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Think of the Children: How the Role of Students in the Classroom Informs Future Applications of *Garcetti v. Ceballos* in Academic Contexts

INTRODUCTION

In *Garcetti v. Ceballos*,¹ the Supreme Court determined that public employees may raise successful First Amendment speech claims only when speaking in their capacity as private citizens. Although this rule applies to almost all public employees, the Court specifically chose not to answer whether this rule applies to “speech related to scholarship or teaching” because there “is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”² In subsequent cases, the circuit courts have split concerning this potential exception to the *Garcetti* rule. Similarly, First Amendment scholars have disagreed on whether professors should have greater First Amendment protection than other public employees.

Although several different arguments have arisen on both sides of the debate (mostly dealing with whether academic freedom should protect an academic institution or individual teachers), very little has been published by judges or scholars concerning how the role of students in the classroom should factor into determining whether professors’ speech should receive greater protection than the speech of other public employees. This relative silence is startling because students are clearly the primary targets of “speech related to . . . teaching” and “classroom instruction,” and consequently deserve some analytical attention. For example, if courts wish to justify giving additional protection to professors’ speech by stating that the classroom is “peculiarly the marketplace of ideas,” a justification the Supreme Court has previously stressed when discussing the First Amendment rights of teachers,³ it seems necessary that future courts

1. 547 U.S. 410, 419 (2006).

2. *Id.* at 425.

3. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotation marks omitted).

consider whether students are capable of truly participating in such a marketplace. Additionally, regardless of the justification for protecting professors' speech, it is also necessary to determine whether students should be considered captive audiences, which would make their interests as listeners much more important in a First Amendment analysis.

This Note contributes to the post-*Garcetti* debate concerning professors' free speech rights by introducing the rights and roles of students to the discussion. Consideration of students' rights and roles leads to the conclusion that professors should be given greater free speech protection for their speech related to scholarship but not for their speech related to teaching. Part II of this Note reviews the pertinent Supreme Court and circuit court cases on professors' speech. Part II discusses the post-*Garcetti* scholarship that has considered whether *Garcetti* should apply to speech related to teaching and scholarship. Part III considers the relevance of students to the issue, identifying studies and other sources that demonstrate students' general inability to participate in a marketplace of ideas within the classroom and their potential status as captive audiences.⁴ Part IV proposes that, in light of these insights, future courts should separate speech related to teaching from speech related to scholarship for purposes of the *Garcetti* rule, exempting the latter, but not the former. Parts V and VI defend this proposal from likely criticisms and provide a concluding summary.

I. BACKGROUND

Traditionally, the Supreme Court has been very supportive of professors' speech in the classroom. In fact, in 2003, the Court noted, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."⁵ Despite the special niche that has existed for professors' speech, the *Garcetti*

4. This paper will focus primarily on undergraduate students at colleges or universities. It is generally assumed, for purposes of this paper, that if undergraduate students are unable to participate in a marketplace of ideas within a classroom, elementary and secondary students will be at least as unable to participate therein. The same assumption is true for any captive audience argument.

5. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

Court's hesitancy to shield such speech from its rule has opened the door for federal courts to reexamine whether professorial speech should receive any special treatment. This section will briefly examine some of the Court's pre-*Garcetti* discussion of academic freedom⁶ and the role *Garcetti* and its progeny have played in challenging the added protection that professors' speech had acquired.

A. Supreme Court Academic Freedom Cases

One of the first opinions to suggest that professors' speech might require greater protection than the speech of other public employees was Justice Frankfurter's concurring opinion in the 1952 case *Wieman v. Updegraff*.⁷ In *Wieman*, the Court ruled that an Oklahoma statute that required all public employees to take a "loyalty" oath violated the Due Process Clause.⁸ The oath required public employees to swear that they were not currently—nor had been within in the past five years—affiliated with any organization that had "been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization."⁹ While concurring in the opinion, Justice Frankfurter wrote separately to emphasize why the statute's application to university professors was particularly problematic.¹⁰ Justice Frankfurter summarized the problem as follows:

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.¹¹

6. The cases to be discussed have been selected based on their prominence in Justice Souter's dissent in *Garcetti* and the majority opinion in *Grutter*.

7. 344 U.S. 183, 194–98 (1952) (Frankfurter, J., concurring).

8. *Id.* at 184 (majority opinion).

9. *Id.* at 186.

10. *Id.* at 194 (Frankfurter, J., concurring).

11. *Id.* at 196.

Although only one other Justice joined Justice Frankfurter's concurrence, the essence of Frankfurter's idea that teachers have the special responsibility to foster "habits of open-mindedness and critical inquiry" was later adopted by a majority of Justices as a principal reason for the academic freedom theory of professorial speech.

Five years after *Wieman*, the Supreme Court emphasized the importance of professorial academic freedom in *Sweezy v. New Hampshire*.¹² In *Sweezy*, the Court ruled that a district court had improperly held a university professor in contempt for refusing to answer the Attorney General's questions concerning his associations with the Progressive Party and the content of several lectures he had provided to university classes.¹³ While the Court did not indicate how much scrutiny government action would be given when academic freedom was restricted,¹⁴ the Court emphatically stated in dicta that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," and that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."¹⁵ Despite this strong language, the Court did not rely on the academic freedom theory in its actual holding; instead, it found the actions unconstitutional on due process grounds.¹⁶

The Court's last landmark academic freedom case dealing with professors' free speech rights occurred ten years after *Sweezy*. In *Keyishian v. Board of Regents*,¹⁷ several faculty members of a public university challenged provisions of New York law that made "treasonous or seditious" utterances grounds for dismissal from

12. 354 U.S. 234, 250 (1957).

13. *Id.* at 237-42, 249-50.

14. The Court declined to answer this question after concluding that the Attorney General's questions violated the Due Process Clause because there was no government interest of any kind in having the Attorney General obtain information concerning the professor's past speech and associations. *Id.* at 254-55.

15. *Id.* at 250.

16. *Id.* at 254-55 ("The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment.").

17. 385 U.S. 589 (1967).

public service.¹⁸ After the faculty members failed to sign a certificate stating that they were not affiliated with the Communist party, in accordance with regulations passed pursuant to those provisions, each member became subject to dismissal; one of them, Keyishian, was denied a contract renewal as a result.¹⁹ The Court again noted the importance of academic freedom by stating that “[o]ur Nation is deeply committed to safeguarding academic freedom,” and, more specifically, that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”²⁰ As with the previous cases, however, the Court did not rely on the academic freedom theory in its holding but found that the relevant provisions were unconstitutional because they were vague and overly broad.²¹

Two final cases merit some brief discussion because of their contribution to the general theory of academic freedom, even though they are not freedom of speech cases. In *Regents of University of California v. Bakke*²² and *Grutter v. Bollinger*,²³ the Court addressed whether certain college and university admission programs were constitutional. Although coming to opposite conclusions for the individual programs at issue,²⁴ the Court in each instance stated that “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.”²⁵ These cases indicated that academic freedom, at least sometimes, functions at an institutional level. This result has led to tension between the competing concepts of institutional academic

18. *Id.* at 593–95.

19. *Id.* at 592.

20. *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.N.Y. 1943)).

21. *Id.* at 603, 608–10.

22. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

23. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

24. In *Bakke*, the admission program at issue was deemed unconstitutional because it functioned as an impermissible quota program. 438 U.S. at 319–20. In *Grutter*, the Court held that the admission program at issue was permissible because it did not function as a quota program. 539 U.S. at 335–36.

25. *Bakke*, 438 U.S. at 312; *Grutter*, 539 U.S. at 324 (endorsing that line from Justice Powell’s opinion in *Bakke*).

freedom and the academic freedom of individual professors. This tension has come to the forefront of First Amendment jurisprudence in the wake of *Garcetti*.

B. The Garcetti Rule and Subsequent Circuit Court Split

Although *Garcetti v. Cabellos* did not directly involve academic speech, the Court's opinion in *Garcetti* has given courts and scholars reason to debate how much First Amendment protection academic speech deserves. *Garcetti* involved a deputy district attorney who wrote a disposition memorandum for his employer and participated as a witness for the defense in challenging a warrant.²⁶ The attorney did not dispute that these actions were consistent with his official duties as a prosecutor.²⁷ The attorney claimed that after taking these actions he was "subjected to a series of retaliatory employment actions."²⁸

After the attorney's employment grievance was denied based on a finding that his employer had not actually retaliated against him, the attorney filed a lawsuit claiming that his employer had violated the First and Fourteenth Amendments through the alleged retaliatory actions.²⁹ The Court noted that its past decisions sought "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."³⁰ "With these principles in mind," the Court concluded "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."³¹ Consequently, the attorney could not bring a First Amendment claim against his governmental employer because his speech (writing the memo) was pursuant to his official duties.³²

26. *Garcetti v. Ceballos*, 547 U.S. 410, 413–15 (2006).

27. *Id.* at 421.

28. *Id.* at 415.

29. *Id.*

30. *Id.* at 420.

31. *Id.* at 420–21.

32. *Id.* at 424.

After so ruling, the Court acknowledged Justice Souter's dissent, which argued that the majority's "decision may have important ramifications for academic freedom, at least as a constitutional value."³³ In his dissent, Justice Souter used *Keyishian* and *Sweezy* to demonstrate that "[academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."³⁴ This special concern led Justice Souter to state, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"³⁵ In response to these concerns, the majority chose not to decide "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."³⁶ As a result, *Garcetti* left circuit courts without any direction for how to handle future First Amendment claims brought by professors against their governmental employers.

It is no surprise, therefore, that in the eight years since *Garcetti*, the circuit courts have split regarding whether the new public employee rule should extend to speech related to scholarship or teaching.³⁷

Two circuits, the Third and Seventh, have held that, despite the concerns expressed in Justice Souter's dissent, the *Garcetti* rule applies to teachers and professors, at least in some circumstances. In a case where a tenured professor was allegedly disciplined for assisting a student athlete, the Third Circuit applied the *Garcetti* rule, but only after acknowledging Justice Souter's academic freedom concerns and emphasizing that the professor's actions "clearly were not 'speech related to scholarship or teaching.'"³⁸ While such an application does not address the ultimate issue, it does show that the Third Circuit is

33. *Id.* at 425.

34. *Id.* at 439 (Souter, J., dissenting).

35. *Id.* at 438 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

36. *Id.* at 425 (majority opinion).

37. In addition to the circuit court split, two circuits have thus far explicitly declined to rule on the matter. *See Panse v. Eastwood*, 303 F. App'x 933, 934–35 (2d Cir. 2008) (recognizing the circuit split but declining to rule on the matter because the appellant did not raise the issue on appeal); *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 18 (D.C. Cir. 2008) (noting that the Supreme Court left "undecided the many questions relating to the concept and breadth of academic freedom" but choosing to not resolve the issue because the case did not "raise any serious questions" about the issue).

38. *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

willing to extend the *Garcetti* rule to cover some speech from professors pursuant to their official duties.

Going even further, the Seventh Circuit has been willing to apply *Garcetti* across the board.³⁹ In *Renken v. Gregory*, the court applied *Garcetti* to a professor who was allegedly punished for speaking out to his university's administration about the proposed use of grant funds.⁴⁰ Despite extending *Garcetti*, the court did not explicitly inquire into whether the rule should apply to speech related to teaching and scholarship. This changed in *Mayor v. Monroe*, where the Seventh Circuit affirmed a grant of summary judgment that applied *Garcetti* to a teacher whose contract was not renewed after she took a stance—during an elementary school class that she was teaching—against the United States' military involvement in Iraq.⁴¹ In affirming the judgment, the Seventh Circuit stated that *Garcetti* applied because “the school system does not ‘regulate’ teachers’ speech as much as it *hires* that speech.”⁴² Additionally, the court found that “pupils are a captive audience” because their education is compulsory and because they are likely to be indoctrinated.⁴³ The court concluded “the first amendment 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.”⁴⁴

On the other side of the spectrum, the Fourth⁴⁵ and Ninth⁴⁶ Circuits have held that the *Garcetti* rule does not apply to speech related to teaching and scholarship at any level. The Fourth Circuit exempted this speech simply because the Supreme Court “explicitly

39. See *Renken v. Gregory*, 541 F.3d 769, 773–74 (7th Cir. 2008); *Mayor v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007).

40. *Renken*, 541 F.3d at 774 (“*Renken* was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform.”).

41. 474 F.3d at 478, 480.

42. *Id.* at 479 (“Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved program calls him one . . .”).

43. *Id.*

44. *Id.* at 480.

45. *Adams v. Trs. of the Univ. of N.C.—Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007).

46. *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013).

did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching.”⁴⁷ The Ninth Circuit exempted the speech after conducting a thorough analysis of *Garcetti* and concluding that “if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”⁴⁸ Specifically, the court noted that the academic freedom principles discussed in *Keyishian*, *Sweezy*, and *Grutter* could not be adequately preserved unless speech related to teaching and scholarship is exempt from the *Garcetti* rule.⁴⁹

The differences in the reasoning of the Fourth and Ninth Circuits—and similarly the differences in the reasoning of the Third and Seventh Circuits—demonstrate that even where circuits agree concerning the proper application of *Garcetti*, they are still split as to why the conclusion is proper. This indicates a need for more guidance from the Supreme Court. Additionally, despite the many different reasons given for extending or not extending *Garcetti* in these cases, none of them include a detailed analysis of how the role of students in the classroom should factor into the determination. This is especially true with regard to the role of college students in the classroom.

II. POST-GARCETTI SCHOLARSHIP

Not only has the *Garcetti* opinion caused a division among the circuit courts, but it has also sparked a debate among legal scholars. Within the post-*Garcetti* scholarship addressing the rule’s application to speech related to scholarship or teaching, scholars generally fit into three categories:⁵⁰ those who conclude that *Garcetti* should apply to both scholarship and teaching, those who maintain that *Garcetti* should not apply to either scholarship or teaching, and

47. *Lee*, 484 F.3d at 694 n.11; *see also Adams*, 640 F.3d at 562–64.

48. *Demers*, 729 F.3d at 1019.

49. *Id.* at 1019–20.

50. There is also a fourth category of scholars who do not proscribe a specific application but simply summarize the current state of the academic freedom theory. *See, e.g.*, Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1 (2013). Due to its primarily descriptive nature, such scholarship is less applicable to the topic at hand and will not be summarized in this section.

those who contend that *Garcetti* should apply in some situations but not in others.

Scholars in the first category, who would apply *Garcetti* to both scholarship and teaching, commonly argue that the academic freedom theory is not at odds with an extension of *Garcetti* because the theory covers only the academic institution, not individual professors.⁵¹ Some of these scholars also call into question the very idea that a classroom is “peculiarly the marketplace of ideas.”⁵² Regardless of the reasoning, these scholars believe that speech related to teaching and scholarship is not sufficiently different from the speech of ordinary government employees to justify an exemption to the *Garcetti* rule.

Scholars who contend against applying *Garcetti* to speech related to teaching and scholarship argue that application of the rule would prevent students from developing necessary skills and discourage professors from acquiring and teaching the cutting-edge knowledge that is vital to a proper education.⁵³ These scholars also emphasize the aspirational language of the Supreme Court’s early academic freedom cases to demonstrate that all professorial academic speech deserves more First Amendment protection than the speech of other governmental employees.⁵⁴

51. See, e.g., Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Caballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 645–49, 656 (2012) (arguing that *Garcetti* should at least apply to some speech related to academia and teaching because teachers must be evaluated on their speech for job performance).

52. Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL’Y 321, 337–38 (2008) (internal quotation marks omitted) (“The academic marketplace functions neither as an economic marketplace driven by laws of supply and demand nor as a wide-open, uninhibited marketplace where multitudes of differing ideas can clash.”).

53. See, e.g., Hilary Habib, *Academic Freedom and the First Amendment in the Garcetti Era*, 22 S. CAL. INTERDISC. L.J. 509, 535 (2013) (“A university is a setting unique from the public institutions like the DMV because, in a public university setting, professors’ First Amendment protection is crucial to engaging students in critical thought.”); Darryn Cathryn Beckstrom, Note, *Reconciling the Public Employee Speech Doctrine and Academic Speech After Garcetti v. Ceballos*, 94 MINN. L. REV. 1202, 1230 (2010) (“If [learning and entering into a marketplace of ideas] is the purpose of the modern public university, then government control over the ideas presented by academics makes no sense.”); David Fox, Note, *Turning Up the Heat on Science: A New Threat to Academic Freedom*, 43 U. TOL. L. REV. 173, 193 (2011) (arguing that *Garcetti* should not apply to professors’ speech because “[c]ourts . . . cannot continue to take a back seat to these types of issues and hope that the scientists and public interest groups can adequately defend the freedom of inquiry”).

54. See, e.g., Beckstrom, *supra* note 53, at 1219–20, 1238 (discussing the academic freedom principles articulated in *Sweezy*, *Keyishian*, *Bakke*, and *Grutter* and concluding that

Scholars in the final category have taken a more nuanced approach to whether *Garcetti* should cover speech related to teaching and scholarship. Instead of seeking a wholesale extension of or exemption to the rule, these scholars point out that in some contexts speech related to scholarship might deserve more First Amendment protection than speech related to teaching.⁵⁵ Specifically, these scholars argue that at elementary and secondary schools, speech related to teaching should be governed by *Garcetti* whereas speech related to scholarship might be exempted from such governance.⁵⁶ Because “teaching and scholarship may often be intertwined at the university level,”⁵⁷ and for reasons discussed later,⁵⁸ these scholars decline to determine whether this division should apply to college professors and whether college professors’ academic speech should be governed by the *Garcetti* rule.⁵⁹

None of the scholars provide more than a minimal evaluation of what function the role of students in the classroom should play in determining whether *Garcetti* should apply to speech related to teaching and scholarship.⁶⁰ This paper will argue that, after considering

“[a]pplying the public employee speech doctrine to academic speech is inappropriate. When the government creates a public university, part of the bargain is academic freedom”); Erica Goldberg & Kelly Sarabyn, *Measuring a “Degree of Deference”: Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 249–52 (2011) (“Institutional academic freedom should not be used to squash the academic freedom rights of students or professors Academic freedom rights should protect professors above and beyond the free speech rights of individual employees, even when counterbalanced against institutional academic freedom.”); Lauren K. Ross, Note, *Pursuing Academic Freedom After Garcetti v. Ceballos*, 91 TEX. L. REV. 1253, 1281 (2013) (“[T]he Court should recognize a constitutional right to academic freedom that protects professors’ speech, as long as it is related to the academic purpose of the university.”).

55. See, e.g., Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 697, 715 (2011) (“Proceeding under employee speech analysis, primary and secondary teaching should not receive an exemption from the *Garcetti* rule.”).

56. See, e.g., *id.* at 697 (concluding that *Garcetti* should apply to teaching but noting that “[d]ifferent sorts of First Amendment protection may be appropriate for scholarship than for teaching because scholarship requires the ability to freely pursue research and candidly share results, while teaching primarily involves the conveyance of information prescribed by the curriculum”).

57. *Id.* at 697.

58. See *infra* Part IV.B.

59. See, e.g., Forster, *supra* note 55, at 713–15.

60. See, e.g., Whitmore, *supra* note 52, at 377 (“Regardless of the outcome, students appear to have the least amount of freedom in the academic marketplace, and are the most vulnerable to the choices of others.”).

the role students play in the classroom, the separation of speech related to scholarship and speech related to teaching can—and should—apply to college professors in addition to elementary and secondary school teachers.

III. STUDENTS' ROLE IN SPEECH CONCERNING TEACHING AND SCHOLARSHIP

Prominently absent from every case and scholarly work discussed herein is an in-depth evaluation of how the interests of students should factor into whether the *Garcetti* rule should extend to speech related to teaching and scholarship. Although several cases have asserted that professors must have added First Amendment protection because of their special relationship with students,⁶¹ none have provided any analysis into whether that relationship actually functions in a manner that merits giving the professors' speech added protection. This section argues that no such added protection should be granted because an undergraduate classroom is not a true marketplace of ideas and because undergraduates are effectively captive audiences.⁶²

A. Student Participation in the Marketplace of Ideas

Courts⁶³ and scholars⁶⁴ alike have asserted that the classroom is a quintessential marketplace of ideas. Typically, the Supreme Court has used the marketplace of ideas metaphor within First Amendment cases to signify a public forum in which ideas can be freely presented and discussed, with the ultimate goal of ascertaining which ideas are

61. *See supra* Part I.

62. Admittedly, many of the factors that chill student speech in elementary, secondary, and undergraduate classrooms do not exist in post-graduate classrooms. For example, graduate students are generally older (and, consequently, their brains are more mature), they have more knowledge about the subjects they are pursuing, and they are likely to be less worried about what their peers may think of them. However, the fact that professors are still the ultimate judges over student work in graduate classes (in addition to other concerns such as the fact that students want to be able to obtain glowing letters of recommendation from their graduate professors) might have a sufficient chilling effect on student speech to make a separation between speech related to teaching and speech related to scholarship appropriate even in that context.

63. *See Healy v. James*, 408 U.S. 169, 180–81 (1972) (“The college classroom . . . is peculiarly the ‘marketplace of ideas.’”) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50 (1957)).

64. *See, e.g.*, Beckstrom, *supra* note 53, at 1202.

true.⁶⁵ Some critics have argued, however, that such a marketplace is a utopian idea that, in general, does not actually exist.⁶⁶

Whether this broad claim is true, several factors demonstrate that an undergraduate classroom is not a true marketplace of ideas. Among these factors are the impressionability of typical undergraduates, the inability of undergraduates to truly challenge their professors, and other features of undergraduate education that influence students to stay quiet in the classroom. These factors tend to create a classroom in which the professor's word is completely authoritative and in which alternative ideas from anyone else are not likely to be presented in a persuasive manner.

1. Impressionability of undergraduates

The impressionable nature of an average-aged undergraduate is evident from neurological studies. For example, a Dartmouth College study indicated that the brains of 18-year-old college students are still going through a hard-wiring process.⁶⁷ The study was conducted by using magnetic resonance imaging to track the changes of nineteen Dartmouth freshmen.⁶⁸ The results suggested that the 18-year-olds showed “a dramatic burst of brain development . . . concentrated in the white matter, which is essentially the wiring that connects various parts of the brain.”⁶⁹ After comparing these results to the results found from a control group consisting of several 25- to 35-year-old students, one of the researchers affirmatively stated that “[t]he brain of an 18-year-old college freshman is still far from resembling the brain of someone in their mid-twenties.”⁷⁰

65. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”).

66. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

67. *Brain Changes Significantly After Age 18, Says Dartmouth Research*, DARTMOUTH NEWS (Feb. 6, 2006), <http://www.dartmouth.edu/~news/releases/2006/02/06.html>; Steve Zind, *Dartmouth Study Looks at Adult Brain Development*, VERMONT PUBLIC RADIO (Feb. 13, 2006, 12:00 AM), http://www.vpr.net/news_detail/74456/dartmouth-study-looks-at-adult-brain-development/.

68. *Brain Changes Significantly After Age 18*, *supra* note 67; Zind, *supra* note 67.

69. Zind, *supra* note 67.

70. *Brain Changes Significantly After Age 18*, *supra* note 67.

Other neuroscientists have indicated that the results of the Dartmouth study are not unique to young college students. Indeed, according to neuroscientist Sandra Aamodt, “brain scans show clearly that the brain is not fully finished developing until about age 25.”⁷¹ Additionally, Aamodt noted that an 18-year-old’s brain is only about “halfway through [the] process” of developing its prefrontal cortex, which is “the part of the brain that helps you to inhibit impulses and to plan and organize your behavior to reach a goal.”⁷² Other neurologists and psychologists have supported Aamodt’s assessment as well.⁷³ A logical inference from these conclusions is that because college-aged brains are still developing, college students are more likely than individuals with fully developed brains to simply mimic the beliefs expressed by authority figures—such as professors.⁷⁴

Additional evidence in support of this inference derives from the fact that the ongoing brain development in 18- to 25-year-olds correlates with a significant shift in political leanings from college students’ freshman to senior years. For example, a national survey conducted by the Cooperative Institutional Research Program at the Higher Education Research Institute at UCLA suggested that, in

71. *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 11, 2011, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

72. *Id.*

73. *See, e.g.*, Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC NEWS (Sept. 23, 2013), <http://www.bbc.co.uk/news/magazine-24173194> (reporting on the United Kingdom’s new policy that allows children psychologists to work with their patients until the age of 25, up from the age of 18); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate: Risky Behavior Diminishes at Age 25, NIH Study Finds*, WASH. POST, Feb. 1, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A52687-2005Jan31_2.html (discussing a study performed by the NIH’s Institute of Mental Health and UCLA’s Laboratory of Neuro Imaging that concluded that “the point of intellectual maturity . . . comes at about age 25”).

74. This seems to be a plausible conclusion because the abilities affected by the prefrontal cortex are those “such as planning, reasoning and problem solving.” Simon Gerhand, *The Prefrontal Cortex—Executive and Cognitive Functions*, 122 *BRAIN* 993, 994 (1999) (reviewing *THE PREFRONTAL CORTEX—EXECUTIVE AND COGNITIVE FUNCTIONS* (A. C. Roberts et al. eds., 1998)), *available at* <http://brain.oxfordjournals.org/content/122/5/994.full.pdf+html>. Put simply, if a student does not possess fully developed reasoning and problem-solving skills, it seems unlikely that the student will be able to come up with alternatives to a professor’s ideas (or the student may simply not think through the professor’s ideas thoroughly enough to realize the professor might be wrong). Consequently, because college students—who pay to attend classes—presumably attend classes to learn and succeed (rather than rebel like students who are forced to attend classes), they are likely to simply parrot the professor instead of thinking of alternatives.

general, students become significantly more liberal during their four years in college.⁷⁵ Some groups have used this conclusion to demonstrate that college professors use their authoritative capacity in the classroom to impose their liberal views on their students,⁷⁶ especially because it is unquestionably clear that a majority of college professors nation-wide characterize themselves as liberals.⁷⁷ Other groups, however, argue that the political shifting of college students is not significantly more dramatic than the shift that occurs during the same ages among people who do not attend college.⁷⁸

Regardless of whether the views of college students change more dramatically than non-college students, what is clear is that many

75. AMY LIU ET AL., COOP. INST. RESEARCH PROGRAM AT THE HIGHER EDUC. RESEARCH INST. AT UCLA, FINDINGS FROM THE 2008 ADMINISTRATION OF THE COLLEGE SENIOR SURVEY (CSS): NATIONAL AGGREGATES 30 (2009), *available at* http://www.heru.ucla.edu/PDFs/pubs/Reports/CSS2008_FinalReport.pdf. Some of the significant statistics include that from the time students enrolled in college to the time they were ready to graduate, there was a 9% increase in students who characterized themselves as “Liberal of Far Left,” a 14% increase in students who believed that “[m]arijuana should be legalized,” a 13% increase in students who believed that “[homosexual] couples should have the right to legal marital status,” and a 12% increase in students who believed that “[a]bortion should be legal.” *Id.*

76. *See, e.g.*, Jill Laster, *College Makes Students More Liberal, but Not Smarter About Civics*, CHRON. HIGHER EDUC. (Feb. 5, 2010), *available at* <http://chronicle.com/article/College-Makes-Students-More/64040/> (“The institute found that people who had attained at least a bachelor’s degree were more likely than Americans whose formal education ended with a high-school diploma to take a liberal stance on certain controversial social issues.”) (citing INTERCOLLEGIATE STUDIES INST., THE SHAPING OF THE AMERICAN MIND (2009), *available at* https://chronicle.com/items/biz/pdf/2010%20Civic%20Lit%20Report%2012%2015%20FINAL_small_2_0.pdf).

77. Scott Jaschik, *Moving Further to the Left*, INSIDE HIGHER EDUC. (Oct. 24, 2012), *available at* <https://www.insidehighered.com/news/2012/10/24/survey-finds-professors-already-liberal-have-moved-further-left> (analyzing a 2010–2011 study that indicates that 62.7% of “full-time faculty members at four-year colleges and universities” identify as either “Far Left” or “Liberal”); *see also* Neil Gross, *The Indoctrination Myth*, N.Y. TIMES, Mar. 4, 2012, at SR12 (“[A] survey of more than 1,400 professors . . . conducted in 2006, covering academics in nearly all fields and in institutions ranging from community colleges to elite universities, . . . found that about half of the professors identified as liberal, as compared to just one in five Americans over all.”).

78. Scott Jaschik, *Faculty Are Liberal—Who Cares?*, INSIDE HIGHER EDUC. (Mar. 27, 2008), *available at* <http://www.insidehighered.com/news/2008/03/27/politics> (describing a study that concluded that “college students graduate with a smaller share of people identifying as ‘far left’ than does the 18–24 year old cohort of the U.S. population” and providing a chart that demonstrates that 29.1% of college seniors self-identify as “liberal” compared to 28.7% of the “18–24 year old cohort in U.S.”). Admittedly, if this is true, then college aged individuals might be impressionable but not overly affected by professors.

college students *do* change their world-views.⁷⁹ Consequently, it is not hard to imagine that anything a respected elder, such as a college professor, promotes to students at this stage in their lives could heavily influence the viewpoints they adopt and the decisions they make for better or worse.⁸⁰ This impressionability, while not inherently problematic, should give some pause to courts when deciding how much leeway to give professors' speech in a classroom.

2. *Inability to challenge professors*

On top of being generally impressionable, college students are also generally unable or unwilling to challenge the ideas their professors may promote. The most obvious problem in this regard is that professors are experts in their fields whereas college students often have little or no outside knowledge of the topics discussed in class. In other words, college students, in general, simply do not have enough information at their disposal to provide a compelling opinion that contradicts the opinion of the professor.

Even if students did have sufficient information to challenge a professor's opinion in class, many students will be discouraged from doing so for one simple reason: the professor controls their grades. There is evidence that students frequently care more about the grades they earn than about actually learning or ascertaining the truth. For example, some teachers admit that they do not believe in the grading system precisely because they believe that grading is a "flawed system that teaches students to only do the minimum to get a certain grade."⁸¹ The incentive to focus on grades stems from the reality that a student's ability to obtain admission into a desirable graduate program⁸² or to acquire a desirable job⁸³ largely depends on

79. Although this susceptibility could potentially be explained through other factors, impressionability seems to be the most plausible explanation (for the neurological reasons already discussed).

80. See *supra* note 74 and accompanying text.

81. See, e.g., Trent M. Kays, *Grades Are Arbitrary, Learning Is Not*, MINN. DAILY (Nov. 21, 2011), <http://www.mndaily.com/2011/11/21/grades-are-arbitrary-learning-not>.

82. See, e.g., Claudine Vainrub, *The Importance of Grades for College*, EDUPLAN (Sept. 21, 2010), available at <http://www.eduplan.us/the-importance-of-grades-for-college/> (explaining that when applying for either college or for a graduate program "if your grades aren't great, everything else will have to be").

83. David Koepfel, *Those Low Grades in College May Haunt Your Job Search*, N.Y. TIMES, Dec. 31, 2006, <http://www.nytimes.com/2006/12/31/jobs/31gpa.html?pagewanted=all>; Ken Sundheim, *The Important of Getting Good Grades in College*,

the grades the student achieves in college. Students know that they cannot fully indicate (nor could employers or admission officers discern) everything they have learned in college. Instead, they must use grades as a proxy.⁸⁴ To borrow an oft-used First Amendment phrase, this obsession with grades coupled with the knowledge that a professor's impression of a student directly affects that student's grades certainly "chills"⁸⁵ the speech of many students who may otherwise be capable and willing to challenge the ideas their professor promotes.⁸⁶

3. Other factors that keep students quiet

In addition to their comparative lack of knowledge and their dependence on professors in the grading system, students may refrain from challenging their professors' ideas in the classroom for other reasons. After struggling to figure out how to help quiet students speak up in class, one university professor decided to survey the self-described quiet students in her class to determine why they chose to stay silent during class.⁸⁷ To her surprise, many of their

EXAMINER.COM, (Dec. 7, 2010), <http://www.examiner.com/article/the-important-of-getting-good-grades-college>.

84. Admittedly, many people also try to emphasize to college students that grades are ultimately not that important; however, while the importance of grades is almost certainly evident to most students by the time they are in college (even without being counseled on their importance), the fact that there is so much emphasis on why grades are *not* ultimately important actually seems to indicate that grade obsession is a very real thing. *See, e.g.*, Lauren Landry, *Why Grades Just Don't Matter*, BOSTINNO, (July 30, 2012, 11:50 AM), <http://bostinno.streetwise.co/2012/07/30/why-grades-just-dont-matter/> ("[Grades are] [t]he singular thing every student strives for."); Lauren Schuhmacher, *Why Grades Don't Really Matter That Much After All*, HUFFINGTON POST (Feb. 14, 2013, 5:07 PM), http://www.huffingtonpost.com/lauren-schuhmacher/why-grades-dont-really-ma_b_2682922.html ("The current perception of the importance of grades in academia dumbfounds me, because I think that by caring too much about grades, most students are missing the point of education.").

85. *See, e.g.*, Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 620 n.9 (2003) ("The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected." (citing *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958))).

86. Truly, some professors may value opposing opinions and reward students who explore them, but likely not most professors, at least based on this author's experience.

87. Mary M. Reda, *What's the Problem with Quiet Students? Anyone? Anyone?*, CHRON. HIGHER EDUC. (Sept. 5, 2010), <http://chronicle.com/article/Whats-the-Problem-With-Quiet/124258/>.

reasons for staying quiet had nothing to do with grades.⁸⁸ The professor discovered that students “also consider their self-images, their knowledge, and their comfort levels with criticism and confrontation in the classroom setting when deciding whether to speak or be silent.”⁸⁹ The quiet students in her class, who are likely similar to quiet students elsewhere, were particularly concerned that a misstatement or a misunderstanding in the classroom would create an unfixable rift between the student who misspoke and the rest of the class.⁹⁰ This means that even if a student is not susceptible to changing her opinion based on the views of an authority figure, has enough knowledge on the subject to adequately challenge the professor, and is not worried about the potential negative effect on her grade such a challenge may have, that student may still not challenge the professor’s viewpoints in the classroom because the challenge may give her peers a negative impression of her.

All of these hindrances to student challenges to professors’ viewpoints illustrate that a college classroom is not a true marketplace of ideas because the truth of the views promoted by the professors will rarely be meaningfully challenged.⁹¹ Thus, although a college classroom is undoubtedly a very important learning environment, it is not a place where multiple parties are engaging each other with speech and counter-speech to actively ascertain the truth. Consequently, future courts should not justify a teaching exception to the *Garcetti* rule by stating that the classroom, even in a college or a university, is peculiarly a marketplace of ideas.

B. Students as Captive Audience

Students are also relevant to the question of professorial speech rights for another reason: students may constitute a captive audience

88. *Id.* She also noted, however, that “[t]he more pressure a professor creates through grading class participation, the more complicated it becomes for students to speak.” *Id.*

89. *Id.*

90. *Id.*

91. In addition to the factors laid out here, legal scholars have also noted that a teacher’s ability to start and stop discussion at a whim and her ability to potentially humiliate the students are also factors that lead to the inevitable conclusion that added protection to teachers’ (and, similarly, professors’) classroom speech cannot be justified by stating that the classroom is peculiarly a marketplace of ideas. See, e.g., Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 62 (1983).

even at the collegiate level. Past Supreme Court rulings have made clear that otherwise protected speech may be restricted due to the captive nature of the audience.⁹² Courts have already indicated that elementary and secondary students (often referred to as pupils) constitute captive audiences in certain contexts,⁹³ but no court has held the same concerning college students. Due to the increasing economic pressure to attend college and due to the mandatory class requirements imposed by colleges and universities, in many ways college students are effectively a captive audience as well. Importantly, the Supreme Court, in other First Amendment contexts, has already shown a willingness to imply that an audience is captive even when members of the audience are not legally required to attend.⁹⁴

1. Differences between pupils and college students

Many scholars have argued that college students are not a captive audience, based on differences between college students and pupils, who clearly qualify as captive audiences.⁹⁵ The most obvious difference that scholars have identified is that “[u]nlike college and university students, pupils are compelled to attend school until a specified age.”⁹⁶ College attendance is much more voluntary, at least in a legal sense, than elementary school or secondary school attendance. Other differences include the following: pupils are minors and minors deserve a much higher level of protection from certain types of speech;⁹⁷ college students have a greater opportunity

92. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 716–18 (2000); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970) (validating a statute that allowed people to remove their names from a mailing list for erotic materials).

93. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (“Children in public schools are a ‘captive audience’ that ‘school authorities acting *in loco parentis*’ may ‘protect.’” (quoting *Fraser*, 478 U.S. at 684)).

94. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 595 (1992) (“Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term ‘voluntary,’ for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”).

95. See, e.g., Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54 (2008).

96. Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 503 (2009).

97. See Forster, *supra* note 55, at 714 (noting that pupils should be treated differently

to respond to teachers' speech;⁹⁸ college students select which school to attend;⁹⁹ and college students are not legally required to be at certain parts of their campus at any given time, whereas elementary and secondary school students are required to be specific places on campus during the day.¹⁰⁰ While these differences may appear to justify greater protection from unbridled speech for pupils than for college students, the following subsections demonstrate that these differences are not as drastic as they may seem.

2. *Mitigating the differences*

The perceived differences between pupils and college students fade to some extent on closer examination. First, as has already been discussed, the majority of college students have not yet mentally developed into mature adults.¹⁰¹ Consequently, classifying high school students as "minors" and 18- to 22-year-old college students as "adults" might create an improper understanding. Indeed, in addition to neuroscientists, car rental services¹⁰² and psychologists¹⁰³

than college students because "[t]he ability of students to think for themselves increases with age, whereas younger students are more likely to accept whatever a teacher says as true." (citing *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc)).

98. Daniel J. Trainor, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U. ILL. L. REV. 971, 989-991 (1995) ("Primary and secondary school officials restrict student speech, but college and university officials do not.").

99. Moran, *supra* note 96, at 503 ("Even when families are dissatisfied with their local school, they may find it difficult to move to another district or pay tuition for a child to attend a private institution.").

100. See Greg C. Tenhoff, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511, 535 (1991) ("Moreover, university students are not a captive audience as are high school students. Students are not required to attend college, nor are they required to be on camps [sic] during any period of time."). *But see About Pepperdine*, PEPPERDINE UNIV., <http://www.pepperdine.edu/about/pepperdine/christiantradition/> (last visited Nov. 7, 2013) ("Each semester, all undergraduates [attending Pepperdine] are required to attend 14 programs in the Convocation Series, which are activities aimed at building Christian faith, affirming Christian values, or addressing ethical and moral issues within a Christian worldview posed by current events."). It is important to note that Pepperdine is a private university and, consequently, would not be affected by an extension of the *Garcetti* rule.

101. See *supra* Part III.A.1.

102. Robin Marantz Henig, *Why Are So Many People in Their 20s Taking so Long to Grow Up?*, N.Y. TIMES (Aug. 18, 2010), available at <http://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?pagewanted=all> ("[S]cientists found the children's brains were not fully mature until at least 25. 'In retrospect I wouldn't call it shocking, but it was at the time,' Jay Giedd, the director of the study, told me. 'The only people who got this right were the car-rental companies.'"); see also Kristen Hamlin, *How to Rent a Car When You Are Under*

also suggest that 25 years of age might be a better line to distinguish between minors and adults. Moreover, the prior discussion about the classroom as a marketplace of ideas demonstrates that college students actually have only a minimally greater opportunity—if greater at all—to challenge their teachers' speech than do pupils, at least in the classroom.¹⁰⁴ College students are also similar to pupils in other ways: for example, they are compelled, at least financially, to attend school and—once they begin attending—to be in certain places at certain times.

a. College students are financially compelled to attend class. Even though college students are not legally compelled to attend classes as pupils are, they are, to a large extent, financially compelled to attend. Findings from the Bureau of Labor Statistics demonstrate that, for persons 25 years old and older, college graduates have significantly more—and significantly higher paying—jobs available to them than people with only a high school diploma.¹⁰⁵ According to the Bureau, the unemployment rate of individuals with just a high school diploma exceeds that of individuals with a bachelor's degree by 3.8 percentage points.¹⁰⁶ Additionally, individuals with just a bachelor's degree make an average of \$21,528 more per year than high school graduates.¹⁰⁷ Considering high school graduates make only \$33,904 per year on average,¹⁰⁸ this is a significant difference.

Other statistics further demonstrate the increasing pressure to attend college in the current job market. The percentage of high school graduates who attend college has never been higher than during the past decade. That percentage reached an all-time high in 2009 at 70% and is still at 66% as of 2013.¹⁰⁹ Part of the reason for

25, USA TODAY, <http://traveltips.usatoday.com/rent-car-under-25-61224.html> (last visited Sept.9, 2014) (noting the difficulty and great expense of renting a car if you are under 25 due to rental companies' policies).

103. Wallis, *supra* note 73.

104. *See supra* Part III.A.2.

105. *Employment Projections: Earnings and Unemployment Rates by Educational Attainment*, BUREAU OF LABOR STATISTICS (May 22, 2013), http://www.bls.gov/emp/ep_chart_001.htm.

106. *Id.*

107. *Id.* (indicating that high school graduates make an average of \$651 a week). For some perspective, the poverty line for a single-person household in the United States is \$11,490. 2013 *Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERV., <http://aspe.hhs.gov/poverty/13poverty.cfm#thresholds> (last visited Nov. 7, 2013).

108. *Employment Projections*, *supra* note 105.

109. *Most High School Grads Go to College in 2012; Drop-Outs Face Unemployment*,

these high numbers might be that high school students know it is difficult for them to obtain a job if they do not have a college education. After all, 34% of students who graduated from high school last year and did not enroll in college are currently unemployed.¹¹⁰ Additional findings from past censuses show that the percentage of the national population age 25 and older who have obtained at least a bachelor's degree has increased from 4.6% in 1940 to 30.9% in 2012¹¹¹ and that “[a]dults with bachelor's degrees in the late 1970s earned 55 percent more than adults who had not advanced beyond high school. That gap grew to 75 percent by 1990—and is now at 85 percent.”¹¹² All of these statistics tend to show that high school graduates are now expected—and almost financially required—to attend college, a fact that was not always true.

b. College students are bound by graduation requirements. Although college students admittedly have more liberty than pupils to select the school they will attend, once they make that choice, they face specific requirements that they must meet in order to graduate. These requirements, while also technically followed voluntarily, include mandates on where students need to be on campus at specific times.¹¹³ Often, students will have to take a specific class that is taught by only one professor at limited times. Legal scholars have noted that students in this type of class are particularly likely to experience the same type of captivity that is experienced by pupils.¹¹⁴ While students can choose to enroll but

EXAMINER (Apr. 18, 2013), <http://www.examiner.com/article/most-high-school-grads-go-to-college-2012-drop-outs-face-unemployment>.

110. *Id.*

111. *Figure 2: Percent of Population Age 25 and Over by Educational Attainment: 1940–2012*, U.S. DEP'T OF COMMERCE, <http://www.census.gov/hhes/socdemo/education/data/cps/historical/fig2.jpg> (last visited Nov. 26, 2013). The percentage of people with only a high school degree or some college experience in the same timeframe increased from 19.6% to 56.7%. *Id.*

112. G. Scott Thomas, *Earnings Widen Between College and High School-Only Grads*, BUS. JOURNALS (Dec. 28, 2012, 2:30 PM EST), <http://www.bizjournals.com/bizjournals/on-numbers/scott-thomas/2012/12/grads-earn-85-more-than-those-without.html?page=all>.

113. For example, class attendance and adherence to specific time and place requirements for exams will be required for a passing grade in many classes.

114. *See, e.g.*, Lisa M. Woodward, *Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?*, 27 CAP. U. L. REV. 667, 682 (1999) (citing Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 102, 117 (1996)) (“Students in a college or university classroom setting may well constitute a captive audience, particularly if the class is required for graduation and no other sections are available.”).

not attend those “mandatory” classes, such a choice will inhibit their ability to secure a good grade in the course, to obtain a much-needed letter of recommendation from the professor teaching the course, or even to graduate from college at all (if they fail the course as a result). Due to the financial pressure to obtain a degree,¹¹⁵ and to get good grades while doing so,¹¹⁶ the choice to not attend these required classes is more theoretical than real. For similar reasons, college students may arguably constitute a captive audience even in elective classes, especially if those classes help the students satisfy minimum credit requirements for graduation.

While there may still be some differences between pupils and college students that have not been mitigated, it is evident that the two groups are not too dissimilar. In fact, the two groups are similar enough that it seems reasonable to assert that college students, at least in some scenarios, constitute a captive audience during class. Even if courts are not willing to rule that college students are a captive audience, the fact that college students are so similar to pupils coupled with the fact that a college classroom is not a true marketplace of ideas should lead courts to conclude that the classroom speech of college professors (as well as that of elementary and secondary school teachers) should not be exempt from the *Garcetti* rule.

IV. PROPOSED SOLUTION: SEPARATE TEACHING AND SCHOLARSHIP

The conclusion that *Garcetti* should cover professors’ classroom speech does not answer whether *Garcetti* should cover professional speech related to scholarship. At first glance, it may seem that the two words are inseparable—and thus deserve the same judicial treatment—because they stem from much of the same research and preparation. However, a more thorough consideration shows that the two can be separated in the following manner: teaching is professors’ speech to students in a classroom or in their offices concerning coursework, and scholarship is professors’ speech to other professors outside the classroom setting. By separating the two terms in elementary, secondary, and collegiate settings, *Garcetti* can apply (or not apply) to speech related to teaching and scholarship in a manner

115. *See supra* Part III.B.2.a.

116. *See supra* Part III.A.2.

that accommodates the principles behind the academic freedom theory and the interests of students.

A. Speech Related to Teaching

When the definition of teaching is narrowed to include only professors' classroom speech, many of the arguments against extending *Garcetti* to speech related to teaching lose a lot of traction. This is especially true in light of the analysis concerning the rights and roles students maintain in a classroom.¹¹⁷ Because the arguments appear to be less compelling with regard to a typical classroom setting, it seems less necessary to exempt classroom speech from the *Garcetti* rule.¹¹⁸

While this conclusion may seem contrary to the academic freedom theory, it is not clear that the academic freedom theory was ever intended to cover individual professors or even their classroom speech. Indeed, the most recent major Supreme Court cases to invoke the academic freedom theory have protected the academic freedom of academic institutions generally, not individual professors.¹¹⁹ Moreover, the Supreme Court has also held that professors do not have a constitutional right to participate in university policy decisions,¹²⁰ and several circuit courts have affirmatively held that academic institutions (and not individual teachers) have the right to set curriculum.¹²¹

117. For example, because the classroom is not the type of place where students are willing and able to challenge their professors' theories, it seems that the classroom is not a setting where students can *freely* inquire and evaluate; nor is it a marketplace of ideas. *See generally supra* Part III.

118. Although individual teachers' classroom speech should be covered by the *Garcetti* rule, courts will not be discouraged from continuing to allow academic institutions to determine curriculum without outside governmental interference. In this way, some aspects of a professor's classroom speech will be exempted from the *Garcetti* rule, at least insofar as the institution allows the individual professor to participate in determining the curricula. *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 288 (1984) (ruling that professors do not have a constitutional right to participate in their academic institution's policymaking decisions by stating that "[f]aculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution").

119. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

120. *Minn. State Bd. for Cmty. Colls.*, 465 U.S. at 288. On the other hand, as some scholars have pointed out, even without a constitutional right, "shared governance and academic decisions often involve faculty input into policies and decisions of the institution." Robert J. Tepper & Craig G. White, *Speak no Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 146 (2009).

121. *See, e.g., Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007)

Determining that a professor does not have constitutional protection from her governmental employer for her classroom speech does not conflict with these rulings and would support the notion that academic institutions should ultimately be in charge of determining who should be admitted into their classrooms¹²² and what should be taught therein.¹²³ Even under this proposal, however, individual professors are not entirely unprotected because their classroom speech can be shielded from institutional interference through tenure¹²⁴ and through other means, such as state constitutional or statutory law.¹²⁵ As a result, First Amendment interests are protected in other ways.

B. Speech Related to Scholarship

Unlike professors' speech related to teaching, their speech related to scholarship should not be governed by the *Garcetti* rule. When scholarship is defined as speech among professors outside of a classroom, which includes a professor's individual research, there are two factors that dictate that *Garcetti* should not apply to such speech: first, scholarship, unlike teaching, is "peculiarly a marketplace of

(quoting *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1273 (7th Cir. 1979)) ("The First Amendment is 'not a teacher license for uncontrolled expression at variance with established curricular content.'"); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370–71 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998) ("We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum."); *Bishop v. Arnov*, 926 F.2d 1066, 1077 (11th Cir. 1991) ("The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments."); *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision. . . . The first amendment does not require that each nontenured professor be made a sovereign unto himself."). See also *Tepper*, *supra* note 120, at 180 ("[T]hrough initially concerned with individual faculty rights, academic freedom has taken on a decidedly institutional character: it protects the freedom of the institution to decide internal matters including selection of personnel, curriculum, and teaching methods.").

122. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

123. See cases cited *supra* note 121.

124. After earning tenure, professors' "service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies." AM. ASS'N OF UNIV. PROFESSORS & ASS'N OF AM. COLLS., 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 4 (2006), available at <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

125. See *infra* Part V.B (explaining in part the pressures faced by an institution that may indirectly protect professors' speech rights); See also *Tepper*, *supra* note 120, at 130 ("[W]hile academic freedom may be best protected by tenure, other mechanisms apart from federal constitutional protection may offer some shelter, including state constitutional and statutory law, freedom of contract and collective bargaining provisions, and academic policy.").

ideas”); and, second, many of the academic freedom principles articulated by the Supreme Court can be preserved by solely protecting professors’ scholarship.

1. Scholarship is peculiarly a marketplace of ideas

Most of the barriers that prevent a classroom from being a true marketplace of ideas are absent in the realm of scholarship. For example, professors are not dependent on grades determined by other professors in their field. It is true that professors are reliant upon each other to some degree (e.g., peer reviews and networking), but there is generally a level of respect among professors that makes this reliance less speech-chilling. Similarly, professors are generally experienced enough to no longer be as impressionable as a typical student. While there are certainly exceptions, most professors are older than 25, and those who are not have already demonstrated a high level of intellectual maturity by going through all the steps to become a professor at a young age.

Finally, and perhaps most importantly, professors have enough knowledge concerning their subject matter to truly challenge other professors in their field. The same qualifications that make professors vastly more capable of presenting a plausible theory than students also enable professors to adequately challenge each other’s theories. In other words, professors in similar fields will know enough about the subject to sift out flaws or false assumptions in each other’s theories.¹²⁶ This mutually held skill creates an environment in which truth can be more readily ascertained than in just about any other setting, thus establishing a true marketplace of ideas that may deserve a special niche in First Amendment jurisprudence.¹²⁷

2. Academic freedom principles in scholarship

Not only does exempting speech related to scholarship satisfy the Court’s desire to protect speech in settings that are “peculiarly the

126. See, e.g., *Quality and Value: The True Purpose of Peer Review*, NATURE (2006), available at <http://www.nature.com/nature/peerreview/debate/nature05032.html> (“At its best, the peer review system provides not only expert advice, but also a strong incentive for authors to heed the advice and to improve the paper.”).

127. Other such settings may include debates among informed politicians or in brain trusts. It is worth noting that these settings usually also consist of people who are considered to be experts in their fields.

marketplace of ideas,” but it also appears to independently advance other academic freedom principles. As discussed above, it is debatable whether the academic freedom theory should protect the speech of individual professors at all.¹²⁸ However, when the Court has indicated that the speech of individual professors might be entitled to special First Amendment protection, it has done so in a manner that peculiarly points towards protecting scholarship. Most notably, the Court has frequently recognized the importance of allowing professors to explore their fields of study and remain uninhibited in their own search for truth.¹²⁹ For reasons mentioned in the previous subsection,¹³⁰ it is clear that a professor’s exploration and pursuit of truth will usually be more fruitful when she is conducting research, writing scholarly pieces, or conversing with her peers than when she is teaching her students.

Therefore, because academic freedom principles can be adequately advanced by protecting only speech related to scholarship and because speech among professors—unlike speech between professors and students in a classroom—is peculiarly a marketplace of ideas, speech related to scholarship should be exempted from the *Garcetti* rule, whereas speech related to teaching should not be.

V. RESPONSES TO LIKELY CRITICISMS

Although it has only been seven years since *Garcetti*, there has already been enough discussion of the case’s potential implications to recognize some major criticisms of the proposed solution. The three most apparent criticisms are that, although the solution may sound good in theory, it will be difficult to separate teaching from scholarship in practice; that a regulated classroom will prevent

128. *See supra* notes 119–24 and accompanying text.

129. *See, e.g.,* *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”); *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (“Teachers . . . must be exemplars of open-mindedness and free inquiry.”). On a related note, it is also arguable that a student’s ability to freely inquire would actually be inhibited by exempting speech related to teaching from the *Garcetti* rule because of the same factors that indicate that the classroom is not a marketplace of ideas. For example, if a professor decided, against her employer’s will, that she was not going to teach all viewpoints on a particular topic, the students’ information stream would be stifled and they would likely not be able to challenge the professor to teach the withheld information.

130. *See supra* Part IV.B.1.

students from obtaining the cutting-edge information they need and pay for; and that the government should not restrict the speech of those it funds to convey a private message (i.e., professors).

A. Professors' Teaching Stems from Scholarship

Scholars have noted that, at least at a collegiate level, it might be impractical to separate teaching from scholarship.¹³¹ Specifically, critics may claim, professors necessarily use the fruits of their scholarship as part of their curriculum.¹³² An inability to do so would prevent professors from fully presenting pertinent materials to their students. Moreover, if curriculum and teaching decisions are protected only at a university level, the limitation on professors' speech would expand to the point that a professor may never know which viewpoints she is allowed to present to a class—a completely speech-chilling result.

While such an outcome seems somewhat troubling, it can be easily prevented. Colleges have a vested interest in a professor's scholarship and in her teaching because a college's reputation among scholars and current and prospective students largely depends on the quality of both types of speech. Additionally, if a professor is regarded as a prominent scholar in a particular field, it seems counterproductive for a college to stifle that professor from sharing her beliefs with her students. Accordingly, the ideal situation to avoid conflicts between professors and their colleges would be for colleges to allow professors to present many different ideas—including the fruits of their own scholarship—in the classroom, so long as the professors refrain from promoting (as opposed to merely presenting) any of those ideas. While students will certainly understand that the professor believes the viewpoints that she expresses in her work product, that understanding will not prevent

131. *See, e.g.*, Forster, *supra* note 55, at 697 (“Although teaching and scholarship may often be intertwined at the university level, the same cannot usually be said of public primary and secondary schools.”). Forster does not go into any depth beyond this statement about the two types of speech being intertwined, so the argument in this paper is merely inferential. Additionally, because Forster specifically stated that this argument did not readily apply to elementary and secondary school teachers, the response to this argument will focus solely on college professors.

132. Additionally, it should be noted that sometimes professors teach seminars that explore the issues they are writing about. Admittedly, the teaching in these classes obviously furthers scholarship, but these classes seem to be a rather narrow exception.

them from sincerely delving into other viewpoints so long as the professor presents other views in the best light possible.¹³³ Thus, professors would be able to voice their own opinions in a manner that is less likely to indoctrinate and limit the viewpoints available to their students. Such a situation should also advance the interests of the college that employs the professor. After all, the institution funds the professor to research and teach within a specific field.¹³⁴ By allowing a professor to express her findings to her students, a college realizes a return on its investment rather than shutting down the very speech that it funded the professor to develop in the first place.

Even if such a scenario is not realized at any given college, and the college decides to stifle professors from presenting the fruits of their own scholarship (or any other speech) in the classroom, the proposed separation between speech related to scholarship and speech related to teaching would still allow professors to speak freely among themselves. Additionally, it would not prevent students from investigating the fruits of their professors' scholarship on their own. In sum, just because a professor's speech would be protected to a lesser degree when she is teaching than when she is participating in scholarship does not necessarily mean that she could not use the fruits of her scholarship in her teaching. Nor does it mean that her students would be deprived of the opportunity to learn from the professor's scholarship if she is prohibited from sharing her scholarship with the class—though they might have to do so during their free time.

B. Without Free Speech in Teaching, Students Will be Deprived of Cutting-Edge Subjects

Another argument presented by several courts¹³⁵ and scholars is that *Garcetti* cannot govern speech related to teaching because such governance would deprive college students of receiving the cutting-

133. Students may still parrot the professor's ideas in class and on exams, but at least they would be exposed to other ideas.

134. Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 *BUFF. PUB. INT. L.J.* 1, 64 (2004) (“[Professors] are paid to develop theories and to speak, write, and teach about their intellectual labors in all stages of the creation, dissemination, and reformulation of those ideas.”).

135. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

edge information they need and pay for. These critics argue that without some First Amendment protection from their employing universities, professors would be too worried about being disciplined for unpopular speech to address any controversial or cutting-edge issues in the classroom.¹³⁶ However, it is in the best interest of colleges and universities to allow their professors to discuss these cutting-edge issues in class. Students often choose to attend particular colleges precisely because those colleges—or even specific professors—have a reputation for delving into cutting-edge subjects.¹³⁷ If a college gains a reputation for forbidding or ignoring such subjects, its academic reputation would likely diminish and enrollment (or the quality of students who do enroll) would likely decline as potential students choose to attend schools that address those subjects. Additionally, the separate treatment of classroom speech and scholarship would allow professors to continue to obtain cutting-edge information and provide them the opportunity to persuade their schools to teach that information without fear of retaliation.

On a related note, some post-*Garcetti* cases arise from a professor's criticism of the administration of the college or university made in his or her capacity as a professor.¹³⁸ This kind of speech is not the cutting-edge or educational material that the courts are so eager to protect in the classroom and, therefore, it does not deserve added protection within the classroom. However, by exempting scholarship from the *Garcetti* rule, such speech would still be protected when it is addressed to other professors or administrators, a result that seems justifiable and fair.

C. The Government Funds Professors to be Private Speakers

The final criticism against the proposed solution is that collegiate professors should not be considered public employees for *Garcetti* purposes because they are funded by the government to promote

136. See, e.g., *supra* note 53.

137. Robert Morse, *Students Say College Rankings Aren't Most Important Part of Decision*, U.S. NEWS (Feb. 4, 2010), <http://www.usnews.com/education/blogs/college-rankings-blog/2010/02/04/students-say-college-rankings-arent-most-important-part-of-decision> (noting that a national survey of incoming Freshmen revealed that 63.6% of students listed that it was "very important" that the college they chose had a very good academic reputation, the highest such percentage of any criteria listed on the survey).

138. See, e.g., *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

private messages. The general argument is summarized by one scholar as follows:

[C]ontrary to *Garcetti*, an academic's status as a public employee is more similar to the public funding of lawyers described in *Velazquez*, where the government provided federal funding to lawyers offering free legal services to indigent clients. The Court explained that the lawyers receiving the government funding were not speaking as agents of the government because Congress gave the money to the lawyers to convey private messages. Academics employed by public universities are also not speaking as agents of the government because the university provides them with a salary to convey private messages in the form of their scholarship.¹³⁹

It is true that the government funds professors' scholarship and it is also true that universities are different from other governmental agencies, but these facts actually seem to cut against the idea that all professional academic speech should be exempted from the *Garcetti* rule. For example, because universities are different from other governmental agencies, funding from the two sources should arguably be treated differently as well. Regarding professors' speech, the funding for scholarship often comes from outside agencies whereas the funding for teaching comes primarily from the university itself.¹⁴⁰ This seems to indicate that although the government may fund professors to be private citizens in scholarship settings, professors are still the agents of the university while teaching. That professors are agents of their employing university while teaching seems correct because, as noted above,¹⁴¹ a university is largely dependent upon the quality and content of its professors' classroom speech and because universities ultimately control the curriculum. Therefore, it is completely logical to allow the college to closely monitor classroom speech without fear of judicial retribution. Consequently, even if one accepts the argument that the government funding provided to professors simply promotes their private

139. Beckstrom, *supra* note 53, at 1230. Beckstrom also emphasizes that colleges are different than other governmental agencies. This difference stems from the fact that "[w]hen students attend a public university, they enter with the intent to receive an education. The university serves as a marketplace of ideas." *Id.*

140. This does, however, depend largely on the discipline. Most scientific and engineering research is funded by outside grants. Humanities and law, by contrast, do not usually involve much outside funding.

141. *See supra* Part V.B.

messages, the relevant funding primarily promotes speech that is related to scholarship,¹⁴² not speech related to teaching. This result further endorses the separate treatment of the two types of speech.

VI. CONCLUSION

Due to their unique role as the primary recipient of speech related to teaching, students deserve special attention when determining how much First Amendment protection public professors should receive while performing their official duties. This Note has demonstrated that when such attention is paid to the role students play in the classroom, it becomes evident that the *Garcetti* rule should govern professional speech related to teaching but not professional speech related to scholarship.

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142. Indeed, even the author of the criticism itself refers to a professor's private message as "scholarship." Beckstrom, *supra* note 53, at 1228.

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