9-1-2009

A Teacher's Right to Remain Silent: Reasonable Accommodation of Negative Speech Rights in the Classroom

Matthew Baker

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Education Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://digitalcommons.law.byu.edu/lawreview/vol2009/iss3/10

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
A Teacher’s Right to Remain Silent: Reasonable Accommodation of Negative Speech Rights in the Classroom

I. INTRODUCTION

Nearly every significant case analyzing public school teacher speech rights in the classroom involves affirmative expression. This should come as no surprise, given that the learning process in the classroom is built on active speech, mostly by the teacher. But what happens when the school district’s approved curriculum compels a teacher to express views that contradict the teacher’s own deeply held personal or religious beliefs? Given that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all,” may the teacher refuse?

In Palmer v. Board of Education, one of the few cases to squarely address the issue of a teacher’s negative speech rights in the classroom, the Seventh Circuit answered with a conclusory “No.”

1. See, e.g., Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007) (involving a teacher taking a stance on a contentious political issue in a classroom current events discussion); Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001) (involving a teacher’s presentation on industrial hemp in class); Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (involving a teacher’s choice of a play for a student production at school); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989) (involving a teacher’s use of a supplemental reading list at variance with district-prescribed curriculum).

2. See Todd A. DeMitchell, A New Balance of In-Class Speech: No Longer Just a “Mouthpiece,” 31 J.L. & EDUC. 473, 474–75 (2002). According to a study conducted by Ned Flanders (not to be confused with The Simpsons’ inimitably pious neighbor) and cited by DeMitchell, “teacher talk consists of approximately 80% of classroom activity.” Id. at 475 (citing NED FLANDERS, ANALYZING TEACHING BEHAVIOR (1970)).


4. 603 F.2d 1271 (7th Cir. 1979).

5. Indeed, other than Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994) (rejecting biology teacher’s claim that the school district violated his First Amendment rights by forcing him to teach evolution to his students), this was the only case I could find dealing with a teacher’s negative speech rights, which represents an even narrower subcategory of the “narrow” exception to state control of curriculum for religious expression and belief, affirmative or negative, discussed by the Palmer court. See Palmer, 603 F.2d at 1273 Peloza will not be addressed as extensively as Palmer because the teacher in the former case primarily relied on an Establishment Clause argument in which he argued that evolution

705
But the *Palmer* court largely ignored the issue of negative speech rights and based its holding instead on cases that involved affirmative speech rights in conflict with the prescribed curriculum.\(^7\) According to the *Palmer* analysis, it is irrelevant whether teachers are actively disregarding the curriculum in favor of their own content,\(^8\) or merely refusing to teach material that contradicts their deeply held beliefs.\(^9\) The First Amendment provides no protection in either case because teachers do not have such authority over the curriculum.\(^10\) Simply put, if the end result is frustration of the prescribed curriculum, it makes no constitutional difference to the analysis what reasons teachers give to justify or explain their behavior.

But it *should* make a difference. If we accept as true that “teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”\(^11\) then efforts must be made to preserve these rights so long as the efficient operation of public schools is not unduly compromised.\(^12\) As such, school districts

---

6. See *Palmer*, 603 F.2d at 1274 (“Plaintiff’s right to her own religious views and practices remains unlettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy.”).

7. *Id.* at 1273. The court cited three principal cases in support of its holding. *Id.* First, in *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), which, in the *Palmer* court’s view, involved a teacher who “ignored the prescribed course content and engaged in unauthorized student counseling,” the Seventh Circuit held that “the First Amendment was not a teacher license for uncontrolled expression at variance with established curricular content.” *Palmer*, 603 F.2d at 1273. Second, the *Palmer* court noted that in *Ahern v. Board of Education*, 456 F.2d 399 (8th Cir. 1972), the Eighth Circuit held “that the Constitution bestowed no right on the teacher to disregard the valid dictates of her superiors by teaching politics in a course on economics.” *Palmer*, 603 F.2d at 1273. Finally, in *Adams v. Campbell County School District*, 511 F.2d 1242 (10th Cir. 1975), the Tenth Circuit, as the *Palmer* court found, held “that the Board and the principal had a right to insist that a more orthodox teaching approach be used by a teacher who was found to have no unlimited authority as to the structure and content of courses.” *Palmer*, 603 F.2d at 1273.

8. This was what occurred in the three cases cited by the *Palmer* court: *Clark*, *Ahern*, and *Adams*. See supra note 7.

9. See *Palmer*, 603 F.2d at 1272.

10. See *id.* at 1272–73.


12. This approach is analogous to the balancing test used by the Supreme Court in *Pickering v. Board of Education*: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” 391 U.S. 563, 568 (1968).
and school boards should be required to make reasonable accommodations, such as an opt out provision, for teachers who refuse to teach material that directly violates their deeply held and preexisting personal or religious beliefs. The outline of such an approach can be drawn from values already present in school speech rights precedent, including Palmer. Reasonable accommodation of negative speech rights effectively balances the various interests and policy considerations implicated by speech rights in the schools, thus disarming the “troubling paradox” of democratic education while advancing some important educational values. It also displaces the government-as-employer from the awkward position of requiring speech that is fundamentally inconsistent with the teacher’s conscience, which is a potentially unconstitutional condition. Establishing a more appropriate standard is important because while cases involving the negative speech rights of teachers are rare, they

13. While negative speech cases most often involve religious beliefs, see, e.g., Palmer, 603 F.2d at 1272, protection should not be limited to one particular subset of speech. This Comment advocates a broader approach in keeping with Justice Jackson’s opinion in West Virginia State Board of Education v. Barnette. See generally 319 U.S. 624 (1943). As Professors Nowak and Rotunda observe, “Justice Jackson was careful not to limit the decision by basing it on the religion clauses of the First Amendment alone.” JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 16.4 (2d ed. 2005). Justice Jackson clearly signaled the breadth of the Court’s opinion in its most famous line: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Barnette, 319 U.S. at 642 (emphasis added).

14. See Martin H. Redish & Kevin Finnerty, What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox, 88 CORNELL L. REV. 62, 62 (2002). By “troubling paradox,” Redish and Finnerty refer to the tension between the need in a democratic system for “an educated electorate,” facilitated through discussion of diverse viewpoints, and the reality of the educational system as “an inherently authoritarian institution,” designed to inculcate a set of common values. Id. They propose an “anti-indoctrination” model of First Amendment analysis, “designed to allow courts to curb the most egregious governmental erosions of free thought while simultaneously leaving school systems with substantial discretion to control curricular and educational decision making.” Id. Others have similarly argued that the courts must find a way to balance these competing goals of the public school system described by the Supreme Court. See, e.g., Walter E. Kuhn, Note, First Amendment Protection of Teacher Instructional Speech, 55 DUKE L.J. 995, 997–98 (2006) (“At times, the Court has suggested that education demands open-mindedness and expression of multiple opinions, but at others it has indicated that primary and secondary schools play a unique role in inculcating fundamental societal values.”) ( citations omitted). In some sense, from a teacher’s perspective, reasonable accommodation of negative speech rights, as proposed in this Comment, serves the same basic end by respecting different opinions without undermining the inculcation of the common values chosen by those who frame the curriculum.
may arise more frequently as contentious political and religious issues make their way into primary and secondary school curriculum.15

Part II of this Comment reviews precedent in the area of negative speech rights for students and teachers to show that this is not an altogether foreign concept. Part III discusses the Palmer decision in more detail, focusing on the court’s failure to adequately account for the negative speech rights of teachers in the classroom, while also recognizing the value placed by the court on the rights of students to learn. Part IV then reviews the most popular analytical approaches courts use to determine the extent of free speech rights in the public school context, none of which is directly analogous to a case involving teacher negative speech rights. Yet at the same time, the policies and values reflected in these approaches provide guidance in framing a new approach for negative speech rights. Finally, Part V advances a reasonable accommodation approach to negative speech rights, including threshold limitations to avoid widespread litigation.

II. THE PRECEDENT FOR RECOGNITION OF NEGATIVE SPEECH RIGHTS IN SCHOOLS

Protection for negative speech rights in schools is not a new concept. Since the Supreme Court decided West Virginia State Board of Education v. Barnette,16 students have enjoyed First Amendment protection from officially compelled speech in the classroom setting.17 Justice Jackson’s poetic prose captures the breadth and tenor of this constitutional guarantee: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”18

15. The most obvious example would be discussion of sexual orientation, which has already resulted in at least one lawsuit by parents asserting free exercise rights on behalf of their children to opt out of lessons designed to teach children about homosexual relationships in a way that contradicted the religious views of the parents and children. See Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008).
17. See id. at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).
18. Id.
concurring in the result, offered a clearer but less colorful view: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all." 19

Of course, it takes a big leap of faulty logic to extend that same broad protection to teachers as public employees charged with expressing the values reflected in the curriculum chosen by school officials, high or petty. Underscoring this point, Justice Murphy's articulation of negative speech rights in Barnette includes a significant caveat: the Constitution protects negative speech rights, "except in so far as essential operations of government may require [affirmative speech] for the preservation of an orderly society." 20 This view finds analogous expression in the realm of affirmative speech rights in cases such as Pickering, where the Court weighed the teacher's right to expression against the interest of the government in efficient operation of the school system. 21 More broadly, the Supreme Court has long "recognized that the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" 22

Notwithstanding the Court's emphasis on the different constitutional role of the government-as-employer, there are a couple of reasons to believe that stronger negative speech rights protection for teachers in the classroom is not merely wishful thinking. First, in his Barnette opinion, Justice Jackson actually appears to place a greater burden on the state where negative speech rights are implicated: In light of the fact that affirmative expression can only be restricted by a showing of "clear and present danger," "[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." 23 Based on that standard, teacher negative speech rights should be afforded at least the same, if not more, protection than affirmative speech rights in the classroom. While the Barnette analysis applied specifically to student negative speech rights, courts have already

19. Id. at 645 (Murphy, J., concurring).
20. Id.
23. 319 U.S. at 633.
made a habit of adopting standards from student speech rights cases in the context of teacher speech rights.\(^{24}\)

Second, the Supreme Court's own approach to negative speech rights cases remains in flux and unpredictable.\(^{25}\) Generally, the Court has applied a flexible, fact-based approach, suggesting the need to take into account the varied nature and extent of infringement in each case.\(^{26}\) If the Court moves instead to "making principled

\(^{24}\) See, e.g., Bishop v. Aronov, 926 F.2d 1066, 1073 (11th Cir. 1991); Roberts v. Madigan, 921 F.2d 1047, 1056–57 (10th Cir. 1990). Bishop relied directly on Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), a case involving restrictions on school-sponsored student speech. See 926 F.2d at 1071. The Bishop court also specifically discussed the Tenth Circuit's reliance in Roberts on both Hazelwood and another student speech case, Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). See 926 F.2d at 1073. Although the Bishop court referenced the forum—i.e., "in-school expressions which suggest the school's approval"—rather than the type of speech at issue in Hazelwood, id. at 1074, and expressly disclaimed reliance on Tinker because it "involve[d] students, not teachers," id. at 1073, the court's borrowed standard only addressed "why Hazelwood permits regulation of teacher speech . . . while ignoring the how." See Karen C. Daly, Balancing Act: Teachers' Classroom Speech and the First Amendment, 30 J.L. & Educ. 1, 14 (2001). The Bishop court, like many others, "simply assume[d] that the Supreme Court standard [in Hazelwood], crafted to restrict student speech, should apply equally to teachers." See id. Indeed, the court's justification for its application of the Hazelwood standard—"insofar as it covers the extent to which an institution may limit in-school expressions which suggest the schools approval"—fails to address how application to teachers might be different. See Bishop, 926 F.2d at 1074.

Currently, this trend of analogizing to student cases results in more restrictive treatment of teacher in-class speech. See Daly, supra at 16 ("As interpreted by the lower courts, Hazelwood is increasingly hostile to the idea of teachers as reasonably autonomous professionals."). But if the tide turned, and courts began enforcing broader protection for the speech rights of teachers in the classroom, courts may analogize to Barnette in negative speech rights cases to extend even further protections to teacher speech. Because such a sea change is unlikely, this Comment advocates a separate reasonable accommodation analysis to increase protection for the negative speech rights of teachers.

\(^{25}\) Kari M. Dahlin, Note, Actions Speak Louder than Thoughts: The Constitutionally Questionable Reach of the Minnesota CLE Elimination of Bias Requirement, 84 Minn. L. Rev. 1725, 1736–37 (2000) ("Doctrinal uncertainty also permeates compelled speech cases because the Court applies a variety of analytical methods in reaching negative free speech decisions."); Leora Harpaz, Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism, 64 Tex. L. Rev. 817, 902 (1986) ("It is clear that the Supreme Court's approach to the [First Amendment problem of compelled expression and association is neither consistent nor adequate."). Professor Harpaz finds the Supreme Court's approach inadequate because it fails to distinguish between invasions of First Amendment rights that chill the expression of diverse ideas and "the less worrisome form of invasion" affecting only the rights of the individual complaining. See Harpaz, supra.

\(^{26}\) See Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("Compelling the affirmative act of a flag salute [in Barnette] involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate [in Wooley], but the difference is essentially one of degree."); see also Harpaz, supra note 25, at 913 (observing that the Court's
distinctions," as some critics have advocated,\textsuperscript{27} it may determine that there are vital constitutional principles connecting teachers and students on this issue. For instance, as Justice Jackson recognized in \textit{Barnette}, the fact that school officials "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."\textsuperscript{28} It may be confusing for students to realize that their minds are free, but their teachers' are not.

\section*{III. The Palmer Court Sidestepped the Issue of Negative Speech Rights}

As one of the few negative speech rights cases set in the classroom, the Seventh Circuit's decision in \textit{Palmer} effectively eviscerated any claim to negative free speech rights by teachers. What's more, the court did so without any meaningful discussion of negative speech rights. Under \textit{Palmer}, speech of any kind, affirmative or negative, is not protected when it departs from the prescribed curriculum of the school, and there is no need to weigh the teacher's interest against the interests of her employer. That said, the court appropriately recognized the interest of parents and students in the learning process that might be forfeited through \textit{per se} protection of negative speech rights for teachers. 

\textit{Palmer} involved a kindergarten teacher's refusal to abide by the prescribed curriculum related to patriotic matters, including participation in the Pledge of Allegiance, patriotic songs, and the celebration of some national holidays.\textsuperscript{29} As a faithful member of the Jehovah's Witnesses religion, the teacher claimed that such participation would violate her religious beliefs.\textsuperscript{30} In its short opinion, the court framed the issue not as whether the public school teacher had any cognizable negative speech rights, but as whether she was "free to disregard the prescribed curriculum concerning patriotic matters when to conform to the curriculum she claims

\footnotesize{decisions in the wake of \textit{Wooley} "reflect an effort to draw a line somewhere, but . . . this effort was effectuated more by seeing factual differences than by making principled distinctions".}

\textsuperscript{27} See, e.g., Harpaz, supra note 25, at 913.

\textsuperscript{28} \textit{W. Va. State Bd. of Educ.}, 319 U.S. 624, 637 (1943).

\textsuperscript{29} \textit{Palmer v. Bd. of Educ.}, 603 F.2d 1271, 1272 (7th Cir. 1979).

\textsuperscript{30} \textit{Id.}
would conflict with her religious principles.”

Having recast the issue to focus on authority over the curriculum, and not on the teacher’s individual rights, the *Palmer* court rejected any claim by the teacher to negative speech rights in the classroom by citing case law that establishes strict limits on a teacher’s right to engage in speech that conflicts with curriculum. The majority first cited *Epperson v. Arkansas*, in which the Supreme Court recognized “that the states possess an undoubted right so long as not restrictive of constitutional guarantees to prescribe the curriculum for their public schools.” In the majority’s view, Plaintiff’s free speech claim importuned “an exception to that general curriculum rule” rather than a cognizable constitutional right that would merit at least a balancing of the interests involved. In keeping with its focus on the curriculum, the *Palmer* court then relied on case law to hold, for example, that “the First Amendment was not a teacher license for uncontrolled expression at variance with established curricular content.” However, the court failed to discuss in any meaningful way the existence or extent of a teacher’s negative speech rights in the classroom. In fact, as noted in the introduction above, the three principal cases cited as authority for the court’s holding involved affirmative teacher expression in conflict with the prescribed school curriculum.

Moreover, the court dismissed any precedential value in cases that did involve negative speech rights at school because these cases did not address the “specific issue”— curriculum control—as defined

31. *Id.* The *Palmer* court’s successful reframing of the central issue in the case can be confirmed simply by consulting a compendious mainstream education law treatise, which characterizes the case as “holding that teachers may not teach outside the curriculum and that the curriculum is to be set by the school board.” RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:18 (2004).

32. 393 U.S. 97 (1968).
33. *Palmer*, 603 F.2d at 1272–73 (citing *Epperson*, 393 U.S. at 107.).
34. *Id.* at 1273.
35. *Id.* at 1273 (discussing the court’s own holding in *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972)).
36. The court did mention in passing that “[e]xtraordinary efforts were made to accommodate plaintiff’s religious beliefs at her particular school and elsewhere in the system, but it could not reasonably be accomplished.” *Id.* at 1272. However, the court failed to describe these efforts or evaluate them in light of the teacher’s negative speech rights, and did not hold that such efforts at reasonable accommodation were legally required of the school administration of school board.
37. *Id.* at 1272–73; see also cases cited supra note 7.
by the court. In these cases involving negative speech rights at school, courts upheld the right of students to refuse "to participate in a patriotic pledge contrary to their beliefs" and held that a "teacher could not be dismissed for her silent refusal to participate in her school's daily flag ceremonies." In discussing the latter case, the Palmer court made sure to underscore how the Second Circuit "carefully indicated that through its holding it did not mean to limit the traditionally broad discretion that has always rested with local school authorities to prescribe curriculum."

Rather than engaging in an examination of whether and to what degree protection for negative speech rights should extend to teachers in the classroom setting, the court reverted to analysis of the issue as it had defined it: whether a teacher can deviate from prescribed curriculum. Focusing on unauthorized deviation from curriculum as a significant factor is no doubt appropriate. However, curriculum control is not the only factor; the court conspicuously ignored any specific substantive discussion of a teacher's negative speech rights, or even more general discussion of negative speech rights in the classroom context.

The Palmer court does, however, appropriately recognize the significant interest of parents and students in the learning process—though it couches discussion of this interest in overblown criticism at the teacher's expense. Specifically, the court charges that by ignoring the prescribed curriculum, the "plaintiff would deprive her students of an elementary knowledge and appreciation of our national heritage." Allowing plaintiffs to selectively teach from the patriotic curriculum would provide students with "a distorted and unbalanced view of our country's history." Additionally, the court observed that "[p]arents have a vital interest in what their children are

38. Palmer, 603 F.2d at 1273.
40. Id. (citing Russo v. Cent. Sch. Dist., 469 F.2d 623 (2d Cir. 1972)). The Palmer court easily distinguished Russo by stating that, unlike Ms. Palmer, "[Ms. Russo's] job was not to teach patriotic matters to children, but to teach art." Id.
41. Id.
42. Id. at 1274. The Court's unflattering appraisal of the teacher's behavior goes even further, perhaps revealing its institutional bias as a product of the times: "In this unsettled world, although we hope it will not come to pass, some of the students may be called upon in some way to defend and protect our democratic system and Constitutional rights, including plaintiff's religious freedom. That will demand a bit of patriotism." Id.
43. Id.
taught," and this interest is protected through adherence to the prescribed curriculum. While consistent with the court's complete dismissal of the teacher's negative speech rights, the court's defense of the students' right to learn the curriculum is not entirely misplaced. Any protection for teacher negative speech rights must balance these rights against a student's interest in the learning process.

In sum, the Palmer court laid down a simple, bright-line analysis—or dismissal—of negative teacher speech rights: where those in authority to prescribe curriculum in schools have spoken, government can compel teacher adherence to the program without any regard for the teacher's deeply held personal or religious beliefs that may conflict with the curriculum. On a positive note, Palmer vigorously protects the important and unignorable interests of parents and students in the learning process. Additionally, this rule provides predictability and discourages lawsuits by aggrieved teachers. In spite of these beneficial results, the rule is fatally flawed in that it effectively strips teachers of their First Amendment right to be silent and compels them to speak as required or face discipline—all without any substantive discussion of their negative speech rights.

IV. THE FLAWED BUT HELPFUL SCHOOL SPEECH PRECEDENTS

Beyond the narrow confines of Palmer, courts rely upon four Supreme Court cases involving free speech rights in the school setting when analyzing teacher in-class speech: (1) Tinker v. Des Moines Independent Community School District, which famously declared that students and teachers could invoke First Amendment protections at school; (2) Hazelwood School District v. Kuhlmeier, which held that schools can restrict "school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"; (3) Pickering v. Board of Education, which established a balancing test to weigh "the interests of the teacher, as a citizen, in commenting upon matters of public concern [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"; and (4)

44. Id.
A Teacher's Right to Remain Silent

705

Garcetti v. Ceballos, which adds an additional threshold rule 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."\(^{48}\)

While helpful in identifying the values and boundaries of First Amendment protection for teachers, none of these cases provides a comprehensive and directly applicable approach to negative speech rights. This problem is exacerbated by wide disagreement among courts as to which of the available frameworks should be applied to teacher in-class speech cases,\(^{49}\) and by the fact that none of the current tests applied by courts are well-suited for the job. Though limited in applicability, these cases serve to underscore the most significant considerations that should be addressed in developing a distinct approach to negative speech rights. These considerations include the teacher's claim to speech rights at school, the government's pedagogical concern for the school curriculum, the distinction between speaking as a public employee or as a citizen, the distinction between speaking on a matter of public or private concern, and the need for efficient operation of public schools.

A. Tinker's Overarching Principle

Since the Supreme Court's landmark decision in Tinker v. Des Moines Independent Community School District,\(^{50}\) lower courts analyzing free speech rights in the public school context have parroted that decision's most famous line: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\(^{51}\)

Read uncritically, the Court's broad language appears to give broad

---


49. Daly, supra note 24, at 15–17. Even before the advent of Garcetti's additional threshold review, Daly describes a dramatic split in the lower courts: "The Third, Fourth, Fifth, Ninth, and D.C. Circuits apply Pickering, while the First, Second, Seventh, Eighth, and Tenth Circuits employ Hazelwood in their analysis of teachers' in-class speech rights." Id. at 16.

50. Tinker, 393 U.S. at 503.

51. Id. at 506. For example, see Bishop v. Aronov, 926 F.2d 1066, 1072 (11th Cir. 1991) ("While neither teachers nor students shed their constitutional rights to [free speech] at the schoolhouse gate[,] the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." (citations omitted)).
protection to teacher speech rights. But the Court further held that the Constitution protected these rights only to the extent that the teacher’s speech “did not disrupt the educational process or invade the rights of others.” The Tinker Court stopped short of outlining the precise analytical relationship between these competing interests.

As the boundaries have been drawn in Tinker’s wake, teacher speech protection has been more promise than practical reality. In spite of the seemingly strong support for protected speech rights in schools adopted by the Tinker Court, teachers have generally found that where in-class speech is concerned, they are still bound by the “unchallenged dogma . . . that a public employee [has] no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.” Indeed, some commentators argue that the various analytical frameworks applied by courts to determine the extent of teacher affirmative free speech rights in the classroom “provide[] inadequate protection . . . and result[ ] in excessive restrictions on classroom speech.” This is certainly true when compared with the

53. Id.
54. Connick v. Myers, 461 U.S. 138, 143 (1983). This represents the strict view of employee free speech rights passed down by Oliver Wendell Holmes while serving on the Supreme Judicial Court of Massachusetts: “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” McAuliffe v. Mayor of New Bedford, 29 N.E. 2d 112 (Mass. 1892), abrogation recognized by Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112 (Mass. 2000). One commentator has proposed a reconceptualization of the strict Holmesian theory in the form of an “internal/external model,” which applies the Holmesian theory to “all matters occurring on the job,” but affords “the same degree of protection enjoyed by speakers who are not government employees” for all matters occurring outside the job context. Randy J. Kozel, Reconceptualizing Public Employee Speech, 99 NW. U. L. REV. 1007, 1044 (2005). In other words, “a ‘citizen’ with powerful free speech protections becomes an ‘employee’ subject to employer speech restrictions the moment she begins work.” Id.
55. E.g., Daly, supra note 24, at 2. Daly’s article was published prior to the Supreme Court’s decision in Garcetti v. Ceballos, in which the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” 547 U.S. 410, 421 (2006). It is hard to see how this decision would broaden speech rights in the classroom, and, in fact, education and law scholars who have written on the effect of Garcetti conclude that “most signals arc to the contrary.” See 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, 219 (2008); see also Alison Lima,
broad language of the Tinker Court. But Tinker, at least in rhetorical if not practical terms, gave voice to the principle of First Amendment speech rights for teachers.

B. Pickering’s Balancing Test

The first installment of more specific guidance arrived with the Supreme Court’s decision in Pickering, which established “the foundation of modern public employee speech jurisprudence.”

Pickering involved a public school teacher who was fired for sending a letter to a local newspaper criticizing the school board and superintendent for their handling of past proposals to raise revenue for the schools. Justice Marshall described the Court’s difficult task in simple terms: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

In applying the test, the Court first determined that the teacher’s speech touched on a matter of public concern, and then balanced the interest of the teacher in writing the letter against the interest of the government in promoting efficient operation of the school. Ultimately, the Court held that the teacher’s dismissal was improper because his interest in making the critical comments outweighed the government’s interest in restricting him. The Pickering test thus functions in two steps. First, the court determines whether the teacher’s speech involves a matter of public concern; if not, then the government can restrict it outright. If the speech does involve a

Shedding First Amendment Rights at the Classroom Door?: The Effects of Garcetti and Mayer on Education in Public Schools, 16 GEO. MASON L. REV. 173, 173 (2008) (concluding that “recent case law suggests that public school teachers may indeed lose their First Amendment rights upon entering their classrooms”); see also Martha M. McCarthy, Garcetti v. Ceballos: Another Hurdle for Public Employees, 210 EDUC. L. REP. 867, 884 (2006) (identifying “sincere concerns that potential whistleblowers will conclude they must make a difficult choice between acting according to their consciences or keeping their jobs”).

56. Kozel, supra note 54, at 1015.
58. Id. at 568.
59. Id. at 569–75.
60. Id. at 574. The Court also based its ruling on the fact that there was no proof that the teacher knowingly or recklessly made the false statements contained in his letter. Id.
61. Id. at 568 (noting that teachers may not be “compelled to relinquish the First
matter of public concern, then the court must balance the interest of the teacher-as-citizen against the interest of the government-as-employer.62

But the Court left unresolved the scope of Pickering's applicability, undefined the precise nature of the government's interest as an employer, and unanswered the question of what qualifies as a matter of public concern. Lower courts have since broadened the scope of Pickering, applying it to cases involving speech by teachers inside the workplace or classroom.63 The Supreme Court itself has enhanced the Pickering definition of government's interest—that is, "promoting the efficiency of the public services it performs through its employees"64—with facilitating "the efficient function of [public employers'] operations,"65 and avoiding disruption to "work, personnel relationships, or the speaker's job performance" inasmuch as these "detract from the public employer's function."66

In Connick v. Myers,67 the Supreme Court attempted to outline the contours of what qualifies as a matter of public concern under the Pickering test.68 The Court concluded that speech involves a matter of public concern when it relates to "any matter of political,

Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest").

62. Id. At least one commentator has attacked the logical imbalance at work in the Court's formulation in that a teacher found to be speaking as a private citizen has her interest weighed against the interest of government-as-employer, rather than government-as-sovereign. Seeog Hun Jo, The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting, 31 J.L. & EDUC. 413, 418-19 (2002). If the teacher is treated as a citizen, it would be more appropriate and fair to balance her interest against the government-as-sovereign, giving the teacher a better shot at constitutional protection because government-as-sovereign is more limited in its ability to restrict. Id.

63. See supra note 1, with the exception of Mayer v. Monroe County Community School Corp., 474 F.3d 477 (7th Cir. 2007), in which the Seventh Circuit relied on the Garcetti standard.

64. Pickering, 391 U.S. at 568.


66. Id. at 388.


68. Id. at 140 (noting that the Court is returning to the Pickering problem again to "consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs").

718
social, or other concern to the community" as determined by the "content, form, and context of a given statement." Refining the Pickering test’s initial threshold question, the Connick Court held as follows:

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

Rather than clarify the Pickering test, the Connick contribution has resulted in further confusion. For example, some courts, expressly relying on Connick’s development of Pickering, have treated the employee’s role—i.e., as a private citizen or public employee—in making the statement as the determinative factor in the threshold analysis. Other courts explicitly disagree with this interpretation, focusing instead on whether the actual content of the speech touched on a matter of public concern. In advocating this latter approach, the Sixth Circuit directly criticized the former approach as a gross misreading of Connick: “As the Supreme Court made clear in its analysis, however, the key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee’s speech in fact touches on matters of public concern.

69. Id. at 146.
70. Id. at 147–48.
71. Id. at 147.
72. See, e.g., Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368-69 (4th Cir. 1998) (holding that “[s]ince plaintiff’s dispute . . . is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection” under the Connick public concern threshold); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798-99 (5th Cir. 1989) (holding that under the Pickering test as defined by Connick, teacher speech warrants “protected status if the words or conduct are conveyed by the teacher in his role as a citizen and not in his role as an employee of the school district”).
73. See, e.g., Cockrell v. Shelby County Sch. Dist., 270 F.3d 1036, 1051-52 (6th Cir. 2001) (holding that a teacher’s presentation on the benefits of industrial hemp survived the Connick threshold test because although the teacher "was speaking in her role as an employee . . . the content of her speech . . . most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest").
concern."74 After all, to answer the "public concern" threshold question on the basis of the employee's role in speaking "essentially gives a teacher no right to freedom of speech when teaching students in a classroom, for the very act of teaching is what the employee is paid to do."75

Given these serious analytical shortcomings and principled disagreements, the Pickering test, along with its Connick amendment, provides a poor framework in which to analyze cases of teacher in-class speech—although, as shown above, this has not stopped courts from trying.76 To begin, application of Pickering to in-class speech is inappropriate because Pickering involved teacher speech outside of the classroom.77 Teacher instructional speech is fundamentally different than the external speech at issue in Pickering. As such, the Pickering test both ignores "the right of students to hear diverse viewpoints in the classroom" and "fails to account for the importance of social value education and exposure to diverse opinions."78 The analogy to Pickering breaks down even further when considered in relation to a case involving the negative speech rights of teachers in the classroom. In dual contrast, Pickering addressed affirmative speech outside of the school context.

Moreover, the inclusion of disruption as part of the governmental interest to be weighed against the employee's interest in speaking amounts to "little more than the constitutionalization of a heckler's veto."79 Even assuming that a teacher's instructional speech touches on a matter of public concern and thus passes Connick's initial threshold, the government can restrict the speech simply because it causes sufficient disruption by offending too many students—or, more significantly, parents. The interests of parents and students in the learning process are obviously valuable, and teachers must be "somewhat beholden to the views of parents in the community."80 But this should not automatically place parents'

---

74. Id. at 1052 (citing Connick, 461 U.S. at 148–49).
75. Id. at 1051.
76. See supra notes 67–73 and accompanying text.
77. See Kuhn, supra note 14, at 1008 ("The most important criticism of applying Pickering to instructional speech cases is that the facts of the case do not exactly correspond to teacher speech within the classroom.").
78. Id. at 1009.
79. Kozel, supra note 54, at 1019.
concerns ahead of other competing interests, including the teacher’s right to speak and the student’s right to hear diverse viewpoints. And this heckler’s veto is even more dangerous to the protection of diverse viewpoints in the context of negative speech rights. Generally, the prescribed school curriculum reflects the majority views of the community, while negative speech rights are most likely to be asserted by teachers who espouse minority views. 81

The “public concern” threshold, however, represents the most problematic aspect of the Pickering test as applied to in-class teacher speech rights. First, by distilling the threshold inquiry to a narrow focus on the public or private nature of speech, or on the teacher’s role in speaking as a private citizen or public employee, courts ignore the broader effects and purposes of teacher in-class speech. These include, for example, “giv[ing] students ideas that may be part of the public debate and educat[ing] students about the process of rational discourse.” 82 In that sense, even when a teacher speaks as a public employee on matters not of public concern, “it still has a significant [and public] effect on society by instructing students on the process of public debate and exposing students to ideas they might encounter therein.” 83 This too should count as touching on a matter of public concern. Teacher in-class speech implicates these and other “special concerns” that are not adequately addressed through the Pickering/Connick distinction between public and private. 84

These issues are even more pronounced in the context of negative speech rights in the classroom, effectively rendering unworkable the Pickering test. After all, how should courts categorize a teacher’s refusal to speak for deeply personal or religious reasons? In Connick, the Supreme Court framed the choice as between a private citizen speaking on matters of public concern and a public employee speaking on matters of private interest. 85 But a teacher asserting negative speech rights does not fit in either

81. See, e.g., Palmer v. Bd. of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979) (involving a member of the Jehovah’s Witnesses faith asserting negative speech rights by refusing to teach what the court found to be mainstream, “traditional” patriotic material in order to avoid violation of her religious beliefs).
82. Kuhn, supra note 14, at 1009.
83. Id.
category. On one hand, if we focus on the teacher’s perspective, it would seem that the teacher “speaks” as a private citizen on a matter of private interest. On the other hand, if we focus more broadly on the students’ perspective in the classroom, the teacher arguably “speaks” as a public employee on a matter of public concern. Courts applying the Pickering test to a teacher’s assertion of negative speech rights would no doubt deem the personal nature of the speech as existing outside of the scope of cognizable “public concern.” But this does nothing to alleviate the troublesome analytical issues posed by such a case.86

In spite of these deficiencies, the Pickering test succeeds in highlighting several of the major considerations that must be addressed in a distinct standard for negative speech cases. These include the government’s interest in both promoting the efficient operation of schools and avoiding disruption to the students’ learning environment, the parents’ interest in the education of their children, and the need to broadly address the nature of the teacher’s speech.

C. Hazelwood’s “Pedagogical Concern” Test

As an analogy to cases involving teacher in-class speech, the Hazelwood “pedagogical concern” test presents a completely different set of issues. Unlike Pickering, which involved speech outside of the school,87 Hazelwood involved speech inside the classroom.88 At the same time, however, unlike Pickering, which

86. Indeed, if the emphasis in the Pickering/Connick threshold is on whether the teacher’s “words are those of a detached citizen and not . . . an interested employee,” as Professor Jo argues, Jo, supra note 62, at 417, then it would appear that, if anything, teacher negative speech rights should be singled out for protection as the speech of a “detached citizen.” The situation is further complicated by the Connick Court’s disclaimer to strict application of the public/private distinction: “We do not suggest, however, that Myers’ speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.” Connick, 461 U.S. at 147. Even if viewed as purely private speech, a teacher’s exercise of negative speech rights may still warrant protection as if the teacher were a private citizen.

88. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988). In Hazelwood, a high school principal removed two pages of the student-written and -edited high school newspaper prior to publication because he objected to two stories on those pages—one on teen pregnancy, the other on divorce. Id. at 263–64. The principal feared that the pregnant students featured in the teen pregnancy article might be identified, and that some of the subject matter would be inappropriate for younger students. Id. at 263. He was also concerned.
involved teacher speech rights.\textsuperscript{89} Hazelwood involved student speech rights.\textsuperscript{90} The dispute in Hazelwood centered on the school’s removal of questionable material from the student-edited school newspaper published as part of a journalism course at the school.\textsuperscript{91} Students who worked on the newspaper sued, claiming a violation of their First Amendment rights.\textsuperscript{92} In deciding the case, the Supreme Court held “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”\textsuperscript{93}

Many lower courts have applied the Hazelwood “pedagogical concern” principle to teacher in-class speech as well,\textsuperscript{94} so that any “expression representing the public school can be censored for legitimate pedagogical reasons.”\textsuperscript{95} In fact, this is now the dominant approach to teacher in-class speech cases among the lower courts,\textsuperscript{96} resulting in a decline in the success rate of teachers alleging violations of their First Amendment rights.\textsuperscript{97} The Tenth Circuit, which first incorporated the Hazelwood analysis in teacher speech cases,\textsuperscript{98} saw no problem with the fact that the Hazelwood case itself

\textsuperscript{89}. See Pickering, 391 U.S. at 566.
\textsuperscript{90}. See Hazelwood, 484 U.S. at 262.
\textsuperscript{91}. Id. at 263–64.
\textsuperscript{92}. Id. at 264.
\textsuperscript{93}. Id. at 273.
\textsuperscript{94}. See, e.g., Conward v. Cambridge Sch. Comm., 171 F.3d 12, 23 (1st Cir. 1999) (holding that while members of the school community do not shed their First Amendment rights, school officials can restrict school speech through regulations reasonably related to legitimate pedagogical concerns); Miles v. Denver Pub. Sch., 944 F.2d 773, 777 (10th Cir. 1991) (applying the Hazelwood standard in light of “the special characteristics of a classroom environment”); Bishop v. Aranov, 926 F.2d 1066, 1078 (11th Cir. 1991) (holding that a University can restrict teacher classroom conduct when such restrictions are “issued under its authority to control curriculum”); Roberts v. Madigan, 921 F.2d 1047, 1057 (10th Cir. 1990) (holding that any school speech that forms “part of the school curriculum or school-sponsored activities” is subject to greater restriction than personal speech).
\textsuperscript{95}. McCarthy & Eckes, supra note 55, at 214.
\textsuperscript{96}. Kuhn, supra note 14, at 1012.
\textsuperscript{97}. Id. at 1011–12.
\textsuperscript{98}. Id. at 1010.
involved not teacher but student speech: “We find no reason here to draw a distinction between teachers and students where classroom expression is concerned.”

Not surprisingly, critics of the Hazelwood test aim squarely at this very distinction between teachers and students—and they do not mince words. One commentator, addressing the Tenth Circuit’s approach specifically, declares it “as ominous as it is questionable” that the Hazelwood test “was developed in the context of student speech in supervised learning settings.”100 In other words, it is highly objectionable that a test geared toward exerting more control in student speech cases should be applied to exert “greater administrative control in teacher speech cases.”101 Another commentator takes great umbrage that teacher speech would be treated the same as student speech, even charging that Hazelwood, as applied by courts to teacher speech rights, results in “the subtle infantilization of teachers.”102 Hazelwood effectively gives school officials “the power to treat employees as if they were unruly children.”103 Instead, courts should recognize that “[t]eachers, as well as administrators and much more so than students, have a stake in defining ‘legitimate pedagogical concerns.’”104 Though perhaps overstated, the practical implications of these critical observations raise a more serious problem: because “teachers are far more likely to engage in curricular speech than students,” application of Hazelwood by courts to teacher speech cases “strip[s] a far greater proportion of teacher speech of constitutional protection, possibly restricting the universe of protected teacher speech within the schools to conversations in the teachers’ lounge or ‘random comments’ in the classroom.”105

It is precisely for these reasons that the Hazelwood “pedagogical concern” test fails as a workable standard for teacher negative speech rights in the classroom. Certainly, a teacher’s assertion of negative

---

99. Roberts, 921 F.2d at 1057.
101. Kuhn, supra note 14, at 1020.
102. See Daly, supra note 24, at 16.
103. Id.
104. Id. at 15 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).
105. Id. at 41–42 (citing Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1305 (7th Cir. 1980)).
speech rights through refusal to teach the prescribed curriculum presents the school with a legitimate pedagogical concern. This approach, however, raises two interrelated problems. First, *Hazelwood* involved affirmative speech by students. Applying this same standard to negative speech by a teacher seems to ignore the different character of speech. Second, and more significantly, as the critics lament, application of *Hazelwood* to teacher speech cases puts the teacher on constitutional par with students. And yet, unlike the teacher in *Palmer*, whose negative speech rights were not protected by the First Amendment when she refused to teach patriotic material because she was a member of the Jehovah's Witnesses, students who assert negative speech rights are protected in nearly identical situations. That said, *Hazelwood*, like *Palmer*, recognized a significant value that must be addressed in an approach to negative speech rights for teachers: the vital importance of the prescribed curriculum to the learning process and the educational system.

**D. Garcetti’s Additional “Official Duties” Threshold Requirement**

While the foundational case in the area of public employee speech rights involved the exercise of teacher speech rights, teachers are often subject to analytical standards developed in cases arising in the broader context of public employment outside of education. The Supreme Court’s *Garcetti* decision laid down the most recent and most significant of these standards. In *Garcetti*, a deputy district attorney claimed that he was reassigned, transferred, and denied a promotion on the basis of a memo he wrote to his supervisor communicating his opinion that an affidavit used to obtain a search warrant in a case he was handling contained serious misrepresentations. Rather than examine the case under the

---

106. See *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1272 (7th Cir. 1979).
110. *Garcetti*, 547 U.S. at 414–15. The deputy district attorney wrote the memo detailing perceived inaccuracies in the affidavit after he did not receive a satisfactory explanation from the warrant affiant. *Id.* at 414. His supervisor met with the sheriff’s department to discuss the issue, and after that discussion determined that the case should go forward in spite of the district attorney’s reservations. *Id.* The trial court held a hearing on a defense motion challenging the warrant, and the defense called the district attorney to testify.
Pickering standard as the Ninth Circuit had done in ruling for the employee, the Supreme Court established a new threshold inquiry that must be determined before application of the Pickering balancing test: “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.” Applying this threshold standard to the deputy district attorney’s memo, the Court concluded that “his expressions were made pursuant to his duties as a calendar deputy” and reversed the Ninth Circuit decision.

Invoking his inner-Holmes, Justice Kennedy, writing for a narrow five-to-four majority, gave substantial—indeed, near total—deference to government-as-employer in restricting speech made in furtherance of the employee’s official duties. In identifying the “overarching objectives” of the Court’s jurisprudence on public employee speech, he began by stressing that “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” Although the majority acknowledged that society has an important interest in protecting speech made by public employees as citizens on matters of public concern, Justice Kennedy’s opinion focused more heavily on the interest of government employers in exercising a “significant degree of control over their employees’ words and actions.” The only real limit placed on government restriction of public employee speech is essentially toothless: restrictions imposed “must be directed at speech that has some potential to affect the entity’s operations.” In short, Garcetti represents a bright-line approach that excludes public employee speech made pursuant to official duties from First

---

concerning his observations. Id. at 414–15. The trial court rejected the motion. Id. at 415.

111. Id. at 415–16.
112. Id. at 421.
113. Id.
114. Id. at 426.
115. For a brief introduction to the view of Justice Holmes on public employee speech rights, see supra note 54.
116. Garcetti, 547 U.S. at 418 (citation omitted).
117. See id.
118. Id.
119. Id. (emphasis added).
Amendment protection.\textsuperscript{120} 

It remains unclear what effect the \textit{Garcetti} decision will have on teacher in-class speech rights,\textsuperscript{121} though some believe the practical impact may be minimal.\textsuperscript{122} The Supreme Court’s majority opinion, in response to concerns raised by Justice Souter in dissent, contained the following relevant disclaimer: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”\textsuperscript{123} Many lower courts have not yet applied the new threshold standard to the classroom setting. The Seventh Circuit, however, has relied on \textit{Garcetti} in holding that a teacher’s expression of her personal views on the war in Iraq as part of class discussion was not constitutionally protected speech.\textsuperscript{124} In its brief and conclusory opinion, the court found that “\textit{Garcetti} applie[d] directly” to the teacher’s speech because it occurred during a “current-events lesson [which] was part of her assigned tasks in the classroom.”\textsuperscript{125} But the court’s holding does not depart in the least from its basic deferential approach to the school system in prescribing curriculum\textsuperscript{126}—an approach it also employed in \textit{Palmer}.\textsuperscript{127} 

As applied to teacher speech in the classroom, the \textit{Garcetti} threshold would appear to remove First Amendment protection from all speech made by teachers as part of their job, especially in light of the Seventh Circuit’s ruling.\textsuperscript{128} This rigid approach effectively

\textsuperscript{120} See id. at 421.
\textsuperscript{121} McCarthy & Eckes, \textit{supra} note 55, at 224.
\textsuperscript{122} Id. at 225 (reasoning that “public school authorities have always had more latitude to censor employees’ expression in the classroom than their comments on public issues made outside school”).
\textsuperscript{123} \textit{Garcetti}, 547 U.S. at 425.
\textsuperscript{125} \textit{Id}.
\textsuperscript{126} \textit{Id}. ("It is enough to hold that the [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.").
\textsuperscript{127} See Palmer v. Bd. of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979) ("[The school board has] in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.").
\textsuperscript{128} Indeed, the Seventh Circuit specifically emphasized that “the school system does not ‘regulate’ teachers’ speech as much as it \textit{hires} that speech.” Mayer, 474 F.3d at 479. As such, teacher speech is by definition made in furtherance of a teacher’s duties on the job.
“eliminate[s] any semblance of tailoring restrictions on teacher speech to the interests that those restrictions serve,” such as promoting the efficient operation of school and preventing disruption of the learning process.129 Indeed, some critics characterize the Garcetti rule as simply “an additional barrier” to application of the more favorable Pickering test, which would actually balance the teacher’s interest in speaking with the government’s interests in restricting.130

Moreover, a threshold developed in the broader context of employee speech may not be well suited for application in the classroom setting. Teachers already occupy a precarious position on the battleground of public employee speech rights. Given the sheer volume of teacher speech required by the job, teachers are vulnerable to any shift toward further restriction of public employee speech. With the unique nature of teaching in mind, some scholars argue that “the speech of teachers is somehow qualitatively different from that of other public employees, [thus] necessitating special protection.”131 If strictly applied to classroom speech, the Garcetti rule would deny even the most basic protection available through Pickering.

As with the other tests discussed in this Part, the Garcetti rule appears to be even less helpful in the case of negative speech rights. The teacher’s negative speech may occur on the job, but it strains credulity to construe such speech as somehow being made “pursuant to [the teacher’s] official duties.”132 The Garcetti majority reinforced its conclusion that the deputy district attorney’s memo was written pursuant to his official duties by reasoning that he “did not act as a citizen” in doing so.133 A teacher refusing to teach discrete portions of the curriculum for personal or religious reasons appears to be acting as a citizen, not as an employee. Garcetti thus provides little guidance in analyzing the negative speech rights of teachers in the classroom.

130. See McCarthy & Eckes, supra note 55, at 218–19.
131. Daly, supra note 24, at 42. Daly mentions the theoretical work of Alexander Meiklejohn, Amy Gutmann, and Charles Beard in “developing a basis for protection of teacher speech based on its unique function.” Id. at 42 n.235. For further discussion of these theories, see Merle H. Weiner, Dirty Words in the Classroom: Teaching the Limits of the First Amendment, 66 TENN. L. REV. 597, 653–54 (1999).
133. Id. at 422.
A Teacher's Right to Remain Silent

classroom. But, as with the other cases treated above, Garcetti does offer a strong perspective on the interests of the government-as-employer in restricting employee speech that must be considered in fashioning any approach to negative speech rights.

To review, none of the available standards applied to school speech rights cases seem appropriate for cases involving the negative speech rights of teachers in the classroom. At the same time, however, each of the cases discussed above outlines one or more of the important considerations that must be addressed in any attempt to frame a new standard. These include the following: from Tinker, the general notion that teachers do not abandon their First Amendment rights at school; from Pickering, the government's interest in promoting the efficient operation of schools and preventing disruptions, and the need to address the nature of the teacher's speech and the teacher's interest in speaking; from Palmer and Hazelwood, the vital importance of the prescribed curriculum; from Hazelwood, the school's interest in regulating speech that might be attributed to it; from Palmer and Pickering, the parents' interest in the prescribed curriculum and the education of their children; from Palmer, the students' interest in learning the prescribed curriculum; and, finally, from Garcetti, the government's interest in regulating speech by employees in carrying out their duties.

V. REASONABLE ACCOMMODATION OF TEACHER NEGATIVE SPEECH RIGHTS IN THE CLASSROOM

This Comment proposes that school districts and school boards should be required to make reasonable accommodations for teachers who refuse to teach material that directly violates their deeply held and preexisting personal or religious beliefs. The following section defines the reasonable accommodation standard; demonstrates how it balances the policy considerations gleaned from Part IV's review of school speech rights cases and, in the process, advances important educational values; and discusses the possible dangers of restrictions on teacher negative speech rights in the classroom as an unconstitutional condition of employment.

A. Defining Reasonable Accommodation

Under the proposed reasonable accommodation standard, a teacher must first show that discrete curricular materials or classroom
activities required as part of employment contradict the teacher’s deeply held and preexisting personal or religious beliefs. Once this showing is made, the school district or school board must demonstrate that no reasonable accommodation could be made under the circumstances, which vary from school to school and district to district. 134 In some respects this standard is similar to Pickering’s balancing test. Whether a reasonable accommodation has been made by school officials will still require an inquiry into the relative interests of each party. Schools will not be required to make an accommodation that undermines the efficient operation of the school or disrupts the learning process to any significant degree. 135 What changes under this analysis, however, is that the burden rests more squarely on school officials once a teacher has shown that the required speech violates the teacher’s personal or religious beliefs against the dictates of conscience. More importantly, the reasonable accommodation standard ignores entirely the threshold question of whether the teacher is speaking as a citizen on a matter of public concern, or as a public employee on a matter of private interest. This distinction makes little sense in the context of negative speech rights.

Although at first glance this appears to be a radical departure from the orthodox view of teacher speech cases, invocation of such protection would be limited in several important respects. First, teachers must give notice prior to the start of employment by reviewing the curriculum and informing school administrators if there are potential conflicts. This notice requirement serves a dual purpose: (1) facilitating early cooperative efforts between the school

134. As such, a reasonable accommodation agreed to by one school or district cannot be required of another school or district when the facts show that such an accommodation is unreasonable under the circumstances of the latter school or district.

135. This notion of reasonable accommodation is borrowed—self-consciously, though in stronger form—from the language of the Civil Rights Act of 1964, which mandated protection in the employment context of “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” § 701(j), 42 U.S.C. § 2000e(j) (2000). Interpreting this provision in Ansonia Board of Education v. Philbrook, the Supreme Court stated that employers face an extremely low threshold, exemption for “undue hardship” requiring only a showing that “[a]n accommodation results in ‘more than a de minimis cost’ to the employer.” 479 U.S. 60, 67 (1986) (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)). The version of reasonable accommodation proposed in this Comment has more force, requiring a showing of significant negative impact on the efficient operation of the school.
and teacher to arrive at a reasonable accommodation, and (2) ensuring that a teacher does not disrupt the school’s operation by bringing (possibly frivolous) conflicts to light in the middle of the school year. Because only deeply held and preexisting personal and religious beliefs warrant reasonable accommodation by schools, teachers should vouch for the sincerity and validity of their claim by giving proper notice to their employer before the start of the year.

Second, the curricular material at issue must be relatively small in volume and discrete. While this is obviously not a concrete, bright-line standard, courts are well equipped to make judgments as to the amount of material and the substantiality of the teacher’s refusal to teach it. If a teacher refuses to teach large portions of required material, a presumption arises that no reasonable accommodation would be possible. A biology teacher, for example, could not ask for reasonable accommodation to avoid teaching the theory of evolution. But an elementary school teacher might be justified in refusing to participate in the Pledge of Allegiance each morning, if the students could be taught to lead the pledge on their own, or with the occasional oversight of a parent, an aide, or another teacher. Generally, reasonable accommodation is most appropriate for minor routine activities, such as the flag salute, or for discrete substantive topics to be covered over distinct segments of time. Control over the former might be ceded to students or aides, while responsibility for the latter can be shifted to a teacher who does not object to the material, with the refusing teacher taking the other’s place during that time. No matter what the arrangement, reasonable accommodation must not alter the prescribed curriculum or deprive

136. This appears to have been the case in Palmer v. Board of Education, given that the teacher refused to teach “any subjects having to do with love of country, the flag or other patriotic matters in the prescribed curriculum.” 603 F.2d 1271, 1272 (7th Cir. 1979). Although the court does not require reasonable accommodation efforts by the school board, it does mention that “extraordinary efforts were made to accommodate plaintiff’s religious beliefs at her particular school and elsewhere in the system, but it could not reasonably be accomplished.” Id.

137. Cf. Peloza v. Capistrano Unified Sch. Dist., 87 F.3d 517 (9th Cir. 1994) (rejecting a teacher’s claim that school officials violated his First Amendment rights by forcing him to teach evolution). It makes little sense for a teacher who feels so strongly about certain curricular material to teach a subject to which that material is critical. No reasonable accommodation is possible in such circumstances.

138. Or, alternatively, the teacher and the school may work out a lesson plan that depersonalizes the material. That way, the teacher would still teach the lesson, but would not be forced to express personal affirmation with the principles being taught.
students of the opportunity to learn the material.

Although such an approach may lead to conflict between a teacher and school officials, the reasonable accommodation standard provides both sides with incentive to cooperate. If the teacher is too demanding, she runs the risk of forfeiting her protection. If school officials are too inflexible, they run the risk of a costly lawsuit they will likely lose. Like the *Pickering* balancing test, the reasonable accommodation inquiry seeks to balance all interests by protecting teacher negative speech rights without disrupting the school’s operation.

**B. Balancing Policy Considerations and Advancing Educational Values**

Reasonable accommodation of teacher negative speech rights in the classroom effectively balances the divergent policy considerations and interests at stake in the determination and, by so doing, advances several important educational values. Providing increased negative speech rights protection does more than simply validate the teacher’s right to a free mind and conscience. It also serves many important educational goals related to the curriculum and students’ learning outcomes. Through this process, the reasonable accommodation standard achieves balance among the competing policy interests by granting limited negative speech rights to teachers without undermining the interests of government, parents, and students. In fact, in many ways it furthers those interests.

Other than *Tinker* and, to a far lesser degree, *Pickering*, the precedential cases relied upon to determine teacher speech rights in the classroom heavily favor the government. For instance, the significant policy considerations discussed in *Hazelwood* and *Garcetti* focus almost exclusively on the government’s interests. And in *Palmer*, the only case involving negative speech rights, the court summarily dismissed the teacher’s claims in deference to the authority of the school board to prescribe curriculum—and did so with “traditional” bias. Though it may seem so, adoption of a

---

139. It may also lead to an increase in latent employment discrimination at schools, with school districts avoiding or removing teachers most likely to invoke the reasonable accommodation protections. But anti-discrimination laws already cover these situations, so further safeguards would seem unnecessary.

140. See supra text accompanying note 41.
reasonable accommodation standard does not simply reverse the field and favor the teacher against the government. It does, however, seek to recognize and further other policy interests that do not play much of a role in the prevailing speech rights analysis—but not at the complete expense of the government’s significant interests. Ultimately, reasonable accommodation provides much needed balance among the competing interests of the government, the teacher, the students, and the parents.

1. Protection of the government’s interests

The government essentially holds three significant interests in the determination of teacher negative speech rights in the classroom: (1) authority over and advancement of the prescribed curriculum; (2) control over expression that might be attributed to the school; and (3) regulation of teacher speech to promote efficient operation of, and prevent disruption to, the educational system.

Under a reasonable accommodation standard, the first and second interests remain intact. As discussed above, by definition an accommodation is not reasonable if the prescribed curriculum is ignored through the teacher’s refusal to teach it. And given the personal nature of a teacher’s refusal, there is little chance the negative speech will be attributed to the school. Indeed, the Hazelwood Court specifically focused its holding on “school-sponsored expressive activities,” which presumably excludes teacher negative speech of the sort at issue here. Moreover, courts applying Hazelwood in the context of teacher in-class speech rely on the fact that teacher speech is more attributable to the school than student speech: “While a student’s expression can be more readily identified as a thing independent of the school, a teacher’s speech can be taken as directly and deliberately representative of the school.”141 Not so with the narrow negative speech rights protected under reasonable accommodation.

But the government’s third interest is burdened to some small degree by the reasonable accommodation requirement, but not in any manner that might have a significant deleterious effect on the operation of schools or the learning process. Again, by definition an accommodation is not reasonable if it requires significant

modification of existing practices and structures. The government’s interests are generally protected in the same way as before. Reasonable accommodation of negative speech rights for teachers in the classroom simply provides a narrow exception to the general rule.142

2. Protection of the teacher’s interests

The interest of teachers at stake in this determination is important and obvious: First Amendment protection for personal or religious expression. Unlike the prevailing standards applied to teacher in-class speech, reasonable accommodation gives teachers some limited measure of protection against compelled affirmation of values or beliefs inconsistent with their own.

Additionally, reasonable accommodation gives the teacher an opportunity to expose her students to a different viewpoint in a non-threatening manner. In our educational system, teachers are charged with the task of preparing students to think about and analyze diverse viewpoints and opinions. In every classroom, the teacher fills a “special role as the moderator of and contributor to the ‘marketplace of ideas’” from which students learn.143 Rigid application of the prevailing restrictive standards deprives students of access to other viewpoints by silencing or compelling one of their primary sources. Reasonable accommodation of negative speech rights allows for the non-threatening expression—indeed, by silence!—of different viewpoints without undermining the core goals of the prescribed curriculum. After all, it seems “unfair to charge teachers with this awesome responsibility while simultaneously denying them any protection for their classroom expression.”144 Negative speech, as well as affirmative speech, provides a gateway of understanding into other perspectives that are, more than likely, not part of the official curriculum. In short, a reasonable accommodation standard assists the teacher in discharging part of her responsibility as the purveyor of diverse viewpoints in the classroom.

142. Here we have echoes of Palmer v. Board of Education: “Plaintiff would have us fashion for her an exception to that general curriculum rule.” 603 F.2d 1271, 1273 (7th Cir. 1979). The Seventh Circuit recognized that “[t]he issue is narrow.” Id. So, too, is the reasonable accommodation exception proposed in this Comment.


144. Lima, supra note 55, at 198.
3. Protection of the students' interests

Reasonable accommodation of teacher negative speech rights protects and furthers the students' core interest in the determination of whether teacher speech is protected; that is, an interest in the best learning outcomes possible. As mentioned above, reasonable accommodation will not deprive any student of the opportunity to learn the prescribed curriculum. In fact, protection of negative speech rights through reasonable accommodation enhances the prescribed curriculum and benefits students through non-threatening exposure to different viewpoints, protection from indoctrination and the "pall of orthodoxy," and instruction in and affirmation of their rights as citizens participating in democracy.

Reasonable accommodation validates the students' right to hear. According to Karen C. Daly:

The right to hear contains two related components: the right of students to avoid indoctrination and the right to be exposed to a variety of ideas and viewpoints during the course of their education. Protection of teacher speech prevents the first right from being violated and enables the second right to be realized.

By refusing to teach material contradicting her own deeply held personal or religious beliefs, a teacher offers both a different view of the world and a brief, but undistruptive, respite from the orthodoxy of the classroom. It serves as a reminder that the prescribed curriculum provides one view of things, but by no means the only view.

More significantly, a teacher's exercise of her negative speech rights in the classroom offers students a practical demonstration of their rights as citizens and participants in democracy. Reasonable accommodation of these rights embodies the spirit of Justice Jackson's astute observation in Barnette: "That [school officials] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not

146. Daly, supra note 24, at 31. Daly admits that the doctrine "rests on a relatively uncertain judicial foundation." Id. (citing Catherine J. Ross, An Emerging Right for Mature Minors to Receive Information, 2 U. PA. J. CONST. L. 223, 230 (1999) ("[T]he right to receive information remains a relatively unexplored aspect of freedom of speech even when adults assert such a claim."). But for policy purposes, the notion of a student's right to hear has at least some persuasive power.
to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 147 Indeed, "[s]tudents cannot learn the value of their protected freedoms in an environment that chills the rights of the teacher to model and demonstrate." 148 And teachers "cannot effectively teach students to be powerful democratic participants when [they] participate like sheep." 149 There is nothing sheepish about a teacher's exercise of negative speech rights through reasonable accommodation. In fact, the teacher might bring comfort and encouragement to students in the class or school who hold sincere personal or religious beliefs that require them to exercise negative speech rights by opting out of certain material in the prescribed curriculum. School can be an unforgiving place for students who must sometimes participate outside of the mainstream culture. That a teacher does too, on occasion, might be a welcome revelation.

4. Protection of the parents' interests

Parents hold interests in the prescribed curriculum being taught by the teacher, and in the education of their children as students. These interconnected parental interests remain undisturbed by reasonable accommodation of teacher negative speech rights. As the Seventh Circuit noted in Palmer, "[p]arents have a vital interest in what their children are taught." 150 They establish and shape the curriculum through their representatives in government. 151 As such, these interests mandate that "[i]t cannot be left to individual teachers to teach what they please." 152 Thus, when a teacher ignores the curriculum in favor of his own affirmative expression, this speech is not protected. 153 But with reasonable accommodation of teacher negative speech rights, there is no such deviation from the curriculum. All that changes is the person

149. Id. at 235 (citing RANDY BOMER & KATHERINE BOMER, FOR A BETTER WORLD: READING AND WRITING FOR SOCIAL ACTION 19 (2001)).
151. Id.
152. Id.
153. See supra note 7 and accompanying text.
teaching it. Negative speech of the sort contemplated by the reasonable accommodation standard generally does not affect parental interests the way affirmative speech can.

C. Unconstitutional Conditions

Finally, a brief note on “unconstitutional conditions,” a doctrine under which reasonable accommodation of teacher negative speech rights may be legally required. Put simply, the unconstitutional conditions doctrine means that “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”\textsuperscript{154} When government acts as an employer, conferring privileges and benefits through hiring employees, the doctrine of unconstitutional conditions might be applied.\textsuperscript{155} This suggests that by not recognizing teacher negative speech rights, and thus conditioning employment on a waiver of the teacher’s First Amendment right to free expression, the government runs afoul of the doctrine and must accommodate.

The case for unconstitutional conditions is not so simple, however, for two main reasons. First, the doctrine “has little independent force in modern practice.”\textsuperscript{156} In fact, “when some condition is actually invalidated, the work is almost invariably done not by the doctrine of unconstitutional conditions, but by something else entirely.”\textsuperscript{157} It is difficult to say whether this jurisprudential fact, by itself, would invalidate a teacher’s claim under the doctrine. From the cases reviewed in this paper, only rarely has “something else” been available for application to the restrictions at issue. Nor have any of the litigants or judges seriously pursued an unconstitutional conditions analysis.

Second, and more importantly, for the doctrine to apply the government must require the teacher to waive a preexisting constitutional right.\textsuperscript{158} Thus, “care must be taken to ascertain which

\textsuperscript{155} Kozel, supra note 54, at 1029.
\textsuperscript{156} Id. at 1030.
\textsuperscript{157} Id. (quoting Frederick Schauer, \textit{Principles, Institutions, and the First Amendment}, 112 HARV. L. REV. 84, 103 (1998)).
constitutional rights the complainant has and what it is that the complainant is being asked to give up as a condition of obtaining an opportunity offered by the government." Professor Buss has offered the following illustrative discussion based on a situation where the government "tell[s] a teacher who is hired to teach literature that she must assign Uncle Tom's Cabin and not Huckleberry Finn".

The suggested parallel is that the teacher has been hired on the condition that she waive her constitutional right of freedom of speech to say what she believes to her students. . . . Citizens generally do have a constitutional right of freedom of speech to communicate ideas about Huckleberry Finn to a willing audience in a place where they have a right to be. Prior to being hired to teach, however, no one has a constitutional right to teach a particular subject in a particular place (say, for instance, by assigning and discussing Huckleberry Finn to a particular group of students in a particular public school classroom). A teacher hired with directions to teach Uncle Tom's Cabin (and not Huckleberry Finn) has waived no constitutional right, because the teacher remains free to exercise the right to communicate ideas about Huckleberry Finn to a willing listener not supplied by the employer at the place of employment. What the teacher has given up is not a constitutional right because the teacher had no prior right to teach Huckleberry Finn to the group of students provided by the employer.

Professor Buss's hairsplitting example clearly shows how, in general, restrictions on affirmative speech by teachers that strays from the prescribed curriculum do not amount to unconstitutional conditions. But in a case involving negative speech rights, the analysis seems less clear and more awkward—partly because the audience and location factors do not seem as relevant. Prior to being hired to teach, a teacher arguably has a preexisting constitutional right not to teach a particular subject in a particular place; put differently, before hiring the teacher, the government cannot force her to teach a particular subject in a particular place. In that sense, then, by forcing the teacher to teach a particular subject in a particular place as a condition to its offer of employment, the

159. Id. at 235.
160. Id.
161. Id. at 235-36 (emphasis added).

738
government has in fact violated the unconstitutional conditions doctrine. Nevertheless, it seems likely that a court would simply characterize the preexisting constitutional rights and conditions in a way that avoids this outcome through hairsplitting similar to Professor Buss's audience and place considerations in the above example. In other words, the court would conclude that prior to being hired, the teacher had no constitutional right to engage in negative speech in front of a classroom full of children provided by the employer. Thus, while promising in theory, the unconstitutional conditions doctrine would no doubt disappoint in practice.

VI. CONCLUSION

Reasonable accommodation of negative speech rights for teachers in the classroom would afford limited but vital protection to the First Amendment rights of teachers by requiring school officials to engage in good faith cooperative efforts. School officials would still retain their substantial interests in promoting efficient operation and preventing disruption of schools, through both the expectation that the accommodation be reasonable and the limitations placed on teachers seeking to invoke the protection. Overall, the reasonable accommodation standard balances rather than frustrates the significant interests of the government, teachers, students, and parents. At the same time, exercise of such negative speech rights enhances the educational experience of students, expanding on the prescribed curriculum without ignoring or replacing it. In contrast to the currently prevailing frameworks, which largely favor the government by almost completely ignoring the teacher's rights, reasonable accommodation presents a more reconciliatory approach that serves all interests well.

As Justice Souter observed in his Garcetti dissent: "[T]he lesson of Pickering (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake."162 Reasonable accommodation

represents just such an attempt at a small adjustment in a teacher's right to remain silent.

Matthew Baker*

* The author dedicates this Comment to his wife Jackie, and sons, Liam and Evan, for their patience and sacrifice in his behalf during law school.