COLORING OUTSIDE THE LINES: *GARCETTI V. CEBALLOS* IN THE FEDERAL APPELLATE COURTS

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I. INTRODUCTION

When the Supreme Court recognizes an exemption from First Amendment protections, the lower courts have an important responsibility to faithfully apply the exemption, a duty which includes the responsibility to read such a rights-limiting rule strictly.[1] When a speech limitation applies to the speech of public educators, lower courts must exercise particular care to apply the limitation on its terms and to avoid expanding it beyond its initial boundaries. This is because any restriction on educator speech rights has the potential to

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[1] *See, e.g.*, *United States v. Alvarez*, 617 F.3d 1198, 1212-14 (9th Cir. 2010) (declining to apply the First Amendment exemption for criminal conduct accomplished through expression to uphold a conviction under the Stolen Valor Act, 18 U.S.C. § 704, a law criminalizing the false representation that one has received a military honor, stating, "Although certain subsets of false factual speech have been declared unprotected, such classes of speech were developed as the result of thoughtful constitutional analysis of what other characteristics the speech must have before it can be proscribed without clashing with First Amendment protections. The Act does not fit neatly into any of those 'well-defined' and 'narrowly limited' classes of speech previously considered unprotected, and we thus are required to apply the highest level of scrutiny in our analysis."); Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67 (2010) (arguing that the limitation of the rationales supporting the exemption for child pornography should be limited to the special case of that form of speech and its inherently criminal character); Gail H. Javitt, Erica Stanley, & Kathy Hudson, *Direct-to-Consumer Genetic Tests, Government Oversight, and the First Amendment: What the Government Can (and Can't) Do to Protect the Public's Health*, 57 OKLA. L. REV. 251, 288 (2004) (of the current First Amendment exceptions, stating "Jurisprudence that has developed has attempted to define, and in some cases, strictly limit the exemption of each of these categories."); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 524 (1990) (referring to the limitations present in the "fighting words" exemption to First Amendment protection, "Because those limits are necessitated by free speech principles, they must be strictly enforced."). Indeed, the very definition of exempt categories presupposes their narrowness. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."); *see also* William B. Lockhart & Robert C. McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene*, 7 UTAH L. REV. 289, 299 (1961) (arguing for a narrow reading of obscenity doctrine, designed for "protecting the basic freedom of both the artist and the audience").

impact the quality of education, both through the chilling of classroom speech and pedagogical innovations and through the chilling of school-related speech made outside the classroom, where the public may benefit from the special knowledge of the education system held by the educators working in it.[2] The Supreme Court's most recent decision limiting the scope of First Amendment protections in *Garcetti v. Ceballos*,[3] which denied protection to public employee speech made "pursuant to" job duties, gives rise to these and similar concerns.[4]

Garcetti articulated a categorical exemption from First Amendment protection, similar to other exemptions found in much of First Amendment doctrine.[5] However, the scope of the *Garcetti*

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[2] *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (making this point as a justification for protecting a teacher's right to pen a letter to the editor of a local newspaper challenging administrative decisions of his school district employer); Anthony N. Moshirnia, *The* Pickering *Paper Shield: The Erosion of Public School Teachers' First Amendment Rights Jeopardizes the Quality of Public Education*, 16 B.U. PUB. INT. L.J. 313, 332 (2007).

[3] 547 U.S. 410 (2006).

[4] *Id.* at 421("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."). Numerous commentators have criticized the *Garcetti* decision for the limitations that it placed on public employee speech rights. *See, e.g.*, Paul M. Secunda, Garcetti*'s Impact on the First Amendment Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 92 (2008); Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75 (2008); Sheldon Nahmod, *Academic Freedom and the Post-*Garcetti *Blues*, 7 First Amend. L. Rev. 54 (2008); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. PUB. INT. L.J. 209 (2008); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37 (2008); Charles W. "Rocky" Rhodes IV, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL OF RIGHTS J. 1173 (2007). Other commentators have viewed the case more sympathetically, emphasizing the role of managerial authority in the employee speech context. *See, e.g.*, Elizabeth Dale, *Employee Speech and Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. OF EMP. & LAB. L. 175 (2008); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008). This article does not seek to resolve these ongoing debates as to the worth of the *Garcetti* decision itself, but instead focuses on the implementation of the decision in the federal courts of appeals.

[5] Some of the most well-known First Amendment doctrines are doctrines of exemption from the Amendment's protections. *See Virginia v. Black*, 538 U.S. 343 (2003) (exempting "true threats" from protection); *Miller v. California*, 413 U.S 15 (1973) (exempting "obscenity"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (exempting "fighting words"); Brandenburg v. Ohio, 395 U.S. 444 (1969) (exempting "incitement to imminent lawless activity"); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (recognizing the lack of protection for "defamation," albeit including a modified exception-to-the-exemption if the subject is a public figure); *see also New York v. Ferber*, 458 U.S. 747 (1982) (implying an exemption for child pornography).

exemption has apparently caused some confusion in the lower courts. Examining cases brought by educational employees, this article documents an improper expansion of *Garcetti*'s exemption in the federal appellate courts and argues for restoring its proper and very limited scope. The article proceeds as follows. Part Two reviews the special status of speech in public educational settings, noting the connections that exist between educator speech and student speech. Following this review, Part Three presents an analysis of the Supreme Court's decision in *Garcetti*, paying particular attention to the Court's articulation of the exemption from First Amendment protection of a limited category of public employee speech—that speech which is made "pursuant to official duties."[6] Based on the Court's decision in *Garcetti*, and on the facts of the case, Part Three also develops a workable test for determining whether a public employee has engaged in speech "pursuant to official duties."

In light of this proposed test, Part Four reviews the decisions in the federal appellate courts applying *Garcetti*, concluding that most circuits have impermissibly read the *Garcetti* rule to impose a much broader exemption than the Court recognized, and that this misapplication stems from a failure of these lower courts to recognize the restrictive function of the words "pursuant to" in the context of the facts before the *Garcetti* Court. Part Four also presents a normative case for restoring the proper scope of *Garcetti*'s categorical exemption, using the test proposed in Part Three. Notwithstanding the foregoing, Part Five identifies two problematic applications of the *Garcetti* rule that remain even after application of this article's test and presents some preliminary thoughts directed at addressing these remaining problems. Part Six briefly concludes.

II. SPEECH RIGHTS IN PUBLIC EDUCATIONAL SETTINGS

As an inherently expressive enterprise, education requires its participants to engage in speech and expressive conduct. Education is a process of communication between and among teachers, students, administrators, parents, and the larger community.[7] Dialogue among all participants is vital to the success of the education process. However, each of these groups of speakers has a different status under the First Amendment. Parents and community stakeholders, for instance, are public citizens, whose speech rights

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[6] *Garcetti*, 547 U.S. at 421 ("We hold that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[7] *See, e.g.*, JOHN TIFFIN & LALITA RAJASINGHAM, IN SEARCH OF THE VIRTUAL CLASS: EDUCATION IN AN INFORMATION SOCIETY 19-47 (1995) (describing education as a system of communication with inter-connected networks and sub-networks).

extend to the limits of the First Amendment, which nevertheless allows for limitations on their speech, for example under certain conditions (governed by forum analysis),[8] and for certain reasons (governed by strict scrutiny analysis).[9]

Students are certainly citizens with speech rights, but they are also public charges, such that their speech rights may be limited for their own protection, as well as for the protection of other students engaged in the educational process alongside them.[10] It is a familiar axiom that students do not completely "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11] Nevertheless, both common sense and current First Amendment doctrine hold that student speech in public educational settings does not allow for the same constitutional protections that similar speech in public would require.[12] For example, in most cases, public school principals may censor student speech by removing certain items from student newspapers published as part of school journalism classes, provided that such removal or censoring is done to serve "legitimate pedagogical concerns."[13] Students also generally may not engage in speech in schools that is lewd or outside the bounds of decorum.[14] Even political speech may conceivably be limited if it causes a "material and substantial disruption" to the learning environment.[15] A school administration's ability to limit student speech can even extend outside the physical limits of the school grounds.[16]

Teachers and administrators are simultaneously (1) employees, who often must speak to fulfill their contractual

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[8] *See* ERWIN CHMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.4 (discussing forum analysis).

[9] *See* CHEMERINSKY, *supra* note 8, at § 11.2 (discussing strict scrutiny).

[10] *See, e.g.*, *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1247 [175 Ed. Law Rep. [88]] (11th Cir. 2003) ("Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve."); NELDA H. CAMBRON-MCCABE, MARTHA M. MCCARTHY, & STEPHEN B. THOMAS, LEGAL RIGHTS OF TEACHERS AND STUDENTS 94-107 (2d ed. 2009) (discussing student rights to free expression).

[11] *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

[12] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 [32 Ed. Law Rep. [1243]] (1986); *Morse v. Frederick*, 551 U.S. 393, 396-397 [220 Ed. Law Rep. [50]] (2007).

[13] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 [43 Ed. Law Rep. [515]] (1988).

[14] *Bethel*, 478 U.S. at 682.

[15] *Tinker*, 393 U.S. at 506 (1969).

[16] *See Morse*, 551 U.S. at 401-402.

employment duties; (2) citizens, who may speak responsibly on matters of public concern;[17] and (3) embodiments of "the State," which the Constitution disables from acting to limit the rights of the other participants in the dialogue.[18] Similar to students, teachers maintain their basic constitutional rights despite their status as government employees. In fact, it is a well-settled doctrine of constitutional law that a public entity may not condition the provision of a public benefit—including public employment—on one's relinquishment of a constitutional right.[19] Nevertheless, courts have permitted the government-as-employer to limit public educational employees' speech that would otherwise be protected in a non-employment setting.[20] In most cases, these limitations have sought to protect interests similar to those served by limits on student speech, often centering on concerns of pedagogical effectiveness and school managerial interests.[21] Until recently, such limitations have largely emerged through case-by-case analysis, rather than through categorical rules.

Pickering v. Board of Education,[22] the leading case on public employee speech rights, illustrates the case-by-case approach. In *Pickering*, a local Board of Education dismissed a teacher after he sent a letter to a newspaper criticizing the Board's prior handling of

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[17] *See generally* CAMBRON-MCCABE, MCCARTHY, & THOMAS, *supra* note 10, at 228-39 (discussing teacher rights to free expression).

[18] *See* CAMBRON-MCCABE, MCCARTHY, & THOMAS, *supra* note 10, at 93 (discussing the "state action" doctrine in schools).

[19] *See, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (holding that a public university cannot condition employment as a professor on the professor's signing of a "Loyalty Oath"); Kathleen A. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (outlining the state of the "unconstitutional conditions" doctrine). *But see* Paul M. Secunda, *Neo-formalism and the Return of the Rights/Privilege Distinction in Public Employment Law*, ___ SAN. DIEGO L. REV. ___ (forthcoming 2011), (manuscript at 7), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666580 (last visited October 2, 2010) (arguing that the Supreme Court's line of decisions in *Pickering*, *Connick*, and *Garcetti* have weakened the unconstitutional conditions doctrine to the point of near obliteration).

[20] *See Williams v. Dallas Ind. Sch. Dist.*, 480 F.3d 689, 690-691 [217 Ed. Law Rep. [802]] (5th Cir. 2007), *Mayer v. Monroe County Community Sch. Co.*, 474 F.3d 477 [215 Ed. Law Rep. [626]] (7th Cir. 2007), *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 [222 Ed. Law Rep. [596]] (5th Cir. 2007).

[21] *See, e.g.*, *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 [124 Ed. Law Rep. [56]] (4th Cir. 1998) ("We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum."); *see also* Rosenthal, *supra* note 4 (arguing that *Garcetti* is the latest in a series of Supreme Court decisions elevating "managerial prerogative" to constitutional status).

[22] 391 U.S. 563 (1968). For a thoughtful summary of the pre-*Garcetti* jurisprudence, beginning with *Pickering*, see Robert M. O'Neil, *Academic Speech in the Post-*Garcetti *Environment*, 7 FIRST AMEND. L. REV. 1 (2008).

previous proposals to increase the Board's revenues.[23] The Board determined that the letter was "detrimental to the efficient operation and administration of the schools of the district" and that these interests justified his dismissal.[24] The Court held the dismissal unconstitutional, holding that, absent substantial justification, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[25] The Court engaged in a balancing of the interests of the Board as an employer and the interests of Mr. Pickering as a participant in public debate. The Court ultimately concluded that the Board could state no interest sufficient to overcome the interest of Mr. Pickering in participating as an ordinary citizen in an important public discussion.

In 1983, the Supreme Court modified *Pickering* through its decision in *Connick v. Myers*,[26] holding that a public employee's internal questionnaire, circulated among her co-employees, was unprotected speech, due to its nature as a personal employee grievance, rather than a matter of public concern, and also due to its negative impact on office operations and efficiency.[27] After *Connick*, a court facing a First Amendment retaliation claim is required to engage in a threshold inquiry, which requires the court, prior to engaging in the *Pickering* balancing test, to first ascertain whether the employee's speech addressed a matter of public concern.[28] If the answer to this question is "no," then the speech is unprotected.[29] If the answer is "yes," then the court proceeds to the *Pickering* balancing test, but this threshold determination of public concern precedes the *Pickering* test in all cases.[30]

Following both *Pickering* and *Connick*, the Court entertained few public employee First Amendment retaliation claims. However, one significant case, *Givhan v. Western Line Consolidated School District*,[31] further clarified that neither the place nor the target of the speech in question is dispositive when determining whether the speech is protected. In *Givhan*, the Court held that an employee's internal complaints to her principal about possible race discrimination in

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[23] *Id.* at 564.

[24] *Id.* at 564-565 (citations omitted).

[25] *Id.* at 574.

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

[27] *Id.* at 150-54.

[28] Robert C. Cloud, *Public Employee Speech on Matters Pursuant to their Official Duties: Whistle While you Work?*, 210 ED. LAW REP. 855, 857-858 (2006).

[29] Cloud, *supra* note 28, at 858.

[30] Cloud, *supra* note 28, at 861.

[31] 439 U.S. 410 (1979).

personnel decisions at her school site were protected speech.[32] Thus, the fact that speech on a matter of public concern is made while an employee is at work, to a superior, or otherwise through internal channels (rather than through a public medium), does not render the speech unprotected. This was the state of the law at the time the Court heard *Garcetti.*

III. THE *GARCETTI* DECISION AND ITS NEW CATEGORICAL RULE

A. *The* Garcetti *Decision*

Richard Ceballos worked as a deputy district attorney for the Los Angeles County District Attorney's Office. During his employment, a defense attorney contacted him, alleging that there were inaccuracies in an affidavit used to obtain a search warrant in a pending case.[33] Per Ceballos, "it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases."[34] After completing his investigation, Ceballos concluded that there were unsatisfactory inaccuracies in the affidavit, and he relayed his findings to his superiors in the form of a disposition memorandum.[35] Despite the contents of Ceballos's memo, his superiors decided to proceed with the prosecution. Ceballos testified for the defense concerning the affidavit during a hearing on a motion to suppress the evidence obtained with the warrant, a motion that the trial court ultimately denied.[36] Ceballos claimed that, as a result of drafting the memorandum, he was subsequently subjected to a variety of retaliatory employment actions, including reassignment from his position and the denial of a promotion.[37]

After unsuccessfully pursuing an employment grievance, Ceballos sued in United States District Court for the Central District of California, asserting a claim under the Civil Rights Act of 1871[38]

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[32] *Id.* at 415-16.

[33] *Garcetti v. Ceballos*, 547 U.S. 410, 413-414 (2006).

[34] *Id.* at 414.

[35] *Id.* at 414.

[36] *Id.* at 414-415.

[37] *Id.* at 415.

[38] The Civil Rights Act of 1871 protects individuals against the deprivation of their federally guaranteed rights by those acting under color of state law, and provides any individual experiencing such deprivation with a cause of action:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

for a violation of his First Amendment rights.[39] After initially losing at summary judgment in the District Court, Ceballos won a reversal on appeal with the Ninth Circuit. The Court of Appeals applied the *Pickering/Connick* test and found the memo to be "inherently a matter of public concern" since it "recited what [Ceballos] thought to be governmental misconduct."[40] The Ninth Circuit then proceeded to the interest-balancing portion of the *Pickering/Connick* test and found that Ceballos's interest in his speech outweighed the government's interests, noting that the government "'failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office' as a result of the memo."[41]

When the Supreme Court reviewed the case, the Court noted that the Ninth Circuit had failed to properly consider whether "the speech was made in Ceballos' capacity as a citizen."[42] The Court explained that the importance of limiting government employer restrictions on speech to circumstances when an employee does not speak as a private citizen "limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."[43] In addition, the public's interest in receiving information relevant to the community from those most qualified to provide it is substantial.[44] Nevertheless, the Court pointed out that employers have a countervailing interest in policing speech that, due to the employee's role, may contain confidential information, may be premature or factually incorrect, or may be damaging to the employer's standing in the community.[45]

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

[39] *Garcetti*, 547 U.S. at 415.

[40] *Id.* at 416.

[41] *Id.* at 416 (quoting *Ceballos v. Garcetti*, 361 F.3d 1168, 1180 (9th Cir. 2004)).

[42] *Id.* at 416.

[43] *Id.* at 419.

[44] *Id.* at 419-420.

[45] Cloud, *supra* note 28, at 861.

The Court balanced these principles and distilled from them a generally applicable categorical rule,[46] stating, "We hold that, when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[47] The Court reasoned that, since Ceballos "wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do," he was not speaking as a citizen.[48] In essence, while writing the memo, Ceballos was not acting as a citizen any more than when he investigated charges or filed paperwork for his employer.

The Court said much in addition to articulating its new categorical rule. Among this dicta, one can identify two limiting glosses on the holding. Justice Kennedy, who wrote the majority opinion, offered the first in response to Justice Souter's argument in dissent that cynical employers, in response to *Garcetti*'s focus on "official duties," will simply draft every job description to include speaking duties, resulting in no First Amendment protection for any public employee.[49] Rejecting the objection, Justice Kennedy stressed that formal job descriptions should have little value when conducting the analysis.[50] Employers cannot "restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one."[51]

The second gloss took the form of the failure to decide an issue not before the Court, coupled with an oblique prediction of how the matter might be resolved if it ever were to come before the Court. In response to Justice Souter's prediction that the Court's newly articulated rule would have a debilitating effect on academic freedom in both public higher education teaching and scholarship,[52] Justice Kennedy somewhat weakly predicted that the Court would recognize an exemption from *Garcetti*'s rule for this kind of job-required speech:

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[46] Professor Sheldon Nahmod has referred to this *ex ante* version of balancing of interests, done in pursuit of the development of a generally applicable categorical rule, as "categorical balancing." Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2008).

[47] *Garcetti*, 547 U.S. at 421 (emphasis added).

[48] *Id.*

[49] *Id.* at 431 n.2 (Souter, J., dissenting).

[50] *Id.* at 424-425.

[51] *Id.* at 424.

[52] *Id.* at 438-39 (Souter, J., dissenting).

> 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.[53]

Even such a qualified and ultimately dismissive dictum offers some solace to teachers and scholars, as it at least presents a foundation for arguments distinguishing *Garcetti* on the law where teaching and scholarship are concerned. Examination of the lower court applications of *Garcetti* in the educational context, however, suggests that such solace may be misplaced.

B. *The Rule of* Garcetti

The requirement to adhere to controlling precedent—referred to in the strong sense as *stare decisis*—is a foundational aspect of the United States legal system, and one that distinguishes common-law systems such as those in the United States and England from civil law systems, such as are prevalent in Continental Europe.[54] Indeed, within forty-eight hours of the first law school class, a student understands the simple concept that lower courts must apply the "holdings" set down by higher courts in cases embracing appropriately similar facts. While this foundational requirement can become extremely difficult to apply in hard cases, it is still the foundation of the judicial process.

Both early and recent scholarly commentary has focused significant attention on the interpretation of judicial decisions.[55]

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[53] *Id.* at 425.

[54] *See, e.g.*, Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000) (arguing that at least the consideration of precedent from a court at the same level as the deciding court is a constitutional compulsion, and pointing out the distinction in approaches between common law and civil law systems); Lawrence J. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CON. L. 155, 156 (2006) (distinguishing between the Supreme Court's responsibilities relating to its own precedent, which it is free to overrule, and lower courts' responsibilities relating to the same precedent, which they are bound to follow, and arguing for the Suprme Court's stricter adherence to its own precedents).

[55] *See generally* Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. ___ (2010), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661185 (last visited Oct. 2, 2010); Shawn J. Bayern, *Case Interpretation*, 36 F.S.U. L. Rev. 125 (2009); Hon. Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249

Most of this commentary addresses the complicated task of distinguishing between a case's "holding," which is binding on lower courts as precedent, and its "dicta," which is merely persuasive. A comprehensive evaluation of these theories is beyond the scope of this article. Rather, it is sufficient to note for the purposes of this article that each approach to deriving the holding—and therefore the binding propositions—of a judicial decision begins with two elements: (1) the facts of the prior case decided, and (2) the court's pronouncements of its decision, along with any justifications for the decision, where such justifications relate to those facts.[56]

In the case of *Garcetti*, the facts the Court considered contained stipulations that (1) the memorandum that Mr. Ceballos drafted recommending dismissal of the case was the only speech at issue, and (2) Mr. Ceballos drafted the memorandum pursuant to a specific job duty to draft legal memoranda.[57] Following a recitation of these facts, the Court clearly stated, "We hold that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[58]

Just prior to making this pronouncement, the Court clarified both that (1) the relation of speech to an employee's job is not a dispositive or controlling consideration in determining whether the speech is protected; and (2) the location of the speech—whether it was uttered at work, or whether it was only made internally to superiors or coworkers—is also not a controlling or dispositive factor in the determination.[59] Rather, "The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy."[60] The Court cited this factor—that the memorandum was drafted as a requirement of Ceballos's job—as the factor "distinguish[ing] Ceballos' case from those in which the First

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(2006); Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953 (2005); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994); *see also* EUGENE WAMBAUGH, THE STUDY OF CASES § 13 (2d ed. 1894); A.L. Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959); Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 453 (1957); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

[56] *See generally* sources cited *supra* note 55.

[57] *Garcetti*, 547 U.S. at 421 ("Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.").

[58] *Id.*

[59] *Id.* at 420-21 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)).

[60] *Id.* at 421.

Amendment provides protection against discipline."[61] Thus, a simple and faithful reading of the case would see the binding rule emerging from it as creating a categorical exemption from First Amendment protection for speech made "pursuant to official duties."[62]

As Professor Sheldon Nahmod points out, this "pursuant to official duties" inquiry forms a new threshold step in the existing *Pickering/Connick* analysis.[63] Prior to *Garcetti*, the existing *Pickering/Connick* three-step analysis began with an inquiry as to whether the speech addressed a matter of public concern, then proceeded to ascertain the employer's interests in regulating the speech, and finally balanced the identified interest with the employee's First Amendment interest.[64] Now, before proceeding to this set of inquiries, a court must first inquire whether the employee spoke pursuant to an official duty to speak.[65]

C. The Proper Scope of Garcetti*'s Rule*

But what does "pursuant to official duties" really mean?[66] The Supreme Court has long cautioned readers and users of its

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[61] *Id.*

[62] Though it is true that the mere utterance of "We hold that" before a statement is insufficient to convert it from dicta to holding. Leval, *supra* note 55, at 1257. Nevertheless, this conclusion is only bolstered by the fact that the Court preceded its "pursuant to official duties" statement with "We hold that . . .." *Id.*

[63] *See* Nahmod, *supra* note 4, at 56 n.7 (2008). Professor Nahmod, in discussing *Connick*, describes the previously existent "*Pickering* three-step" thus:

> Establishing what I call the *Pickering* three-step, the Court there held that when a public employee speaks as a citizen on a matter of public concern (step one), there is an inquiry into the government's interest, such as the existence of an adverse effect on either the employment relationship or the functions of the government entity involved (step two), followed by a balancing of the free speech interest against the government interest (step three). If the free speech interest outweighs the government interest, the employee is protected against employer discipline by the First Amendment. However, if the public employee's speech is on a matter of private concern only, then the First Amendment drops out at step one, and plays no further role.

Nahmod, *supra*, at 55 n.6 (2008). Professor Nahmod then points out that *Garcetti* added a fourth step (which is actually now the first, threshold step in the analysis). Nahmod, *supra*, at 56 n.7.

[64] Nahmod, *supra* note 4.

[65] Nahmod, *supra* note 4, at 56 n.7.

[66] In his dissent, Justice Souter criticized the majority's formulation as one that allows for too much variation due to its failure to clearly limit the speech within the exempt category. *See Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting). Justice Souter's dissent focused on the words "official duties," whereas this article focuses on the more important words "pursuant to." The authors contend that the

written decisions not to "dissect" or "parse" every word, as though the decision were a federal statute.[67] This admonishment certainly makes sense, in light of the obvious fact that the production of a judicial opinion on a collegial appellate court is very much a cooperative and consensus-based endeavor.[68] The collaborative nature of opinion drafting permits the inference that the writing judge does not intend for each and every word chosen in the opinion to have the binding force of law and therefore to be parsed for its specific, narrow meaning.[69]

Nevertheless, as Justice Scalia implied in making a similar point in *St. Mary's Honor Center v. Hicks*, when the word or phrase in question is a central element of the Court's holding, the admonishment against parsing has less force.[70] This qualification also makes sense, as it is difficult to say that lower courts ought to hold themselves bound to the rules articulated in Supreme Court decisions if discovering the meaning of the words used to articulate these rules is essentially a fool's errand. Particularly in the context of the *Garcetti* decision, in which the Court states its rule several times, consistently

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proper resolution of the words "pursuant to" make further resolution of the words "official duties" far less problematic than Justice Souter imagines it to be. *See infra*, notes 91-94 and accompanying text.

[67] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute."). These admonishments directly arise out of the ancient debates over the uses of obiter dicta in Supreme Court opinions. *See Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 103 (1937) (quoting *Cohens*); *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (same).

[68] *See, e.g.*, Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1119 (1997) (speaking of shifting judicial statements in cases presenting similar issues, "One very likely possibility is that the individual Justices are not nearly as obsessive as academics suppose them to be about the precise meaning of every specific word or phrase in the opinions that they write or join.") (citing Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 229-30 (1991) (pointing out that a Supreme Court opinion is "the proverbial 'work of many hands'").

[69] *Supra* notes 67-68. This is particularly true in contrast to the words of statutes, as each successive amendment of a statute—even a mere "stylistic" amendment that changes these words—is voted on and does not become part of the statute unless approved by a majority in both houses of Congress and signed into law by the President. U.S. Const. art. I, § 7.

[70] 509 U.S. at 515.

using the phrase "pursuant to official duties," interpreting the phrase is vital to proper application of the Court's rule.

1. The Meaning of "Pursuant to Official Duties"

In statutory interpretation, those seeking the meaning of particular words and phrases often begin by consulting a dictionary or a series of dictionary-like resources.[71] As Judge A. Raymond Randolph points out in the context of statutory interpretation, though, even where dictionary-based parsing of specific words and phrases is commonplace and well-accepted, such parsing frequently does not yield satisfactory answers to interpretive questions, often raising more questions than it answers.[72] This is even truer in the context of case application, where dictionary-based analysis is more novel, and an attempt to derive the meaning of "pursuant to" by consulting dictionary sources illustrates this point. For example, *Webster's New World Dictionary* defines "pursuant to" as meaning "in accordance with."[73] As one can readily see, this definition actually obscures, rather than clarifies, the Court's intended use for the couplet, for "in accordance with" may mean "as authorized by," as it does in the context of a court order granting leave to amend a pleading.[74] Or it could mean "as required by," is it does in the context of a contractual duty.[75]

The three definitions of "pursuant to" found in *Black's Law Dictionary* further reflect this indeterminacy.[76] The first meaning provided in *Black's* is "[i]n compliance with; in accordance with; under," and this meaning comes only with the court-order example

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[71] *See* Hon. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 71-72 (1994) (critiquing the widespread use of dictionaries in statutory interpretation).

[72] Randolph, *supra* note 71, at 72. As Judge Randolph points out, dictionaries "define words with other words," and these other words often require definition themselves. Randolph, *supra*.

[73] WEBSTER'S NEW WORLD DICTIONARY 524 (4th ed., Michael Agnes ed. 2003); *see also* OXFORD ENGLISH DICTIONARY 887 (Vol. XII) (2d ed. 1989) (defining "pursuant" as "Following upon, consequent and conformable to; in accordance with").

[74] *See* Fed. R. Civ. P. 15(a)(2) (requiring a party to obtain consent from an opposing party or leave from the court if the party seeks to amend a pleading more than 21 days after a responsive pleading has been filed).

[75] *See, e.g., Franchise Tax Bd. of Cal. v. Constr. Labor. Vaca. Tr. for Southern Cal.*, 463 U.S. 1, 28 (1983) (describing funds intended for use to pay benefits as being "held in trust pursuant to an ERISA-covered employee benefit plan"); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 699 (1966) (referring to unpaid union employee wages and vacation days sought in a suit as "wages or vacation pay claimed by its members pursuant to the terms of a collective bargaining contract").

[76] BLACK'S LAW DICTIONARY 1250 (7th ed., Bryan A. Garner ed. (1999).

offered above.[77] Thus, it is subject to the same criticisms. The second is "[a]s authorized by; under," and this meaning comes with an interesting example: "pursuant to Rule 56, the plaintiff moves for summary judgment."[78] Of course, this example itself is indeterminate, as one not only is authorized to move for summary judgment under Rule 56, but one also must conform one's motion to the requirements of Rule 56.[79] In light of the example, the second meaning may itself mean "as authorized by" or "as required by," as is the case with the first meaning.

The third meaning provided in *Black's* is "[i]n carrying out," which is followed with the example: "pursuant to his responsibilities, he ensured that all lights had been turned out."[80] This example under-determines the meaning provided, for "in carrying out" may refer to the idea expressed in the example, which illustrates a person performing required duties, but "in carrying out" certainly can also refer to conduct performed *while* performing required duties.[81] As one can see, a resort to dictionaries alone provides little help in determining the intent behind Justice Kennedy's use of the words "pursuant to official duties" to circumscribe the category of speech exempt from First Amendment protection because any dictionary meaning must be placed into a specific factual context to have real meaning.

Thus, Justice Kennedy's repeated use of the phrase "pursuant to official duties" and its variants must be read in light of the facts before the Court.[82] As outlined above, the two most relevant facts before the Court in the *Garcetti* case were that (1) Mr. Ceballos's

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[77] BLACK'S LAW DICTIONARY, *supra* note 76 ("she filed the motion pursuant to the court's order.").

[78] BLACK'S LAW DICTIONARY, *supra* note 76.

[79] *See* Fed. R. Civ. P. 56(a) (authorizing a plaintiff to move for summary judgment); 56(b) (authorizing a defendant to move for summary judgment; 56(c)-(g) (providing time limits, content requirements, and sanctions for bad faith submissions).

[80] BLACK'S, *supra* note 76 at 584.

[81] For example, consider the sentence, "In carrying out his contractual duty to scrub the toilet, Joe stubbed his toe." In this example, "in carrying out" refers both to the performance of the contractual duty, and, temporally and situationally, to the stubbing of the toe, which occurred while Joe was "carrying out" his duty.

[82] Such an approach would be entirely consistent with the dominant approaches to distinguishing between holding and dicta, each of which requires that a proposition be linked to the facts before the court at the time it rendered its decision in order to be considered part of the binding holding of the case. *See* Abramowicz & Stearns, *supra* note 55, at 1045-65 (reviewing the dominant approaches); Bayern, *supra* note 55, at 167-73 (2009) (proposing a new approach based on judicial intent, but limiting any expressions of intent to those within the facts of the case).

memorandum was the only speech at issue; and (2) Mr. Ceballos drafted the memorandum as a requirement of his job. When the Court stated, "We hold that, when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline,"[83] the Court did so in the context of these stipulated facts. The Court made this clear by preceding the statement of its holding with the limiting justification, "The controlling factor in Ceballos' case is that his expressions were made *pursuant to his duties* as a calendar deputy."[84] Finally, citing both *Pickering* and *Givhan* as authority, the Court also made it clear that its stated holding was *not* to be construed to bar First Amendment protection for statements merely *related to* work, or for statements made *while at work*, or for statements made only *to coworkers or superiors.*[85] Thus, it would be patently incorrect to interpret the words "pursuant to" to mean "related to" or "in the course of," as each of these interpretations is directly foreclosed by the Court's statements of what it was *not* holding.[86]

Adoption of either of these latter meanings would require an interpretation of the *Garcetti* decision as having overruled *Givhan.* In *Givhan*, a public school employee complained internally to her supervisors about alleged race discrimination in personnel decision making in her school.[87] The employee certainly made her statements while she was "in the course" of her employment, and her statements certainly "related to" her job. The Supreme Court unanimously held that her statements were protected.[88] In deciding *Garcetti*, the Court explicitly relied on its decision in *Givhan* to establish the state of the law under *Pickering*,[89] and the Court ultimately distinguished *Givhan* from *Garcetti* based on the differences in the facts—specifically, that Mr. Ceballos, unlike the employee in *Givhan*, had a *contractual duty* to

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[83] *Garcetti*, 547 U.S. at 421 (emphasis added).

[84] *Id.* at 421 (emphasis added); *see also id.* ("Ceballos drafted his memorandum because that is what he was employed to do.").

[85] *Id.* at 420 (citing and reaffirming *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) for the proposition that speech related to work remains subject to protection, and *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) for the proposition that speech made while at work, even if made only internally to supervisors or coworkers, remains protected).

[86] *See Givhan*, 439 U.S. at 415 (upholding First Amendment protection for a public school employee who complained of race discrimination in school personnel decisions while at work, and stated her complaints only internally to her supervisors).

[87] *Id.* at 412-14.

[88] *Id.* at 415.

[89] *Id.*

make the speech for which he was punished.[90] Therefore, when Mr. Ceballos spoke "pursuant to his official duties," he spoke because his employment contract required him to speak.

With the above discussion in mind, the most natural meaning of "pursuant to"—and the meaning most faithful to the Court's decision—is "as required by." This meaning, reflected obliquely in a few of the dictionary definitions and examples above, but not directly presented by any of them, is clearly the meaning that the Court intended. The Court took great pains to distinguish Mr. Ceballos from Mr. Pickering, who spoke *about his workplace* and identified himself *as a teacher* in doing so, and Ms. Givhan, who spoke *about her workplace while at work* and *only internally to her supervisors*. The simple fact distinguishing Mr. Ceballos from these other two defendants is that neither Mr. Pickering nor Ms. Givhan were *required by their employment contracts* to engage in the speech for which they were punished.

2. A Simple Test

Another way—and probably the best way—of stating the conclusion reached above is that, had Mr. Ceballos *declined to draft his memorandum at all*, he would have been subject to legitimate discipline from his superiors for breaching his official employment duty to draft legal memoranda. In stark contrast, neither Mr. Pickering nor Ms. Givhan could have been subject to any discipline for failure to perform their duties had they chosen to remain silent because neither had among their employment duties the duty to make the speech for which they were punished. It is this simple fact that makes Mr. Ceballos's case unique, and the Court's articulated holding must be read in light of this important factual distinction.

Accordingly, where lower courts are faced with a case that seems to present a *Garcetti* threshold issue, their inquiry as to whether the employee in question spoke "pursuant to his official duties" should follow a simple test that begins and ends with a determination *whether, had the employee remained silent on the incident in question, he would have then been in breach of his employment contract.*

Employing this test effectively renders Justice Souter's concerns over the potential indeterminacy of the majority's rule moot. Justice Souter's primary concern with the majority's "pursuant to official duties" rule was that it would incentivize employers to define every job as requiring speech, thus rendering all employee

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[90] *Garcetti*, 547 U.S. at 421 ("Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do."). Another way of saying this is that drafting the memorandum is what he contracted with his employer to do. *See* SAMUEL ESTREICHER & GILLIAN LESTER, EMPLOYMENT LAW 35-36 (2008) (discussing the employment relationship as a contractual relationship with duties on each side of the bargain).

speech unprotected.[91] In most cases, it will be clear from an employee's contract or job description whether a failure to speak on a challenged occasion would have constituted a breach of the employee's contractual duties. However, even where a devious public employer engages in the kind of gamesmanship that worries Justice Souter, the court need only inquire in a limited evidentiary hearing whether the employee in question has ever actually been required to make the kind of speech for which he was punished, or whether any other employee had ever been punished for failure to speak in circumstances similar to that of the plaintiff.[92]

In the vast majority of cases, this inquiry should be very easy to make, as there will be several employees of the same rank in the same workplace who remained silent on the occasion in question, or under similar circumstances, and were not punished.[93] In other cases, such as those involving upper-management employees with unique job ranks and responsibilities, the inquiry will be more difficult, but such employees will often have increased bargaining power at the initiation of the employment relationship to negotiate the speech required and permitted by their job duties,[94] and these employees will

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[91] *Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting).

[92] *See Garcetti*, 547 U.S. at 424-25 (addressing Justice Souter's objection by calling for a skeptical, fact-bound inquiry as to the duties required of an employee). In a sense, this inquiry seeks to determine whether the employer's "defense"—that the speech motivating its action was required by the employee's job duties—is "pretextual," an inquiry very familiar in the workplace discrimination context. *See, e.g., Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2d Cir.1998) (holding that the inconsistent application of company disciplinary policy justified a jury verdict that the employer's proffered non-discriminatory reason for termination was pretextual, and was offered only to disguise its true, discriminatory reason). Interestingly, and troublingly, it appears based on the cases reviewed here that the federal appellate courts have taken Justice Kennedy's admonishment to be skeptical of *employers'* claims that a job requires speech as an invitation to instead be skeptical of *employees'* claims that their jobs did not require the speech for which they were punished. *See infra* Part IV.

[93] It is important to note that this test is proposed for the purpose of applying the *Garcetti* rule in a way faithful to the Court's decision. That is, the purpose here is not to "fix" the *Garcetti* decision itself, but to identify and provide a means of remedying misapplications of the decision in the lower courts. Of course, as outlined in the penultimate part of this article, this approach still leaves for future refinement the obvious negative effects that the *Garcetti* rule, even properly applied, has on those who really are required to engage in speech as a contractual duty, such as teachers engaging in classroom teaching, college professors engaging in scholarly research, and internal auditors engaging in quality control reporting. Even the proper application of *Garcetti*'s rule arguably leaves these categories of speech unprotected, and this fact alone justifies additional scholarly work, as well as careful attention from the federal courts. *See infra* Part V.

[94] *See, e.g.*, Kathleen W. Carr, *Note, Managerial Employee: A Label in Search of a Meaningful Definition*, 48 U. CIN. L. REV. 435, 436 (1979) (in discussing the purposes of the "managerial employee" exception to the National Labor Relations Act, stating, "Moreover, many managerial employees already have substantial

therefore be better able to produce evidence of what was and was not understood to be required by their jobs. They will also be far less susceptible to the kind of gamesmanship that worries Justice Souter.

IV. *GARCETTI* IN THE FEDERAL APPELLATE COURTS

Lower courts have largely strayed from the application of the *Garcetti* rule outlined here. In fact, most of the federal appellate courts that have weighed in on First Amendment retaliation claims arising out of public educational employment have committed the very errors identified above—they have interpreted the words "pursuant to" as meaning either (or both) "related to" or "in the course of." Some have also interpreted any speech made within a workplace's "chain of command" to be speech made "pursuant to official duties." Although it is by far the majority approach, erroneous application of *Garcetti*'s rule has not been strictly uniform among the circuits, suggesting that a circuit split may be developing, and that the Court may have to revisit the issue soon. Beginning with the cases erroneously applying *Garcetti*'s rule, this Part reviews the decisions of the federal appellate courts and identifies a potential circuit split surrounding the proper application of the "pursuant to official duties" language of *Garcetti.*

A. Garcetti *Misapplied*

The Fifth Circuit's decision in *Williams v. Dallas Independent School District*[95] illustrates the dominant trend. Gregory Williams was the Athletic Director and Head Football Coach of a public school within the defendant school district. After experiencing difficulties securing appropriate funding for the athletic department, Williams wrote a memorandum to his superior, Principal Wright, questioning the use of athletic funds.[96] Arguably in response to the memorandum, Principal Wright removed Williams from his position as Athletic Director four days later.[97] Williams filed a complaint in federal court, alleging retaliation for exercising First Amendment speech rights, and lost at summary judgment in the district court. Williams then appealed.

The Fifth Circuit noted that the facts on appeal were very similar to the facts of *Pickering* itself.[98] The court then correctly

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bargaining power with employers, because of their special expertise and value to the business.").

[95] *Williams v. Dallas Ind. Sch. Dist.*, 480 F.3d 689 [217 Ed. Law Rep. [802]] (5th Cir. 2007).

[96] *Id.* at 690-691.

[97] *Id.* at 691.

[98] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

pointed out that *Garcetti* now requires a threshold question to be answered before applying the *Pickering* test, one that, in the words of the court, "shift[s] [the] focus from the content of the speech to the role the speaker occupied when he said it."[99] The court began by articulating a factual stipulation eerily similar, but diametrically opposed, to the stipulations treated as dispositive in *Garcetti.* The court related that "In the instant case, DISD concedes that an Athletic Director is not required to write memoranda to his principal regarding athletic accounts."[100]

Based on the approach outlined here, this stipulation should have ended the *Garcetti* threshold inquiry. Simply put, if one is not required by one's job to speak, then one cannot speak pursuant to one's official duties. Rather than simply applying this rule, the Fifth Circuit instead endeavored to "determine the extent to which, under *Garcetti*, a public employee is protected by the First Amendment if his speech is not necessarily required by his job duties but nevertheless is related to his job duties."[101] As outlined above, the majority opinion in *Garcetti* specifically limited the exemption's application to speech made "pursuant to official duties,"[102] so it is unclear why the Fifth Circuit thought this further inquiry into job-related speech necessary.

Nevertheless, and despite the *Garcetti* Court's careful attention to Ms. Givhan's speech, which she clearly made while she was in the course of her workday,[103] the *Williams* court held that speech that is, "undertaken in the course of performing" one's duties is speech that is made "pursuant to" one's duties.[104] After redefining the *Garcetti* test in this way, the court then proceeded to determine whether the plaintiff spoke "in the course of performing" his duties as an athletic director, ultimately holding that he had so spoken.[105]

In reaching its holding, the court also repurposed the Court's argument in *Pickering* that, even if the letter's contents contained falsehoods, the Board could easily rebut any such inaccuracies because they did not stem from any special knowledge that Mr. Pickering possessed, but rather were based on publicly available

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[99] *Williams*, 480 F.3d at 692.

[100] *Id.* at 694.

[101] *Id.* at 693.

[102] *See supra* notes 66-94 and accompanying text (explaining the *Garcetti* rule and its scope).

[103] *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 411-13 (1979) (describing the plaintiff's speech, which entirely occurred in private meetings during the school day with the principal of her school, and which was directed at criticizing the employment practices of her school).

[104] *Williams*, 480 F.3d at 693 ("Activities undertaken in the course of performing one's job are activities pursuant to official duties.").

[105] *Id.*

information.[106] Relying on this discussion, the Fifth Circuit added to the *Garcetti* Court's exemption an additional element that, where the speech is part of the employee's job-related knowledge, it is unprotected.[107] Adding such a novel element to the *Garcetti* exemption based on an out-of-context quote from *Pickering* both greatly expands the *Garcetti* rule and directly contradicts the tenor of the *Pickering* decision, in which the teacher's "special knowledge" was considered very important to the value of his speech to the public.[108]

As a result of the Fifth Circuit's decision, the speech of a public school employee made of his own choice, in circumstances where simply remaining silent would have breached no employment duty, was exempted from First Amendment scrutiny simply because he spoke while working based on work-related knowledge. Considering the care that the *Garcetti* majority took in distinguishing Mr. Ceballos's case from Mr. Pickering's and Ms. Givhan's, this result is startling, to say the least.

Nevertheless, other courts have made similar rulings that unduly broadened the scope of *Garcetti*'s exemption. In *Fox v. Traverse City Area Public Schools Board of Education*,[109] for example, the Sixth Circuit recently denied protection on *Garcetti* grounds to speech that fell outside the scope of *Garcetti*'s categorical rule. Susan Fox, an elementary school special education teacher, brought a First Amendment retaliation action against her former school board employer. Ms. Fox alleged that she was terminated from her position because she complained to her superiors that her teaching caseload was larger than that allowed by law. The court ultimately held that, in making her complaints, Fox spoke as an employee, not as a citizen.

Like the Fifth Circuit in *Williams*, the Sixth Circuit in *Fox* resolved the *Garcetti* issue by reading an additional rule into the rule

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[106] *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) ("In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer.").

[107] *Williams*, 480 F.3d at 694 (distinguishing the plaintiff from Mr. Pickering, stating, "Unlike Pickering, whose 'position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer,' Williams had special knowledge that $200 was raised at a basketball tournament. He was also experienced with standard operating procedures for athletic departments. Even his language accusing the principal of engaging in a 'network of friends and house rules' was part-and-parcel of his concerns about the program he ran.") (quoting *Pickering*, 391 U.S. at 572).

[108] *See Pickering*, 391 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

[109] 605 F.3d 345 [257 Ed. Law Rep. [23]] (6th Cir. 2010).

stated by the *Garcetti* majority. Under the Sixth Circuit formulation, all speech that "'owes its existence to [the speaker's] professional responsibilities'" is unprotected.[110] While it is true that this language comes out of the *Garcetti* opinion, it does not form part of the Supreme Court's holding, which was limited to speech required by, rather than merely enabled by, Mr. Ceballos's duties.[111] The Sixth Circuit's use of this *Garcetti* dictum as its rule, while ignoring the Court's careful clarification that the job-*required* nature of Mr. Ceballos's speech was the controlling factor,[112] greatly expands the scope of the *Garcetti* exemption. The Sixth Circuit has applied this formulation outside the education context to deny First Amendment protection to a park ranger making comments to an outside consultant based on an "ad hoc duty" to do so,[113] and in *Fox*, the formulation was extended to deny protection to Ms. Fox, who spoke of her own volition, but merely spoke at work on the topic of her job.[114] Applying its formulation, the court concluded that, because Fox's speech "owe[d] its existence to" her duties as a teacher, it was speech made "pursuant to" her official duties.[115]

To reach this conclusion, the *Fox* court principally relied on the fact that Fox spoke directly to her superiors, rather than outside the "chain of command."[116] The court reasoned that, because Fox spoke to her immediate superiors and not those outside the chain of command, she could not have been speaking as a citizen.[117] This

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[110] *Id.* at 348 (quoting *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 544 (6th Cir. 2007)). The *Weisbarth* court lifted *Garcetti*'s justificatory dictum that "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen" out of the opinion and elevated it to the status of a holding, essentially removing First Amendment protection based on a "but for" test. *See Garcetti*, 547 U.S. at 420-21. *See also Garcetti*, 547 U.S. at 421.

[111] *See Garcetti*, 547 U.S. at 421 ("The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy.").

[112] *See Garcetti*, 547 U.S. at 421-22 ("Ceballos wrote his disposition memo *because that is part of what he, as a calendar deputy, was employed to do.* It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.") (citing by analogy *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 833 [101 Ed. Law Rep. [552]] (1995)) (emphasis added).

[113] *Weisbarth*, 499 F.3d at 544.

[114] *Id.* at 349.

[115] *Id.* at 349

[116] *Fox*, 605 F.3d at 349-50.

[117] *See id.* at 350 (quoting the Fifth Circuit as stating, "[c]ases from other circuits are consistent in holding that when a public employee raises complaints or

type of analysis is, of course, directly in contrast with *Garcetti*, in which the Court made clear that whether speech is made internally to superiors or publicly does not enter the analysis at the threshold stage of the inquiry.[118] As discussed above, the Court in *Garcetti* took pains to explain that the internal nature of a complaint, such as the complaints at issue in the *Givhan* case—which the *Garcetti* Court reaffirmed—is non-dispositive, and thus cannot be the basis of a threshold categorical exemption.[119]

In *Gorum v. Sessoms*,[120] the Third Circuit similarly misapplied the "pursuant to" language of *Garcetti* to deny First Amendment protection to the speech of a tenured professor at a state university. Gorum, a department chair, was terminated ostensibly for changing the grades of many student athletes at the university without the permission of the professor of record in each case.[121] In response to his termination, Gorum filed suit against the university's president, Sessoms, on the grounds that Gorum was actually dismissed in retaliation for two speech-related actions. The first was Gorum's participation as an advisor to a student-athlete in a hearing before a university disciplinary committee.[122] The second was Gorum's rescission of an invitation for Sessoms to speak at the function of a fraternity of which Gorum was the faculty advisor.[123]

The court held that Gorum had engaged in both forms of expressive conduct pursuant to his duties as a professor. As to the advising of the troubled student, the Third Circuit, like the Fifth in *Williams*, modified the *Garcetti* exemption to further exempt speech that reflects "'special knowledge' or 'experience' acquired through [an employee's] job."[124] The court concluded that Gorum's advising work, though not required by his employment contract, nevertheless

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concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job.") (quoting *Davis v. McKinney*, 518 F.3d 304, 313 [230 Ed. Law Rep. [507]](5th Cir. 2008)). How any of these decisions can be reconciled with *Givhan* is puzzling.

[118] *See Garcetti*, 547 U.S. at 420-21 (explaining that neither the relatedness of the speech to the employee's workplace nor the internal nature of the speech is a dispositive factor).

[119] *See id.* at 520 ("That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work.") (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U. S. 410, 414 (1979)).

[120] 561 F.3d 179 [242 Ed. Law Rep. [679]] (3rd Cir. 2009).

[121] *Id.* at 182.

[122] *Id.* at 183.

[123] *Id.*

[124] *Id.* at 185 (quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir.2007), itself quoting *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 [217 Ed. Law Rep. [802]] (5th Cir.2007)).

occurred "pursuant to" his job duties because, as the author of the campus disciplinary code, he had special knowledge of its application, and because he himself felt it important to engage in such advising to set an example for other faculty.[125] The fact that advising was completely optional under the terms of the employment contract was immaterial.

As to the revocation of the invitation, the court's reasoning was equally expansive. The court determined that, because the faculty bylaws for the university included the job responsibility to aid "student organizations and clubs as mentors and advisors," Gorum's revocation of the invitation as fraternity counselor was speech made pursuant to official duties.[126] As with the advising activity, the court did not make any inquiry as to whether the expressive portion of aiding student organizations—especially the expression in which Gorum had engaged, which merely constituted "instruct[ing] a member of the [speaker's] committee to revoke an invitation to speak that the committee member mistakenly made to Sessoms after the committee already had selected another speaker"—was a job requirement.[127]

Here, had the Third Circuit applied the simple test proposed in this article and asked whether, had Gorum remained silent on the occasions in question, he would have been subject to discipline for failing to fulfill his employment duties, the clear answer would have been "no," and the speech would have survived *Garcetti*'s threshold inquiry. Further, it seems that Dr. Gorum's speech would have ultimately been deemed unprotected under the *Pickering/Connick* analysis in that it did not relate to a matter of public concern. Thus, the Third Circuit's choice to substantially broaden the threshold inquiry of *Garcetti* worked doctrinal mischief that was not even necessary.[128]

In *Brammer-Hoelter v. Twin Peaks Charter Academy*,[129] the Tenth Circuit applied *Garcetti* to the informal public and formal internal grievances of several charter school teachers. A number of teachers at a charter school began meeting outside of school and after school hours to discuss criticisms about the school with each other, parents, and other citizens in the community.[130] Several of these teachers also filed formal grievances through the school district's employment grievance channels. The teachers alleged that subsequently, they

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[125] *Id.* at 186, 186 n.5.

[126] *Id.* at 188.

[127] *See id.* at 184.

[128] *See id.* at 187 (alternatively holding that neither category of Gorum's speech embraced a matter of public concern).

[129] 492 F.3d 1192 [222 Ed. Law Rep. [596]] (10th Cir. 2007).

[130] *Id.* at 1198-99.

experienced retaliation at the hands of the principal and school district.[131]

The court focused its *Garcetti* threshold inquiry on the *content* of the speech, holding to be categorically unprotected all speech made on the *subject* of the teachers' official duties.[132] The court held that, because the teachers "were paid to execute the Academy's curriculum and utilize an effective pedagogy" and "expected to regulate the behavior of . . . students," any speech made after school concerning these topics or the amount of resources being used on instructional aids was "made pursuant to [the teachers'] inherent duty as teachers to ensure they had adequate materials to educate their students."[133] Obviously, the court read the words "pursuant to" as meaning "related to," in direct contravention of the *Garcetti* Court's admonishment that relatedness is non-dispositive.

Puzzlingly, however, the court also held that speech made by the teachers on certain topics was protected under *Garcetti* because it was insufficiently related to the teachers' responsibilities.[134] These topics included the following concerns:

> (1) the resignations of other teachers, (2) whether the Academy Code of Conduct could restrict Plaintiffs' freedom of speech, (3) staffing levels, (4) the Academy's spending on teacher salaries and bonuses, (5) criticisms of the school board, (6) the visibility of Dr. Marlatt [the principal] and the Board at important events, (7) the lack of support, trust, feedback and communication with Dr. Marlatt, (8) Dr. Marlatt's restrictions on speech and association, (9) the treatment of parents by the Board, (10) Dr. Marlatt's favoritism, (11) whether the Academy charter would be renewed, and (12) the upcoming Board elections.[135]

According to the court, none of these matters embraced the teachers' employment responsibilities, so the speech on each of these topics passed the *Garcetti* threshold inquiry.[136]

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[131] *Id.* at 1202.

[132] *See id.* at 1203 ("Nearly all of the matters Plaintiffs claim they discussed were made pursuant to their duties as teachers.").

[133] *Id.* at 1204; *see also id.* at 1204 n.7 ("The district court's opinion and order was issued prior to *Garcetti*. Consequently, it did not analyze the matters discussed to determine whether they were *related to* Plaintiffs' employment duties.") (emphasis added).

[134] *Id.* at 1204-05.

[135] *Id.*

[136] *Id.* at 1205.

In *Brammer-Hoelter*, then, speech about money spent by the school for classroom computers was made pursuant to official duties, while speech made at the same off-campus meeting about money spent by the school on teacher salaries was not made pursuant to official duties.[137] This illogical and unprincipled set of holdings could easily have been avoided through a proper application of the *Garcetti* rule. If the *Brammer-Hoelter* court had applied this article's test, it would have concluded easily that the teachers' failure to speak on any of the challenged occasions would not have subjected them to discipline, and thus that the teachers could not have spoken pursuant to any job requirement.

In *D'Angelo v. School Board of Polk County*, the Eleventh Circuit similarly applied *Garcetti* to speech dissimilar to that of Mr. Ceballos.[138] The plaintiff was a high school principal who alleged retaliation because of speeches that he made to faculty during his efforts to convert his school to a charter school.[139] The court held that D'Angelo spoke pursuant to his job responsibilities as a principal.[140] The court offered two rationales for its holding. First, the state statute regulating the process for charter school conversion did not grant all citizens the power to establish a charter school.[141] Thus, the court reasoned, because principals were among the limited class of individuals granted the power to convert a public school to a charter school, D'Angelo must have been speaking pursuant to his job responsibilities as a principal when he spoke about charter school conversion.[142]

The second basis of the court's holding stemmed from the statements made by D'Angelo in both his email and trial testimony.[143] The court found D'Angelo's own prior email statements particularly compelling:

> In an email to an assistant principal at Kathleen High, D'Angelo explained his duty to pursue charter conversion. D'Angelo wrote that he "in good conscience could not continue the practice of providing an inferior educational opportunity to [the] ESE students [at Kathleen High]." He explained that,

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[137] *See id.* at 1204-05.

[138] 497 F.3d 1203 [223 Ed. Law Rep. [598]] (11th Cir. 2007).

[139] *Id.* at 1205.

[140] *Id.* at 1210.

[141] *Id. quoting* Fla. Stat. § 1002.33(3)(b) (stating, "An application for a conversion charter school shall be made by the district school board, the principal, teachers, parents, and/or the school advisory council.").

[142] *Id.*

[143] *Id.*

> "with[] the charter opportunities granted by the State of Florida[, he] would be remiss in [his] duties as the leader of Kathleen High School if [he] did not explore any and all possibilities to improve the quality of education at [the school]."[144]

The court also pointed out that, though D'Angelo had denied during trial that the pursuit of charter status was one of his job duties, he did indicate that he personally considered the pursuit of charter status to be in the best interests of the school, which he was duty-bound to seek.[145] In concluding that D'Angelo spoke pursuant to his official duties, the court explained, "It is enough that D'Angelo admitted that he pursued charter conversion to 'explore any and all possibilities to improve the quality of education at [his school],' which was one of his listed duties and he described as his 'number one duty' in his 'job as a principal.'"[146]

While this analysis seems proper at first blush, one must remember that the actual test from *Garcetti* is based on *officially required speech*, not *officially required goals*.[147] Thus, the court should have simply asked whether speech made while attempting to convert the high school into a charter school was the type of speech required by D'Angelo's duties. As this article contends, the best way of making this determination would be to inquire whether, had D'Angelo refrained from speaking to the faculty regarding charter school conversion, he would have been subjected to discipline for failure to perform his employment duties.[148]

The court might have even framed the category of speech more broadly, asking whether it was a job requirement for D'Angelo to address the faculty in meetings relating to the school's strategic plans. Certainly, the court could have concluded that speaking to the faculty during such meetings is a job requirement for a school principal, even under this article's test, for it is hard to imagine a principal staying in the role for very long while refusing to conduct faculty meetings on the school's strategic directions.[149] If this is the

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[144] *Id.* at 1206 (alterations in original).

[145] *Id.* at 1206.

[146] *Id.* at 1210 (citation omitted).

[147] *See Garcetti*, 547 U.S. at 421.

[148] *See supra* notes 90-94 and accompanying text.

[149] For example, the relevant job description for a principal in Polk County, Florida, approved in 2004 (prior to *Garcetti*), mentions both a requirement to "provide leadership for and implement school improvement initiatives," and a requirement for "face-to-face discussions and contact with individuals and teams." *See* Job Description, Principal, Senior High, The School Board of Polk County, Florida, *available at* http://www.polk-fl.net/jobdescriptions/pdf/9010.pdf (last visited October 10, 2010).

case, then the court could have issued a principled ruling within the *Garcetti* facts holding the charter school speeches to the faculty to be unprotected speech. The court elected instead to expand the scope of the *Garcetti* rule to cover any speech made in furtherance of a required goal of the employment relationship—an error similar to the "related to" error of the Sixth Circuit.[150] While D'Angelo would probably not have prevailed had the case proceeded to the *Pickering/Connick* balancing test,[151] the court's election to sweep discretionary administrative speech "rallying the troops" within *Garcetti*'s categorical threshold exclusion presents an example of the troubling nationwide trend to expand the *Garcetti* exclusion, and thereby to narrow individual speech rights.

The Eleventh Circuit subsequently relied on *D'Angelo*'s expansive reading in *White v. School Board of Hillsborough County*,[152] holding that a charter school director's letter to the School Board requesting the waiver of certification requirements for a vocational teacher and another letter contesting the results of a fire safety inspection as "absolutely false" fell within the scope of *Garcetti*'s category of unprotected speech.[153] The Court held that White had engaged in both categories of speech "in the course of her duties as director of the school," and that the speech was therefore not protected.[154] The court cited *D'Angelo* to justify an expansive reading of the job duties of the principal, but the facts of *White* presented an even broader category of speech than the facts of *D'Angelo*.

As discussed above, though the *D'Angelo* court chose not to proceed in this way, it could have framed D'Angelo's official duty as a duty to address the faculty in meetings relating to the strategic directions of the school, a duty that would seem to be required of every school principal. This framing would have justified a narrow and fact-bound application of the *Garcetti* rule to hold the speech of D'Angelo in support of charter conversion unprotected. Under this article's proposed test, one might have said that, were a high school principal to decline to address the faculty in meetings relating to the school's strategic directions, he would be subject to discipline for failure to appropriately communicate with his subordinates.[155]

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[150] *See supra* notes 100-108 and accompanying text.

[151] The fact that he spoke as the leader of the school and urged a course of action directly contrary to the desires of his superiors in the district office ought to have been enough to allow the district to prevail on the *Pickering* balance. *See Connick v. Myers*, 461 U.S. 138, 153-54 (1983) (holding that the employer's interest in seeing that the office's mission is supported justifies limiting speech that contradicts that mission).

[152] 2009 WL 174944 (11th Cir. 2009) (unpublished, slip op.).

[153] *Id.* at *3.

[154] *Id.*

[155] *See supra* notes 91-94 and accompanying text.

In *White*, however, the same test would have yielded the opposite result—no discipline would have been justified based on a failure to fulfill job duties had White simply elected not to petition the Board about the vocational teacher and elected not to contest the fire inspection (though based on the facts as reported in the opinion, she likely would have been subject to discipline anyway for gross mismanagement of the school). Only by reading the *Garcetti* exemption to encompass all speech "made in the course of duties" was the Eleventh Circuit able to avoid this result. Thus, *White* represents both a mistaken application of *Garcetti* in its own right and an approving citation of the *D'Angelo* court's election to read *Garcetti*'s exclusion, rather than the principal's job duties, broadly.

Finally, a divided panel of the Second Circuit followed the dominant, erroneous approach in *Weintraub v. Board of Education.*[156] In *Weintraub*, a teacher suffered an adverse employment action after filing a grievance with his union about how his superiors handled the discipline of a student who was throwing books in class.[157] The Second Circuit followed the Fifth Circuit's decision in *Williams*, holding that "speech can be 'pursuant to' a public employee's official job duties even though it is not required by" such duties.[158] The court concluded that the teacher spoke "'pursuant to' his official duties" because his speech was "part-and-parcel of his concerns about his ability to properly execute his duties."[159] The majority also found it relevant that the teacher's speech "ultimately took the form of an employee grievance, for which there is no relevant citizen analogue."[160]

Judge Calabresi's dissent criticized the majority for its penchant to "construe [*Garcetti*] broadly (and, concomitantly, to construe public employees' First Amendment protections narrowly)."[161] Judge Calabresi addressed the majority's articulation of a two-pronged meaning of "pursuant to," which captures speech that (a) is "in furtherance of" the employee's "core duties," and (b) has "no relevant analogue to citizen speech."[162] As to the first prong, Judge Calabresi criticized its breadth, explaining that the majority's formulation would hold as unprotected teacher speech about nutrition, a stable home life, and other prerequisites to a successful

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[156] *Weintraub v. Bd. of Educ.*, 593 F.3d 196 [253 Ed. Law Rep. [17]] (2d Cir. 2010).

[157] *Id.* at 198.

[158] *Id.* at 202.

[159] *Id.* at 203 (internal quotations omitted).

[160] *Id.*

[161] *Id.* at 205 (Calabresi, J., dissenting).

[162] *Id.* (Calabresi, J., dissenting).

education.[163] As to the second prong, Judge Calabresi explained that the language in *Garcetti* speaking of "citizen analogues" did not represent the Court's holding, but merely the Court's "expounding upon 'the theoretical underpinnings of [its] decisions.'"[164]

Judge Calabresi explained that he would adhere to *Garcetti*'s narrowly stated holding on its own terms, based on the facts of the case before the Court.[165] Judge Calabresi's dissent would hold that speech is pursuant to an employee's duties "when the employee is required to make such speech in the course of fulfilling his job duties."[166] Thus, Judge Calabresi's approach would apply similarly to the approach advanced in this article—only speech required by the employee's job would be unprotected, and only speech that, if not made, would subject the employee to discipline for failure to perform his or her duties would be seen as speech pursuant to official duties.

Each of these cases represents an erroneous application of *Garcetti*, and in each case, this error results from an overbroad reading of the *Garcetti* rule and the alterations it made to existing public employee speech doctrine. Importantly, in each of these cases, reaching the proper result on the threshold *Garcetti* inquiry would not have precluded a later finding that the speech in question was unprotected. Other than inserting a threshold inquiry to precede them, *Garcetti* made no change to the proper inquiries relating to the content of a public employee's speech. That is, if speech survives the threshold *Garcetti* exclusion, then the content of the speech and the circumstances surrounding it are still evaluated under *Pickering* and *Connick* for public concern and the effect on the workplace. *Garcetti* simply inserts a narrow threshold inquiry removing a very small category of speech from the later balancing stages.

Under *Garcetti*, if an employee spoke *because that is what the employee was employed to do*,[167] then the speech is unprotected. If the employee spoke *even though speaking was not required*, then the speech is subjected to the remaining steps in the *Pickering/Connick* analysis. This is why the simple test offered in this article functions so well—if an employee would not be subject to discipline for the failure to perform duties as a result of *not* speaking, then speaking cannot be a job requirement.

While the cases outlined above illustrate a troubling trend among the federal appellate circuits to read *Garcetti*'s narrow

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[163] *Id.* at 205-06 (Calabresi, J., dissenting).

[164] *Id.* at 206-08 (Calabresi, J., dissenting) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).

[165] *Id.*

[166] *Id.* at 208 (Calabresi, J., dissenting).

[167] *See Garcetti*, 547 U.S. at 421 ("Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.").

categorical exclusion very broadly, they do not represent the entirety of federal appellate case law on First Amendment retaliation arising out of public educational employment. Some cases among the circuits, at least when read with a charitable eye, may be seen as applying *Garcetti*'s threshold test in its explicit, narrow terms. In the next section, a case arguably correctly applying *Garcetti* in the education context is reviewed, but even this correct application suffers from serious misconceptions relating to the scope of *Garcetti*'s rule.

B. Garcetti *Arguably Correctly Applied, and a Potential Circuit Split*

A difficult case is presented when a public employee's speech initially appears to have been made as a job requirement, and the court must inquire more deeply to determine whether this is in fact true. Only the Tenth Circuit has arrived at the correct application in any such case, and that fact alone ought to cause concern. Moreover, the Tenth Circuit decision reviewed in this section may portend an emerging circuit split, as well as a potential intra-circuit disagreement within the Tenth Circuit itself.

In *Reinhardt v. Albuquerque Public Schools Board of Education*,[168] the Tenth Circuit analyzed a complicated factual situation in the *Garcetti-Pickering* mode. The plaintiff worked as a speech-language pathologist at a high school in the defendant school district. Reinhardt often complained to her superiors about mistakes she thought were being made in the administration of the special education program that resulted in denials of required services.[169] Additionally, Reinhardt filed a complaint with the state's Public Education Department that eventually resulted in the school board being ordered to take corrective action.[170] Shortly thereafter, Reinhardt's workload was lessened and her contract status was changed in a way that impacted Reinhardt negatively.[171] Reinhardt brought suit for retaliation, claiming a violation of her First Amendment rights.[172]

When the case reached the Tenth Circuit, the court held that Reinhardt's complaints—both internal and external—were not made "pursuant to" her official duties, and the court remanded the question of the remaining *Pickering* fact-finding and analysis to the district court.[173] In reaching its holding, the court analyzed two

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[168] 595 F.3d 1126 [253 Ed. Law Rep. [567]] (10th Cir. 2010).

[169] *Id.* at 1130.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 1130-31.

[173] *Id.* at 1137.

factors which "suggest an employee was speaking as a private citizen rather than pursuant to her job responsibilities."[174] The first factor was whether the employee's job responsibilities included exposing misconduct.[175] The second factor was whether the employee went outside the chain of command when raising her concerns.[176]

The Tenth Circuit's inquiry in *Reinhardt* first focused on whether it was the employee's job to expose malfeasance. The *Reinhardt* court initially focused correctly on the relevant facts, concluding, "Ms. Reinhardt . . . was hired to provide speech and language services to special education students." Because Reinhardt was not hired to expose noncompliance with legal requirements, any speech she made directed at such exposure was not made "pursuant to" her official duties. Thus, the Tenth Circuit, faced with a case that tantalizingly presented speech both related to the plaintiff's duties, and uttered by the plaintiff while in the course of her workday, came to the conclusion compelled by a proper application of *Garcetti*.[177] The court should have stopped there.

For some reason, though, the *Reinhardt* court did not stop there. Rather, after correctly answering the only question required to be answered at *Garcetti*'s threshold stage, the court went on to inquire whether the plaintiff had gone "outside the chain of command" in engaging in the challenged speech.[178] In dicta, the court responded to the school district's argument that the mere act of complaining through an attorney could not place Ms. Reinhardt's speech outside her job duties. The court cited two earlier cases, each of which had involved external complaints, and stated that employees who speak outside the chain of command do so outside their job duties.[179]

Standing alone, the court's efforts to fit the case before it within the facts of earlier cases is not objectionable, but the importance that the court attached to the fact that the speech at issue was made outside the chain of command could cause courts to view this factor as part of the *Garcetti* rule, thus overruling *Givhan* "under the table."[180] Notwithstanding the ambiguity created by the Tenth

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[174] *Id.* at 1135-36.

[175] *Id.* at 1136.

[176] *Id.*

[177] *Id.* ("Ms. Reinhardt was not hired to ensure IDEA compliance at Albuquerque Public Schools. She was hired to provide speech and language services to special education students.").

[178] *Id.* at 1136-37.

[179] *Id.* at 1137.

[180] *See generally* Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067 (2008). If the inquiry is merely *Garcetti*'s "pursuant to official duties" question, it is unclear why a chain-of-command concern should even be relevant. That is, if the speech in question was not required by the plaintiff's job duties, it is illogical to say that failure to follow the chain of command when making it renders

Circuit's dicta relating to chain-of-command issues, the core of the court's holding in *Reinhardt* is that the reporting of IDEA violations by a special education teacher is not speech made pursuant to the teacher's official duties, and for that reason, the case stands apart from the other education cases decided among the circuits. Whether this decision portends the initial fissure of a circuit split remains to be seen.

C. The Importance of Proper Application

Accepting this article's descriptive thesis that in the educational employment context, the circuits have impermissibly broadened the *Garcetti* threshold exemption far beyond its intended scope, one must confront the normative matter of whether and why this broadening is undesirable. To begin with, it is important to remember that lower courts are bound only by the holdings of the decisions of higher courts,[181] and that extension or broad reading of the holding of a controlling case to apply it to a case presenting dissimilar facts requires justification. Of course, this general principle does not foreclose such extension or broad reading, but in the First Amendment context, an overly broad reading of a Supreme Court opinion is particularly troubling, due to the basic structure of much of First Amendment doctrine.

First Amendment law may be thought of structurally as consisting of a baseline right—the right to express oneself freely without governmental restriction. This baseline right to speak without government interference, however, has been limited through a series of exemptions—some prudential and standard-based, and others categorical and rule-based. Examples of the former include the application of strict scrutiny analysis to government limitations on the content of protected speech, which application requires the court to evaluate whether the challenged restriction is "narrowly tailored to promote a compelling government interest."[182] These forms of

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the speech unprotected. Indeed, the use of the requirement as an element of the threshold test could potentially muddy the analytical waters further. On the other hand, perhaps this concern is overblown. A reasonable inquiry into chain of command issues may shed light on whether the speech actually was required—if the employee followed a chain of command in making the speech, perhaps this indicates that the speech is a routine job requirement, like a teacher's daily reporting of attendance for her class. However, stating it as though it were a generally applicable portion of the threshold inquiry confuses any such reading.

[181] *See supra* Part III.B. (discussing this general principle).

[182] *See, e.g.*, *United States v. Playboy Entertain. Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). For an illuminating analysis of the ways in which the Supreme Court deals with rules and standards in general, see Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging*

restriction are applied, by nature, on a case-by-case basis. The basic *Pickering* analysis may reasonably be placed in this standard-based group.

Examples of the latter include categorical exemptions for "fighting words,"[183] "obscenity,"[184] "incitement,"[185] and "defamation,"[186] among others.[187] These restrictions theoretically are designed to apply uniformly to any speech that fits each of the relevant categories. If speech constitutes "obscenity," for instance, it is constitutionally unprotected, regardless of any otherwise redeeming characteristics the particular speech in question may have had. The *Garcetti* threshold exemption fits into this category of First Amendment rules.[188] As other scholars have pointed out, these categorical exemptions are limited in their application and should be construed strictly based on their initial terms because overly broad applications have the effect of restricting broader varieties of speech than those initially contemplated when the exemptions were crafted.[189]

The overly broad applications of the *Garcetti* exemption illustrate this point. As this article has demonstrated, most, if not all, of the speech held to be unprotected in the federal appellate decisions applying *Garcetti* would at least pass the *Garcetti* threshold under a proper and narrow application of the Supreme Court's rule as exempting only speech required by a public employee's contractual duties from the First Amendment's protections.[190] And at least some of this speech would have survived the *Pickering/Connick* balance were it to have reached that stage. Thus, the overly broad application among the circuits has removed the First Amendment's protections from a broader scope of speech than the Supreme Court

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Versus Error Correction in the Supreme Court, 63 WASH. & LEE L. REV. 271, 287-96 (2006).

[183] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[184] *Miller v. California*, 413 U.S 15 (1973).

[185] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[186] *See N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (articulating a modified, but still categorical, exemption if the subject is a public official).

[187] *See Virginia v. Black*, 538 U.S. 343 (2003) (true threats); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography). *But see Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002) (striking down portions of the federal statute criminalizing child pornography, 18 U.S.C. § 2256, as overbroad).

[188] *See Garcetti*, 547 U.S. at 421 ("We hold that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[189] *See supra* note 1 and accompanying text.

[190] *See supra* Part IV.

contemplated in *Garcetti*. Where the Supreme Court articulates a categorical exemption from the baseline speech right, and this category is broadened through appellate decision making, the baseline right is thereby narrowed. Any such limitation of the baseline speech right should therefore be justified, but in the decisions, the courts view this narrowing as merely a straight application of the *Garcetti* rule and its progeny. Thus, in the guise of adherence to precedent, the appellate courts have engaged in an expansion of precedent that has resulted in constricting rights.

This sleight of hand is particularly troubling in the context of *Garcetti*, as it illustrates the federal appellate courts exceeding their own structural powers. The Court in *Garcetti* carefully drew boundaries around the rule that it was articulating. The Court did so by clearly indicating that it was not overruling *Pickering*, and its protection of speech related to teaching and made by a teacher identifying himself as a teacher.[191] The Court also clearly indicated that it was not overruling *Givhan*, and its protection of work-related speech made while the employee was at work and made only internally to a superior in the employee's "chain of command."[192] Applying the Court's narrow exemption beyond these boundaries by interpreting "pursuant to" to encompass speech "related to" or "made in the course of" job duties, or to speech made within the employee's "chain of command," is tantamount to overruling the Supreme Court, which, of course, federal appellate courts are not empowered to do.[193] This fact alone compels the conclusion that the Supreme Court must revisit *Garcetti*.

In addition, an important education-related interest, first recognized in the *Pickering* decision itself, is jeopardized when the *Garcetti* rule is read too broadly in the education context. This is the public's interest in receiving information related to the school system from those in the best position to provide it—the employees of the system.[194] As Professor Paul Secunda points out, the speech of

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[191] *See Garcetti*, 547 U.S. at 420 ("As the Court noted in *Pickering*: 'Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.'") (quoting *Pickering*, 391 U. S. at 572).

[192] *See Garcetti*, 547 U.S. at 420 ("That Ceballos expressed his views inside his office, rather than publicly, is not dispositive.") (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U. S. 410, 414 (1979)).

[193] *See, e.g.*, William G. Peterson, Note, *Splintered Decisions, Implicit Reversals and Lower Federal Courts:* Planned Parenthood v. Casey, 1992 B.Y.U. L. REV. 289, 289 (1992) ("The judicial system which Congress has created pursuant to Article III requires inferior or lower federal courts to abide by the decisions of the Supreme Court.").

[194] *Garcetti v. Ceballos*, 547 U.S. 410, 428-429 (2006) (stating "there is no good reason for categorically discounting a speaker's interest in commenting on a

public employees serves an important function in ensuring the accountability of public agencies.[195] Where such speech is interpreted as being part of the duties of a public employee, the ability of the public employee to provide valuable information to members of the public is chilled, leading to less public accountability.[196]

Preserving the public's ability to profit from the "informed opinion" of those who work within public agencies is a core principle of the *Pickering* doctrine.[197] Commentators have already noted that because of the way *Garcetti* has been applied, "public employees may be less likely to 'blow the whistle' on dishonesty or inefficiency in their workplace if doing so results in disciplinary action from vindictive supervisors."[198] This makes little sense; the public deserves to have the benefit of the special knowledge of teachers employed in the education system.

Ironically, those who work for the government are also among those most at risk to experience unlawful speech restriction from that same government. The broad application of *Garcetti*'s exemption in the appellate courts goes beyond the language of the Court's decision itself and unduly restricts educational employee speech. This interpretation will result in a chilling of the speech of public educational employees, which will lead to a reduction in information for public about the workings of public educational institutions.[199] As explored more fully below, the Court's reticence concerning academic speech creates uncertainty about *Garcetti*'s application, and the overly broad application in the federal appellate courts no doubt exacerbates this uncertainty, leading to the confusion of those "on the ground" in public educational workplaces trying to make day-to-day decisions based on the law in this area.

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matter of public concern just because the government employs him" and "[g]overnment employees are often in the best position to know what ails the agencies for which they work.") (internal citation omitted).

[195] Secunda, *supra* note 4, at 143; *see also* Norton, *supra* note 4 (arguing, in the government-speech context, that this accountability function should drive courts' determination of whether speech should be characterized as the government's own speech); Justin Bathon, *More on Why* Garcetti *Was Wrong for Schools*, EDJURIST, *available at*: http://www.edjurist.com/garcetti-and-schools (last visited March 17, 2010) ("Because teachers are our front lines, their perspectives are some of the best to have. The state and public are frequently benefited when teachers express their opinions, even if they are counter to what the administration feels comfortable with.").

[196] Secunda, *supra* note 4.

[197] *Garcetti*, 547 U.S. at 433 (Souter, J., dissenting) (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004)).

[198] Cloud, *supra* note 28, at 866; *see also* Secunda, *supra* note 4 (discussing the important role of public employees as informational sources ensuring accountability to the public).

[199] *See Garcetti*, 547 U.S. at 433 (Souter, J., dissenting) (quoting *Roe*, 543 U.S. at 82); Secunda, *supra* note 4.

These likelihoods may justify the Supreme Court's reconsideration of the *Garcetti* decision. However, barring that less likely scenario, lower courts have a duty to ensure that the Court's rule is not expanded beyond its factual basis. At a minimum, lower courts must recognize the very limited nature of the *Garcetti* exemption and apply it on its stated terms. The test offered through this article makes that task simple. If lower courts faced with public educational employee speech claims simply were to inquire whether, on the occasion in question, the public employee would have been in breach of his employment contract were he to have refrained from speaking at all, the question whether the employee's speech was made "pursuant to official duties" will all but answer itself.

V. TWO REMAINING PROBLEMS

Even a proper application of the *Garcetti* rule appears to leave a troubling amount of very important speech subject to no First Amendment protection whatsoever. Internal auditors who report safety violations, for example, can seemingly be punished under *Garcetti* for their true and accurate reports, simply because such reports are required by their job duties—and a similar conclusion seems compelled for any other employee with a compliance-ensuring function. Similarly, academic employees, who are required to speak through teaching and research, would seem to be unprotected under *Garcetti* against retaliation for such speech.

A. *Internal Auditor Speech*

A reasonable objection to the *Garcetti* rule is that it leaves categorically unprotected the speech of a public employee who is employed to audit the activities of the public entity employing him or her. In the academic context, such an employee may take the role of an academic ombudsman, an accounts auditor, or a professor with accounting responsibilities for an internal academic center or funded grant, among other roles. In each of these positions, the employee's official duties require the employee to engage in speech that has the potential to embarrass or upset the employer, making retaliation more likely. Such speech is thought to be vitally important in ensuring that the public employer does not act to waste or misuse the public's funds. Yet under *Garcetti*, this speech is categorically unprotected.

In *Renken v. Gregory*,[200] one of the few federal appellate court decisions applying the *Garcetti* rule to speech deemed to actually be

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[200] 541 F. 3d 769 (7th Cir. 2008). Although it would make a useful addition to Part IV.C., which discusses arguably correct applications of *Garcetti*, the decision is discussed here as the only example to date of *Garcetti*'s application to the speech of a professional whistleblower in a public educational institution.

required by official duties, the Seventh Circuit held unprotected a professor's internal complaints to university officials regarding alleged violations of National Science Foundation policies in the proposed uses of federal research grant funds.[201] The court held that, as the principal investigator of the grant in question, the professor had an official duty to report such misuse, rendering such reports unprotected as speech pursuant to the professor's official duties.[202]

Although this case appears to have been correctly decided in the technical sense, it should not sit well with those who see accountability to the public as an important basis for protecting public employee speech—particularly where such speech is of the "whistleblower" variety, directed at exposing wrongdoing.[203] Furthermore, even employing this article's proposed test does not solve the problem. Ostensibly, an employee engaged to report on fraud, waste, or mismanagement, who is then punished for such reporting, would seem to have been subject to punishment for *not* reporting, as well. Fully resolving this dilemma is beyond the scope of this article. Nevertheless, at least one possible approach exists to mitigate the effects of this apparent Catch-22.[204]

This approach is to take seriously Justice Stevens's objection that professional auditors must do their reporting externally to receive the First Amendment's protection,[205] and to allow for a few rulings in favor of employees who go outside their workplaces to

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[201] *Id.* at 774. Reasonable objections can be made to the *Renken* court's determination that the plaintiff's speech was in fact required speech, as the alleged "job requirement" seems to have come out of NSF regulations, rather than the professor's employment contract. *See id.* at 773-74. Nevertheless, in contrast to the other circuits studied, the Seventh Circuit in *Renken* at least based its ultimate decision on its factual determination that the speech was actually required, rather than bootstrapping a job requirement to the relatedness of the speech to the job, or the temporal or locational connection of the speech to the job. *See id.* at 774.

[202] *Id.* at 774.

[203] *See, e.g.*, Secunda, *supra* note 4; Norton, *supra* note 4. Justice Stevens points out that the *Garcetti* rule "perverse[ly]" requires such employees to report the irregularities they perceive outside the employment context, rather than to use the more efficient internal means of reporting such irregularities, if they want their statements to remain protected under the First Amendment. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting). However, it seems that only from a managerial effectiveness standpoint is this requirement "perverse." From a "whistleblowing" employee's perspective, if the objective is genuinely to expose wrongdoing and mismanagement in the public workplace for the benefit of the public, then it would seem to make the most sense to report outside the workplace.

[204] *See* JOSEPH HELLER, CATCH-22 (1961) ("There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions.").

[205] *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

report wrongdoing (while also covering themselves for contract purposes by contemporaneously reporting internally). It is obvious that public employers—especially the public employers least interested in accountability—will not want the dirty laundry of their offices aired without first having the opportunity to address the problems internally. After a few such rulings are issued, employers will likely understand that they must provide contract-based protections against speech-based retaliation if they expect their auditing employees to keep their reports internal.[206] Of course, this solution will ring hollow to those who prefer a constitutional backstop that does not depend on the location of the speech, so other approaches should be developed in further research.

B. *Academic Speech*

In the case of academic employees, the *Garcetti* Court may not have directly imperiled speech rights, but it may have done something worse—left academics and school teachers in a troubling state of uncertainty about their rights. This uncertainty stems from the *Garcetti* majority's response to Justice Souter's objection that the "pursuant to" rule, if applied on its terms, would justify retaliation against teachers and scholars for classroom and academic speech.[207]

Justice Kennedy addressed this objection by dismissing it:

> 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.[208]

Justice Kennedy's qualified and dismissive approach to Justice Souter's objection that the *Garcetti* rule would seem to exempt all teaching and scholarship from the First Amendment's protections at best suggests that these sorts of speech are indeed the "special concern[s] of the First Amendment" that the Court has previously

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[206] *Cf. id.* at 424 (positing that employers troubled by "perceived" incentives to report wrongdoing externally have the option of adopting policies protective of internal reporting).

[207] *See id.* at 438-39 (Souter, J., dissenting).

[208] *Id.* at 425.

implied them to be.[209] On the other hand, the Court's failure to explicitly say that the *Garcetti* rule does not extend to academic speech leaves an ominous alternative possible implication that the rule may apply to such speech, after all.

Compounding this uncertainty, several circuits have deliberately avoided consideration of the *Garcetti* rule in cases arising out of the classroom and curricular speech context. These federal appellate courts have taken Justice Kennedy's academic freedom dictum to mean that courts should not engage the *Garcetti* issue in the context of such speech. No case relating to academic *scholarship* has reached a federal appellate court, but three federal appellate cases involving *classroom speech* have resulted in avoidance of the *Garcetti* issue.

In *Lee v. York County School Division*,[210] the Fourth Circuit took the Court's dictum as an invitation to completely ignore *Garcetti* where a teacher's classroom teaching is involved. In *Lee*, the plaintiff taught high school Spanish. Lee posted on a bulletin board in his classroom materials that were religious in nature, and the school's principal later removed these materials unilaterally.[211] Lee sued the district, asserting both free expression and free exercise claims.[212] However, the primary issue that the court considered was whether the speech constituted protected expression.[213]

While the court ultimately (and correctly) held for the school board, the important part of the case is what the court elected not to address. In considering the threshold *Garcetti* inquiry, the Fourth Circuit sidestepped the issue, reasoning that, in *Garcetti*, the Supreme Court "explicitly did not decide whether [its] analysis would apply in the same manner to a case involving speech related to teaching."[214] Based on this reading of *Garcetti*, the court proceeded directly into the *Pickering* analysis.[215] It seems that the *Lee* court mistakenly read the

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[209] *Keyishian v. Bd. of Regents*, 385 US 589, 603 (1967) ("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.").

[210] 484 F.3d 687 [219 Ed. Law Rep. [413]] (4th Cir. 2007).

[211] *Id.* at 689-91.

[212] *Id.* at 691.

[213] *Id.* at 694-95.

[214] *Id.* at 695 n.11.

[215] *Id.* In an unpublished opinion, the Second Circuit held similarly as to classroom speech, employing the "legitimate pedagogical interest" test from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988) to hold the teacher's speech to be unprotected, and declining to reach the *Garcetti* issue. *See Panse v. Eastwood*, 303 Fed. App'x. 933, *1-*2 [242 Ed. Law Rep. [50]] (2d Cir. 2008).

Supreme Court's explicit decision not to decide the academic speech issue as a holding that *no* court should decide the issue.

Similarly, the Third Circuit sidestepped the question whether the *Garcetti* rule applied to the pregame speech of a coach in *Borden v. School District of the Township of East Brunswick*.[216] In *Borden*, a high school football coach led his team in prayer prior to games and also selected a student to lead the team in prayer during the pre-game meal.[217] Rather than engage the *Garcetti* rule, the court proceeded directly to the *Pickering/Connick* inquiry of whether Borden had spoken on a matter of public concern in leading the team in prayer, concluding that he had not and ending the analysis there.[218] In a footnote, the court explained its failure to analyze or even cite *Garcetti* in the body of the opinion, noting that it was unclear whether *Garcetti*'s rule applied in the educational context.[219]

In *Piggee v. Carl Sandburg College*,[220] the Seventh Circuit made a similar choice. Piggee was a part time cosmetology teacher at the defendant college who, during instruction time, put two anti-homosexual pamphlets into a gay student's smock.[221] After the gay student objected to college officials, Piggee's contract was not renewed for the following semester.[222] Piggee sued for retaliation. Sidestepping the *Garcetti* issue, the court declared:

> The Supreme Court's decision in *Ceballos* is not directly relevant to our problem, but it does signal the Court's concern that courts give appropriate weight to the public employer's interests. In that case, the employer had an interest in the deputy district attorney's recommendations about prosecutions, in the face of a problematic search warrant affidavit. Here, the public employer is a university, and its interest is in the instructor's adherence to the subject matter of the course she has been hired to teach.[223]

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[216] 523 F.3d 153 [231 Ed. Law Rep. [583]] (3rd Cir. 2008).

[217] *Id.* at 159.

[218] *Id.* at 170-71.

[219] *Id.* at 171 n.13. The court additionally, and without analysis, stated in the same footnote that, even if *Garcetti* were to apply, Borden's speech would be unprotected because Borden spoke as an employee pursuant to his coaching duties when he led and encouraged the prayers. *Id.*

[220] 464 F.3d 667 [213 Ed. Law Rep. [98]] (7th Cir. 2006).

[221] *Id.* at 668.

[222] *Id.*

[223] *Id.* at 672.

The court concluded that the *Garcetti* issue was not presented because the case boiled down to curricular control. As to this issue, the court easily concluded that the college was well within its prerogatives to demand that a cosmetology teacher teach cosmetology, not religion.[224]

These cases justify cautious optimism for those who seek to protect the expressive rights of teachers and scholars. The fact that each of these cases, as presented to the courts, would seem to have invited a *Garcetti*-based analysis, but each court nevertheless found a way to avoid reaching the *Garcetti* issue, is somewhat encouraging. It is possible that some federal appellate courts, mindful of the "special concern" that academic freedom arguably presents under the First Amendment,[225] prefer not to extend *Garcetti*'s exemption into the realm of academic speech.

If so, however, the courts' avoidance of the *Garcetti* issue seems to be the least preferable way to serve the values of academic freedom. Rather, if the federal courts remain concerned about *Garcetti*'s implications for academic freedom, as they should, the courts should take Justice Kennedy's dictum as an invitation to engage the issue that the Supreme Court expressly declined to engage. Justice Kennedy's response to Justice Souter's objection would not justify the decision of a lower court to avoid the *Garcetti* issue in a case presenting retaliation for classroom or scholarly speech. Rather, it would justify the lower court's own careful and independent analysis to determine whether an exception to the *Garcetti* rule is justified in the case of such speech, due to its unique value in the public discourse.

In response to Justice Souter's objection, the Court could have simply held that the *Garcetti* threshold test applies to public employees in general. This holding would have been broader than the one actually issued, but it would have been justified by the facts before the Court.[226] Nevertheless, the Court withdrew in the face of hypothetical facts concerning public employees employed to speak academically. The Supreme Court's hesitance to include academic public employees within its stated rule covering "public employees" may reasonably be read as a signal that the Court believes that further development in the lower federal courts is necessary before the *Garcetti* rule's application in the academic context may be fully

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[224] *Id.*

[225] *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("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.").

[226] *See supra* notes 54-56 and accompanying text (discussing the general principles of *stare decisis* and the importance of case facts).

understood.[227] With this general principle in mind, it is incumbent on the lower federal courts to fulfill this law-development role by addressing *Garcetti*'s application in cases with facts that require it to be addressed.

Contrary to the common wisdom on the matter, the Supreme Court has never explicitly recognized a stand-alone right to academic freedom for individuals under the First Amendment.[228] However, Supreme Court dicta have often referred to academic speech as having a form of special status in the First Amendment context.[229] Justice Kennedy's dictum in *Garcetti* obliquely refers to this special status and at least grudgingly concedes that the *Garcetti* case might be resolved differently were the speech in question classroom or scholarly speech.[230] Thus, the question remains whether and how the *Garcetti* rule applies to academic speech.

Prior to *Garcetti*, the *Pickering* regime made addressing this question unnecessary, as the *Pickering* balancing test applied to the speech of at least higher education teachers and scholars, and in the few cases in which the courts denied protection, they generally did so for speech that did not involve teaching or scholarship.[231] After *Garcetti*, this speech must be addressed. Academic speech both in the classroom and through scholarly research is inherently speech made

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[227] *See* Shapiro, *supra* note 182, at 274 (arguing that the Supreme Court has the ability to signal the importance of issues by choosing which cases it will decide); *id.* at 331 (discussing the phenomenon of "percolation," whereby the Supreme Court elects to allow the lower court doctrine to develop and frame issues of national concern that then "percolate" to the Supreme Court for final resolution); *cf.*, Solum, *supra* note 54, at 191-92 (discussing the process by which a Supreme Court holding becomes limited progressively through future decisions, until it is either limited to its unique facts or invalidated).

[228] *See* Frederick Shauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 908-13 (2006).

[229] *Parents Inv. in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724-25 [220 Ed. Law Rep. [84]](2007) (explaining that "universities occupy a special niche in our constitutional tradition"); *Keyishian*, 385 U.S. at 603. Professor Shauer also points out that the lower courts have, at times, been receptive to the concept of individual academic freedom, and he concludes that there may be a very limited right to choose classroom pedagogy and materials under these cases. *See* Shauer, *supra* note 228, at 911.

[230] *See Garcetti*, 547 U.S. at 425.

[231] *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 976 (2009) (referring to the lack of individual faculty plaintiffs in academic freedom cases after *Pickering*, stating, "The change in plaintiffs no doubt reflects the fact that after Pickering, most lower courts treated faculty-initiated internal disputes as ordinary public-employee speech cases."); *id.* at 975 n.153-156 and accompanying text (discussing a Third Circuit case and a Tenth Circuit case denying First Amendment protection for non-academic, governance-related speech); *id.* at 987-88 n.246-248 and accompanying text (discussing similar internal governance-related speech held to be protected).

"pursuant to official duties."[232] Employing this article's test, a scholar who refuses to publish scholarship is in breach of his employment agreement, as is a classroom teacher who refuses to speak in the classroom. Thus, academic speech falls squarely within the *Garcetti* rule's scope, even as appropriately and narrowly interpreted according to the approach advanced in this article. Therefore, in cases presenting facts involving retaliation for academic speech, courts must confront and resolve whether *Garcetti*'s rule applies to this speech, and if the courts decide that it does not apply, they must develop a coherent set of principles justifying the departure.

So far, only two federal appellate decisions have faced the question and resolved it directly. In *Mayer v. Monroe County Community School Corporation,*[233] the Seventh Circuit heard the case of a probationary elementary school teacher whose contract was not renewed after she answered a question from a student in her class. In a current events lesson, Mayer was discussing political protests. In response to a student's question whether Mayer had personally participated in a political demonstration, Mayer said that she did honk her car horn when passing a placard that read "Honk for Peace" during the second Iraq War.[234]

After the school district declined to renew her contract, Mayer sued for retaliation, citing this in-class expression. During the course of the suit, Mayer stipulated that speaking on current events was one of her official duties, and she rested her hopes entirely on the principles of academic freedom in seeking the First Amendment's protection.[235] This stipulation made the Seventh Circuit's decision on the threshold question easy—if speaking to her students on the topic of current events was one of her job duties, then her statements made during the current events lesson in question constituted speech "pursuant to" such duties.[236] However, the plaintiff contended, based both on general principles of academic freedom and on the

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[232] As Robert O'Neil points out, application of the *Garcetti* rule presents the perverse result of denying academics the ability to speak freely on the very matters of expertise comprising their academic posts, thus denying the public their unique knowledge and perspective. O'Neil, *supra* note 22, at 20.

[233] *Mayer v. Monroe County Comm. Sch. Corp.*, 474 F.3d 477 [215 Ed. Law Rep. [626]] (7th Cir. 2007).

[234] *Id.* at 478.

[235] *Id.* at 479. As this article points out, in the K-12 context, academic freedom-based arguments are generally unsuccessful, as *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 [43 Ed. Law Rep. [515]] (1988), places a very low bar for the school district employer to clear—the employer need only articulate a "legitimate pedagogical interest" to justify a restriction on curricular speech. Thus, Ms. Mayer's legal strategy to rely on academic freedom was likely a mistake, and a better approach would have been to contest the compulsory nature of her current events lesson.

[236] *Id.* at 480.

Seventh Circuit's prior avoidance of the *Garcetti* issue in *Piggee*, that the *Garcetti* rule does not control classroom speech.[237]

The court rejected this contention. The Seventh Circuit has historically held that classroom teachers do not have the freedom to choose instructional materials or deliver instruction in ways conflicting with the wishes of their supervisors.[238] Building from this existing rule, the court explained that "the school system does not 'regulate' teachers' speech as much as it *hires* that speech."[239] The court described a teacher's classroom speech as a "commodity" that the teacher "sells" to the school district, and explained that, as such, a teacher of history may not contradict his district's wishes by engaging in revisionist instruction, and a teacher of math may not elect on her own to teach calculus instead of trigonometry.[240] The court also pointed out that, unlike in most employee speech cases, K-12 teachers address their speech to a captive audience, a fact which necessitates that curricular and pedagogical decisional authority rest with those who may be voted out of office for poor decisions.[241]

Finally, the court rehabilitated its failure to decide the *Garcetti* issue in *Piggee* by distinguishing between Piggee's speech from Mayer's speech:

> Our remark that *Garcetti* was "not directly relevant" did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours; it reflected, rather, the fact that Piggee had not been hired to buttonhole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin. The speech to which the student (and the college) objected was not part of Piggee's teaching duties. By contrast, Mayer's current-

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[237] *Id.* at 479.

[238] *See id.* (citing *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 [63 Ed. Law Rep. [749]] (7th Cir. 1990) (holding that a classroom teacher did not possess a right to teach his students that the Earth was thousands, rather than billions, of years old).

[239] *Id.* (emphasis in original).

[240] *Id.* ("A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.").

[241] *Id.* at 479-80.

> events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly.[242]

Although it ruled against the teacher on the academic freedom issue, the court nevertheless justified its decision by drawing a clear line between speech merely made in the classroom while working and classroom speech made pursuant to teaching duties. *Mayer* therefore represents an encouragingly narrow application of the *Garcetti* rule, as well as a departure from the general line of federal appellate case law.[243] Further, the court left the door open for a different conclusion as to higher education academic speech, as well as scholarly writing by primary and secondary school teachers.[244] Thus, in the Seventh Circuit, the door to academic freedom for classroom teaching and curricular decisions remains closed, just as it was prior to *Garcetti*, but the issues left undecided in the *Garcetti* case remain undecided after *Mayer*.

In a similar case, *Evans-Marshall v. Board of Education*,[245] the Sixth Circuit recently addressed the claim of a high school English teacher who had experienced negative reactions—first from the community, then from the Board of Education, and finally from her principal—regarding her book choices and the pedagogical strategies that she used in relation to the books.[246] Ultimately, the Board voted unanimously not to renew the teacher's contract, and the teacher sued, alleging unconstitutional interference with and retaliation for her exercise of an alleged right "to select books and methods of instruction for use in the classroom without interference from public officials."[247] When the case reached the Sixth Circuit, the court rejected the plaintiff's argument that *Garcetti* should not be held applicable because of the Supreme Court's failure to squarely address the issue.[248] The court acknowledged that the exchange between Justice Kennedy and Justice Souter in the *Garcetti* opinion left open the application of the *Garcetti* rule to certain academic speech, but that K-12 classroom teaching is not among this speech.[249]

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[242] *Id.* at 480.

[243] *See supra* Part IV (discussing the general trend in the cases to expand *Garcetti*'s First Amendment exemption).

[244] *Id.* ("How much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* and *Piggee* and need not be resolved today. Nor need we consider what rules apply to publications (scholarly or otherwise) by primary and secondary school teachers or the statements they make outside of class.").

[245] ___ F.3d ___, 2010 WL 4117286 (6th Cir. 2010) (Slip Op.).

[246] *Id.* at *1-*3.

[247] *Id.* at *1.

[248] *Id.* at *10-*11.

[249] *Id.*

In rejecting the plaintiff's arguments, the court focused on two principles arising out of both the academic literature on academic freedom and the prior case law defining the concept. The first is that academic freedom exists primarily to protect scholarly research, and based on this principle, the protection of academic freedom likely exists only in the higher education context.[250] The court also cited Justice Souter's academic freedom-based objection to the *Garcetti* rule, which mentions only "the teaching of a public university professor," and that higher education faculty "speak and write 'pursuant to official duties.'"[251] The court further explained that, even assuming that academic freedom exists in the primary and secondary education contexts, it is an institutional right, not an individual right when the speech in question occurs in the classroom.[252] The court ultimately held that classroom teaching and expressive pedagogical choices, as speech made "pursuant to official duties," are unprotected under the First Amendment.[253]

Although it forecloses any kind of special protection for K-12 teachers, the Sixth Circuit's approach, much like the Seventh Circuit's, preserves the possibility that the academic speech of higher education employees may be treated differently than the speech of other public employees under the First Amendment. Still, other circuits may view the K-12 issue differently should they choose to switch their current course and engage the academic speech issue. And as pointed out above, no federal appellate court has taken on the teaching and scholarly speech of higher education academics. Thus, important questions remain regarding the applicability of *Garcetti* to teaching and scholarship. Fully resolving these issues is beyond the scope of this article, but a few starting points present themselves.

First, courts must seriously grapple with the question whether an *individual* right to academic freedom as a First Amendment right exists, and in fact whether it has ever existed, even in the higher education context.[254] The Supreme Court's recognition of the

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[250] *Id.* (citing J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251, 288 n.137 (1989)).

[251] *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting) ("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.'") (omissions in original).

[252] *Id.*

[253] *Id.* at *7.

[254] It seems clear after the Supreme Court's decision in *Grutter v. Bollinger* that at least a corporate or institutional conception of academic freedom has the status of a constitutional interest sufficient to satisfy the "compelling government interest" prong of the strict scrutiny analysis under the Equal Protection Clause. *See Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (reviewing Justice Powell's

principles of academic freedom has been spotty and, in the case of individual academic freedom, quite vague.[255] All of the Court's recent pronouncements on the issue of academic freedom relate to an institutional right, not an individual right.[256]

Second, if academic freedom does exist as an individual right, then in resolving the question of *Garcetti*'s application, courts should be mindful of the fact that First Amendment law consists of a variety of exemptions, some of which are themselves limited by counter-exemptions.[257] Take defamation, for instance, which is itself categorically exempt from First Amendment protections (exemption), but not if the allegedly defamatory statement concerns a public official or public figure (counter-exemption), unless the speaker can be shown to have acted with "actual malice" (fault-based limitation on the counter-exemption).[258] One can readily imagine a similar set of counter-exemptions for academic speakers. Thus, the structure of First Amendment jurisprudence may suggest a workable structure for the resolution of whether *Garcetti* applies to academic speech, and courts may choose to simply craft a limitation on the *Garcetti* rule that makes the rule inapplicable to academic speech.

Other potential approaches exist, of course. For example, prior to *Garcetti*, Professor Kevin Welner attempted to resolve the confusing state of doctrine surrounding the classroom speech rights of teachers. Professor Welner suggested that such rights be held to depend initially on concepts of notice, similar to those found in procedural due process jurisprudence, but tying the notice to the

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concurring opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-14 (1978), describing this concurrence as having grounded the government's interest in student body diversity in "the academic freedom that 'long has been viewed as a special concern of the First Amendment,'" and holding, "[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."). But as Professor Shauer points out, an individual right to academic freedom is more elusive. *See* Shauer, *supra* note 228.

[255] *See generally* Shauer, *supra* note 228.

[256] *See Parents Inv. Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 [220 Ed. Law Rep. [84]] (2007); *Grutter v. Bollinger*, 539 U.S. 306, 324 [177 Ed. Law Rep. [801]] (2003) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) ("The freedom of a university to make its own judgments as to education includes the selection of its student body.")).

[257] *See supra* note 5 and accompanying text (outlining some of the more familiar categories of speech exempt from First Amendment protections).

[258] *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (outlining the "public official" exception to the exemption of defamatory speech from First Amendment protections); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (recognizing the expansion of the exception to public figures).

scope of curricular speech regulation.[259] Under Professor Welner's approach, a "scripted curriculum" approach to managing a school's teaching, for example, would provide notice to teachers that curricular and pedagogical innovations are not permitted, while a less-scripted approach would suggest more academic freedom as to pedagogy and micro-curricular choices.[260]

Recently, in response to *Garcetti*, Professor Judith Areen proposed to add a third branch to the existing First Amendment dichotomy between "government-as-employer" and "government-as-sovereign," the former of which is a role typically thought to allow for more regulation of speech than the latter.[261] Under Professor Areen's formulation, there should be a new, third conception of the government's role as a speech regulator—"government-as-educator."[262] Speaking only of higher education employee speech, Professor Areen makes a powerful case that such speech ought to be presumptively protected wherever it involves teaching, scholarship, or participation in collegial faculty governance.[263]

Whatever resolution results from courts' analyses of the academic freedom issue, the point here is simply that courts have the responsibility to address the issue where cases present it. The *Garcetti* majority correctly declined to address the issue not because the Court wanted to permanently remove the issue from consideration, as some courts appear to believe. Rather, the Court was simply acting as we expect courts to act—declining to resolve a hypothetical issue of law not presented by the case before it.[264]

VI. CONCLUSION

This article has demonstrated that the rule in *Garcetti v. Ceballos* is a far narrower rule than the federal appellate courts have applied in education-related cases. The article has also advanced an approach to *Garcetti*'s "pursuant to official duties" inquiry that both mutes Justice Souter's concerns over indeterminacy and allows for a more principled approach to applying the threshold First

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[259] *See generally* Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959 (2003).

[260] Welner, *supra* note 259; *see also* AREND E. CARL, TEACHER EMPOWERMENT THROUGH CURRICULUM DEVELOPMENT: THEORY INTO PRACTICE 208-14 (3ed ed. 2009) (discussing the micro-curriculum that exists in the classroom).

[261] *See* Areen, *supra* note 231, at 994-99.

[262] Areen, *supra* note 231, at 994.

[263] Areen, *supra* note 231, at 994-99.

[264] *See, e.g.*, Leval, *supra* note 55, at 1261 (cautioning against courts engaging legal issues not presented in the case materials or argued by the parties).

Amendment exemption without further limiting rights. The path ahead for the lower courts should therefore be clear. Where a claim comes to a court presenting allegations of retaliation for speech, and—employing the test advanced in this article—the court determines that the speech was required as a contractual duty, the court should rule in favor of the employer. In contrast, where a claim is based on speech not required as a contractual duty, the court should proceed to the further steps in the *Pickering/Connick* analysis. Any contrary approach is foreclosed by *Garcetti*'s rule, and by the *Garcetti* Court's care in re-affirming and relying on both *Pickering* and *Givhan* to frame the outer boundaries of its new rule.

But where the speech is academic in nature—and thus is made pursuant to academic employment duties—the court should approach it with a fresh eye, understanding that the Supreme Court declined to include it in, or to exclude it from, *Garcetti*'s exemption, and that the law of academic freedom needs development and clarification. Understanding both what the *Garcetti* Court decided and what it did *not* decide clarifies both the limited scope of the *Garcetti* rule and the very important question of the rule's applicability to teachers and scholars that the Supreme Court all but invited the lower courts to resolve. The courts should accept the invitation.