matter of the speech is of "unusual importance" or the speaker "satisfies high standards of responsibility in the way he does it."⁵⁷ He also expressed concern that the reach of the majority's decision may include "teachers [who] necessarily speak and write 'pursuant to official duties.'"⁵⁸ The majority simply responded to Justice Souter's teacher speech concern: "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."⁵⁹

Justice Breyer, in his dissent, argued that although some speech may be regulated because of the government's interest as employer, some employee speech may garner additional constitutional protections.⁶⁰ Justice Breyer emphasized that *Ceballos*' prosecutorial speech was "professional speech," which incurred professional obligations and "special constitutional obligations."⁶¹ The combination of these "professional and special constitutional obligations" weighed in favor of First Amendment protection, diminished the government's employer interest, and "the Constitution mandates special protection of employee speech in such circumstances."⁶²

Prior to the Supreme Court's decision in *Garcetti*, the *Pickering* balancing test provided the framework for public employee speech cases, including

52. *Id.*

53. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

54. *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting).

55. *Id.* at 1965 (Souter, J., dissenting).

56. *Id.*

57. *Id.* at 1967.

58. *Id.* at 1969-70.

59. *Id.* at 1962 (majority opinion).

60. *Id.* at 1974 (Breyer, J., dissenting).

61. *Id.* at 1974-75.

62. *Id.* at 1975 (arguing for an adapted application of the *Pickering* balancing test).

teacher speech. However, while the Supreme Court has extensively applied the public concern prong of the *Pickering* balancing test to teacher speech, the Court has only addressed non-teacher public employees when developing the balancing prong of the test. It remains unclear what additional constitutional interests may exist for teachers. Also, it is unknown whether the government as the employer of teachers is acting only as an employer or also in a sovereign role. Furthermore, it is unclear how the *Garcetti* “pursuant to official duties” limitation will apply to teacher speech. Thus far, the Fourth and Seventh Circuits have referenced *Garcetti* in their analyses of teacher curricular speech.⁶³

B. Appellate Court Application of the Public Employee Speech Doctrine to Teacher Curricular Speech

Several appellate courts have applied the *Pickering* balancing test to teacher curricular speech. In some circuits, the public employee balancing test summarily ends at the first prong when the court ascertains that the speech is curricular in nature.⁶⁴ The Fourth and Fifth Circuits held that under *Pickering*, curricular speech is not a matter of public concern because the teacher is speaking as employee rather than citizen.⁶⁵ However, the Sixth Circuit, also applying *Pickering*, held that curricular speech could be a matter of public concern and protected as such.⁶⁶ The Seventh Circuit, under *Garcetti*, held that teacher curricular speech is part of a teacher’s “assigned tasks” and is therefore not protected by the First Amendment.⁶⁷

In *Boring v. Buncombe County Board Of Education*, the Fourth Circuit determined that curricular speech “does not present a matter of public concern.”⁶⁸ Boring, a drama teacher, selected a play for her drama class to per-

63. See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (interpreting the additional academic scholarship or classroom instruction constitutional interests alluded to in *Garcetti* as not applying to primary or secondary teachers); *Lee v. York County Sch. Div.*, 484 F.3d 687, 695 n.11 (4th Cir. 2007) (“The [Supreme] Court explicitly did not decide whether [the *Garcetti*] analysis would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering-Connick* standard.”).

64. See *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998).

65. *Boring*, 136 F.3d at 370-71; *Kirkland*, 890 F.2d at 795. Further, the Fourth Circuit noted that even if curricular speech was protected, curricular decisions are, by definition, legitimate pedagogical interests that can be regulated. *Boring*, 136 F.3d at 368.

66. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1050-55 (6th Cir. 2001).

67. *Mayer*, 474 F.3d at 480.

68. 136 F.3d 364, 368 (4th Cir. 1998).

form at a regional competition.⁶⁹ After winning at the regional competition, the drama class performed the play for another class at the school.⁷⁰ A parent complained about the controversial nature of the play, and the school's principal forbade its presentation at the state drama competition.⁷¹ Other parents persuaded the principal to allow the students to compete, and after modifying the play, he complied.⁷² Boring was later transferred because of her decision to use the play; she brought suit for violation of her First Amendment rights.⁷³ While applying the *Pickering* public concern prong, the court determined that the choice of a school play could not represent a matter of public concern, and thus was not protected First Amendment speech.⁷⁴

The Fifth Circuit also does not recognize teachers' curricular decisions as a matter of public concern.⁷⁵ In *Kirkland v. Northside Independent School District*, a teacher added a supplemental reading list to his history class as an extra credit opportunity for students.⁷⁶ At the end of the year, his contract was not renewed; Kirkland claimed that the nonrenewal was due to impermissible censorship in violation of his First Amendment rights.⁷⁷ The court held that a teacher's decision to supplement the school's reading curriculum was not a matter of public concern.⁷⁸ The court based this holding, in part, on the fact that Kirkland had an opportunity to speak as a public citizen about the extra credit booklists, but did not take advantage of that opportunity.⁷⁹

However, the Sixth Circuit held that a teacher's speech can be a matter of public concern.⁸⁰ In *Cockrel v. Shelby County School District*, a teacher made a curricular choice to allow an in-class speaker presentation on industrial hemp.⁸¹ The school terminated the teacher; she filed suit for violation of

69. *Id.* at 366. Boring also notified her principal of the choice of play. *Id.*

70. *Id.* Boring notified the other teacher that the play was controversial in nature and suggested that students bring in permission slips to see the play. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 367.

74. *Id.* at 368. Since *Garcetti*, the Fourth Circuit has reaffirmed its *Boring* holding. In *Lee v. York County School Division*, the Court concluded that creation of bulletin boards was curricular in nature and not a matter of public concern, and therefore could not be protected by the First Amendment. 484 F.3d 687, 700 (4th Cir. 2007). Thus, using a very broad definition of teacher duties, postings on bulletin boards and decisions about plays are never protected First Amendment speech in the Fourth Circuit. *Id.* at 692.

75. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989).

76. *Id.* at 796.

77. *Id.*

78. *Id.* at 800.

79. *Id.*

80. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001).

81. *Id.* at 1042.

her First Amendment rights.⁸² The court held that Cockrel's curricular choice was a matter of public concern and that her interests as a speaker outweighed the government's interest as employer.⁸³ The court recognized that if teacher curricular speech is always a matter of employee private interests as opposed to public interest, "[t]his essentially gives a teacher no right to freedom of speech when teaching students in a classroom."⁸⁴ It is unclear how the distinction between citizen and employee articulated in *Garcetti* will affect the Sixth Circuit's position on this issue.⁸⁵

More recently, the Seventh Circuit has applied *Garcetti* to teacher curricular speech in *Mayer v. Monroe County Community School Corporation*.⁸⁶ While teaching an approved curricular unit on the war in Iraq, Mayer responded to students' queries about peace as an alternative to war.⁸⁷ School administrators instructed her to refrain from discussing peace in the classroom and did not renew her contract at the end of the year.⁸⁸ She brought suit for violation of her First Amendment rights, but the court found that the school district "hire[d]" her classroom speech.⁸⁹ The court acknowledged that there might be "additional constitutional protections" for *post-secondary* teachers.⁹⁰ However, 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."⁹¹

These cases stand for the proposition that teacher curricular speech is rarely protected under the public employee speech doctrine. In fact, only the Sixth Circuit recognizes that teacher speech can be a matter of public concern. However, these decisions do not distinguish between the government as employer and the government as sovereign provider of education.

82. *Id.* at 1045.

83. *Id.* at 1055.

84. *Id.* at 1051-52.

85. This holding has already been called into doubt by the Seventh Circuit. See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

86. *Id.*

87. *Id.* at 478.

88. Brief for the Plaintiff-Appellant Deborah A. Mayer at 4-6, *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (No. 06-1993), 2006 WL 2024105.

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

90. *Id.* at 480.

91. *Id.*

IV. STUDENT SPEECH DOCTRINE

A. Supreme Court Jurisprudence

Student speech was first addressed by the Supreme Court in 1969, when the Supreme Court upheld the rights of two students to wear black arm bands in protest of the Vietnam War.⁹² In *Tinker v. Des Moines Independent Community School District*, the Court established the material and substantial disruption standard.⁹³ This standard provides First Amendment protection of student speech in the school environment (including the classroom) except when the speech is materially or substantially disruptive.⁹⁴ Although this case involved student speech, the Court emphasized the importance of First Amendment protection for both students and teachers: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁹⁵

The Court has only addressed elementary and secondary student speech three times in the nearly forty years since *Tinker*.⁹⁶ In *Bethel School District No. 403 v. Fraser*, the Court distinguished lewd student speech from *Tinker*’s student political speech, holding that schools can regulate the former even when it does not cause a material and substantial disruption to the school environment.⁹⁷ Although the Court acknowledged that Fraser’s risqué speech at a school wide assembly would be protected outside the school setting, it upheld the school’s discipline of the speech precisely because it occurred at school.⁹⁸ The Court distinguished students from adults, acknowledging that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”⁹⁹

In *Hazelwood School District v. Kuhlmeier*, the Court did not apply the *Tinker* material and substantial disruption standard to the censorship of two articles in a student-run school newspaper.¹⁰⁰ Rather, it held “that educators do not offend the First Amendment by exercising editorial control over the

92. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

93. *Id.*

94. *Id.* The Court emphasized that the material and substantial disruption must be more than just “discomfort and unpleasantness” associated with expression of an unpopular viewpoint. *Id.* at 509.

95. *Id.* at 506.

96. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

97. *Bethel*, 478 U.S. at 680.

98. *Id.* at 682.

99. *Id.*

100. *Hazelwood*, 484 U.S. at 270.

style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹⁰¹ The Court identified the school newspaper as part of the school curriculum, which bore the “imprimatur” of the school.¹⁰² The Court allowed reasonable regulation of such student curricular speech so that the “views of the individual speaker [were] not erroneously attributed to the school.”¹⁰³ *Hazelwood* marked a new era in student speech; schools could reasonably regulate speech associated with the curriculum, whereas speech that incidentally took place on school property could only be regulated if there was a material and substantial disruption.¹⁰⁴

Most recently, in *Morse v. Frederick*, the Supreme Court, in a narrow holding, decided that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”¹⁰⁵ In *Morse*, a student held a banner advocating drug use at a school-sanctioned event.¹⁰⁶ He was suspended for his actions and brought suit for violation of his First Amendment rights.¹⁰⁷ The Court noted that *Tinker* “warned that schools may not prohibit student speech because of ‘undifferentiated fear or apprehension of disturbance.’”¹⁰⁸ However, the Court found that student drug abuse did not constitute this kind of “undifferentiated fear”; thus, the limitations imposed on schools by *Tinker* did not apply.¹⁰⁹ The Court also rejected the idea that *Bethel*’s “plainly offensive” standard could be stretched to “encompass any speech that could fit under some definition of offensive.”¹¹⁰ In fact, the Court limited the holding in *Bethel* to two basic principles. First, “the rights of students in public school are not automatically coextensive with the rights of adults in other settings”; and second, “the mode of analysis set forth in *Tinker* is not absolute.”¹¹¹ The Court also did not apply *Hazelwood*, finding that under the circumstances “no one would reasonably believe that [the student’s] banner bore the school’s imprimatur.”¹¹²

The judicial deference to school authority in *Fraser* and *Hazelwood* has long overshadowed the protection of student speech that the Court announced

101. *Id.* at 273.

102. *Id.* at 271.

103. *Id.*

104. *See id.*

105. 127 S. Ct. 2618, 2622 (2007).

106. *Id.*

107. *Id.* Although the holding of this case was very narrow, the analysis of the Court and review of its previous students speech jurisprudence is informative.

108. *Id.* at 2629 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)).

109. *Id.*

110. *Id.* (internal quotations omitted).

111. *Id.* at 2626-27.

112. *Id.* at 2627.

in *Tinker*.¹¹³ The appellate courts' application of *Tinker* and its progeny is inconsistent, but most courts allow pervasive regulation of school speech.

B. Appellate Court Application of *Hazelwood* to Teacher Curricular Speech

Because the definition of curriculum is so broad,¹¹⁴ the reach of the *Hazelwood* reasonableness standard has been expansive. Four appellate courts have expanded this student speech framework to include teacher curricular speech with uniform results.¹¹⁵ Under this analysis, each court concluded that teacher curricular speech always bears the imprimatur of the school and that the school board's right to control the curriculum is always a legitimate pedagogical concern.¹¹⁶ The courts do not distinguish between *Hazelwood*'s regulation of student speech and the application of the same principles to teacher speech.

The First Circuit determined that *Hazelwood* should govern teacher curricular speech.¹¹⁷ In *Ward v. Hickey*, a biology teacher was denied reappointment because of her discussion of abortion of Downs Syndrome fetuses in a high school biology class.¹¹⁸ Although the court gave voice to the *Tinker* proclamation that teachers have First Amendment protection in school, it also emphasized the "great deference [afforded schools] in regulating classroom speech."¹¹⁹ To balance these opposing goals, the First Circuit articulated a rational basis scrutiny for teacher speech, allowing for regulation when it is "reasonably related to a legitimate pedagogical concern" and the teacher has been given notice.¹²⁰

113. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 535 (2000).

114. The definition includes any activity that "imparts knowledge" to students. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

115. *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722 (2d Cir. 1994); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991).

116. *Ward*, 996 F.2d at 452; *Silano*, 42 F.3d at 723; *Lacks*, 147 F.3d at 724; *Miles*, 944 F.2d at 776. Thus, under the *Hazelwood* analysis, it does not appear that teacher curricular speech could ever be protected speech.

117. *Ward*, 996 F.2d at 453.

118. *Id.* at 450. Although the court established that teacher speech should be analyzed under *Hazelwood*, the court did not apply that analysis in this case because *Ward* only challenged the lack of notice, an issue she failed to reserve for appeal. *Id.* at 453-55.

119. *Id.* at 452.

120. *Id.* The court also inexplicably interpreted *Hazelwood*'s holding to allow viewpoint based regulation of classroom curricular speech. *Id.* at 454. Even in non-public fora, where content regulation is permitted, viewpoint based discrimination is

The Second Circuit has also applied the Supreme Court's *Hazelwood* student speech analysis to teacher curricular speech.¹²¹ In *Silano v. Sag Harbor Union Free School District Board of Education*, a member of the board of education gave a guest lecture on the "persistence of vision" problem to a tenth grade mathematics class.¹²² Silano used thirty-five millimeter film to demonstrate the phenomenon and one of the films included a man and two women naked from the waist up.¹²³ After his first presentation, Silano was asked to remove the film, which he did.¹²⁴ Using the *Hazelwood* reasonableness standard, the court held that Silano's use of the film was not protected by the First Amendment.¹²⁵ Although Silano had no notice that the film was not allowed and the school lacked "clearly-established rules and procedures" for such regulation, the court relied on *Hazelwood's* contention that "such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."¹²⁶ To find the film curricular in nature, the court relied upon the broad language of *Hazelwood* that defined curriculum as "school activities that 'are supervised by faculty members and designed to impart particular knowledge or skills to student participants.'"¹²⁷

In *Lacks v. Ferguson Reorganized School District R-2*, the Eighth Circuit addressed a teacher's curricular decision to allow students to use profanity in creative plays.¹²⁸ Although there was a school policy banning profanity, Lacks believed this ban did not extend to creative productions and so did not enforce it.¹²⁹ Lacks argued that her First Amendment rights had been violated by requiring her to enforce a ban on profanity because there was no legitimate pedagogical interest in prohibiting profanity in creative activity.¹³⁰ The court held that a "flat prohibition" on profanity was reasonably related to the school's interest in "promoting generally acceptable social standards."¹³¹

The Tenth Circuit used the *Hazelwood* standard in *Miles v. Denver Public School* to determine if a teacher's comments during a high school social

not allowed. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983).

121. *Silano*, 42 F.3d at 723.

122. *Id.* at 721.

123. *Id.*

124. *Id.*

125. *Id.* at 723.

126. *Id.* at 723 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.6 (1988)).

127. *Id.* at 723 (citing *Hazelwood*, 484 U.S. at 271).

128. 147 F.3d 718, 722 (8th Cir. 1998).

129. *Id.*

130. *Id.* at 723.

131. *Id.* at 724. When analyzing whether Lacks had appropriate notice, the court compared the notice given to her to the notice given to the student speaker in *Bethel*. *Id.* at 723-24.

studies class were protected by the First Amendment.¹³² During government class, Miles commented on the decline of the school since 1967.¹³³ When probed by a student, Miles commented on soda cans lying around and students “making out” during the lunch break.¹³⁴ The court explicitly rejected the idea that the *Pickering* public employee standard would apply, distinguishing between government as employer and the government’s interests as educator.¹³⁵ In this context, the court found that the teacher’s First Amendment rights were “less forceful” in light of the classroom environment.¹³⁶ As a result, the court applied a reasonableness standard and noted that there was “no reason to distinguish between the classroom discussion of students and teachers.”¹³⁷

Taken as a whole, these four circuits have established an entire new strand of application of *Hazelwood*. These cases stand for the proposition that judicial deference to school authority eclipses teachers’ First Amendment rights. It is difficult to imagine a situation where a teacher’s First Amendment rights would be protected under this standard. The broad definition of curriculum encompasses all teacher speech, while the requirement for notice is almost entirely eliminated because there is no requirement for established procedures and policies. Yet, despite the close attention paid to the unique characteristics of the school environment, the differences between student and teacher within this environment are explicitly ignored.

V. ACADEMIC FREEDOM DOCTRINE

A. Supreme Court Jurisprudence

The Supreme Court has often alluded to the doctrine of academic freedom, but the Court has not defined how the public employee speech doctrine and the academic freedom doctrine intersect. The creation of the academic freedom doctrine centered almost entirely around the issues surrounding loyalty oaths; the more recent cases have focused on institutional academic freedom.¹³⁸

Justice Douglas, in his dissent in *Adler v. Board of Education of City of New York*, first articulated the concept of a constitutional doctrine of aca-

132. 944 F.2d 773, 775 (10th Cir. 1991).

133. *Id.* at 774.

134. *Id.* The comment about students making out appeared to be in reference to an unconfirmed rumor that a tennis player had had sex on the tennis court during lunch break the previous day. *Id.*

135. *Id.* at 777.

136. *Id.*

137. *Id.*

138. *Compare* *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589 (1967) (focusing on loyalty oaths), *with* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (focusing on institutional academic freedom).

democratic freedom.¹³⁹ Although the majority noted that the teacher “shapes the attitude of young minds towards the society in which they live,” it upheld the New York Feinberg Law because of the importance of the teacher’s “fitness and suitability for public service” and upon “maintain[ing] the integrity of the schools as a part of ordered society.”¹⁴⁰ In Justice Douglas’ dissent, however, he recognized that teachers are most in need of the protection constitutionally guaranteed by the First Amendment.¹⁴¹ He viewed the public school as “the cradle of our democracy” and the suppression of teachers’ protected First Amendment rights as casting a pall over the school environment that results in destruction of the educative process.¹⁴² Justice Douglas envisioned the potential effects of this destruction as reaching the very essence of the teaching and learning process.¹⁴³ Justice Douglas’ dissent further articulated the constitutional basis for protecting academic freedom.¹⁴⁴ He argued that without the protection of academic freedom, the “pursuit of truth” is lost.¹⁴⁵ Furthermore, he articulated that it is this pursuit which is fundamental to the protection envisioned by the First Amendment.¹⁴⁶

139. 342 U.S. 485, 508-11 (1952) (Douglas, J., dissenting), *overruled in part by Keyishian*, 385 U.S. 589. *Adler* was a McCarthy era case involving the New York Feinberg law, which allowed for the dismissal of public school teachers who “advocated for the overthrow of federal, state or local government” or were members of subversive groups. *Id.* at 490 (majority opinion).

140. *Id.* at 492-93.

141. *Id.* at 508 (Douglas, J., dissenting).

142. *Id.* at 508, 510.

143. *Id.* at 510.

A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

Id.

144. *Id.* at 510-11.

145. *Id.*

146. *Id.* at 511.

This, I think, is what happens when a censor looks over a teacher’s shoulder It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life. We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law.

The Court, in *Wieman v. Updegraff*, struck down a loyalty oath statute on due process grounds.¹⁴⁷ Justice Frankfurter, in his concurrence, elaborated on the importance of academic freedom for teachers.¹⁴⁸ He recognized that the “unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable [sic] tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.”¹⁴⁹ Justice Frankfurter very seriously regarded teachers “as the priests of our democracy” and clearly articulated the constitutional importance of that role.¹⁵⁰ In his view, the teacher’s role of establishing “open-mindedness” and “critical inquiry” amongst their students should be constitutionally protected because it is necessary for the creation of actively engaged citizens who are responsible for the continuation of the democratic process.¹⁵¹

The majority of the Supreme Court articulated the academic freedom doctrine in *Sweezy v. State of New Hampshire by Wyman*.¹⁵² The Court held that the attorney general’s questioning of a university professor about the content of his lectures and political party affiliation violated the professor’s due process rights.¹⁵³ The Court emphasized that “government should be extremely reticent to tread” upon academic freedoms because teachers play a “vital role in a democracy” and therefore “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise

Id.

147. 344 U.S. 183 (1952).

148. *Id.* at 194-98 (Frankfurter, J., concurring).

149. *Id.* at 195.

150. *Id.* at 196.

151. *Id.* at 196-97.

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Id.

152. 354 U.S. 234 (1957).

153. *Id.* at 239-40.

our civilization will stagnate and die.”¹⁵⁴ The Court also noted that it “do[es] not now conceive of any circumstance wherein a state interest would justify infringement of rights in [this] field[.]”¹⁵⁵

In a later case, *Keyishian v. Board of Regents of University of New York*, the Court held that the state violated teachers’ First Amendment rights of association by a statute allowing their removal for “treasonable or seditious” words or acts.¹⁵⁶ The Court articulated the relationship between academic freedom and its constitutional basis, noting that the protection of academic freedom is a “special concern of the First Amendment” because laws which infringe upon constitutional freedoms within the classroom “cast a pall of orthodoxy.”¹⁵⁷

The Court developed the academic freedom doctrine with an emphasis on individual rights of professors at the university level. However, in 1978, Justice Powell, writing for the plurality in *Regents of University of California v. Bakke*, relied on institutional academic freedom to support his conclusion that there was a compelling governmental interest in the university’s “freedom . . . to make its own judgments as to education includ[ing] the selection of its student body.”¹⁵⁸ Since the Bakke decision, the Court has often referenced the important role of academic freedom, but without further elaboration of the contours of the framework.¹⁵⁹ In the intervening years, the tension between professor and institution has become exacerbated, and with no further clarification from the Supreme Court, lower courts are inconsistent in their application of the academic freedom doctrine. It is unclear whether that special right of the Constitution is held only by university professors, by their institutions, or by elementary and secondary teachers as well.

The Supreme Court has not directly applied the academic freedom doctrine to elementary or secondary schools. However, in *Epperson v. State of Arkansas*, the Court discussed, at some length, the importance of the academic freedom doctrine without regard to the fact that the case involved a

154. *Id.* at 250; see also *Barenblatt v. U.S.*, 360 U.S. 109 (1959) (“When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.”).

155. *Sweezy*, 354 U.S. at 251.

156. 385 U.S. 589, 593 (1967).

157. *Id.* at 603.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a *special concern of the First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

Id. (emphasis added) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

158. 438 U.S. 265, 312 (1978).

159. See, e.g., *Garcetti v. Ceballos*, 126 S. Ct 1951 (2006).

secondary teacher rather than a university professor.¹⁶⁰ The Court acknowledged that local school boards have the authority to determine much of the curriculum and manage the day-to-day operations of schools.¹⁶¹ However, they emphasized that when a school board's decisions run contrary to constitutionally protected freedoms, the courts have an obligation to intervene.¹⁶²

Although the Court's decisions related to academic freedom have focused on the university setting, the Court's recent reference to the doctrine in *Garcetti* implies that additional protections may also apply in the classroom.¹⁶³ "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."¹⁶⁴

B. Appellate Court Application of the Academic Freedom Doctrine to Teacher Curricular Speech

In the 1970s, several circuit courts applied the academic freedom doctrine to elementary and secondary classrooms. In *Mailloux v. Kiley*, a district court held that a secondary teacher's teaching methodology could be protected by academic freedom, so long as the method "served a demonstrated educational purpose" and had not been "proscribed by a regulation."¹⁶⁵ The First Circuit affirmed the lower court decision as "sound and sufficient" and articulated academic freedom for elementary and secondary teachers, allowing First Amendment protection based on a variety of factors, including when there is a "concededly valid educational objective."¹⁶⁶ The Seventh Circuit, in 1974, applied the First Circuit's factor-based analysis.¹⁶⁷ The Tenth Cir-

160. 393 U.S. 97, 104-05 (1968) (decided on Establishment Clause grounds)

161. *Id.*

162. *Id.*

163. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

164. *Id.* (emphasis added).

165. 323 F. Supp. 1387, 1390 (Mass. Dist. Ct. 1971).

Our faith is that the teacher's freedom to choose among options for which there is any substantial support will increase his intellectual vitality and his moral strength. The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his student a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth.

Id. at 1391.

166. *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam) (noting that analysis must be made on a "case-by-case" analysis of the facts).

167. *Brubaker v. Bd. of Ed., Sch. Dist.* 149, 502 F.2d 973, 984-85 (7th Cir. 1974). In this case teachers gave students poems telling them of the positive aspects of smok-

cuit, in *Cary v. Board of Education of Adams-Arapahoe School District 28-J*, recognized that teachers may have “some freedom” but not “unlimited liberty.”¹⁶⁸

While the issue of academic freedom on the elementary and secondary level has come up in other circuits, those cases were decided on other grounds.¹⁶⁹ Furthermore, since the establishment of the *Hazelwood* analysis, most circuit courts have analogized teacher speech with student speech without further mention of the academic freedom doctrine on an elementary or secondary level. It is unclear how the lack of application of the academic freedom doctrine is consistent with the Supreme Court’s emphasis on academic freedom in educational settings (or even with the First, Seventh, and Tenth Circuits’ prior holdings regarding academic freedom).

VI. THE NECESSITY OF PROTECTED TEACHER SPEECH FOR A SUCCESSFUL EDUCATION SYSTEM

A. *The Purpose of Education*

First Amendment protection of curricular speech is necessary to achieve one of the primary purposes of public education: preparing students for participation in a democracy.¹⁷⁰ Public education occupies a unique position in our society. Unlike more clearly defined necessities, such as food, clothing, and housing, which are subsidized on an individual basis, the United States provides a free education for every child.¹⁷¹ In fact, attendance is compulsory

ing marijuana. *Id.* at 975-76. Using the First Circuit case-by-case analysis, and weighing the First Circuit factors, the court held that these teachers were not protected by academic freedom. *Id.* at 984-85.

168. 598 F.2d 535, 543 (10th Cir. 1979). In this case, teachers were given a reading list of 1285 books to choose from. *Id.* at 537. While teachers were not allowed to use books off the list for classroom assignments, they could be used as examples in the classroom and spoken about freely. *Id.* at 543. This limitation was reasonable, so long as the list was created in a constitutionally permissible fashion. *Id.* at 544.

169. *See, e.g.*, *Simon v. Jefferson Davis Parish Sch. Bd.*, 289 So. 2d 511 (3d Cir. 1974) (constitutional issue not raised in court below, thus it could not be heard on appeal); *Dale v. Bd. of Educ., Lemmon Indep. Sch. Dist.* 52-2, 316 N.W.2d 108, 114-15 (S.D. 1982) (constitutional issue raised but not argued by counsel).

170. 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, 64 (2002) (“[A] vibrant educational process has long been deemed essential to the effective operation of a democratic system.”).

171. RANDY BOMER & KATHERINE BOMER, FOR A BETTER WORLD: READING AND WRITING FOR SOCIAL ACTION 14 (2001). Also, if the purpose of education is to train workers, why is it not subsidized by corporations? *Id.*

in all states.¹⁷² A free compulsory education serves to prepare children for active participation in society's democratic government.¹⁷³ "The only justification for public subsidized education lies in preparing children for and habituating them to democratic participation Public schools exist to create public selves, public purposes, and public habits."¹⁷⁴

The idea that the school is exactly the place where democratic ideals must be taught is not a new idea.¹⁷⁵ As early as 1749, Benjamin Franklin advocated classroom discussions of "current controversies."¹⁷⁶ George Washington encouraged schools to teach students "'to distinguish between oppression and the necessary exercise of lawful authority.'"¹⁷⁷ Thomas Jefferson envisioned a public education system that would prepare students to perform their civic duty.¹⁷⁸ By 1837, Horace Mann articulated the necessity of actively teaching democratic values.¹⁷⁹ In 1932, George Counts concluded that "in keeping silent about social problems, teachers actively lead children to believe that the world is just as it should be and that we should resist change rather than attempt it."¹⁸⁰

Part of the reason that teaching democracy is so important is the fulfillment of our need (as a community) to recreate the ability to "participat[e] in collectively shaping [] society" in the next generation.¹⁸¹ Although scholars (and courts) may not agree with each other about a vision of what is good or just, or even other values, it is through the reproduction of the ability to make these decisions that the next generation can actually achieve their own ideal democratic society.¹⁸² An educational system focused on promoting active engagement in the democratic process should not purport to inculcate students into making the same decisions that their parents have made; rather it should serve to educate them to be able to make their own decisions.¹⁸³ All future citizens must have the opportunity to "take part in processes of debate,

172. See National Conference of State Legislatures, *Compulsory School Age Requirements*, <http://www.ncsl.org/print/educ/CompulsorySchAgeChart.pdf> (2006), for specific ages and grades that students must attend school state by state.

173. See Redish & Finnerty, *supra* note 170, at 88.

174. BOMER & BOMER, *supra* note 171, at 14 (citing AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987)).

175. *Id.* at 16.

176. Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, 88 *PHI DELTA KAPPAN* 264, 267 (2006).

177. *Id.*

178. *Id.*

179. *Id.* at 268.

180. BOMER & BOMER, *supra* note 171, at 16-17 (citing GEORGE S. COUNTS, *DARE THE SCHOOLS BUILD A NEW SOCIAL ORDER?* (1978)).

181. GUTMANN, *supra* note 174, at 39.

182. *Id.*

183. *Id.*

criticism, choice, and co-operative effort upon which the common social structure depends.”¹⁸⁴

Although it might seem that this type of education is risky because the next generation may not make the same choices or adhere to the same values as their parents, this risk is central to the underlying values of democracy.¹⁸⁵ When the goal is for students to grow to become active participants in democracy, the hope is that the decisions they make as part of their society will be more than a reproduction of current belief systems.¹⁸⁶ In fact, it is this flexibility and ability to evolve that makes democracy viable from one generation to the next.¹⁸⁷ The “ideal of change” is democracy’s greatest strength.¹⁸⁸ It is when this democratic purpose of education is lost that the risk of losing our democratic ideals is the greatest.

B. Pedagogical Teaching Methodology for a Democratic Education

If the goal of education is to prepare students for active participation in a democracy, this cannot be done without protection of teachers’ First Amendment rights.¹⁸⁹ “The habit of active thought, with freshness, can only be generated by adequate freedom.”¹⁹⁰ It is important to remember that throughout history, teachers have said and done things that at the time seemed heretical, treasonous, and in fact downright ridiculous.¹⁹¹ It is this type of freedom to

184. Israel Scheffler, *Moral Education and the Democratic Ideal*, in CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION 435, 438 (Steven M. Cahn ed., 1996).

185. *Id.* at 441.

186. *Id.*

187. *Id.*

188. John Dewey, *Democracy and Education*, in CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION, *supra* note 184, at 288, 288.

189. See MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 198 (2d ed. 1982).

190. Alfred N. Whitehead, *The Aims of Education and Other Essays*, in CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION, *supra* note 184, at 262, 269.

191. For example, Socrates had to defend himself against the idea that he corrupted the youth in Athens. Copernicus had to carefully publish his astronomical theories in 1543. Galileo was punished for his telescopic observations.

[E]very form of orthodoxy that has been imposed on the academy – whether religious, political patriotic, scientific, moral, philosophical, or economic – has been imposed by groups that were fully convinced of the rightness of their position. And it is equally clear, with the benefit of hindsight and some objectivity, that every one of these groups has later come to be viewed by most thoughtful people as inappropriately intolerant, at best, and as inappropriately intolerant and wrong, at worst. It thus seems clear that if we are to avoid repeating the mistakes of the past, we

inquire which underlies a strong pedagogical teaching methodology for a democratic education.

Because democracy is an “open and dynamic society” with no “antecedent social blueprint,” it is malleable and can be recreated infinitely by the decisions of its citizens, so long as they have received an education that honors their participation in the process.¹⁹² The question then becomes: How do we create a classroom that teaches democratic participation? Many educators articulate that participation in a democratic community during the school experience is necessary to prepare for participation in adulthood.¹⁹³ The teacher’s public voice serves to teach students the power of the democratic process, both within and beyond the school gates.¹⁹⁴ “Honestly, we cannot effectively teach students to be powerful democratic participants when we ourselves participate like sheep.”¹⁹⁵

When the classroom is viewed as a behavioral model where complex democratic learning occurs during various engagements, there are “conditions of learning” that should be present for natural and effective education to take place.¹⁹⁶ For effective instruction in the democratic process, the teacher must demonstrate democratic values and rights.¹⁹⁷ This can be done in a multitude of ways, all of which require teachers to believe that their rights within the classroom are protected. Students must be surrounded by what they are to learn, have opportunities to see models of the material, and engage, participate, and respond to what they see and experience.¹⁹⁸ When these learning conditions are applied to the subject of democracy, it becomes clear that protected teacher speech is imperative to the process. Without protected speech, a teacher cannot model the democratic process, immerse students in the essence of democracy, or provide natural and honest feedback.

In fact, the classroom must be critically structured to serve the democratic goals of education. Such an environment should allow discussion of a multitude of current social issues that are still debated among the commu-

must step back from our own fighting faiths, insist on a less self-righteous stance, and subject our own orthodoxies to ruthless self-criticism.

Geoffrey R. Stone, *A Brief History of Academic Freedom*, in *ADVOCACY IN THE CLASSROOM: PROBLEMS AND POSSIBILITIES* 60, 69 (Patricia Meyer Spacks ed., 1996).

192. Scheffler, *supra* note 184, at 436.

193. See BOMER & BOMER, *supra* note 171, at 16.

194. *Id.* at 19 (citing COUNTS, *supra* note 180).

195. *Id.* (citing COUNTS, *supra* note 180).

196. Brian Cambourne, *Toward an Educationally Relevant Theory of Literacy Learning: Twenty Years of Inquiry*, 49 *THE READING TEACHER* 182, 184-86 (Nov. 1995).

197. BOMER & BOMER, *supra* note 171, at 20.

198. Cambourne, *supra* note 196, at 185 (immersion, demonstration, and engagement).

nity.¹⁹⁹ Within this presentation of material, the teacher's own opinion should be clearly stated.²⁰⁰ Otherwise, the teacher cannot be a participant in the process and is no longer a model to the students.

However, the classroom should not be a place to shape students' minds to some preconceived idea.²⁰¹ Active participation means that students bring their own ideas to the table. Democracy itself does not presuppose that there is some inherent good or right answer; rather, goodness comes from the reflection of the community's values expressed through active participation in the process.²⁰² Students cannot learn the value of their protected freedoms in an environment that chills the rights of the teacher to model and demonstrate or the rights of the student to inquire.

VII. DISCUSSION

A. Teacher as a Public Employee

The application of the public employee speech doctrine, without modification, is not a good fit for teacher curricular speech. Under the threshold prong of *Pickering*, only three appellate courts have addressed the issue of whether curricular speech can be a matter of public concern.²⁰³ Two of those circuits have never made it past the "public concern" threshold.²⁰⁴ Before *Garcetti*, the divisive issue in the Fourth, Fifth, and Sixth Circuits was whether curricular speech could be a matter of public concern.²⁰⁵ As the Sixth Circuit concluded, if teacher curricular speech is never a matter of public concern, it would seem that there would be no protections within the classroom.²⁰⁶ Under the balancing prong of *Connick*, it is unclear whether the government as provider of education has the same broad powers as the government as employer. Finally, under *Garcetti*, if an employee speaking pursuant to his duties does not speak as a citizen, it is unclear that a teacher's curricular speech could ever be protected without additional constitutional protection. Despite the appearance of a lack of protection of curricular speech indicated by a strict application of the public employee speech analy-

199. Nadine Strossen, *First Amendment and Civil Liberties Traditions of Academic Freedom*, in *ADVOCACY IN THE CLASSROOM*, *supra* note 191, at 71, 72 (quoting *POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION* 112 (rev. ed. 1994)).

200. *Id.* (citing *POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION*, *supra* note 199, at 112).

201. Scheffler, *supra* note 184, at 441.

202. *Id.*

203. See *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001).

204. See *Kirkland*, 890 F.2d 794; *Boring*, 136 F.3d 364.

205. See discussion *supra* Part III.B.

206. *Cockrel*, 270 F.3d 1036.

sis, the underlying purpose of education demands that teacher curricular speech should be protected.²⁰⁷ This complete lack of protection is also contrary to the Supreme Court's oft quoted maxim that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁰⁸

As both Justice Souter and Justice Stevens noted in their *Garcetti* dissents, the *Garcetti* decision is not easily distinguished from the Court's unanimous decision in *Givhan*.²⁰⁹ One notable distinction is *Givhan*'s status as a teacher. Perhaps teachers should be treated differently from other public employees. Perhaps the distinction is based on the concept that the government as provider of education does not have as broad reaching powers as the government as public employer. When the government acts in its role as provider of education, it incurs the obligation to serve the fundamental purposes inherent in free compulsory education.²¹⁰ Thus, when the government makes employment decisions related to the curriculum, the court should balance the government's employment decision with its effect on the democratic purpose of education.

Furthermore, both Justice Souter and Justice Breyer, in their *Garcetti* dissents argue for adaptations of the public employee speech doctrine.²¹¹ Under Justice Souter's adaptation, the balance would tip in favor of the employee when the speech is of "unusual importance."²¹² When a teacher speaks as teacher of democracy, Justice Souter's "unusual importance" factor should be triggered, so long as the teacher spoke in a responsible manner. Justice Breyer argued that the combination of professional obligations and special constitutional interests weighed in favor of protecting a public employee's speech even when speaking pursuant to his or her duties.²¹³ A teacher, with professional obligations to serve the purposes of public education, should qualify under Justice Breyer's adaptation. Also, there are clearly constitutional obligations inherent in the fundamental democratic purpose of education.

Both the majority and the dissent in *Garcetti* recognized that there may be additional constitutional interests involving teacher classroom speech.²¹⁴ However, without further elaboration of how these interests are intertwined with the public employee speech doctrine, the Supreme Court has left the circuit courts without guidance.

207. See discussion *supra* Part VI.A.

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

209. See *supra* Part III.B.

210. See discussion *supra* Part VI.A.

211. See *supra* Part III.B.

212. *Garcetti v. Ceballos*, 126 S. Ct 1951, 1967 (2006) (Souter, J., dissenting).

213. *Id.* at 1974 (Breyer, J., dissenting).

214. *Id.* at 1962 (majority opinion).

B. How Teacher Curricular Speech is Different than Student Speech

The Circuit court application of *Hazelwood* to teacher speech analogizes teachers facilitating democratic education with student speech. While there is some argument for some limitation of student speech in a school forum, the same concerns do not apply to teachers. The courts should grant teacher speech additional First Amendment protections to ensure teachers' ability to teach students to become active participants in the democratic process. Instead, in many circuits, teacher curricular speech is never protected speech. This result is contrary to both the democratic purpose of education and the means by which to achieve this goal.²¹⁵

There has also been deference within the circuit courts to the right of local school boards to control the curriculum.²¹⁶ And while this deference makes some sense when teachers stray from the teaching of core academic subjects, the result is not as clear when teachers serve the democratic purpose of education and local school board control subverts this purpose. The Supreme Court has emphasized that this deference does not, and should not, keep the Court from protecting First Amendment rights, even within the school:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.²¹⁷

215. See discussion *supra* Part VI.A.

216. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988).

217. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The court also recognized the reach of the constitution.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant [sic] in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

Id. at 637-38.

When a teacher serves the purpose of educating for democratic participation, and a local school district retaliates, public policy should support the teacher, who is serving the democratic fundamental purpose of a free and compulsory public education.

C. Pedagogical Importance in Maintaining Academic Freedom in Elementary and Secondary Classrooms

The academic freedom doctrine is based in both the rights of teachers and students.²¹⁸ In the search for truth, teachers must be free to question and students must be free to learn from this questioning.²¹⁹ “[T]he real threat to academic freedom comes . . . from efforts to impose a pall of orthodoxy that is designed broadly to silence all opposition.”²²⁰

The Supreme Court has thoughtfully articulated the concept and purpose of academic freedom.²²¹ However, despite application of the doctrine in the 1970s, the Court has only mentioned academic freedom in dicta since the *Bakke* decision. Meanwhile, circuit courts are split on whether the doctrine applies to the institution or the university professor.²²² While some appellate courts applied the academic freedom doctrine to secondary classrooms in the 1970s, those circuits (without expressly overruling the academic freedom cases) now apply *Hazelwood* to cases which seem to implicate academic freedom issues.²²³

The theoretical and philosophical basis underlying academic freedom is very applicable to teacher curricular speech. Although *Epperson* was decided on other First Amendment issues, the Supreme Court indicated that academic freedom could be relevant in a secondary classroom.²²⁴ To prepare students for participation in democracy, a teacher must engage in demonstration and facilitate an environment of critical inquiry. These are the very concepts that underlie academic freedom as a special concern of the First Amendment. Students cannot learn the value of their protected freedoms in an environment that chills their teacher’s rights to model, demonstrate, and inquire.

However, academic freedom should not be without limits. Rather, it should be constrained by the context under which the ideas are presented.²²⁵ Where the tension exists between institutional and individual academic free-

218. YUDOF ET AL., *supra* note 189, at 198. Perhaps the first claim of academic freedom was by Socrates in defense of the accusation that he corrupted the youth in Athens. Stone, *supra* note 191, at 60.

219. See YUDOF ET AL., *supra* note 189, at 198.

220. Stone, *supra* note 191, at 68-69.

221. See discussion *supra* Part V.A.

222. See discussion *supra* Part V.B.

223. See discussion *supra* Part V.B.

224. *Epperson v. Ark.*, 393 U.S. 97, 107 (1968).

225. See Strossen, *supra* note 199, at 72.

dom, the inquiry should be a balancing test based upon which party is furthering the democratic ideal. When the democratic ideal is acknowledged as the fundamental underlying purpose of education, it is clear that at times the institution retains the right to insist upon a teacher's adherence to a curricular framework that promotes a democratic education and the teacher at times has the right to make curricular changes that will allow students to experience a democratic education.

The appellate court cases applying academic freedom to elementary and secondary schools provide some guidance for a current application. Clearly, the courts must address cases on the basis of the particular facts. However, one of the factors that courts should take into consideration is whether it is the institution or the individual that is supporting the democratic purpose of education.

VIII. CONCLUSION

Lee Heffernon leads discussions in her third grade classroom about "racism, poverty and consumerism."²²⁶ Ms. Brice provides opportunities for first, second, and third grade students to "interrogat[e] new math textbooks, attend[] local city council meetings about a proposed smoking ban, initiat[e] a letter campaign challenging their school's 'failing' label, study[] a local store's gendered Halloween advertisement, and investigat[e] the Presidential Fitness Award criteria."²²⁷ These teachers engage in an educational teaching methodology that facilitates the democratic ideal.

Throughout this country, educators teach students to become participants in their democratic community. Education literature, particularly that which is focused on the development of a strong democratic educational philosophy, is full of examples of teachers using moments of classroom discussion to facilitate and further our democracy. Yet this very work, which serves the fundamental democratic goal of the education system, may place these same teachers at risk of losing their jobs. Their recourse would be limited; in most circuit courts, their speech would not be protected. Without a speech doctrine based in educational purpose and pedagogy, teachers' ability to facilitate an effective democratic education is at risk.

Teachers are different from other public employees and their rights should not be the same as students in the classroom setting. The court should employ a balancing test that is well grounded in the democratic purpose of education. While the government may articulate a legitimate interest which may limit teacher curricular speech, this interest should be weighed mightily

226. Lee Heffernan, *Writing as a Tool for Change*, SCHOOL TALK (National Council of Teachers of English, Urbana, Ill.), Apr. 2001, at 3, available at <http://www.bazmakaz.com/vasquezhome/books/ST%20CL%20April01.pdf>.

227. Tasha Tropp Laman, *Changing Our Minds/ Changing the World: The Power of a Question*, 83 LANGUAGE ARTS 203, 204 (2006).

2008] *TEACHER CURRICULAR SPEECH & 1ST AMENDMENT* 241

against the interest of serving the fundamental purpose of our educational system.

ANNE GARDNER

