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**The Student Press, the Public Workplace,
and Expanding Notions of Government Speech**

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The Student Press, the Public Workplace, and Expanding Notions of Government Speech

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The Student Press, the Public Workplace, and Expanding Notions of Government Speech

The government speech doctrine, which Justice Souter not long ago described as being in its infancy,¹ appears to have grown up alarmingly fast into a strapping—and potentially dangerous--adolescent.² Although in the past, the Court primarily referred to the doctrine only in dicta,³ or as an after-the-fact explanation of the Court's holding in *Rust v. Sullivan*,⁴ the Court more recently has applied the government speech rationale to the compelled subsidy and public employment contexts. As a result, the Court has disposed of some difficult First Amendment questions with one easy analytical stroke, but at the cost of removing sizeable chunks of what had been considered private speech from the ambit of the First Amendment.

The characterization of speech as “government” or “private” expression is tremendously important, of course, because while state regulation of private speech is subject to stringent First Amendment limitations, including the rule against viewpoint discrimination,⁵ the government's

¹ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (referring to the government speech doctrine as “relatively new” and as being at a “somewhat early stage of development”).

² Certain scholars recognized the dangers associated with government speech long ago. *See generally*, Thomas I. Emerson, *The System of Freedom of Expression* (1970) (concluding that government speech is legitimate when used to inform, educate, or persuade, but that it can destroy the system of free expression if used to coerce); Mark G. Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (1983) (describing how government communication is both necessary for an informed citizenry and yet can also be used to distort democratic processes and falsify consent).

³ *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540-43 (2001) (discussing government speech doctrine but describing program at issue as “designed to facilitate private speech, not to promote a governmental message”); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (stating that although the government must inevitably speak to further its own policies, the University had denied that the speech at issue was its own); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (discussing government speech doctrine but rejecting notion that the University was speaking in this case).

⁴ 500 U.S. 173, 179-80 (1991) (rejecting First Amendment challenge to Title X regulations that forbade doctors at federally funded family planning clinics from discussing abortion); *see, e.g., Velazquez*, 531 U.S. at 541 (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”); *Rosenberger*, 515 U.S. at 833 (explaining that Court in *Rust* “recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”).

⁵ The Court has often emphasized the importance of viewpoint neutrality as a fundamental First Amendment precept. *See, e.g., Velazquez*, 531 U.S. at 548-49 (2001) (“Where private speech is involved, even Congress’ antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government’s own

own speech is not similarly encumbered.⁶ The government, which must communicate to achieve the many tasks of governing, must also by necessity favor certain policies over others.⁷ Citizens who disagree with a particular government position will have the opportunity to express their disapproval at the next election, as accountability for state messages comes more from the political process than from the marketplace of ideas.⁸ Complicating matters, however, is the fact that the government as an entity must often express itself through private persons, who possess individual First Amendment rights to speak on their own behalf.⁹

The Court first openly acknowledged its newfound infatuation with the government speech doctrine in *Johanns v. Livestock Marketing Ass'n*,¹⁰ a 2005 case involving a federal statute that required cattle producers to fund generic advertising designed to promote beef consumption. The free speech questions surrounding various compelled agricultural commodity advertising programs had bedeviled the Court for years; the beef campaign was the third such scheme to reach the Court on First Amendment grounds in less than a decade.¹¹ Just four years before, the Court ruled that a similar statute forcing mushroom handlers to pay for generic

interest.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (“The government may not regulate [private speech] based on hostility - or favoritism - towards the underlying message expressed.”).

⁶ *Velazquez*, 531 U.S. at 541 (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker....”).

⁷ *Rosenberger*, 515 U.S. at 833 (1995) (recognizing that “when the State is the speaker, it may make content-based choices”).

⁸ *Southworth*, 529 U.S. at 235 (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”).

⁹ This observation has been made by a number of commentators. See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001) (“This bipolar universe [of government vs. private speech] is, of course, an artifice, for government speech is necessarily accomplished through the speech of individuals—employees, agents, regulated businesses, supplicants, and volunteers.”); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 100 (1998) (“...[T]hings admittedly become more difficult once we recognize that the state cannot literally speak, but can speak only through the voices of others, others who have their own First Amendment rights in many contexts.”).

¹⁰ 544 U.S. 550 (2005).

¹¹ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

mushroom advertisements designed by a council of private producers and approved by the Secretary of Agriculture violated the First Amendment rights of objecting producers.¹²

It came as a bit of a surprise, then, that the Court in *Johanns* ultimately accepted the government speech rationale to uphold the beef advertising assessments, even while acknowledging that the beef program was “very similar” to the mushroom promotion scheme the Court previously had invalidated.¹³ In his majority opinion, Justice Scalia reasoned that the “Beef: It’s What’s for Dinner” campaign was properly characterized as government speech because it was developed, approved and “effectively controlled” by Congress and the Department of Agriculture, despite the fact that the ads were designed, paid for, and attributed to America’s Beef Producers rather than the federal government.¹⁴ That the public might be misled as to the speech’s true source made no difference in the Court’s analysis; the “correct focus” was whether the compelled assessment interfered with the objecting cattle producers’ speech rights.¹⁵ Once the speech was deemed to be the government’s own, the Court could conclude that the private producers’ First Amendment rights were unaffected.¹⁶

A year later, the Court again used the government speech doctrine to limit the First Amendment’s scope, this time in the realm of public employee speech. Previous Supreme Court

¹² *United Foods*, 533 U.S. at 410-11. Noting that the Court need not consider the government speech defense because the Department of Agriculture failed to raise it in the Court of Appeals, Justice Kennedy’s majority opinion hinted that mere pro forma approval of the mushroom ads by the Agriculture Secretary would not suffice to turn private speech into government expression. *Id.* at 416-17.

¹³ *Johanns*, 544 U.S. at 558. Indeed, the Eighth Circuit Court of Appeals described the beef checkoff program as “in all material respects, identical to the mushroom checkoff” at issue in *United Foods*.” *Livestock Mktg. Ass’n v. Dep’t of Agric.*, 335 F.3d 711, 717 (quoting *Livestock Mktg. Ass’n v. Dep’t of Agric.*, 207 F. Supp. 2d 992, 1002 (DSD 2002)), *vacated sub nom*, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

¹⁴ 544 U.S. at 560-64.

¹⁵ *Id.* at 564 n. 7.

¹⁶ *Id.* Private speech interests might be implicated sufficiently to justify an as-applied challenge, Justice Scalia wrote, but only if objecting producers could demonstrate that program advertisements would be attributed to them individually. *Id.* at 565-66.

Although a critique of the government speech doctrine as applied to compelled agricultural assessments is beyond the scope of this Article, for a critical response to the Court’s decision in *Johanns*, see Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *Hastings L. J.* 983, 1042-48 (2005).

cases had established that a public employee who spoke “as a citizen upon matters of public concern” was protected from employer retaliation unless, on balance, the employer’s interest in promoting workplace efficiency outweighed the value of the speech.¹⁷ In its first five-to-four decision, the Roberts Court held in *Garcetti v. Ceballos* that public employees fail to qualify as “citizens” under the earlier test when they engage in speech required by their jobs.¹⁸ No longer would courts have to balance competing interests when employees spoke “pursuant to their official duties”; *Garcetti* created a blanket First Amendment exception for on-the-job speech, even when that speech dealt with matters of clear public importance.¹⁹ Judicial deference to the discretion of government employers in this area is required, the Court said, to comport with “sound principles of federalism and separation of powers.”²⁰ As in *Johanns*, once the Court categorized the expression as being within government control, the private speaker’s First Amendment rights no longer figured into the Court’s analysis.

Almost twenty years before *Garcetti* and a full three years before *Rust*, however, the Court had employed what was seen by some as a public forum approach,²¹ but what was, in fact, a government speech analysis to impose significant limitations on the First Amendment rights belonging to another class of private speakers within a government institution—in this instance, public high school students.²² In *Hazelwood School District v. Kuhlmeier*, the Court held that a

¹⁷ *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁸ *Id.* at 1960.

¹⁹ 126 S. Ct. 1951, 1960 (2006).

²⁰ *Id.* at 1961.

²¹ *See, e.g., Searcey v. Harris*, 888 F.2d 1314, 1318-19 (11th Cir. 1989) (interpreting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), as holding that schools may regulate student speech in a nonpublic forum based on content but not on viewpoint); Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 Ga. L. Rev. 253, 315-16 (1992) (describing how lower courts interpreted *Hazelwood* as applying a “‘reasonableness’ standard . . . in the context of public forum analysis”).

²² *Hazelwood*, 484 U.S. 260 (1988). In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court cited *Hazelwood* in dicta for the proposition that the state may engage in viewpoint discrimination when the state itself is the speaker. Justice Alito also characterized *Hazelwood* as a government speech case in his concurring opinion in *Morse v. Frederick*, stating that the *Hazelwood* decision “allows a school to regulate what is in essence

high school principal did not violate the First Amendment when he removed two pages in advance of publication from an issue of the school-sponsored student newspaper.²³ School officials clearly have the power to establish the school's curriculum; therefore, the Court reasoned, those officials must also have the ability to control the content of curricular activities such as school-sponsored student publications.²⁴ The newspaper, although written by the students, contained speech that the Court viewed as properly attributable to the school.²⁵

In these various contexts, the Court has relied on the government speech rationale as a quick and clean solution to potentially messy First Amendment questions. If the speech belongs to the government, the Court need not resort to complicated, fact-specific balancing tests that weigh state interests against individual rights. If the speech belongs to the government, the Court can bypass the public forum doctrine, with its insistence on viewpoint neutrality.²⁶ If the speech belongs to the government, the Court can justify deferring to the state's managerial discretion in the name of preserving government and judicial resources and promoting efficiency. The significant downside, of course, is that when the government speech doctrine is invoked, individual liberties always lose. It means, in the *Garcetti* context, that the First Amendment rights belonging to the nearly 19 million adult public servants employed by federal, state and local government entities²⁷ are essentially the same as, if not even weaker than,²⁸ those possessed by public schoolchildren. Given that the Court recently limited student speech rights

the school's own speech, that is, articles that appear in a publication that is an official school organ." *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007)(Alito, J., concurring).

²³ 484 U.S. 260, 276 (1988).

²⁴ *Id.* at 271.

²⁵ *Id.*

²⁶ See *infra* notes 113-121 and accompanying text.

²⁷ According to the U.S. Census Bureau, state and local governments employed 16,135,699 full-time equivalent employees as of March, 2006. U.S. Census Report, U.S. Census Bureau, State and Local Government Employment and Payroll, <http://ftp2.census.gov/govs/apes/06stlus.txt>. The federal government employed 2,720,688 full- and part-time employees as of December, 2006. U.S. Census Bureau, Federal Government Employment and Payroll, <http://ftp2.census.gov/apes/06fedfun.pdf>.

²⁸ See *infra* Part IIB.

even further in *Morse v. Frederick*,²⁹ the Court's analogous approach to First Amendment questions involving public students and public employees becomes even more troubling.

This Article takes the position that the Court has overextended the government speech doctrine as a formalistic, line-drawing exercise that gives too little consideration to the First Amendment rights of individual speakers in government-controlled institutions such as schools and workplaces.³⁰ By doing so, the Court has failed to recognize that when the government speaks through the mechanism of individual speakers, the resulting expression presents a hybrid mixture of public and private speech interests. In Part I of this Article, I show how the Court's decisions first recognizing, and then restricting, speech rights of public school students and public employees have followed a parallel course. I focus particularly on how *Hazelwood* and *Garcetti* use the concept of government speech to limit or eliminate the First Amendment protections previously granted by the Court to public students and employees.

Part II of the Article makes the danger of this approach clear by examining the response to *Hazelwood* and *Garcetti* by the lower courts, a response that shows how government administrators in schools, colleges, and public workplaces have used those holdings to stifle unpopular/unflattering expression and perpetuate their own regimes. I then explore the concept of hybrid speech in Part III, describing how the Supreme Court has acknowledged that both individual and government interests deserve consideration in certain mixed speech contexts, and how at least one federal circuit court of appeals has used a hybrid speech approach in analyzing the constitutionality of specialty license plate programs. In Part IV, I propose that a hybrid

²⁹ 127 S.Ct. 2618 (2007). In *Morse*, the Court created a First Amendment exception for student speech that could reasonably be interpreted as endorsing illegal drugs in contravention of the school's own anti-drug message. *Id.* at 2629.

³⁰ For an excellent analysis of *Garcetti* as a misguided and potentially dangerous example of the Court's current preference for formalism, see Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 Wm. & Mary Bill of Rts. J. 1173 (2007).

speech analysis, rather than a per se application of the government speech doctrine, in student press and public employee speech cases would better serve the First Amendment values presented in these contexts. I conclude that although truly legitimate pedagogical concerns may be sufficiently compelling to justify official control of curricular student publications in the K-12 public school setting, those concerns are significantly less weighty in the context of postsecondary education. Similarly, while government interests may predominate when public employees engage in scripted tasks, the private speech component of discretionary, duty-based employee expression should outweigh government efficiency concerns when job-required speech brings potential wrongdoing, fraud, or corruption to light. Finally, I provide an alternative reading of *Garcetti* that is consistent with this approach, and that would limit the government speech doctrine's application so as to protect public employees who report official misconduct or corruption as part of their jobs.

I. Public Students, Public Employees and the Supreme Court

The extent to which the First Amendment protects speech by public school students on one hand, and public employees on the other, has developed along strikingly similar lines. That speech by either category of speaker is not entirely outside of the First Amendment was established by the Supreme Court almost forty years ago in two landmark cases decided just a year apart: *Pickering v. Board of Education*,³¹ which involved teacher expression and *Tinker v. Des Moines Independent School District*,³² which concerned student speech. Since then, the Court has ruled against student speech rights in every case that it has decided. In later public

³¹ 391 U.S. 563 (1968).

³² 393 U.S. 503 (1969).

workplace cases, the Court has not always sided with the government employer but nevertheless consistently has limited the scope of protected employee speech. When juxtaposed, the Court's major decisions in these two contexts reveal a corresponding reliance on the government speech doctrine to eliminate First Amendment rights belonging to both public students and public employees.

A. *Pickering and Tinker: The Court Protects Nondisruptive Speech*

There can be no doubt that the First Amendment guarantees an ordinary citizen's ability to criticize the government.³³ Whether a different rule applies to government employees by virtue of their employment status was the issue presented to the Court in *Pickering*, where a public school teacher took issue with the school board's financial priorities in a letter to the local newspaper.³⁴ After a hearing, the board fired Pickering on the ground that the letter contained false statements that would damage board members' reputations, interfere with faculty discipline, and create "controversy, conflict and dissension" in the school district.³⁵ The state courts affirmed the board's action based on the old right/privilege doctrine:³⁶ Pickering gave up his First Amendment right to speak out about the public schools the day he accepted a job teaching at one.³⁷

³³ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Bridges v. California*, 314 U.S. 252, 270-71 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

³⁴ 391 U.S. at 566.

³⁵ *Id.* at 567.

³⁶ See, e.g., *Adler v. Bd. of Educ. of New York City*, 342, U.S. 485, 491-93 (1952) (upholding law barring public school teachers from exercising right of association); *McAuliffe v. City of New Bedford*, 115 Mass. 216, 29 N.E. 517, 517-18 (1892) (stating, in an opinion by Justice Holmes, that although a citizen "may have a constitutional right to talk politics, ... he has no constitutional right to be a policeman").

³⁷ 391 U.S. at 567.

The Supreme Court unanimously overturned Pickering’s dismissal, noting in an opinion for the Court by Justice Marshall that earlier decisions had already rejected the right/privilege approach.³⁸ Recognizing that government employers may object to critical statements made by their employees in an “enormous variety of fact situations,” Justice Marshall deemed it inappropriate to create a bright-line rule to resolve these claims.³⁹ Rather, courts should balance the interests belong to the employee “as a citizen in commenting upon matters of public concern” with those belonging to the government employer “in promoting the efficiency of the public services it performs through its employees.”⁴⁰

To assist lower courts in performing what became known as the *Pickering* balancing test, Justice Marshall identified several significant factors in the Court’s analysis. First, Justice Marshall considered whether Pickering’s letter actually impaired his classroom performance or disrupted school operations, and concluded it did not.⁴¹ Second, the Court looked to the content of the speech in balancing the competing interests. Pickering’s letter dealt with school funding, a topic that had generated significant community interest as well as two recent ballot initiatives.⁴² The Court warned that the school board must not be allowed to monopolize discussion of such an important question, emphasizing that “free and open debate is vital to informed decision-making by the electorate.”⁴³ Pickering’s identity as a teacher was a third consideration that weighed in his favor. Teachers were “members of the community most likely to have informed and definite opinions” about school finance; therefore, the Court deemed teacher speech on the issue to be

³⁸ *Id.* at 568.

³⁹ *Id.* at 569.

⁴⁰ *Id.* at 568.

⁴¹ *Id.* at 572-73.

⁴² *Id.* at 571.

⁴³ *Id.* at 571-72.

especially valuable.⁴⁴ Public understanding would suffer a significant blow if teachers could be punished for expressing their opinions on the matter.⁴⁵

After weighing these various factors, the Court found little on the school district's side of the equation to justify Pickering's dismissal. The board had not shown that the letter had impaired Pickering's classroom performance or disrupted school operations generally. On the other hand, Pickering had a substantial interest in being allowed to speak, given the significant public interest in the topic and his own membership in an informed group. Even with respect to those statements in Pickering's letter that were clearly wrong, the Court found that their only effect was to anger the board; according to Justice Marshall, Pickering's missive was greeted by everyone else "with massive apathy and total disbelief."⁴⁶ Nor did the letter stray so far from the truth as to cause genuine concern about Pickering's competence as a teacher.⁴⁷ Had members of the public been misled by the mistakes in Pickering's remarks, the Court considered the board well-placed to correct those misconceptions through its own speech.⁴⁸ Given these facts, the Court concluded that the school district could no more forbid Pickering from expressing his views than it could any other member of the public.⁴⁹

A year after it recognized the First Amendment rights of public school teachers in *Pickering*, the Court engaged in the same kind of fact-specific balancing to hold that public junior high and high school students could not be disciplined for wearing black armbands in class to protest the Vietnam War.⁵⁰ In *Tinker v. Des Moines Independent School District*, the Court rejected the idea that schools can be turned into free speech no-fly zones where school

⁴⁴ *Id.* at 572.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 573, n. 5.

⁴⁸ *Id.* at 572.

⁴⁹ *Id.* at 573.

⁵⁰ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

officials exercise complete control over students.⁵¹ The Court envisioned student speech rights as encompassing not just supervised speech in the classroom, but also interpersonal communications among students between classes, in the lunchroom and elsewhere on school facilities both during and outside of school hours.⁵² Just as Pickering retained his individual status when he expressed his views about work-related issues, the underage students in *Tinker* were considered citizens with First Amendment rights even while at school.⁵³

The Court nevertheless also recognized that school officials must have the authority to impose discipline by creating and enforcing rules of conduct,⁵⁴ in the same manner that employers must be allowed to manage employees to create an efficient workplace. Faced with these conflicting interests, the Court again attempted to resolve the standoff in a way that gave due consideration to both sides. School officials' need to maintain order, the Court said, will trump the students' right to free speech when that expression substantially interferes with schoolwork or the security of other students.⁵⁵ When school authorities cannot show that student expression materially disturbs normal school activities, however, the students' free speech rights must prevail.⁵⁶ Echoing its *Pickering* conclusion, the Court held that the individual's right of free speech in these circumstances is outweighed only when that expression substantially impairs the functioning of the public institution in question.

Even though the school district claimed its anti-armband policy would prevent disturbances, the Court remained unconvinced.⁵⁷ Taking into account the passive, individual, and unspoken nature of the students' speech, as well as statements by school officials disputing

⁵¹ *Id.* at 511.

⁵² *Id.* at 512.

⁵³ *Id.* at 511.

⁵⁴ *Id.* at 507.

⁵⁵ *Id.* at 513.

⁵⁶ *Id.* at 509.

⁵⁷ *Id.* at 504-06

the appropriateness of anti-war protests in class, the Court concluded that the district's desire to avoid controversy, not disruption, was the actual motivating force behind the policy.⁵⁸ Noting that the school district previously had allowed students to wear other potentially divisive political symbols, the Court suggested the real reason school officials opposed the armbands was disagreement with the protesting students' ideological stance—a clear example of constitutionally impermissible viewpoint discrimination.⁵⁹ The Court indicated that schools cannot restrict student expression of disfavored ideas just to prevent those ideas from gaining wider acceptance.⁶⁰ That the students in *Tinker*, like the teacher in *Pickering*, had expressed sentiments the respective school boards preferred others neither hear nor adopt failed to justify the boards' actions in either case.

As it had in *Pickering*, the *Tinker* Court also considered the value of the forbidden speech as a factor in its balancing of interests. In his majority opinion, Justice Fortas celebrated free speech as being not only compatible with public education, but in fact indispensable to the learning process.⁶¹ Although he recognized the school's need to convey its own curricular message, Justice Fortas nevertheless declared that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”⁶² He contrasted America's public schools to ancient Sparta's authoritarian educational regime, concluding that a system of state indoctrination would ill equip young people to assume the mantle of democratic self government.⁶³

⁵⁸ *Id.* at 508-10.

⁵⁹ *Id.* at 510-11.

⁶⁰ *See id.* at 514 (indicating that students in *Tinker* wore armbands both to express their views about the war, and “to influence others to adopt [those views]”).

⁶¹ *Id.*

⁶² *Id.* at 511.

⁶³ *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Taken together, *Pickering* and *Tinker* provide that neither public employees nor public students automatically give up their First Amendment rights by virtue of their status as participants in public institutions. Although public officials must have the ability to manage those institutions, public employees and public students who disagree with officially favored positions cannot be punished simply for expressing a different view. In both cases, the key consideration for the Court was whether the speech substantially disrupted the normal functioning of the school or workplace. The decisions show a reluctance by the Court to rely on institutional managers' justifications for restricting speech; rather, the Court indicated a willingness to scrutinize the underlying evidence itself. Most importantly, the decisions champion the value of dissent, and decry the consequences of official suppression of ideas, even in authoritarian institutions such as public schools and workplaces. Having thus granted a significant measure of First Amendment protection to public student and public employee speakers, the Court has since issued a series of decisions limiting that protection, again in often comparable ways.

B. Connick and Bethel: The Court Emphasizes the Public Interest Value of the Speech

Beginning in the 1980's, the Court ruled that certain types of speech by either public employees or public students could be regulated, even if that speech caused no significant institutional disruption. Rather than focusing on whether the individual speech in these cases impaired efficient institutional operations, the Court instead looked to the content of the speech at issue. More specifically, the Court asked whether the speech dealt with a subject that it believed deserved First Amendment protection, concluding in another pair of landmark cases that it did not.

The issue before the Court in *Connick v. Myers* was whether an assistant district attorney, Sheila Myers, could be fired for distributing a questionnaire at work to measure her colleagues' satisfaction with certain office policies and procedures.⁶⁴ In upholding Myers' termination for insubordination, the Court held for the first time that the *Pickering* balancing test applied only to employee speech that dealt with matters of public concern.⁶⁵ Under this threshold test, public employers are free to discipline or discharge employees for engaging in "personal interest" speech without raising First Amendment implications.⁶⁶

The Court gave little guidance as to how courts should determine when speech involves matters of public concern other than to say that a proper inquiry entails an examination of "the content, form and context of a given statement, as revealed by the whole record."⁶⁷ Here the district court had erred, the Court explained, by concluding that because Myers' questionnaire addressed the "effective functioning of the District Attorney's Office," it automatically qualified as a matter of public concern.⁶⁸ The Court instead concluded that Myers' question that dealt with whether employees were pressured to work in political campaigns was the only one to make the cut as speech about a public matter.⁶⁹

Two main reasons were advanced by the Court in holding that most of Myers' questionnaire did not rise to the level of public concern speech. First, the Court examined Myers' motive in distributing the questionnaire, and found that her actions stemmed more from a desire to advance her own self-interest in avoiding a pending transfer than to apprise the public

⁶⁴ 461 U.S. 138, 140 (1983).

⁶⁵ Although the public concern test had not previously been articulated as a threshold requirement in its previous decisions, the Court located the test's origins in "*Pickering*, its antecedents, and its progeny,"—cases that the Court described as involving the rights of public employees to participate in political affairs. *Id.* at 146.

⁶⁶ *Id.* at 147.

⁶⁷ *Id.* at 147-48.

⁶⁸ *Id.* at 143.

⁶⁹ *Id.* at 149.

about scandal or corruption in the district attorney's office.⁷⁰ The Court was determined not to allow a malcontent employee turn a mere workplace grievance into what it called a "cause celebre."⁷¹ Second, the Court refused to consider all expression about the performance of government officials as public concern speech for pragmatic reasons. Doing so, the Court said, would make it impossible for government offices to function, because "virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."⁷² In the interest of efficiency, employers, not judges, were seen by the Court as the proper arbiters of purely internal workplace disputes.⁷³

Because one question on Myers' survey qualified as a matter of public concern, the Court nevertheless advanced to the second of what had now become a two-part test, and weighed Myers' interest in free speech against the employers' interest in maintaining an effective workplace.⁷⁴ However, even the *Pickering* balance had now become more employer-friendly. The Court held it was appropriate to give "a wide degree of deference" to the employer's judgment as to how the survey would interfere with working relationships, and added that the employer's prediction of interference would suffice to justify Myers' termination.⁷⁵

Given that Myers' questionnaire was distributed at the workplace, the Court also agreed with the employer that the survey posed more of a danger to institutional functioning than had *Pickering's* letter to the editor, which, despite its inaccuracies, was composed and published outside the office.⁷⁶ Finally, the Court weighed the context in which the speech arose, noting yet again that the questionnaire was motivated by a personal workplace dispute rather than an

⁷⁰ *Id.* at 148.

⁷¹ *Id.*

⁷² *Id.* at 149.

⁷³ *Id.* at 146.

⁷⁴ *Id.*

⁷⁵ *Id.* at 151-52.

⁷⁶ *Id.* at 153.

academic desire to obtain “useful research.”⁷⁷ As a result, the lack of significant value ascribed to the questionnaire by the Court resulted in Myers’ speech failing not only the public concern prong, but also the balancing portion, of the Court’s new, two-part *Pickering-Connick* test for employee speech.⁷⁸

Just as it looked to the public interest value of employee speech in *Connick*, the Court in *Bethel School District v. Fraser*⁷⁹ also emphasized the content of student speech in determining whether that expression would be protected by the First Amendment. In *Bethel*, the Court held that the First Amendment did not prohibit school officials from punishing a student who delivered a lewd speech during a high school assembly, noting that indecent, offensive language expresses no political viewpoint and plays “no essential part of any exposition of ideas.”⁸⁰ Chief Justice Burger, writing for the Court, emphasized the “marked distinction” between the political message of the *Tinker* armbands and the sexual innuendo used by Matthew Fraser to nominate a friend to a student government position.⁸¹ Fraser’s sexual double entendres were described by the Court as “plainly offensive to both teachers and students—indeed to any mature person” and as “acutely insulting to teenage girl students.”⁸²

Normally, the First Amendment protects adults who engage in this type of offensive expression; however, Justice Burger denied that the constitutional rights of public school students were equivalent to those of adults.⁸³ The *raison d’être* of the public education system as described by the *Bethel* Court bore an uncanny resemblance to the ancient Spartan system that had been maligned in *Tinker*. Schools exist not only to educate students, but also to instill in

⁷⁷ *Id.*

⁷⁸ *Id.* at 154.

⁷⁹ 478 U.S. 675 (1986).

⁸⁰ *Id.* at 685 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, at 572 (1942)).

⁸¹ *Id.* at 680.

⁸² *Id.* at 683.

⁸³ *Id.* at 682.

them the “fundamental values necessary to the maintenance of a democratic political system.”⁸⁴

Although the schools must teach tolerance of diverse views, the Court emphasized that they must also train students to respect the “sensibilities of others” and the boundaries of what school officials consider socially acceptable.⁸⁵

As it had in *Connick*, the *Bethel* Court downplayed the need for evidence of actual institutional disruption to justify regulating the speech at issue. The district court had concluded, and the appeals court affirmed, that while student reaction to Fraser’s speech may have been “boisterous,” it was not disruptive, and the speech itself had not materially interfered with the educational process.⁸⁶ The Court nonetheless deferred to the judgment of school officials, stating that the “determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”⁸⁷

The *Bethel* majority made two implicit references to the government speech doctrine to justify its holding. First, the Court again recognized, as it had in *Tinker*, that schools are “instruments of the state” that communicate certain state-approved lessons to their students pursuant to an educational mission.⁸⁸ Second, the Court enunciated for the first time what might be called a government speaker’s right of disassociation, a type of negative speech right, stemming from that mission. To teach certain lessons effectively, the Court concluded that a school may need to distance itself by punishing or eradicating student speech that could undermine those lessons.⁸⁹ “Accordingly,” the Court said, “it was perfectly appropriate for the

⁸⁴ *Id.* at 683 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

⁸⁵ *Id.* at 681.

⁸⁶ *Id.* at 693 (Stevens, J., dissenting) (citing 755 F.2d 1356, 1360-61 (9th Cir. 1985)).

⁸⁷ *Id.* at 683.

⁸⁸ *Id.*

⁸⁹ *Id.* at 685.

school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”⁹⁰

This right of disassociation also played an important role in the Court’s recent decision in the “BONG HiTS 4 JESUS” case, *Morse v. Frederick*.⁹¹ There, high school students in Alaska watching the Olympic Torch Relay with their classmates across the street from school unfurled a banner featuring those enigmatic words just as television cameras panned the crowd.⁹² The school principal ordered that the banner be taken down, and when high school senior Joseph Frederick refused, the principal suspended him.⁹³ The Court affirmed the suspension, holding that a school can prohibit and punish student speech at a school-sponsored, off-campus event that the school principal reasonably interprets as sending a pro-drug message.⁹⁴ Had the principal allowed Frederick’s banner to remain, the school would have sent what the Court viewed as a potent, pro-drug message that was not only contrary to, but could also undermine, the school’s anti-drug position.⁹⁵

Although Frederick had argued that the banner was mere “nonsense” meant only to attract media attention, the Court parsed the banner’s words carefully to conclude that it advocated illegal drug use.⁹⁶ Ironically, the Court then relied on Frederick’s “nonsense” claim to deny that the banner constituted a political message about decriminalization of marijuana, aligning the holding with *Bethel* and distinguishing it from *Tinker*.⁹⁷ A banner that plausibly supported drug use, and that potentially undermined the school’s own anti-drug message, could

⁹⁰ *Id.* at 685-86.

⁹¹ 127 S. Ct. 2618 (2007)

⁹² *Id.* at 2622.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2629.

⁹⁶ *Id.* at 2624-25.

⁹⁷ *Id.* at 2625.

be restricted by school officials without a showing of substantial disruption with school activities, according to five members of the Court.⁹⁸

In these cases, the Court concluded that certain types of speech are less worthy of First Amendment protection in public school or office settings, even when the speech has not been shown to have disrupted normal operations. At school or in the workplace, the Court viewed the government's interest in exercising authority over its subordinates, for purposes of either avoiding litigation or inculcating school-approved values, as trumping the individual's right to engage in what the Court considered to be lower-value speech.

C. Hazelwood and Garcetti: The Court Classifies School-Sponsored and Job-Required Expression as Government Speech

Whereas *Bethel* and *Morse* both involved public school students' personal speech, the Court in *Hazelwood School District v. Kuhlmeier*⁹⁹ used the same "disassociation" rationale to give school officials' almost complete control over student speech in school-sponsored, curricular activities. In *Hazelwood*, a high school principal removed two pages from the campus newspaper prior to publication because he objected to a pair of student-written articles, one about teen pregnancy, and the other about the effects of parental divorce on students.¹⁰⁰ Although the Court of Appeals concluded that the newspaper qualified as a public forum for student expression,¹⁰¹ the Supreme Court ruled instead that as a "supervised learning experience," the

⁹⁸ Justice Alito, joined by Justice Kennedy, wrote separately to emphasize that, in their view, the holding extended only to student speech that could not "plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id.* at 2636 (Alito, J., concurring). Apparently, as noted by Justice Breyer's concurring opinion, had Frederick's banner started with the word "LEGALIZE," his speech might well have been protected. *Id.* at 2639 (Breyer, J., concurring).

⁹⁹ 484 U.S. 260 (1988).

¹⁰⁰ *Id.* at 263-64.

¹⁰¹ *Id.* at 265.

paper was part of the school curriculum.¹⁰² State and local school officials are charged with designing the content of public school curricula;¹⁰³ therefore, the Court reasoned that those officials must also have editorial control over curricular publications.¹⁰⁴ School-sponsored activities that bear “the imprimatur of the school,” such as student publications or theatrical productions, were seen by the Court as vehicles used by the school to teach and transmit its own messages.¹⁰⁵ The school, as the real speaker, need not tolerate objectionable student expression that contradicts the school’s own message or could be misattributed to the school.¹⁰⁶

The only First Amendment limit the Court recognized on a school’s ability to restrict student speech “disseminated under [school] auspices” was that the restriction must be reasonably calculated to advance a “valid educational purpose.”¹⁰⁷ Student expression that the Court suggested could legitimately be regulated under this test would include speech that interferes with school operations or violates the rights of others; is poorly written, vulgar, profane or otherwise unsuitable for younger students; advocates unacceptable behavior such as alcohol or drug use, or irresponsible sex; or that “associate[s] the school with any position other than neutrality on matters of political controversy”¹⁰⁸—undeniably a wide swath of student communication that the Court said can be restricted subject to only rational basis review. In these facts, the Court held that it was reasonable for the principal to conclude that the pregnancy article invaded privacy and was inappropriate for younger students, and that the divorce article

¹⁰² 484 U.S. at 270-71. In his dissent, Justice Brennan cited both an approved policy statement published annually in the newspaper in which it claimed “all rights implied by the First Amendment,” and a school board policy providing that “[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism” to argue that the newspaper was a forum for student expression. *See id.* at 277-78 (Brennan, J., dissenting).

¹⁰³ *Id.* at 273; *see also* *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (noting the state’s “undoubted right to prescribe the curriculum for its public schools”).

¹⁰⁴ 484 U.S. at 271-73.

¹⁰⁵ *Id.* at 271.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 272-73.

¹⁰⁸ *Id.* at 272.

did not meet journalistic standards of objectivity.¹⁰⁹ As long as a school acts reasonably, the Court said it must defer to school authorities, because “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”¹¹⁰

Although the Court distinguished *Tinker* as involving personal, political expression that coincidentally took place on school premises,¹¹¹ had *Tinker* come before the Court in 1989 rather than 1969 it is far from certain that the Court would have treated *Tinker*’s facts as beyond *Hazelwood*’s reach. The students in *Tinker* expressed their opinions about the Vietnam War during school-sponsored activities because they wore their armbands to class—the quintessential supervised learning experience. Parents or members of the public visiting the school could reasonably have concluded that the armbands were authorized by the school, and thereby may have associated the school with a non-neutral position regarding a controversial political issue. The school board’s finding that the armbands would disrupt classroom instruction would surely qualify as reasonably related to a legitimate pedagogical objective under *Hazelwood*’s deferential approach. After *Hazelwood*, it is no wonder that some courts and commentators started questioning whether *Tinker* retained much vitality in the public schools.¹¹²

Thanks to the opinion’s imprecise reasoning, some courts and commentators also misclassified *Hazelwood* as a puzzling application of the public forum doctrine rather than as a

¹⁰⁹ *Id.* at 274-75.

¹¹⁰ *Id.* at 273.

¹¹¹ *Id.* at 270-71.

¹¹² See, e.g., *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994) (stating that the Court’s decisions in *Bethel* and *Hazelwood* cast doubt on whether students retain free speech rights in school settings); Erwin Chemerinsky, *Do Students Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?* 48 Drake L. Rev. 517, 530 (2000) (“[I]n the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate.”); but see Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 Baylor L. Rev. 623, 673-74 (2002) (stating that *Tinker* remains good law despite the Court’s later decisions limiting student speech).

relatively straightforward example of a government speech analysis.¹¹³ The confusion occurred because in refuting the lower court’s conclusion that the newspaper constituted a public forum, the Court cited *Perry Education Ass’n v. Perry Local Educators’ Ass’n*¹¹⁴ as the source for its “reasonableness” test.¹¹⁵ In *Perry*, the Court had held that speech could be excluded from a “non-public forum”¹¹⁶ only if such exclusion was both reasonable and “not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹¹⁷ If by citing *Perry*, the Court meant to indicate that it considered the student newspaper in *Hazelwood* a non-public forum, scholars wondered why the Court then failed to complete the analysis by scrutinizing the principal’s actions for viewpoint discrimination.¹¹⁸ Uncertainty with respect to the Court’s intentions resulted in conflicting decisions among the circuits regarding whether school officials could constitutionally restrict school-sponsored student speech on the basis of viewpoint,¹¹⁹ and

¹¹³ See *supra* note 21 and accompanying text. See also *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631 (2d Cir. 2005), *cert. denied*, 547 U.S. 1097 (2006) (observing that while *Hazelwood* ostensibly relied on the Court’s public forum cases, the opinion was unclear about whether those cases’ insistence on viewpoint neutrality was part of the *Hazelwood* reasonableness test).

¹¹⁴ 460 U.S. 37 (1983).

¹¹⁵ Citing *Perry*, the *Hazelwood* Court held that “school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner” because school officials had “reserve[d] the forum for its intended purpos[e]’...as a supervised learning experience for journalism students.” 484 U.S. at 270.

¹¹⁶ In *Perry*, the Court categorized speech that occurs on government-owned property or within government facilities into three categories, each subject to its own set of First Amendment rules: the traditional public forum, the limited public forum, and the non-public forum. 460 U.S. at 45-46. In all three forum types, the government is supposed to honor the ban against viewpoint discrimination. *Id.* at 46.

¹¹⁷ *Id.* (citing *U. S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7, *appeal dismissed and cert. denied*, 453 U.S. 917 (1981)).

¹¹⁸ See, e.g., William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 Iowa L. Rev. 505, 533-34, 541(1989) (questioning why the *Hazelwood* Court failed to apply the viewpoint neutrality prong of the *Perry* test, but ultimately concluding that the Court treated the newspaper as part of the curriculum rather than as a non-public forum); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. L. J. 175, 189 (2007) (“The *Hazelwood* case itself does not explicitly require that the schools’ restrictions of apparently school-sponsored speech be viewpoint-neutral, even though *Hazelwood* seems to rely on cases that do recognize such a requirement.”).

¹¹⁹ Compare *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926 (10th Cir. 2002) (concluding that the Supreme Court intended to create an exception to viewpoint neutrality in *Hazelwood* for school-sponsored speech) and *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (stating that *Hazelwood* did not incorporate a viewpoint neutrality standard into its holding) with *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005), *cert. denied*, 547 U.S.1097 (2006) (opining that “a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical interests,” but acknowledging that an overwhelming state interest could justify viewpoint discriminatory censorship in some

inspired calls by commentators either for or against imposition of a viewpoint neutrality requirement in student speech cases.¹²⁰ Recognizing that the Court in *Hazelwood* intended to go beyond the public forum doctrine to classify the school-sponsored newspaper as the school's own speech—government speech—clears the confusion: when the government speaks, it is entitled to advance its own viewpoint.¹²¹

Hazelwood's counterpart in the Court's public employee speech jurisprudence was not decided for almost two more decades. In 2006, the Court ruled in *Garcetti v. Ceballos* that a public employee's expression made pursuant to an official job duty can be regulated as speech belonging to the employer and not the employee,¹²² just as in *Hazelwood*, the Court had found that a public student's speech delivered in the course of a school-sponsored activity is subject to control as speech belonging to the school rather than the student. After *Garcetti*, public employees who speak pursuant to their job responsibilities have no First Amendment protection

circumstances) and *Searcey v. Harris*, 888 F. 2d 1314, 1319 n.7 (11th Cir. 1989) (concluding that *Hazelwood* did not eliminate the viewpoint-neutrality requirement for school-sponsored student speech in a non-public forum).

¹²⁰ See, e.g., Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 Pepp. L. Rev. 647,668 (2005) (urging that courts prohibit school officials from restricting school-sponsored student speech based on students' political, religious, or racial viewpoints); Wright, *supra* note ____ at 214 (2007) (arguing against imposition of a viewpoint-neutrality rule with respect to school-sponsored, student speech at the grade school level).

¹²¹ In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995), the Court indicated in dicta that *Hazelwood* applied the government speech, rather than the public forum, doctrine:

When the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . It does not follow, however . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead encourages a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. See, e.g., . . .*Hazelwood School Dist. v. Kuhlmeier* . . .

Id. at 834. See also Buss, *supra* note 118 at 513 (stating that *Hazelwood* is best explained "in terms of the school's power to control its communicative resources"); Mark Yudoff, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 St. John's L. Rev. 365, 375 (1995) (recognizing that *Hazelwood* dealt with a "school system's ability to promote its own message").

¹²² 126 S. Ct. 1951, 1960 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

against employer retaliation, even when that speech reveals corruption, wrongdoing, or other matters of clear public interest.

Garcetti involved a retaliation claim brought by a deputy district attorney, Richard Ceballos, against the Los Angeles District Attorney’s office.¹²³ The controversy arose after a criminal defense lawyer challenged the accuracy of statements made by a deputy sheriff in a search warrant affidavit.¹²⁴ As part of his regular duties, Ceballos investigated the claim, concluded that the deputy falsified the affidavit, discussed his findings with his superiors, and followed up with a disposition memo recommending that the charges be dismissed.¹²⁵ After a contentious meeting between the district attorney’s office and the sheriff’s department, Ceballos’ superiors decided to continue with the prosecution.¹²⁶ Believing he had a professional, ethical obligation to do so under *Brady v. Maryland*,¹²⁷ Ceballos gave a redacted copy of his memo to defense counsel and was called to testify by the defense at the suppression hearing.¹²⁸ Ultimately, the warrant was upheld on unrelated grounds,¹²⁹ but shortly thereafter Ceballos claimed he was demoted, transferred to a distant office, and denied a promotion as punishment for his speech.¹³⁰

In its previous employee speech cases, the Court appeared to have linked “speaking as a citizen” and “on a matter of public concern” together, as if to insinuate that by bringing a matter of public interest to light, a public employee did, in fact, behave as a citizen.¹³¹ A number of

¹²³ *Id.* at 1955.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1955-56.

¹²⁶ *Id.* at 1956.

¹²⁷ 373 U.S. 83 (1963) (holding that in a criminal case, due process requires that a prosecutor disclose exculpatory evidence to the defense).

¹²⁸ 126 S. Ct. at 1972 (Souter, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1956.

¹³¹ The Court’s language in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) is ambiguous, stating that “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of

circuit courts of appeals adopted this interpretation, and looked to the speech content as well as the speaker's personal motivation to determine whether the employee's expression was protected by the First Amendment.¹³² If the employee's speech revealed government incompetence or wrongdoing, and was inspired at least in part by the desire to expose such behavior, most lower courts held that the employee had acted "as a citizen."¹³³ However, a few courts understood the phrase as imposing a two-part test, and ruled that even employees who revealed matters of clear public importance did not conduct themselves as citizens if their speech stemmed from their job responsibilities.¹³⁴

The *Garcetti* Court resolved this conflict in the government employer's favor by uncoupling the phrase into two separate inquiries, holding that the roles of "citizen" and "employee" are mutually exclusive whenever an employee engages in job-required speech. The "controlling factor" identified by the Court in determining whether an employee engaged in citizen speech was neither the speech's importance nor the speaker's incentive, but rather

public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. In *Connick v. Myers*, 461 U.S. 138 (1983), the assistant district attorney wrote and distributed her questionnaire in her role as an employee, but the Court nevertheless proceeded to the *Pickering* balancing test after determining that one question addressed a matter of public concern. *See supra* notes 64 -78 and accompanying text. It therefore appeared from *Connick* that an employee could speak both as an employee and as a citizen, if the speech in question touched on a matter of public interest. A more recent Court decision, *City of San Diego v. Roe*, 543 U.S. 77 (2004) focused on whether a police officer's indecent videotapes dealt with a matter of public concern, not on whether he spoke "as a citizen" in making them. *Id.* at 80-84.

¹³² *See, e.g.*, *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 191 (5th Cir. 2005)(holding that a public employee who spoke on the phone about a personnel matter of public interest was speaking as a citizen under *Connick* even though her job duties included answering the phone); *Rodgers v. Bank*, 344 F. 3d 587, 599-601 (6th Cir. 2003) (concluding that employee who wrote a critical memo about patient care in a mental hospital spoke as a citizen under *Connick* because the speech addressed a matter of public concern, even though memo was part of employee's official duties).

¹³³ *See, e.g.*, *Baldassare v. State of N.J.*, 250 F.3d 188, 196-200 (3rd Cir. 2001)(determining that investigators who, as part of their duties, filed an internal report revealing fraud and illegality in law enforcement were protected by the First Amendment); *Wallace v. County of Comal*, 400 F. 3d 284, 289 (5th Cir. 2005)(holding that health inspectors who were dismissed after reporting county health violations as part of their duties spoke on a matter of public concern); *Taylor v. Keith*, 338 F.3d 639 (6th Cir. 2003)(concluding that internal affairs report about police brutality was speech on a matter of public concern, even if report made in the course of employment).

¹³⁴ *See, e.g.*, *Buazard v. Meridith*, 172 F.3d 546, 548-49 (8th Cir. 1999)(concluding that a police official who refused to alter witness statements alleging officer misconduct was not entitled to First Amendment protection because he spoke as an employee, not as a citizen); *Urofsky v. Gilmore*, 216 F.3d 401, 407-09 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (holding that state can regulate public employees' access to sexually explicit material in the course of their job duties on state-owned computers, even if those job responsibilities involve matters of public concern).

whether the speech was made pursuant to the employee's official duties.¹³⁵ The Court established a new categorical rule: "[W]hen 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."¹³⁶ *Hazelwood* had established that student speech was subject to almost unlimited regulation when it occurred in a school-sponsored context; *Garcetti* now made clear that public employee speech falls outside the First Amendment when the expression takes place in the context of official duties.

In his opinion for the five-member *Garcetti* majority, Justice Kennedy interpreted *Pickering* as granting public employees First Amendment rights to participate in civic debate that were coextensive with, but no greater than, the free speech rights belonging to workers employed by private businesses.¹³⁷ The fact that Ceballos was an assistant district attorney did not, in the Court's eyes, entitle him to greater First Amendment rights with respect to on-the-job speech than he would have possessed were he an associate at a private law firm.¹³⁸ The Court's private-sector analogy was faulty, however, on two counts. First, the Court indicated that had Ceballos delivered his disposition memo to the press rather than to his superiors, it would have qualified as "citizen speech," because "that is the kind of activity engaged in by citizens who do not work for the government."¹³⁹ The Court failed to explain, however, why a government employer's status as a state actor depends on whether its employee speaks internally or externally. This result clearly does not correspond to the private sector, where workers can be disciplined for maligning the boss irrespective of whether they do so through internal channels or on the nightly news.

¹³⁵ 126 S. Ct. at 1959-60.

¹³⁶ *Id.* at 1960.

¹³⁷ *Id.* at 1960-61.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1961.

Second, the Court drew a constitutional distinction between internally communicated, official-duty speech, which receives no First Amendment protection, and other internally communicated, job-related (but not job-required) speech, which the Court said may be shielded under the former *Pickering-Connick* analysis.¹⁴⁰ This convoluted conclusion has no equivalent in the private workplace, where employees may be disciplined by their employer indiscriminately for either type of speech.¹⁴¹ The distinction appears to have stemmed from the Court's desire to distinguish *Givhan v. Western Line Consolidated School District*, which had held that the First Amendment protected a teacher who complained directly to the principal regarding discriminatory school hiring policies.¹⁴² According to the *Garcetti* majority, the teacher's speech in *Givhan* may have pertained to her job, but it was not required by it; therefore, the teacher's speech was protected by the First Amendment even though she communicated her concerns through internal channels.¹⁴³ Both Justice Stevens and Justice Souter pointed out the absurdity of this conclusion in their dissents.¹⁴⁴ "[I]t is senseless," Justice Stevens wrote, "to let constitutional protection for exactly the same words hinge on whether they fall within a job description."¹⁴⁵

Community benefits associated with public employee speech, so important to the Court in *Pickering*, were virtually ignored in *Garcetti*, in a way reminiscent of how the *Hazelwood* Court overlooked *Tinker*'s eloquent call for free student debate in the public schools. Although

¹⁴⁰ *Id.* at 1959.

¹⁴¹ The Court nevertheless tried to maintain its analogy on this point by noting that "[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like 'any member of the general public' to hold that all speech within the office is automatically exposed to restriction." *Id.* (internal citation omitted). The flaw in the Court's analysis is apparent--in a private workplace, all employee speech is potentially subject to restriction.

¹⁴² 439 U.S. 410, 414 (1979).

¹⁴³ 126 S. Ct. at 1959.

¹⁴⁴ *Id.* at 1963 (Stevens, J., dissenting); *Id.* at 1965 (Souter, J., dissenting).

¹⁴⁵ *Id.* at 1963 (Stevens, J., dissenting).

the *Garcetti* majority paid lip service to the societal value of public employee speech,¹⁴⁶ its holding mandates that courts ignore the content of employee speech altogether in evaluating its constitutional status. Employees who, in the scope of their employment, discover and report government corruption, fraud, illegality or other misconduct to their superiors are entitled to less First Amendment consideration than office loudmouths who engage in the worst sort of gossip; whistleblowers cannot proceed past the *Garcetti* gate if their speech falls within their regular job responsibilities, whereas rumormongers advance as far as the *Pickering-Connick* balancing test.¹⁴⁷ The Court rationalized that because public employees can go to the media with their concerns, the public will still learn whatever it needs to know about shady government operations.¹⁴⁸ This argument fails to recognize that the end result for government employees will almost certainly be the same: one who prevails on the “citizenship” test by talking to the media about a matter of public interest will almost certainly fall short on the *Pickering-Connick* balancing of interests for being insubordinate, disruptive, or guilty of bad judgment in failing to report concerns up the chain of command. Rather than acknowledge this Catch-22, the Court instead evidenced a Pollyanna-like faith in the integrity of low-level bureaucrats by predicting that government employers would adopt policies “that are receptive to employee criticism” as a way to discourage aggravated employees from tattling to the press.¹⁴⁹

Even if public employee work-product speech has societal value, the Court considered that value outweighed by the litigation and workplace efficiency costs it said would result from a contrary holding. Government employers should be free to discipline employees for work-

¹⁴⁶ *Id.* at 1958-59.

¹⁴⁷ In *Rankin v. McPherson*, the Court held that a deputy constable was protected by the First Amendment when, after learning about an assassination attempt on President Reagan, she remarked to a co-worker, “If they go for him again, I hope they get him.” 483 U.S. 378, 379-80 (1987). *Garcetti* would not change the result in *Rankin*, because the deputy constable’s speech was not made pursuant to her official duties. *Id.* at 380-81.

¹⁴⁸ *Garcetti*, 126 S. Ct. at 1960.

¹⁴⁹ *Id.* at 1961.

required speech, the Court said, to comport with “sound principles of federalism and separation of powers,”¹⁵⁰ just as *Hazelwood* had held that student speech limits should be determined by school officials and not federal judges. Denying First Amendment protection to all job-required speech, the Court noted, would eliminate the need for judicial oversight of these employee speech cases¹⁵¹—a benefit which, if accepted as a valid justification for limiting constitutional rights, could be used by the Court to decimate the Bill of Rights in its entirety.

In his dissent, Justice Souter suggested that the litigation cost savings touted by the Court were almost certainly illusory, given the majority’s refusal to adopt specific guidelines defining what constitutes a “job duty.”¹⁵² Apparently in response to the dissent’s argument that public employers could insulate themselves from whistleblower speech simply by imposing a universal duty on employees to report misconduct,¹⁵³ the majority said courts should look at what falls within an employee’s job responsibilities on a case-by-case basis.¹⁵⁴ As a result, Justice Souter predicted that the Court’s decision would not eliminate public employee speech litigation, but would merely shift the battlefield to whether an employee’s speech occurred in the course of his official duties.¹⁵⁵

Addressing the majority’s government speech argument head on, Justice Souter also objected that the majority mischaracterized Ceballos’ speech as belonging to his employer.¹⁵⁶ Justice Souter argued that government speech presupposes a predetermined government message, such as the clearly outlined policy the doctors in *Rust v. Sullivan* had been hired to

¹⁵⁰ *Id.* at 1961.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1968 (Souter, J., dissenting).

¹⁵³ *Id.* at 1965, n.2 (Souter, J., dissenting).

¹⁵⁴ *Id.* at 1962.

¹⁵⁵ *Id.* at 1968 (Souter, J., dissenting).

¹⁵⁶ *Id.* at 1968-70 (Souter, J., dissenting).

advance.¹⁵⁷ Here, however, Justice Souter noted that Ceballos was employed not to read from a script, but rather to exercise his best judgment as a professional prosecutor on his employer's behalf—a distinction that should have led the Court to recognize that Ceballos retained a personal interest in his speech.¹⁵⁸

The majority also thought First Amendment protection for employee speech was duplicative and unnecessary because of what it described as a “powerful network” of whistleblower protection acts¹⁵⁹—another overstated conclusion set straight by Justice Souter's dissent. In reality, state and federal whistleblower laws provide what Justice Souter rightly described as no more than “patchwork” protection, giving limited and inconsistent levels of coverage for public employees that varies by jurisdiction, industry, and the type and manner of disclosure.¹⁶⁰ For example, had Ceballos been a U.S. Attorney who tried to invoke the federal Whistleblower Protection Act of 1989,¹⁶¹ his attempt would have been in vain. Although the Act's language appears to protect “any disclosure” that a federal employee reasonably believes reveals wrongdoing,¹⁶² rulings by the Federal Circuit Court of Appeals have ensured that whistleblowers are almost never shielded by the statute. Ironically, in 2001, the court ruled that the Act does not protect employees who disclose misconduct in the course of their job duties, meaning that Ceballos' speech would fall outside both the Act and the First Amendment.¹⁶³ The

¹⁵⁷ *Id.* at 1969 (Souter, J., dissenting).

¹⁵⁸ *Id.* (Souter, J., dissenting). As a prosecutor, Ceballos was subject to independent constitutional and professional obligations to turn over what he believed to be exculpatory evidence in a criminal prosecution, which formed the basis of Justice Breyer's dissent. *Id.* at 1974-75 (Breyer, J., dissenting).

¹⁵⁹ *Id.* at 1962.

¹⁶⁰ *Id.* at 1970-72 (Souter, J., dissenting). For an example at the state level, see *Williams v. Riley*, 481 F. Supp. 582, 585 (N. D. Miss. 2007) (holding that the Mississippi whistleblower statute did not protect a prison officer who reported a co-worker's abuse of an inmate to a supervisor rather than to a “state investigative body”). *See also* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1046-47 (2004) (noting the inconsistent levels of protection provided by state whistleblower statutes).

¹⁶¹ Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

¹⁶² 5 U.S.C. § 2302(b)(8)(A).

¹⁶³ *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351 (Fed. Cir. 2001).

court, which exercises exclusive subject-matter jurisdiction over whistleblower appeals, has also held that the Act does not cover disclosures made to co-workers, supervisors, or those suspected of misconduct, among other exceptions.¹⁶⁴ A recent study showed that of the 3,561 whistleblower cases brought under the Act since 1994, whistleblowers lost almost 97 percent of the time.¹⁶⁵ The federal Whistleblower Protection Act starkly illustrates why statutes, which often cover only narrow situations and can always be repealed, modified, or judicially interpreted out of existence, can never serve as an adequate substitute for a constitutional right.

Garcetti's bottom line establishes that employees who speak as part of their official duties are no longer engaged in citizen-speech within the ambit of the First Amendment, but rather act solely as governmental mouthpieces whose speech is subject to complete state control. Writing for the Court, Justice Kennedy explained that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”¹⁶⁶ In the same manner that school officials were empowered by *Hazelwood* to regulate student speech that might be considered part of the school’s own curricular message, *Garcetti* allows public employers to restrict official duty speech in any manner and for any reason, regardless of the expression’s content or the employee’s motivation for speaking. As will be shown in the next section of this Article, the after-effects of both cases have been swift, dramatic, and far-reaching.

¹⁶⁴ Horton v. Department of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995).

¹⁶⁵ See James Sandler, *The war on whistle-blowers*, Salon.com, Nov. 11, 2007, available at <http://www.salon.com/news/features/2007/11/01/whistleblowers.html> (reporting the findings of a joint study by the Center for Investigative Reporting and Salon magazine).

¹⁶⁶ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

II. After *Hazelwood* and *Garcetti*: What Remains of the First Amendment Inside the Government's Gate?

Censorship has always been an issue for the high school student press; studies have shown that officials at many high schools exercised control over their student publications long before *Hazelwood* was decided.¹⁶⁷ Nevertheless, during the two decades following *Hazelwood*, anecdotal reports, empirical studies, and lower court holdings document the decision's significant chilling effect on public school student speech, especially with respect to student newspapers at both the high school and even college level. As troubling as *Hazelwood* has been in the schools, however, its effect on student speech may pale in comparison to the potential danger to public employee speech, as well as to the democratic process, presented by *Garcetti*. Although decided much more recently than *Hazelwood*, *Garcetti*'s government speech approach has already been applied by lower courts throughout the country to justify employer retaliation against public employees who report waste, fraud, or corruption in the course of their employment.¹⁶⁸ This Part explores the ramifications of these two decisions.

A. *Hazelwood*'s Effect on Student Media Outlets

To appreciate the chilling effect that *Hazelwood* has had on student journalism, it is important to realize that most cases involving official censorship of student publications never go to court. Quite simply, this is because the *Hazelwood* standard of review stacks the deck in favor of school officials, giving them a free hand to censor school-sponsored newspapers, magazines, and yearbooks in almost any way they please. Unless a student publication can prove by policy

¹⁶⁷ See Salomone, *supra* note 21, 307-09 (1992) (summarizing studies indicating that school newspapers were often subject to prior review even before the *Hazelwood* decision).

¹⁶⁸ See *infra* notes 251-314 and accompanying text.

and practice that it qualifies as a public or open forum for student expression, a lawsuit protesting school censorship is almost certainly doomed to fail. Additionally, students may lack the support, resources, and motivation to pursue a legal action that has only a marginal chance of success. To illustrate, consider the following three examples of school censorship of student media, all of which occurred in January 2007:

- When the St. Francis High School newspaper tried to publish a photograph that had hung for weeks in the Minnesota school’s performing arts center, the principal threatened legal action and froze the newspaper’s funds.¹⁶⁹ The picture depicted a scene from the previous semester’s school play in which a student held up what appeared to be a shredded American flag, but was actually a piece of a patterned tablecloth.¹⁷⁰ School district policy stated that “[o]fficial school publications are free from prior restraint by officials except as provided by law,” and the school district cited *Hazelwood* as the applicable law—despite the newspaper’s own mission statement, which provided that “*The Crier* is an open forum for student expression.”¹⁷¹ Following the incident, the school district appointed a committee to review its publications policy while the student staff shut down the paper’s web site, but continued to publish a print edition devoid of any controversial content.¹⁷² Ironically, the Cold-War-era play that started the controversy was a cautionary tale about the dangers of totalitarianism.¹⁷³

¹⁶⁹ Dave Orrick, *Photo sparks free-speech feud*, Pioneer Press, Jan. 19, 2007, at 1B.

¹⁷⁰ *Id.*

¹⁷¹ Dave Orrick, *Outcome of Minnesota censorship remains unclear*, National Scholastic Press Association Trends in High School Media, April 30, 2007, <http://www.studentpress.org/nsipa/trends/~stfranciscrier.html>.

¹⁷² *Id.*

¹⁷³ *Id.*

- The principal of Indiana’s Woodlan Junior-Senior High School implemented a mandatory prior review policy and declared himself the publisher of the student newspaper after it printed an editorial advocating tolerance for homosexuals.¹⁷⁴ Although the piece contained no vulgarities and produced no complaints from students or parents,¹⁷⁵ the school placed the newspaper’s faculty adviser on administrative leave and forbade her from teaching journalism for three years.¹⁷⁶ Not surprisingly, the newspaper’s former editor told the press that she had lost her interest in newspapers. “This experience has ruined journalism for me,” she said.¹⁷⁷
- That same month, the student staff of an Ohio high school magazine was ordered by the principal to rip two pages out of 2,100 copies of the December, 2006, issue because of a student-written column that criticized the school football team’s losing record.¹⁷⁸ When the principal threatened to implement a prior review policy, the magazine’s adviser cautioned that the student writers could lose all their independence if they fought too hard against the measure.¹⁷⁹ Ultimately, the principal dropped his insistence on a prior review policy, but instead eliminated the “open forum” reference from the magazine’s publication statement, ensuring that *Hazelwood* would govern any future censorship clashes with the students.¹⁸⁰

¹⁷⁴ Gene Policinski, *School: ‘Tolerance’ editorial will not be tolerated*, April 8, 2007, <http://www.firstamendmentcenter.org/commentary.aspx?id=18382>.

¹⁷⁵ *Id.*

¹⁷⁶ Student Press Law Center, *Ousted adviser of high school paper finds a new home at private school*, News Flash, Sept. 10, 2007, <http://www.splc.org/newsflash.asp?id=1600>.

¹⁷⁷ *Id.*

¹⁷⁸ Associated Press, *Ohio parents object to principal’s censorship of son’s column*, Jan. 9, 2007, <http://www.firstamendmentcenter.org/news.aspx?id=17985>.

¹⁷⁹ *Id.*

¹⁸⁰ Student Press Law Center, *Princeton High School magazine will not be subject to prior review*, News Flash, Jan. 23, 2007, <http://www.splc.org/newsflash.asp?id=1411&year>.

According to records maintained by the Student Press Law Center (SPLC), January 2007 was not an atypical month with respect to censorship of student publications. The SPLC, a non-profit advocacy organization for student journalists that runs a free attorney referral service, has collected countless similar instances that are documented in the SPLC's online archives.¹⁸¹ In fact, since *Hazelwood* was decided in 1988, the SPLC has reported receiving an ever-increasing number of calls from both high school and college students, and their advisers, seeking legal assistance in connection with censorship issues.¹⁸² The SPLC has noted that “[a]lthough *Hazelwood* requires that school officials who choose to censor must provide a valid educational reason for their censorship, calls to the SPLC show many administrators have apparently interpreted the [*Hazelwood*] decision as providing them with an unlimited license to censor anything they choose.”¹⁸³

Empirical studies, while providing what Professor Salomone in 1992 then characterized as only “mixed support” for the claim that *Hazelwood* dramatically increased incidents of high school censorship,¹⁸⁴ have nevertheless indicated that the decision has exerted a chilling effect on high school media.¹⁸⁵ As noted above, school officials have always attempted to control student publications, and as a result, *Hazelwood* may have simply validated the way publications already operated at many schools. That *Hazelwood* discouraged student journalists from covering, or expressing opinions on, controversial issues--or anything that could reflect poorly on the school—has garnered stronger empirical support. For example, a Minnesota study found that forty-three percent of responding advisers said they had chosen not to cover certain stories, or

¹⁸¹ Monthly reports from 2002 through the present detailing incidents of student media censorship are available at www.splc.org/newsflash.asp.

¹⁸² Brief of the Student Press Law Center et al. as Amici Curiae Supporting Petitioners, *Hosty v. Carter*, 546 U.S. 1169 (2006) (No. 05-377), 2005 U.S. S. Ct. Briefs LEXIS 1480, at *14. By the end of 2003, the number of students or advisers who called the SPLC for legal help had grown by 331 percent since 1988. *Id.*

¹⁸³ *Id.*

¹⁸⁴ Salomone, *supra* note 21, at 307.

¹⁸⁵ *Id.* See *infra* notes 186-191 and accompanying text.

had reduced the amount of controversial coverage in their papers, to avoid censorship.¹⁸⁶

Similarly, a content analysis of editorials published by a Midwestern high school newspaper from 1980 through 1996 concluded that post-*Hazelwood* editorials were less likely to criticize school policy or discuss controversial issues.¹⁸⁷

A 1999 national study of 138 high school advisers and 84 principals confirmed that at most responding schools, student journalists themselves engaged in self-censorship.¹⁸⁸ This is hardly a surprising result, given that the same study revealed that three-fourths of the respondents' newspapers are censored, with faculty advisers doing more of the actual censoring than school principals.¹⁸⁹ Furthermore, 87 percent of the principals and two-thirds of the advisers said they supported the statement that "the student newspaper should advance the public relations objectives of the school."¹⁹⁰ As a result, *Hazelwood*'s chilling effect likely extends far beyond the actual reported instances of censorship by discouraging student reporters from even trying to cover stories that could damage the image of the principal or the school.¹⁹¹

Those cases involving high school journalists that actually reach the courts tend to focus on whether the student publication in question qualifies as a limited public forum, which removes it from *Hazelwood*'s government speech analysis.¹⁹² Courts generally assume that

¹⁸⁶ Sherry Ricchiardi, *Despite the Chilling Effect, There is Life After Hazelwood*, Quill & Scroll, Feb.–Mar. 1990, at 8.

¹⁸⁷ Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & Educ. 463 (2000).

¹⁸⁸ Lillian L. Kopenhaver & J. William Click, *Nation's high school newspapers: Still widely censored* (Aug. 2000) (paper presented at the Association for Education in Journalism and Mass Communication, Scholastic Journalism Division, annual convention), available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/63/6e.pdf

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From the "College Hazelwood" Case*, 68 Tenn. L. Rev. 481, 483 (2001) ("However well intended, in countless jurisdictions, *Hazelwood* resulted in a tyranny by school administrators that has devastated high school journalism.").

¹⁹² See, e.g., *Romano v. Harrington*, 725 F. Supp. 687, 690-91 (E.D.N.Y. 1989) (holding that whether school was entitled to complete editorial control over student newspaper under *Hazelwood* was triable issue when paper bore a

school-sponsored publications are not public forums unless the school has affirmatively indicated its intent to create a forum for student expression.¹⁹³ The more control that the school exercises over a publication and its student staff, the less likely that courts will find that the school intended the publication to be a limited or open forum.¹⁹⁴ As some student editors have learned to their chagrin, public forum status is a gift bestowed upon high school publications by school officials, who are free to change their minds and re-assert control at the first hint of controversy.¹⁹⁵

Although the *Hazelwood* opinion drew a distinction between students' personal speech that a school must tolerate under *Tinker* and school-sponsored student expression that can be controlled as the school's own speech,¹⁹⁶ some courts have allowed the latter category to bleed over into the former. As a result, the increased power of school authorities under *Hazelwood* can work to weaken the *Tinker* standard for personal speech, especially if one accepts the argument that the school endorses whatever student expression it fails to prohibit. The Supreme Court itself appeared to embrace this approach in *Morse v. Frederick*, where it had to admit that *Hazelwood* was not controlling precedent because "no one would reasonably believe" the

disclaimer stating that it did not express the views of the school, the board of education, or the adviser and was not produced as part of a class).

¹⁹³ The Court in *Hazelwood* quoted *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) to emphasize that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). See also *Planned Parenthood of Southern Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 819 (9th Cir. 1991) ("[W]e must assume that school-sponsored publications are nonpublic and that unless the schools affirmatively intend to open a forum for indiscriminate use, restrictions reasonably related to the school's mission that are imposed in the context of school-sponsored publications do not violate the first amendment.").

¹⁹⁴ In determining that the student newspaper at issue did not qualify as a public forum for student speech, the *Hazelwood* Court emphasized that the newspaper was a curricular activity that was overseen by both a journalism teacher, who exercised significant control over content and production, and the principal, who gave final approval before publication. *Hazelwood*, 484 U.S. at 268-69. *Hazelwood* indicates that the more control a school exercises over a student publication, the more likely the publication will be deemed to constitute the school's own speech. *Id.* at 270-71.

¹⁹⁵ See, e.g., *Associated Press, Prior review prevails in Wash. school district*, Sept. 4, 2007, available at <http://www.firstamendmentcenter.org/news.aspx?id=18998> (reporting that student editors settled their lawsuit claiming that high school newspaper was a limited public forum after new principal implemented a prior review policy and removed "student forum" designation from paper's masthead).

¹⁹⁶ 484 U.S. at 270-71.

student's BONG HiTS 4 JESUS banner bore the school's imprimatur.¹⁹⁷ In the next sentence, however, the Court characterized *Hazelwood* as "nevertheless instructive" because it "acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school'" and because it "confirm[ed]...that the rule of *Tinker* is not the only basis for restricting student speech."¹⁹⁸ As it had in *Hazelwood*, the Court then applied a reasonableness standard to conclude that the principal was justified in ordering the banner's removal because "failing to act would send a powerful message to the students in her charge...about how serious the school was about the dangers of illegal drug use."¹⁹⁹ In other words, given that the student's banner could be interpreted as glorifying a dangerous, illegal activity, school officials were entitled to convey and enhance their own message by silencing the student's.

Perhaps *Morse* created nothing more than a narrow exception to *Tinker* that applies only to student speech advocating illegal drugs, as Justice Alito claimed in his concurrence.²⁰⁰ If extended to other contexts involving student health or safety, however, the Court's "toleration equals endorsement" reasoning could permit school officials to stifle student speech that contradicts any number of official school positions, including those on alcohol, reckless driving, sexual activity, racial, ethnic, or other types of discrimination, or even bullying.

Lower courts have also used *Hazelwood* to give school officials greater control over student speech that does not bear the school's imprimatur. For example, the Sixth Circuit applied *Hazelwood* to uphold a school's decision to disqualify a high school student council

¹⁹⁷ 127 S. Ct. 2618, 2627 (2007).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2629.

²⁰⁰ Justice Alito, joined by Justice Kennedy, wrote that he endorsed the Court's opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id.* at 2636 (Alito, J., concurring).

candidate whose campaign speech included a discourteous remark about an assistant principal and criticized the school administration’s “iron grip” over the students.²⁰¹ Although no one would misattribute the student’s speech to the school, the court noted that speech was delivered in a school-sponsored assembly and election, and that *Hazelwood* recognized teaching civility as a legitimate pedagogical concern.²⁰² Additionally, a few courts (including, again, the Sixth Circuit) have used *Hazelwood* in conjunction with *Bethel* to uphold decisions by school administrators to forbid students from wearing T-shirts or patches that the school found offensive.²⁰³ In all these instances, no reasonable member of the public could confuse the student’s expression for speech belonging to, or endorsed by, the school; nevertheless these cases show how *Hazelwood*’s rationale can be used to justify regulation of student speech beyond the realm of school-sponsored student publications.

Although the Court in *Hazelwood* expressly declined to address whether its holding would extend to student speech in higher education,²⁰⁴ lower courts have relied on the decision to confirm school officials’ ability to control students’ curricular speech at both the K-12 and college levels.²⁰⁵ The most disturbing extension of *Hazelwood* into the realm of postsecondary

²⁰¹ Poling v. Murphy, 872 F.2d 757, 758-59 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

²⁰² *Id.* at 762-63.

²⁰³ Boroff v. Van Wert City Bd. of Ed., 220 F.3d 465, 468-69 (6th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001) (citing *Hazelwood* to support school’s decision prohibiting student from wearing Marilyn Manson T-shirts because they contradicted the school’s educational mission); Baxter v. Vigo, 26 F. 3d 728, 738 (7th Cir. 1994) (upholding grant of qualified immunity to principal who forbid elementary student from wearing T-shirts critical of school, stating that *Hazelwood* and *Bethel* held that age is a relevant factor in assessing student speech rights); Wentworth Reg’l Sch. Dist. v. Henderson, 412 F. Supp. 2d 410, 419-20 (N.H. 2006), *vacated by, remanded by* 201 Fed. App’x 7 (1st Cir. 2006) (citing *Hazelwood* and *Bethel* as establishing “the fundamental importance of the educational mission entrusted to the public school system, and the critical necessity of maintaining an orderly environment in which learning can take place” in case upholding suspension of student who wore a “No Nazi” patch).

²⁰⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n. 7 (1988) (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

²⁰⁵ *See, e.g.,* McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999) (upholding school superintendent’s ability to control content of high-school band’s marching show); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (applying *Hazelwood* test to uphold university’s curricular requirement that drama major read certain script lines).

speech involves university administrators' attempts to use the decision to censor university student publications. That university administrators try to control college student publications in the same manner as high school principals is an unfortunate fact of life at many campuses.²⁰⁶ In the pre-*Hazelwood* era, however, lower courts generally granted robust First Amendment rights to student journalists at public universities, in accord with Supreme Court rulings that emphasized the importance of free and open expression on college campuses.²⁰⁷ Cases decided in the 1970s and early 1980s from the Fourth, Fifth, and Eighth Circuits upheld the First Amendment rights of college students at state institutions to publish literary magazines and student newspapers free from administrative control, with little or no mention of the public forum doctrine.²⁰⁸ These cases recognized students' First Amendment rights even when the student publications at issue received university funding; as the Fifth Circuit noted, "[t]he state is not necessarily the unrestrained master of what it creates and fosters."²⁰⁹

²⁰⁶ In January 2007, the President of the Society of Professional Journalists Christine Tatum noted that college journalists are "censored all the time." Student Press Law Center, *SPJ, Student Press Law Center partner to support Grambling State journalism students*, Press Release, Jan. 26, 2007, available at www.splc.org/newsflash_archives.asp?id=1420&year=2007. SPLC reports documenting incidents of college censorship are available at <http://www.splc.org/report.asp>.

²⁰⁷ See *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Healy v. James*, 408 U.S. 169, 187-88 (1972) ("The College, acting here as the instrumentality of the State, may not restrict speech... simply because it finds the views expressed by any group to be abhorrent."); and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (recognizing the necessity of free inquiry on college campuses, and noting that "[t]eachers and student must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die").

²⁰⁸ See *Joyner v. Whiting*, 477 F. 2d 456, 462 (4th Cir. 1973) (holding that college president violated the First Amendment by withdrawing financial support for the student newspaper in response to its content); *Bazaar v. Fortune*, 476 F.2d 570, 574-75 (5th Cir. 1973) (drawing analogy to "open forum" cases to rule that the First Amendment prohibited university officials from withholding student literary magazine that contained offensive language); *Schiff v. Williams*, 719 F.2d 257, 261 (5th Cir. 1975) (holding that First Amendment prohibited university president from firing student newspaper editors in an attempt to improve the publication's quality); and *Stanley v. McGrath*, 719 F.2d 279, 282 (8th Cir. 1983) (holding that a university's board of regents could not withdraw or reduce the student newspaper's funding system in response to controversial content). *But cf.* *Husain v. Springer*, 494 F. 3d 108, 121-25 (2d Cir. 2007) (characterizing these pre-*Hazelwood* cases as having "adopted the position that the establishment of a student media outlet... necessarily involves the creation of a limited public forum").

²⁰⁹ *Bazaar*, 476 F.2d at 575.

Following the *Hazelwood* decision, however, courts changed their analysis and began evaluating instances of college media censorship in terms of public forum doctrine.²¹⁰ Because the *Hazelwood* opinion noted that the high school newspaper in question was not a public forum, lower courts concluded that the way to avoid *Hazelwood*'s rational basis test at the college level was to rely on the greater levels of control usually granted to college, as opposed to high school, journalists over their respective publications.²¹¹ As long as the college media outlet qualified as a limited public forum for student expression, courts applied strict scrutiny analysis rather than the "reasonably related to a legitimate pedagogical purpose" standard of review commonly referred to as the *Hazelwood* test, and the student journalists would prevail.²¹² When college students won under public forum analysis, commentators sometimes noted their approval in words to the effect that the court had "refused to apply *Hazelwood* to a college publication."²¹³

That characterization fails to recognize that by applying public forum analysis to the speech rights of college journalists, courts are indeed using an approach that is perfectly consistent with the *Hazelwood* decision. *Hazelwood* held that students who engage in school-sponsored, curricular speech that bears the imprimatur of the school are acting as mouthpieces of the school itself. They have virtually no First Amendment rights because the speech is not their own, but rather belongs to the school. *Hazelwood* also implied that if a school so desires, it can create a public forum for student expression where student speech rights must be respected;

²¹⁰ See, e.g., *Lueth v. St. Clair Cmty. Coll.*, 732 F. Supp. 1410, 1415-16, (E.D. Mich. 1990) (determining that community college newspaper was a limited public forum to hold that dean could not exclude advertisement for nude dancing club).

²¹¹ See, e.g., *Husain*, 494 F.3d at 121 (noting that courts grant First Amendment protection to student media outlets at public universities because those outlets "generally operate as 'limited public fora,' within which schools may not disfavor speech on the basis of viewpoint").

²¹² See, e.g., *id.* at 125-28 (applying strict scrutiny analysis to invalidate decision of public college president to restrict content of student newspaper that qualified as a limited public forum).

²¹³ See, e.g., Daniel A. Applegate, Note, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 Case W. Res. 247, 249 (2005) (stating that before the Seventh Circuit's decision in *Hosty v. Carter*, "[n]either the Supreme Court nor any other federal circuit court has extended *Hazelwood* to cover college publications").

however, public forum doctrine establishes that the school retains the right to set the boundaries of, or re-exert command over, the forum if it so desires.²¹⁴ This means that even if a high school or college grants its students enough authority over a publication to create a limited public forum for student expression, the government—and not the Constitution—determines the outcome. In other words, the opposite of “government speech” (outside the First Amendment) at the high school level is not “individual speech” (protected by the First Amendment) at the college level; rather, the measure of First Amendment protection enjoyed by college journalists depends on how much student control of campus publications the college is willing to allow. Under this analysis, the First Amendment would not prevent college officials from establishing a “student” publication over which they retain sufficient authority that it remains the college’s own speech.

For example, the Sixth Circuit Court of Appeals issued an en banc decision in *Kincaid v. Gibson*²¹⁵ that was hailed by some commentators as refusing to extend *Hazelwood* to college media,²¹⁶ when in fact the court applied a consistent approach but ruled in favor of the students. In *Kincaid*, the court held that Kansas State University officials violated the First Amendment when they confiscated the student-produced yearbook because they disliked its color, theme, and content.²¹⁷ The court cited *Hazelwood* to reject the students’ argument that the First Amendment protected student speech at the university level without regard to the public forum doctrine, stating that at least in the context of a student-produced college yearbook, forum analysis was the

²¹⁴ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 46 n. 7 (1983) (noting that although the state may create designated public forums “for a limited purpose such as use by certain groups...or for the discussion of certain subjects,” the state “is not required to indefinitely retain the open character of the facility”).

²¹⁵ 236 F.3d 342 (6th Cir. 2001) (en banc).

²¹⁶ See, e.g., Ryan D. Pittman, Note, *The College Student Media as House Organ: Reflections on an Off-Key Decision in Hosty v. Carter*, 44 *Hous. L. Rev.* 131, 148 (2007) (citing *Kincaid* as having “explicitly declined to use the *Hazelwood* framework when analyzing the rights of the college student media”).

²¹⁷ 236 F. 3d at 345.

“appropriate framework.”²¹⁸ The court noted that KSU policy placed control of the yearbook’s content in the student editors’ hands, and in practice, the university limited the adviser’s role and allowed students to make editorial decisions with little oversight.²¹⁹ The yearbook’s purpose was expressive, as opposed to curricular, the court said, because the yearbook was not a graded classroom assignment.²²⁰ Finally, the court looked to the context, noting that a university is expected to be “marketplace of ideas” and that the yearbook’s readers were likely to be more mature than the high school newspaper recipients in *Hazelwood*.²²¹ As a result, the court found that the university had created the yearbook as a limited public forum, and applied strict scrutiny to invalidate the university officials’ actions as “rash, arbitrary” and “smack[ing] of viewpoint discrimination.”²²²

Unlike the students in *Hazelwood*, these college yearbook editors won their case, but not necessarily because the court viewed their First Amendment rights as being substantially stronger than those of their high school counterparts. If the university previously had exercised control over the yearbook, or had adopted a prior review policy, would the differences in mission and student age between college and high school have justified, by themselves, the court’s public forum determination?²²³ *Kincaid* did not address this question; the court stated in a footnote that “[b]ecause we find that a forum analysis requires that the yearbook be analyzed as a limited public forum...we agree with the parties that *Hazelwood* has little application to this case.”²²⁴

²¹⁸ *Id.* at 347-48. In a footnote, the court specified that its decision to apply the public forum doctrine to a student-produced yearbook “has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper,” *id.* at n.6, suggesting that the court might have been willing to break out of public forum analysis in a case involving censorship of a college newspaper.

²¹⁹ *Id.* at 349-351.

²²⁰ *Id.* at 351-52.

²²¹ *Id.* at 352.

²²² *Id.* at 356.

²²³ See Peltz, *supra* note 191 at 536-37 (warning that *Kincaid* could actually “provide[] a roadmap for university administrators to seize control of their student media” by establishing student media outlets as non-public forums).

²²⁴ 236 F.3d at 346 n. 5.

Four years later, an en banc panel of the Seventh Circuit provided its answer in *Hosty v. Carter*, where it concluded that when school officials act to impose journalistic standards of quality or disassociate the school with controversial positions, “there is no sharp difference between high school and college papers.”²²⁵ *Hosty* set the risks posed by the government speech/limited public forum dichotomy to the First Amendment rights of college journalists in sharp relief. There, the dean of students at Governors State University imposed a prior review policy on the student newspaper, *The Innovator*, after it published articles that criticized various administrative decisions.²²⁶ The Seventh Circuit began by identifying *Hazelwood* as the controlling case, stating that nothing therein suggested the existence of an “on/off switch: high school papers reviewable, college papers not reviewable.”²²⁷ Rather, *Hazelwood* established that only those student newspapers created as limited public forums could rely on the First Amendment to escape official control, and speaker’s age, the court said, played no role in determining public forum status.²²⁸ Nor did the fact that students produced *The Innovator* as an extracurricular activity necessarily mean that it qualified as a limited public forum; the court cited *Rust v. Sullivan* and *National Endowment for the Arts v. Finley* for the proposition that state-subsidized expression can be subject to government control without reference to the age of the speaker or the curricular status of the speech.²²⁹

Noting that *The Innovator* relied on student activity fees for its funding, the court summarized *Hazelwood* as holding that “[w]hen a school regulates speech for which it also pays, . . . the appropriate question is whether the ‘actions are reasonably related to legitimate

²²⁵ 412 F. 3d 731, 735 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006).

²²⁶ *Id.* at 732-33.

²²⁷ *Id.* at 734.

²²⁸ *Id.*

²²⁹ *Id.* at 735 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

pedagogical concerns.”²³⁰ The court then posed the following hypothetical: if the university paid, or offered course credit to, student journalists to write stories for its alumni magazine, would those students have any right to control which stories the magazine ultimately published?²³¹ Of course not, the court answered, because the magazine would belong to the university and the stories--although written by students—would be government speech under the Court’s decision in *Johanns v. Livestock Marketing Ass’n*.²³² Citing *Johanns*, the court supported its conclusion by explaining that just because “institutions can speak only through agents does not allow the agents to assume control and insist that submissions graded D-minus appear under the University’s masthead.”²³³

The determinative issue, then, became whether the university established *The Innovator* as a public forum for student speech, or whether officials retained sufficient control over the newspaper so that it more closely resembled the hypothetical alumni magazine.²³⁴ If the former, the administrations’ prior review policy would be subject to strict scrutiny; if the latter, the court said that under *Hazelwood*, university administration need only have “legitimate pedagogical reasons” to censor the newspaper.²³⁵ The age difference between high school and college students might properly be considered, the court allowed, in determining the reasonableness of the administration’s asserted justification, although the court also noted that “many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.”²³⁶ Given the procedural posture of the case, the court held that the evidence, taken in

²³⁰ *Id.* at 734.

²³¹ *Id.* at 736.

²³² *Id.* (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560-67 (2005)). See *supra* notes 10-16 and accompanying text.

²³³ *Id.* at 736.

²³⁴ *Id.* at 737.

²³⁵ *Id.*

²³⁶ *Id.* at 734.

the light most favorable to the students, would permit a reasonable jury to find that *The Innovator* operated as a limited public forum.²³⁷

While other courts had applied a public forum analysis to collegiate press cases, *Hosty* was the first to hold that high school and college newspapers are basically indistinguishable for First Amendment purposes. After the Supreme Court refused to review the Seventh Circuit's decision, some commentators predicted that it spelled the end of college journalism;²³⁸ others countered that *Hosty* would have little effect because most college papers operate as limited public forums where university administrators allow student journalists to make content choices and exercise editorial control.²³⁹ The latter view, of course, misses the point that under *Hosty*, college journalists—even those whose publications qualify as limited public forums--have only those speech rights that their respective institutions deign to provide. *Hosty* implies that merely by enacting prior review policies and exercising authority over the college press, university administrators can turn even extracurricular student publications into government speech, regardless of clear contextual differences between colleges and high schools.

This point was certainly not lost on perceptive college administrators, who happily realized after *Hosty* that they held a stronger position vis-à-vis the student press than they had heretofore supposed. For example, in 2007, officials at Grambling State University in Louisiana cited *Hosty* as justification for suspending publication of its student newspaper, *The Gramblinite*, for what the student editor described as negative news coverage, even though Louisiana is

²³⁷ *Id.* at 737.

²³⁸ In his *Hosty* dissent, Judge Evans warned that the majority opinion “gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment.” *Id.* at 742 (Evans, J., dissenting). See also Pittman, *supra* note 216, at 134 (predicting that *Hosty* will encourage college administrators to censor student media, and will impede the education of future journalists).

²³⁹ See, e.g., Jeff Sklar, *Note: The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood's Application to Colleges*, 80 S. Cal. L. Rev. 641, 642 (2007) (stating that after *Hosty*, “most student publications probably will not face a heightened risk of administrative interference because they are public forums”).

outside the Seventh Circuit.²⁴⁰ Similarly, only ten days after *Hosty* was decided, legal counsel for the California State University system (which is also outside the Seventh Circuit) sent a memo to CSU presidents stating that *Hosty* “appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers.”²⁴¹ Had CSU presidents used general counsel’s tip to exert more control over their student press, the resulting impact would have been more than minimal; according to a 2005 SPLC report, CSU’s 400,000 students made it the largest college system in the country.²⁴²

This threat to student speech in California was ultimately defused in 2006 when, as a result of both *Hosty* and the CSU legal memorandum, the state legislature prohibited public university administrators from disciplining college students for on-campus speech that would be protected by either the federal or California constitutions outside of campus.²⁴³ Both the Oregon and the Illinois state legislatures also responded to *Hosty* by increasing state law protections for student publications.²⁴⁴ Over the years, so-called “anti-*Hazelwood*” laws have been passed in several states in a legislative attempt to ameliorate the decision’s effects with respect to public high school students within those jurisdictions.²⁴⁵ However, states with student press rights laws are clearly the exception, not the rule.

²⁴⁰ See Student Press Law Center Press Release, *supra* note 206.

²⁴¹ Memorandum from Christine Helwick, Cal. State Univ. Office of Gen. Counsel, to CSU Presidents 2 (June 30, 2005), available at <http://www.splc.org/csu/memo.pdf>.

²⁴² See Evan Mayor, *Memo Linking California with Hosty Decision Worries Students*, Student Press Law Center, Sept. 15, 2005, available at <http://www.splc.org/newsflash.asp?id=1064>.

²⁴³ Cal. Educ. Code § 66301 (West 2003 & Supp. 2007). For a discussion of the reasons behind the legislation, see Assemb. Comm. On Judiciary, AB 2581 Bill Analysis 2 (May 9, 2006), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2551-2600/ab_2581_cfa_20060505_165444_asm_comm.html (stating that former California Assembly Member Leland Yee introduced the bill in response to *Hosty* and the CSU memorandum). California also has a statute that provides students at private, postsecondary institutions with some protection against disciplinary action for their speech or expression. See Calif. Educ. Code § 94367 (West _____).

²⁴⁴ See Oregon Student Free Expression Law, Or. Rev. State. § _____. (2007); College Campus Press Act, 110 Ill. Comp. Stat. 13/1-97 (2008).

²⁴⁵ Anti-*Hazelwood* laws have been enacted in Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts. For citations to these statutes, as well as a good summary of their provisions, see Student Press Law Center,

Since it was decided in 1988, *Hazelwood* has lived up to Justice Brennan's fear that it would "denude[] high school students of much of the First Amendment protection that *Tinker* itself prescribed."²⁴⁶ Even worse, the *Hazelwood* government speech analysis has had a dangerous tendency to spread beyond its original high school, curricular context. Courts today grant First Amendment protections to school-subsidized student publications at both the high school and college level only if those publications qualify as state-created limited public forums. Colleges and universities are more likely than high schools to turn control of publications and other expressive activities over to students; nevertheless, in both instances, the law assumes that student speech rights depend on the state's magnanimity. While this might be rationalized with respect to K-12 students based on their age and immaturity, it becomes less justifiable when applied to older, more mature college students. As will be seen in the next section, however, lower courts applying *Garcetti* have used the same government speech rationale to deny First Amendment protection to adult public employees who speak pursuant to their job duties, effectively stripping them of their citizen status altogether.

B. *Garcetti*'s effect on public employee speech

Before *Garcetti*, lower courts generally found that internal, job-related speech by public employees was protected by the First Amendment when it involved allegations of corruption, mismanagement or other malfeasance by a public employer.²⁴⁷ Most courts treated employees who reported misconduct up the chain of command as citizens, not mere employees, even when

Understanding student free-expression laws, Legal Analysis, Fall 2007, available at http://www.splc.org/report_detail.asp?id=1351&edition=43.

²⁴⁶ *Hazelwood*, 484 U.S. 260, 290 (Brennan, J., dissenting).

²⁴⁷ See *supra* notes 131-134 and accompanying text.

their revelations flowed from their job descriptions or applicable law.²⁴⁸ Work-related speech that stemmed from policy disagreements or personal disputes between employees and their superiors, on the other hand, typically remained outside the First Amendment. In some instances, courts ruled that employee speech about mere workplace grievances failed to meet *Connick*'s public concern threshold;²⁴⁹ in others, even if the speech addressed matters of public concern, it was outweighed in the *Pickering* balance by the employer's interest in preventing disruption, insubordination, or simple incompetence.²⁵⁰ In the pre-*Garcetti* world, public employees qualified as "citizens" when their work-related speech advanced the public interest in government accountability, but remained "employees" when that speech furthered only selfish concerns.

By holding that public employees forfeit their rights as citizens when they speak pursuant to their job duties, *Garcetti* fundamentally altered how the lower courts address First Amendment retaliation claims. Since *Garcetti*, at least eight federal circuits have held that public employees who report allegations of mismanagement, fraud or misconduct to their superiors in the course of their employment have no First Amendment protection against their employers' retaliatory actions.²⁵¹ Only when the employee also communicates the wrongdoing

²⁴⁸ *Id.*

²⁴⁹ *See, e.g.*, *Carreon v. Ill. Dept. of Human Servs.*, 395 F.3d 786, 792-94 (7th Cir. 2005)(mental health employees' complaints about office temperatures, transfers and co-workers were internal workplace grievances and not matters of public concern); *Farhat v. Jopke*, 370 F.3d 580, 593 (6th Cir. 2004)(school custodian's letter to union president expressing complaints about school officials, while made in the course of employment, was personal job grievance and not a matter of public concern).

²⁵⁰ *See, e.g.*, *Latham v. Office of the Att'y Gen.*, 395 F.3d 261, 265-67 (6th Cir. 2005), *cert. denied*, 546 U.S. 935 (2005) (concluding that state attorney's letter to the Attorney General about departmental operations dealt with a public concern but constituted insubordination); *Lewis v. Cowen*, 165 F.3d 154, 164-65 (2nd Cir. 1999), *cert. denied*, 528 U.S. 823 (1999) (holding that lottery chief's refusal to speak in favor of policy change presented a matter of public concern, but was unprotected as disruptive and insubordinate).

²⁵¹ *See, e.g.*, *Foraker v. Chaffinch*, 501 F.3d 231, 241-42 (3rd Cir. 2007) (reporting dangerous conditions at firing range to superiors and state auditor was among job duties of reassigned state troopers); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (revealing financial improprieties in athletic accounts to principal and office manager held to be within job duties of terminated athletic director); *Sigsworth v. City of Aurora*, 487 F.3d 506, 510-11 (7th Cir. 2007) (alerting police chief to suspicions of corruption in drug task force within job duties of

to someone far enough outside the chain of command will the speech retain any chance of First Amendment protection, and then only if the adverse employment action can be attributed to the protected—as opposed to the duty-based—speech.²⁵²

The sea change wrought by *Garcetti* was clearly illustrated by a series of cases from the Seventh Circuit all involving former Milwaukee Police Chief Arthur L. Jones. In 2002, the Seventh Circuit ruled in *Delgado v. Jones* that a detective’s internal memo about alleged criminal activities involving one of the chief’s friends was protected speech even though the officer wrote the memo as part of his job.²⁵³ The court distinguished an earlier decision that held that internal memos written as part of the “routine discharge of assigned functions, where there is no suggestion of public motivation” did not amount to citizen speech.²⁵⁴ In *Delgado*, the court recognized that a public servant’s job responsibilities can overlap with his or her obligations as a citizen—and when they do, the employee’s speech should retain its First Amendment protection.²⁵⁵ According to the court, the detective’s memo both demonstrated his public purpose in reporting illegal conduct, and went beyond the routine by reflecting his independent judgment and discretion.²⁵⁶ Four years later, the Seventh Circuit again distinguished discretionary employee speech from routine duty speech in another pre-*Garcetti* First

former task force investigator); *Bradley v. James*, 479 F.3d 536, 538 (8th Cir. 2007) (telling investigating officer that police chief was intoxicated was within job duties of fired officer); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329-31 (10th Cir. 2007) (reporting fraudulent Head Start enrollments to school board president and federal authorities was within job duties of demoted school superintendent); *Vila v. Padron*, 484 F.3d 1334, 1340 (11th Cir. 2007) (raising objections regarding fraudulent practices to college president held within job duties of former college vice president); *Wilburn v. Robinson*, 480 F.3d 1140, 1149-51 (D.C. Cir. 2007) (alleging discrimination within personnel office held part of job duties of former interim director); *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1918 (2007) (writing internal memos regarding inmates’ sexual harassment and exhibitionist behavior considered within job requirements of terminated prison guard).

²⁵² *See, e.g.*, *Casey*, 473 F.3d at 1334 (holding that school superintendent acted as a citizen when she reported open meeting violations to state attorney general, but remanding to determine whether retaliation resulted from her protected or unprotected speech).

²⁵³ 282 F.3d 511, 519-20 (7th Cir. 2002), *cert. denied*, 543 U.S. 925 (2004).

²⁵⁴ *Id.* at 519 (distinguishing *Gonzales v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001)).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

Amendment retaliation case where the court ruled against Chief Jones, this time because he demoted a police officer who revealed financial and other improprieties in connection with one of the chief's pet projects.²⁵⁷

Based on these Seventh Circuit precedents, Chief Jones looked like a three-time loser when he was again accused of unlawfully retaliating against two Milwaukee vice squad officers in 1998. In that case, plaintiff officers Kolatski and Morales were demoted to street patrol after they internally reported allegations that Jones and his deputy chief, Monica Ray, had knowingly harbored Ray's fugitive brother.²⁵⁸ In the course of their investigation, Kolatski had repeated to Morales information from a potential witness who allegedly saw Jones, Ray, and Ray's brother together at Ray's home.²⁵⁹ After the brother's arrest, Morales provided the same information to the assistant district attorney assigned to the case.²⁶⁰ Morales also testified in a civil deposition (in yet another retaliation case against Chief Jones) that he believed Jones demoted Kolatski because of the brother's arrest.²⁶¹ In 2005, a jury found that Jones and Ray illegally transferred the officers in violation of their First Amendment rights, and awarded the plaintiffs compensatory and punitive damages.²⁶²

Jones and Ray appealed the jury verdict, and by the time the case reached the Seventh Circuit in 2007, the Supreme Court had issued its ruling in *Garcetti*.²⁶³ Chief Jones' luck now took a dramatic turn for the better, as the Seventh Circuit's main focus changed in response to the high court's decision. No longer did it matter that officer Morales exercised discretion in

²⁵⁷ *Miller v. Jones*, 444 F.3d 929, 936-38 (7th Cir. 2006) (holding that a police chief unlawfully demoted the executive director of Police Athletic League after he internally disclosed financial and other improprieties surrounding one of the chief's proposed projects).

²⁵⁸ *Morales v. Jones*, 494 F.3d 590, 592-95 (7th Cir. 2007), *cert. denied*, 169 L.Ed. 2d 729 (2008).

²⁵⁹ *Id.* at 593.

²⁶⁰ *Id.* at 594.

²⁶¹ *Id.* at 595.

²⁶² *Id.*

²⁶³ *Id.* at 596 n.2.

providing information to the assistant district attorney, nor that both officers furthered the public interest with their speech rather than just their personal concerns. *Garcetti* reduced the inquiry to a simple question of whether public employees spoke as part of their official responsibilities, and the Seventh Circuit held that the vice officers had a duty to apprise their comrades, as well as the district attorney's office, of all pertinent information concerning an investigation.²⁶⁴ To foreclose all doubt about the official nature of the officers' speech, the court pointed out that all Milwaukee police officers operated under a blanket obligation to report potential crimes.²⁶⁵ Kolatski and Morales were caught in a trap that Chief Jones could spring at his pleasure: they could be demoted or disciplined whether they opted to report the allegations or keep silent. Only officer Morales retained a chance to ultimately prevail, based on his auspicious decision to testify at the civil deposition. Although the court noted that Morales testified *about* his job responsibilities, his job did not *require* him to testify.²⁶⁶ The court therefore remanded the case for a new trial to determine whether Morales' demotion resulted from his protected deposition testimony, or his unprotected allegations of misconduct to the district attorney's office.²⁶⁷

Officer Morales' deposition testimony illustrates the one escape route public employees can use to avoid application of *Garcetti*'s per se rule: did the employee speak as part of his or her job? Just as Justice Souter predicted in his *Garcetti* dissent,²⁶⁸ this question has become the focal point of post-*Garcetti* employee retaliation litigation as a result of the Court's failure to clarify how courts are to determine the scope of an employees' "official duties." In *Garcetti*, the Court merely instructed lower courts to conduct a "practical" inquiry into whether the speech at issue falls into the duties the employee "actually is expected to perform," and cautioned courts

²⁶⁴ *Id.* at 596-98.

²⁶⁵ *Id.* at 597.

²⁶⁶ *Id.* at 598.

²⁶⁷ *Id.*

²⁶⁸ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1965 n. 2 (Souter, J., dissenting).

against over-reliance on formal job descriptions.²⁶⁹ Although some commentators suggested that this definitional deficiency would give lower courts an opportunity to curb *Garcetti*'s reach,²⁷⁰ the following analysis of appellate decisions shows that the federal courts of appeals, at least, have defined duty speech broadly rather than narrowly.

Given the lack of instruction from the Supreme Court, how have lower courts determined the extent of public employees' job duties in applying *Garcetti*? In a surprising number of cases, federal appellate courts have relied on employees' own admissions that they spoke as part of their job responsibilities. For example, a narcotics investigator who reported evidence of task force corruption to the police chief stated in his complaint that he acted pursuant to his obligation to maintain communication and cooperation between drug agencies.²⁷¹ In denying the investigator's retaliation claim, the court noted that his "allegations indicate that in reporting his suspicions, he was merely doing what was expected of him as a member of the task force...."²⁷² In another case, a school consultant alleged in a letter to a school commissioner that the district engaged in fraudulent and illegal procedures to award disability benefits.²⁷³ Holding that the consultant spoke as an employee and not a concerned citizen, the court relied on the employee's letter to his employer where he stated that "I consider any time I spend addressing this matter with you or the agency to be services I am giving the state as a consultant."²⁷⁴

Along with employees' own admissions, appellate courts have also looked to applicable law to delineate the scope of an employee's official responsibilities. A university financial aid

²⁶⁹ *Id.* at 1962.

²⁷⁰ See, e.g., Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick's Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y 45, 50 (2007) (predicting that the *Garcetti* Court's failure to define employment duties could "open[] the door for lower courts to evade *Garcetti* or at least mitigate its potential harshness").

²⁷¹ *Sigsworth v. City of Aurora*, 487 F.3d 506, 510-11 (7th Cir. 2007).

²⁷² *Id.* at 511.

²⁷³ *Bailey v. Dept. of Elementary and Secondary Educ.*, 451 F.3d 514, 517 (8th Cir. 2006).

²⁷⁴ *Id.* at 520.

counselor, for example, who was terminated after reporting improprieties in a supervisor's handling of federal funds to the university president, was found by the Eleventh Circuit to have acted within the scope of her employment.²⁷⁵ The court noted that not only had the plaintiff admitted in a deposition that reporting fraud fell within her employment duties, but that Department of Education guidelines also required financial aid counselors to reveal improper financial aid awards.²⁷⁶ A state audit later confirmed the school had engaged in serious noncompliance with federal regulations, and the supervisor in question ultimately resigned.²⁷⁷ In another case, the Tenth Circuit held that a school superintendent who reported improper Head Start enrollments to the school board president acted pursuant to her job duties, both as admitted by the superintendent and as imposed by federal law.²⁷⁸ The court nevertheless held that a jury question existed as to whether the superintendent had been fired for alerting the state attorney general that the school board met in violation of the open meetings act.²⁷⁹ The court reasoned that while the superintendent acted as an employee when she informed the board about meeting irregularities, she had no employment duty to notify the attorney general and therefore acted as a citizen to that limited extent.²⁸⁰

Courts have also looked to job descriptions, job evaluations, or actual orders issued by employers, to determine the extent of an employee's job responsibilities. In a case where a district worker was terminated after accusing the personnel office of racial discrimination, the D.C. Circuit relied on the plaintiff's formal job description, as well as her own statements, to conclude that because eliminating racial discrimination was within her job responsibilities, she

²⁷⁵ *Battle v. Bd. of Regents*, 468 F.3d 755, 757-62 (11th Cir. 2006).

²⁷⁶ *Id.* at 761-62.

²⁷⁷ *Id.* at 759.

²⁷⁸ *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329-31 (10th Cir. 2007).

²⁷⁹ *Id.* at 1332-33.

²⁸⁰ *Id.*

spoke as an employee.²⁸¹ State troopers argued unsuccessfully to the Third Circuit that they acted outside the scope of their employment when they notified their supervisor and the state auditor about safety hazards at the state weapons training unit.²⁸² The troopers insisted that their job duties were limited to teaching students how to fire weapons; however, the court looked to their annual performance evaluations to conclude that because they had previously been involved in workplace safety issues, their revelations constituted unprotected duty speech.²⁸³ In a Sixth Circuit case, a park ranger who complied with her employer's instructions to give honest answers to an outside consultant about departmental morale argued that she was then unlawfully terminated for her responses.²⁸⁴ Although the court admitted that the firing "may seem highly illogical or unfair," it held that under *Garcetti*, the ranger spoke pursuant to her employer's orders and therefore in connection with her official duties.²⁸⁵

In his *Garcetti* dissent, Justice Souter objected that the Court's holding would enable savvy employers to enlarge the range of unprotected duty speech by saddling their workers with a general obligation to report untoward activities,²⁸⁶ a warning that was given little credence by Justice Kennedy and the majority.²⁸⁷ As it turns out, Justice Souter's fear appears to have been well-founded. Most lower courts have been quick to conclude that employees who have been charged either by law or by their employer with broad compliance activities act within the scope of their employment whenever they report malfeasance.²⁸⁸ For example, a college's vice

²⁸¹ *Wilburn v. Robinson*, 480 F.3d 1140, 1150-51 (D.C. Cir. 2007).

²⁸² *Foraker v. Chaffinch*, 501 F. 3d 231, 241-43 (3rd Cir. 2007).

²⁸³ *Id.* at 238, 241-42.

²⁸⁴ *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir. 2007).

²⁸⁵ *Id.* at 545.

²⁸⁶ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1965 n.2 (2006)(Souter, J., dissenting)

²⁸⁷ *Id.* at 1961 (stating that the Court "reject[s]...the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions," and calling instead for a "practical" inquiry).

²⁸⁸ For a rare example of a court taking a narrower approach, see *Marable v. Nitchman*, No. 06-35940, 2007 U.S. App. LEXIS 29741, at *22 n.13 (9th Cir. 2007) (holding that chief ferry engineer had no official duty to report financial improprieties of his superiors, despite broad language in the employment manual).

president of legal affairs was held to have spoken within her job responsibilities when she reported illegal and fraudulent acts by the university's president, as well as violations of the public meetings law, to people within the institution.²⁸⁹ The Eleventh Circuit reasoned that pursuant to her job title, the vice president had a comprehensive duty to advise the college on any and all legal matters.²⁹⁰ And in what surely must be the most expansive definition of official-duty speech yet devised, a federal district court held that because Georgia law imposes an obligation to act in the employer's best interests on all employees, the executive director of the Atlanta Workforce Development Agency spoke as an employee, not a citizen, when he revealed gross financial mismanagement to his superiors.²⁹¹ Based on this ruling, any public employee in Georgia who internally discloses official misconduct—regardless of his or her actual assigned tasks—is potentially fair game for retaliation based on that speech, unless he or she can claim protection under an applicable whistleblower statute.

Courts have gone so far as to infer that employees have an obligation to report misconduct or mismanagement even when such a duty has not explicitly been assigned either by law or the employer. In a Fifth Circuit case, a high school coach was terminated after he disclosed financial irregularities in the athletic department's accounts in a series of memos to the district's office manager.²⁹² Even though the coach was not required to write the memos as part of his job, the court theorized that accurate account information was needed to properly execute his job functions; therefore, the court held that the memos constituted speech as an employee and not a citizen.²⁹³ Similarly, the Tenth Circuit ruled that although a lab technician who raised

²⁸⁹ *Vila v. Padron*, 484 F.3d 1334, 1340 (11th Cir. 2007).

²⁹⁰ *Id.*

²⁹¹ *Springer v. City of Atlanta*, No. 1:05-cv-0713-GET, 2006 U.S. Dist. LEXIS 54326, at *9-10 (N. D. Ga. Aug. 4, 2006).

²⁹² *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 690-91 (5th Cir. 2007).

²⁹³ *Id.* at 693-94.

concerns about the accuracy of a drug screening test and arranged a confirmation test did not act pursuant to her explicit job requirements, her actions nevertheless amounted to “the type of activities she was paid to do.”²⁹⁴ By extension, then, the court held that she spoke as an employee, without the protection of the First Amendment.²⁹⁵

A public employee’s off-the-job expression can also amount to official duty speech, according to a Tenth Circuit case involving a school principal who directed teachers not to associate with one another or discuss workplace concerns outside the school.²⁹⁶ Defining job-related speech as any expression that “reasonably contributes to or facilitates the employee’s performance of the official duty,” the court held that teachers’ discussions of student behavior, school curriculum, and pedagogical concerns constituted employee speech for which they could be disciplined under *Garcetti*, even though those discussions occurred off school premises and outside of school hours.²⁹⁷ The only topics from the after-hours meetings that the court recognized as citizen speech were those that the teachers had no duty to report, or over which the teachers had no supervisory control, such as their opinions about the principal, school board, or school spending.²⁹⁸ The holding’s potential ramifications are most disturbing: were this definition of official duty speech to be adopted by other courts and in other contexts, public employees would have no First Amendment right to engage in private, after-hours discussions about their job-required tasks.

As employees who work in the public schools, teachers reside at the intersection of both *Hazelwood* and *Garcetti*, which has led to some confusion in the lower courts as to which line of

²⁹⁴ *Green v. Bd. of County Comm’rs*, 472 F.3d 794, 800-01 (10th Cir. 2007).

²⁹⁵ *Id.*

²⁹⁶ *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1199 (10th Cir. 2007).

²⁹⁷ *Id.* at 1203-05.

²⁹⁸ *Id.* at 1204-05.

cases to apply to their speech.²⁹⁹ Non-curricular K-12 teacher speech, such as that at issue in the Tenth Circuit case described above, has usually been analyzed by courts both pre- and post-*Garcetti* pursuant to *Pickering*, *Connick* and the other employee speech cases (including *Garcetti* itself).³⁰⁰ Classroom speech, on the other hand, was analyzed in most pre-*Garcetti* decisions pursuant to *Hazelwood*: schools were entitled to regulate teachers' instructional speech because it both made up the curriculum and bore the school's imprimatur.³⁰¹ Following *Garcetti*, however, some courts have applied that decision's employee/citizen distinction instead of *Hazelwood* in the context of in-class, curricular speech. For example, an elementary school teacher who shared her personal opinion about the Iraq war in response to a student's question was found by the Seventh Circuit to have been engaged in her official duty to teach current events.³⁰² As a result, the court relied on *Garcetti* rather than *Hazelwood* to hold that the teacher's speech was not protected by the First Amendment.³⁰³ Ultimately, however, whether a court applies *Hazelwood* or *Garcetti* matters very little; in either instance, the teacher's curricular speech belongs to the government and can be controlled. Lower courts have been more reluctant to apply *Garcetti* to speech by college professors,³⁰⁴ no doubt as a result of the Court's explicit refusal to address how *Garcetti* will affect issues of academic freedom at the university level.³⁰⁵

²⁹⁹ See Walter E. Kuhn, *First Amendment Protection of Teacher Instructional Speech*, 55 Duke L. J. 995, 1001 (2006) (noting that lower courts have difficulty determining whether to apply *Pickering* or *Hazelwood* to teachers' in-class speech).

³⁰⁰ See, e.g., *Brammer-Hoelter*, 492 F. 3d at 1202; *Settlegoode v. Portland Pub. Schs.*, 371 F. 3d 503, 514 (9th Cir. 2004), *cert. denied*, 543 U.S. 979 (2004) (holding that teacher's letters about treatment and facilities for disabled students dealt with a matter of public concern under *Connick*).

³⁰¹ See, e.g., *Miles v. Denver Pub. Schs.*, 944 F. 2d 773, 775-78 (10th Cir. 1991) (applying *Hazelwood* to in-class, curricular speech of high school teacher). *But cf. Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228-29 (6th Cir. 2005) (using both *Pickering-Connick* and *Tinker* to protect teacher who, after parents complained, was fired for teaching board-approved novels).

³⁰² *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478-79 (7th Cir. 2007), *cert denied*, 128 S. Ct. 160 (2007).

³⁰³ *Id.* at 480.

³⁰⁴ See, e.g., *Stotter v. Univ. of Tex.*, 508 F. 3d 812, 824-27 (5th Cir. 2007) (holding that a college professor's memo about his wages did not constitute a matter of public concern under *Connick*, without invoking *Garcetti*). *But see Gorum v. Sessoms*, No. 06-565 (GMS), 2008 U.S. Dist. LEXIS 10366 (Dela. 2008) (holding that professor who

To retain a chance of winning a retaliation claim after *Garcetti* with respect to the disclosure of workplace corruption, employees must direct their revelations of misconduct to an entity sufficiently outside their chain of command so it can be argued that their speech exceeded the scope of their job responsibilities. For example, a police officer who reported departmental corruption to the FBI, rather than to his immediate superiors, had his retaliation claim analyzed by the Sixth Circuit pursuant to the *Pickering-Connick* test, with no mention of *Garcetti*.³⁰⁶ More typically, employees tend to communicate their suspicions to an immediate supervisor; they only approach an external entity as a last resort. This occurred in a Ninth Circuit case where a female prison guard first wrote internal memos about sexual harassment by male inmates.³⁰⁷ When nothing was done, she finally contacted a state senator and the inspector general's office before ultimately being fired.³⁰⁸ Although the court held that the internal memos were official, job-required speech, it ruled that the guard spoke as a citizen in reporting the matter to an elected official and an independent state agency.³⁰⁹ Whether the guard's expression was entitled to First Amendment protection would depend on whether she was dismissed because of her internal (employee) or external (citizen) speech.³¹⁰ Even if the guard spoke as a citizen under *Garcetti*, to be protected by the First Amendment she still would have to pass the *Pickering-Connick* test, pursuant to which her employer would almost certainly argue that by

criticized university's presidential selection process spoke pursuant to his official duties as a faculty member; therefore, his speech was unprotected under *Garcetti*).

³⁰⁵ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

³⁰⁶ See *v. City of Elyria*, 502 F.3d 484, 492-94 (6th Cir. 2007).

³⁰⁷ *Freitag v. Ayers*, 468 F.3d 528, 533-34 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1918 (2007).

³⁰⁸ *Id.* at 535-36.

³⁰⁹ *Id.* at 543-46.

³¹⁰ *But see Andrew v. Clark*, 472 F. Supp. 2d 659, 662 (Ma. 2007) (holding that police official who first reported possible police misconduct to his supervisor and then to the press did not speak as a citizen under *Garcetti*).

going to an outside agency, the guard created an intolerable amount of workplace disruption that justified her termination.³¹¹

Employees who reveal workplace concerns to the press, rather than to their superiors, also speak as citizens under *Garcetti* unless those public statements are required by the job.³¹² It follows that a public official's press secretary speaks as an employee, and not a citizen, when he or she delivers a regular press briefing, because talking to the media falls within the secretary's normal job responsibilities. *Garcetti*'s scope, then, will also depend on how lower courts determine whether an employee's job duties include communicating with the press. In addressing this question, the Fifth Circuit held that a uniformed, on-duty police officer who gave an unauthorized critical statement to the media about the department's high speed chase policy at an accident site spoke as an employee, noting that departmental policy directed all officers to inform the media "[i]n emergency or scene related situations."³¹³ Less justifiably, the court went on to hold that the same officer's off-duty, critical comments to radio talk shows and television news programs the next day were also made pursuant to his job duties because they were a "continuation of [the officer's] accident-scene statements."³¹⁴ This finding demonstrates, again, how lower courts have used an expansive definition of job-required speech in interpreting *Garcetti*, and leads one to wonder whether public employees who interact with the press in an official capacity have forfeited their right to speak to the media as citizens, at least with respect to workplace-related issues.

³¹¹ See, e.g., *Gilbrook v. City of Westminster*, 177 F.3d 839, 868 (8th Cir. 1999) (holding that a factor to consider when balancing interests under *Pickering* is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague").

³¹² *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006) ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.").

³¹³ *Nixon v. City of Houston*, 511 F.3d 494, ___ (5th Cir. 2007).

³¹⁴ *Id.* at ___. Perhaps recognizing that its reasoning was less-than-solid on this point, the court also held that "even if [the officer's next day]...media statements constitute citizen speech, such speech...is not afforded First Amendment protection under *Pickering*. *Id.* at ___."

Although *Garcetti* was decided much more recently than *Hazelwood*, the ruling has already had a similarly detrimental effect on the First Amendment rights of individuals who express themselves within public authoritarian institutions. The *Garcetti* majority purported to recognize the value of employee speech, but argued that the need for judicial economy justified a per se rule categorizing official duty speech as government expression, paid for and subject to complete control by the public employer. By refusing to define the contours of job-related speech, however, the Court ensured that lower courts would still need to engage in factual inquiries to determine whether an employee's speech falls within his or her employment duties, belying the Court's "judicial economy" justification for its holding. Following *Garcetti*, federal appellate courts have interpreted duty speech broadly, with the result that even speech that exposes governmental malfeasance has no chance of even advancing to the *Pickering-Connick* balancing test. Although both cases use a government speech rationale to limit individuals' First Amendment rights, *Hazelwood* at least requires that official censorship reasonably relate to a legitimate pedagogical concern. *Garcetti*, on the other hand, lacks even a bare reasonableness limitation; employees are stripped of their citizenship whenever they speak in connection with their employment duties, even when the resulting retaliation is based on the public employer's desire to conceal his or her own misconduct. Consequently, the First Amendment rights of adult public servants are arguably weaker than those belonging to public school children. In both contexts, these unfortunate results stem from the Court's failure to recognize that speech by public students and public employees constitutes not pure government speech, but a hybrid of public and private speech interests. That the Court previously has acknowledged the concept of hybrid speech is discussed in Part III of the Article.

III. Hybrid Speech as a Constitutional Concept

The Supreme Court's holdings in its government speech cases rest on the notion that speech is either private or governmental in character, and not both. The distinction is one of critical constitutional significance, because when the government itself is the speaker, it is entitled to make viewpoint-based distinctions that would be unconstitutional in the realm of private speech.³¹⁵ In *Rust v. Sullivan*, for example, the Court held the government could constitutionally prevent doctors who worked at federally funded family planning clinics from discussing abortion with their patients, reasoning that when the government pays for a program that includes speech, it is entitled to dictate the speaker's message.³¹⁶ Although the Court professed that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government," it nevertheless found that no such relationship existed in these facts to diminish the governmental character of the doctors' speech.³¹⁷ More recently, the Court held in *Johanns v. Livestock Marketing Ass'n* that promotional messages developed by private industry representatives were entirely government speech despite being attributed to "America's Beef Producers" rather than the government.³¹⁸ At least in the compelled subsidy context presented by *Johanns*, expression belongs to the government whenever "the government sets the overall message to be communicated and approves every word that is disseminated," apparently with

³¹⁵ See *infra* notes 5-8 and accompanying text.

³¹⁶ *Rust v. Sullivan*, 500 U.S. 173, 193-95 (1991). Although the *Rust* Court never specifically mentioned the government speech doctrine, later cases have interpreted *Rust* as holding that the doctors were employed to disseminate a government message. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors...amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

³¹⁷ *Rust*, 500 U.S. at 200.

³¹⁸ 544 U.S. 550, 559-67 (2005).

little consideration of countervailing private speech interests or political accountability concerns.³¹⁹

The Court’s “either/or” approach was even more apparent in *Garcetti*’s holding that public workers cannot be both citizens and employees when they speak “pursuant to their official duties.”³²⁰ *Garcetti*’s counter-intuitive end result means that the office gossip in one department who repeats second-hand rumors of corruption in another speaks “as a citizen,” while a worker with first-hand knowledge and a duty to report that same misconduct forfeits all First Amendment protection. As Justice Souter explained in his dissent, this is a strange distinction for the Court to draw, given that the First Amendment value of the expression to both the speaker and the public is most certainly greater in the latter example--“when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties”—than the former.³²¹

The Court’s categorical approach in these cases is disappointing, given that in other mixed speech scenarios, the Court has recognized that expression can present both government and private speech interests. For example, in holding that a public employee cannot speak both as a citizen and as an employee for First Amendment purposes, the *Garcetti* majority failed to acknowledge that the Court had come to the opposite conclusion in an employment-related case twenty years before. In *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*³²²—cited by Justice Souter in his *Garcetti* dissent to no avail³²³—the Court held that a public schoolteacher who addressed an open meeting of the school board regarding a collective bargaining issue “appeared and spoke both as an employee and a citizen exercising First

³¹⁹ *Id.* at 562. See *supra* notes 10-16 and accompanying text.

³²⁰ 126 S.Ct. 1951, 1960 (2006).

³²¹ *Id.* at 1965 (Souter, J., dissenting).

³²² 429 U.S. 167 (1976).

³²³ 126 S. Ct. at 1964 (2006) (Souter, J., dissenting).

Amendment rights.”³²⁴ The *Madison* Court cited *Pickering* for the proposition that teachers may not be “compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work,”³²⁵ and concluded that it would “strain First Amendment concepts extraordinarily” to hold that teachers could not communicate their views directly to the school board when they could, without question, take their concerns to the news media.³²⁶ *Garcetti*, of course, turned that logic on its head, stating that while the First Amendment protects employees who take official-duty-related issues to the press, it applies not at all to those who report the same issues to their superiors, because only the former “is the kind of activity engaged in by citizens who do not work for the government.”³²⁷

Rather than distinguish *Madison*, the *Garcetti* Court chose to ignore it; however, *Madison* was not the only First Amendment case where the Court previously relied on a mixed speech approach. This Part examines how the Court (as well as at least one federal circuit court of appeals) has recognized the concept of hybrid speech in the license plate context, and suggests that the Court may have implicitly, although inadequately, acknowledged the private speech rights of public high school journalists in *Hazelwood* itself.

A. License Plates and Specialty Plates

Almost thirty years before *Garcetti*, in a far different context, the Court in *Wooley v. Maynard*³²⁸ recognized that speech can possess both individual and government components. The Court in *Wooley* held that a New Hampshire law requiring drivers to display license plates

³²⁴ 429 U.S. at 177.

³²⁵ *Id.* at 175 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

³²⁶ *Id.* at 176 n. 10.

³²⁷ 126 S. Ct. at 1961.

³²⁸ 430 U.S. 705 (1977).

bearing the state motto “Live Free or Die” violated the First Amendment rights of complaining drivers.³²⁹ Under the test announced in *Johanns*, the plates’ message unquestionably would constitute government speech, as the state perforce chose its motto and “approve[d] every word” of it,³³⁰ and, accordingly, the First Amendment’s prohibition against viewpoint discrimination would not apply.³³¹ This, in fact, was the analysis advanced by Justice Rehnquist in his *Wooley* dissent, where he insisted that the license law did not force New Hampshire drivers to say anything at all.³³² The state could certainly use taxpayer money to erect billboards featuring its motto, and, in Justice Rehnquist’s view, the license plates were no different: in either case, the message was visibly attributable to the state rather than to an individual.³³³

In its majority opinion, however, the Court disagreed, holding that the drivers’ First Amendment rights were indeed in play. While the license plate and its motto clearly belonged to the state, the law nevertheless converted a citizen’s private vehicle into what the Court described as a “mobile billboard for the State’s ideological message.”³³⁴ Because the state’s asserted justification for the law—to communicate “an official view as to proper appreciation of history, state pride, and individualism”—was not viewpoint neutral, the Court held the drivers’ First Amendment rights must prevail.³³⁵ In *Wooley*, the Court acknowledged that both the government and a citizen can speak through the same mechanism, and that the governmental aspect of such hybrid speech does not automatically negate the concomitant First Amendment rights belonging to the individual.

³²⁹ *Id.* at 713.

³³⁰ 125 S. Ct. at 2063.

³³¹ *See, e.g.,* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the State is the speaker, it may make content-based choices.”).

³³² 430 U.S. at 720 (Rehnquist, J. dissenting).

³³³ *Id.* at 721-22.

³³⁴ *Id.* at 715.

³³⁵ *Id.* at 717.

That same hybrid speech analysis has been applied by at least one federal circuit court of appeals in the related context of “Choose Life” specialty license plates.³³⁶ Legislatures in at least seventeen states have authorized the issuance of specialty plates that promote adoption as an alternative to abortion;³³⁷ however, some of those same state legislatures have turned down requests for a “pro-choice” tag.³³⁸ As a result, challenges to the “Choose Life” plates have been brought in several states by abortion-rights advocates, who argue that the plates’ issuance amounts to unconstitutional viewpoint discrimination that advances one side of the abortion debate at the expense of the other.³³⁹ Pro-life groups in several states have also objected on the same grounds when their applications for “Choose Life” plates were rejected by state legislatures or commissions that were attempting to avoid the controversy altogether.³⁴⁰ In either case, the success of the viewpoint discrimination argument depends on whether courts categorize specialty license plates as government speech that permissibly favors a state-endorsed policy, or private/hybrid speech that triggers the First Amendment’s viewpoint neutrality requirement.

When confronted with this issue in *Planned Parenthood of South Carolina v. Rose*, the Fourth Circuit looked to an earlier case where it used a four-factor test to rule that specialty

³³⁶ See *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005).

Most states allow groups to apply for and purchase specialty license plates that display the organization’s name, logo, and/or slogan. A state-by-state summary of the statutes governing specialty plates is available at <http://www.firstamendmentcenter.org/analysis.aspx?id=16337&Sea...> The profits from the plates generally either go to a designated charitable cause, or are shared between the state and the sponsoring organization. See Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 Fla. L. Rev. 419, 424 (2001).

³³⁷ An updated list of states where “Choose Life” plates are sold is available on the Choose Life, Inc. website at <http://www.choose-life.org/newsletter.html>.

³³⁸ For example, while the Tennessee legislature authorized a Choose Life plate, it refused to approve a pro-choice alternative. See *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 371-72 (6th Cir. 2006), *cert. denied*, 126 S. Ct. 2972 (2006).

³³⁹ See, e.g., *Henderson v. Stalder*, 407 F. 3d 351, 352 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 2967 (2006); *Rose*, 361 F.3d 786, 787-88 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005); *Women’s Emergency Network v. Bush*, 323 F.3d 937, 940-42 (11th Cir. 2003).

³⁴⁰ See, e.g. *Choose Life Illinois, Inc. v. White*, No. 04 c 4316, 2007 U.S. Dist. LEXIS 21863 (N.D. Ill. 2007); *Arizona Life Coalition, Inc. v. Stanton*, No. 05-16971, 2008 U.S. App. LEXIS 1795 (9th Cir. 2008).

plates issued on behalf of the Sons of the Confederate Veterans (“SCV”) were purely private speech.³⁴¹ Concurring in a denial of a rehearing en banc in *SCV*, Judge Luttig had proposed a different analysis, calling specialty license plates the “quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable.”³⁴² Any determination that the SCV plate was entirely government or private speech was both “overly simplistic” and utterly unconvincing, Judge Luttig reasoned, because both parties undeniably used it to communicate a message.³⁴³ Recognizing that the plate constituted hybrid speech, Judge Luttig then evaluated the strength of the respective speakers’ interests. After finding the plate’s private speech component “significant” and the government speech interest “less than compelling,” Judge Luttig concluded that “at a minimum...the government may not engage in viewpoint discrimination” in the specialty license plate program.³⁴⁴ Any other conclusion would require that speech by private individuals in traditional public forums, such as public parks or streets, also be treated as government speech, a result that Judge Luttig noted would run counter to established First Amendment forum law precedents.³⁴⁵

Two years later in *Planned Parenthood of South Carolina v. Rose*, a three-judge panel of the Fourth Circuit, with each judge writing separately, agreed that South Carolina’s “Choose Life” plate was a blend of private and government speech.³⁴⁶ The court was troubled that by

³⁴¹ *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 792-95 (4th Cir. 2004) (citing *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F. 3d 610, 618 (4th Cir. 2002).) In determining that the plates were private speech, the court examined (1) the purpose of the specialty plate program; (2) the degree of editorial control exercised by government or private entities over the plates’ wording; (3) the identity of the “literal speaker” affiliated with the plates; and (4) the identity of the party who would bear “ultimate responsibility” for the plates’ message. *Id.* at 792-93.

³⁴² *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., concurring from denial of rehearing en banc).

³⁴³ *Id.*

³⁴⁴ *Id.* at 247.

³⁴⁵ *Id.* at 246.

³⁴⁶ *Planned Parenthood of S.C. v. Rose*, 361 F. 3d at 794 (opinion of Michael, J.); 361 F. 3d at 800 (Luttig, J., concurring in judgment); 361 F. 3d at 801 (Gregory, J., concurring in judgment). Because Judge Michael announced the court’s judgment, I refer to his opinion as that of the court.

approving the plate, the South Carolina legislature had favored its own position in a way that could be misperceived by the public. Citizens who saw the “Choose Life” plate might mistakenly believe that its existence was the result of popular support, rather than legislative action.³⁴⁷ Furthermore, the court believed that the sheer number of specialty plates available in South Carolina would discourage citizens from associating them with the state, thereby reducing elected officials’ political accountability for supporting the “Choose Life” tag.³⁴⁸ Accordingly, the court held that by authorizing the plate, the state engaged in unconstitutional viewpoint discrimination, noting that “[t]he government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.”³⁴⁹

Although a few other courts have applied a hybrid speech analysis to specialty license programs,³⁵⁰ the Sixth Circuit in 2006 instead extended *Johanns* outside the compelled subsidy context to uphold the constitutionality of Tennessee’s “Choose Life” plate as a purely governmental message.³⁵¹ Drawing a parallel to the beef promotion scheme at issue in *Johanns*, the court said that the state legislature both “chose the ‘Choose Life’ plate’s overarching message and approved every word to be disseminated,” and, therefore, the plate “must be attributed to Tennessee for First Amendment purposes.”³⁵² The court analogized the plates to “government-printed pamphlets or pins” handed out by private volunteers who not only agreed with the state’s

³⁴⁷ *Id.* at 798.

³⁴⁸ *Id.* at 799.

³⁴⁹ *Id.* at 795-96.

³⁵⁰ In an unpublished opinion in 2006, the Second Circuit also recognized that specialty plate programs “involve, at minimum, some private speech.” *Children First Found., Inc. v. Martinez*, 169 Fed. Appx. 637, 639 (2d Cir. 2006). Additionally, at least one federal district court has concluded that specialty license plates constitute hybrid private/government speech. *See Women’s Resource Network v. Gourley*, 305 F. Supp. 2d 1145, 1161 (E.D. Cal. 2004). The Ninth Circuit recently ruled that Arizona’s specialty plate program constituted a public forum for private speech in *Arizona Life Coalition, Inc. v. Stanton*, No. 05-16971, 2008 U.S. App. LEXIS 1795 (9th Cir. 2008).

³⁵¹ *ACLU of Tenn. v. Bredesen*, 441 F. 3d 370, 375-76 (6th Cir. 2006).

³⁵² *Id.* at 376.

message, but were also willing to pay a premium to express it.³⁵³ *Rose* was an unpersuasive precedent, the court said, primarily because it predated *Johanns*.³⁵⁴ As it had in *Rose*, the Supreme Court denied certiorari, leaving the circuits divided on the issue.

Did Tennessee's "Choose Life" plate really express a state message comparable to the "Live Free or Die" motto embossed on the New Hampshire plates at issue in *Wooley*? Tennessee had authorized more than 100 specialty plates supporting organizations as diverse, and as unrelated to any perceptible state interest, as the Fellowship of Christian Athletes, Ducks Unlimited, the Sons of Confederate Veterans (including its Confederate flag logo), and various out-of-state colleges, including the University of Florida.³⁵⁵ Why, the dissent asked, would Tennessee enlist private volunteers to support the University of Florida when the Gators are well-known as the University of Tennessee's football arch-rivals?³⁵⁶ The dissent also questioned why the state would require at least 1,000 pre-paid plate orders before authorizing its own message, and noted that the plate application form encouraged citizens to "support your cause and community," not to "support the government's message."³⁵⁷ By considering the program as a whole, the dissent correctly concluded that the plates were not pure government speech, but rather a mixture of a private message expressed through a government medium.³⁵⁸ Through its plate program, the state voluntarily opened a forum for the expression of private views, and as such, the First Amendment's prohibition on viewpoint discrimination should not have been ignored.³⁵⁹

³⁵³ *Id.* at 379.

³⁵⁴ *Id.* at 380.

³⁵⁵ *Id.* at 382-83, 384 n. 8 (Martin, J., dissenting).

³⁵⁶ *Id.* at 382 n. 4 (Martin, J., dissenting).

³⁵⁷ *Id.* at 384 & n.7 (Martin, J., dissenting).

³⁵⁸ *Id.* at 389-90 (Martin, J., dissenting).

³⁵⁹ *Id.* at 390 (Martin, J., dissenting).

Recognizing that both government and private individuals speak together in the specialty license plate context, some judges and scholars have suggested that the government has its own expressive interest in avoiding “speech by attribution.”³⁶⁰ That is, given that specialty plates contain both government and private expression, the government should have veto power over the messages expressed so it can disassociate itself from speech with which it disagrees. Requiring a state to exercise viewpoint neutrality in a specialty license plate program abridges the government’s own speech interest, according to this argument, because it leaves the state powerless to avoid issuing plates for hate groups or others whom the state does not want to endorse.³⁶¹ Under this rationale, specialty license plates are no different from postage stamps that honor various causes or organizations that may be proposed by private individuals, but are ultimately approved or rejected by the government.³⁶²

While a detailed analysis of this argument falls outside this Article’s scope,³⁶³ the fatal flaw in this position should be apparent: allowing the government to dissociate itself from speech whenever it provides the medium of expression, and not the message, would gut the public forum doctrine—in each instance where private views are expressed in a state-provided

³⁶⁰ See, e.g., *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc) (“I would have hoped, if rehearing were granted, that we would consider the government’s interest in avoiding ‘speech by attribution;’ that is, the government’s right not to be compelled to speak by private citizens.”); Helen Norton, *Not For Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. Davis L. Rev. 1317, 1349 (concluding that in hybrid speech situations, the government should be allowed to refuse to disseminate messages with which it disagrees).

³⁶¹ See, e.g., *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376-77 (arguing that if “Choose Life” plate were found to be unconstitutional, the state would be required to provide specialty plates for hate groups such as the KKK and the American Nazi Party).

³⁶² *Id.* at 379; see also James C. Colling, Casenote: *General Lee Speaking: Are License Plate Designs Out of the State’s Control? A Critical Analysis of the 4th Circuit’s Decision in Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dept. of Motor Vehicles*, 12 Geo. Mason L. Rev. 441, 467 (analogizing specialty license program to U.S. Postal Service Semipostal Stamp Program).

³⁶³ For a thorough review of this and other issues surrounding both specialty and vanity license plates (on which drivers select their own letter/number combination), see Marybeth Herald, *Licensed to Speak: The Case of Vanity Plates*, 72 U. Colo. L. Rev. 595 (2001) and Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 Fla. L. Rev. 419 (2001). For a detailed discussion of government’s “negative expressive interests” in general, see Norton, *supra* note 360.

venue, the government would win.³⁶⁴ Supreme Court precedent establishes that although the state may prefer to keep the Ku Klux Klan from demonstrating in a public park, the government must allocate assembly permits on a viewpoint-neutral basis.³⁶⁵ When the state allows its property to be used for private, expressive purposes, it may not prefer one viewpoint to another, even at the risk that some taxpayers may wrongly fault the state for any resulting offensive speech.³⁶⁶ Just as most citizens ascribe parade banners to the sponsoring group, most drivers rightfully attribute the message on specialty license plates to vehicle owners, not to the state.³⁶⁷ When substantial private speech interests are at stake, the function of the First Amendment should be to safeguard the individual's, not the government's, right to speak. Conversely, postage stamps, while displayed on private letters, are much more closely associated by citizens with the government's own decision to commemorate a person, organization, or event, and therefore the government's interest in controlling its speech should prevail.³⁶⁸

³⁶⁴ See *SCV*, 305 F. 3d at 246 (Luttig, J., concurring in denial of rehearing en banc) (“No one, upon careful consideration, would contend that, simply because the government owns and controls the forum, all speech that takes place in that forum is necessarily and exclusively government speech. Such would mean that even speech by private individuals in traditional public fora is government speech, which is obviously not the case.”).

³⁶⁵ See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (finding that, in the context of a picketing ordinance, the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views”); *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45-46 (1983) (describing “streets and parks” as examples of traditional public forums, and noting that in the forum context, the state may not restrict speech “merely because public officials oppose the speaker’s view”).

³⁶⁶ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (stating that the government may not suppress contrary messages because of their viewpoint in a forum designed “to encourage a diversity of views from private speakers”).

³⁶⁷ See *Herald*, *supra* note 363, at 650 (stating that reasonable viewers would not attribute the message on vanity license plates to the government); *Jacobs*, *supra* note 362, at 454 (asserting that specialty plates are “generally understood by purchasers and viewers to be private speech”). *But see Colling*, *supra* note 362 at 471 (claiming that citizens will hold the state accountable for specialty plates that contain offensive symbols such as the Confederate flag).

³⁶⁸ However, personalized custom postage or “stamps” featuring business brands or logos are more likely to be viewed as private speech, and therefore would be more analogous to specialty license plates. See *Beth Snyder Bulik, Advertising Goes Postal: USPS Cancels Law Against Branded Stamp Art*, *Advertising Age*, May 2006, at 4, 40 (describing the postal service’s attempt to raise revenues by selling personalized and branded “stamp art”).

B. Hazelwood (*Briefly*) Revisited

The argument advanced in the specialty license plate context that the government must be allowed to disassociate itself from speech with which it disagrees, is a familiar one, of course. In *Hazelwood*, it will be recalled, the Court relied on this reasoning to hold that a principal's removal of certain articles from a student publication did not violate the First Amendment. Censorship by school officials of student newspapers "and other expressive activities that students, parents, and the members of the public might reasonably perceive to bear the imprimatur of the school" was justified, the Court said, to ensure that "the views of individual speakers are not erroneously attributed to the school." *Hazelwood* categorized student expression as either private speech that the public school must tolerate under *Tinker*, or school-sponsored speech that the school affirmatively chooses to promote and therefore considers its own, and over which school officials retain editorial control as long as their actions "are reasonably related to legitimate pedagogical concerns."³⁶⁹ Student expression within a school-sponsored activity would also be attributed to the school for First Amendment purposes under the "test" for government speech announced by the Court in *Johanns*. Under that test, student speech properly belongs to the school whenever school officials design the underlying curricular program ("set[] the overall message to be communicated") and reserve the right to exercise prior review of student speech within that program ("approve[] every word to be disseminated").³⁷⁰

As with specialty license plates, however, student expression that occurs within a school-sponsored media outlet contains an undeniable element of private speech. Articles in a student newspaper, for example, are generally conceived, reported and written by student authors, not dictated to them in final form by school administrators. School newspapers are commonly held

³⁶⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

³⁷⁰ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

out to contain student work, even though individual stories may be edited by a journalism teacher and approved by the principal at the K-12 level, or reviewed by a faculty adviser at a college publication. Professional journalists, too, produce stories that are edited for style, substance, and length at various levels within a media organization; nevertheless, the original author in both professional and student newspapers is usually given byline credit for his or her efforts. Accordingly, public student expression within a school-sponsored publication should be recognized as another example of mixed or hybrid speech that presents both private and governmental speech interests, rather than simply considered to be “the school’s own speech.”³⁷¹

Granted, a school’s interest in determining its curriculum, maintaining high publication standards, instilling values, protecting the sensibilities of younger students, and avoiding misattribution of student views constitute significant interests weighing in favor of limited government control over student expression at the K-12 level. The Court has emphasized that public school students do not possess First Amendment rights that are equal to those of adults,³⁷² and even the *Tinker* Court recognized the “special characteristics of the school environment.”³⁷³ Nevertheless, the First Amendment values advanced by protecting student journalism are also substantial. Free student expression serves First Amendment interests belonging both to the speaker and the audience by furthering individual autonomy and the search for truth,³⁷⁴ educating students about constitutional principles,³⁷⁵ and promoting toleration of diverse views.³⁷⁶ Student

³⁷¹ *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (Alito, J., concurring) (describing *Hazelwood* as “allow[ing] a school to regulate what is in essence the school’s own speech”).

³⁷² *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

³⁷³ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³⁷⁴ *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984) (“The freedom to speak one’s mind is not only an aspect of individual liberty...but also is essential to the common quest for truth and the vitality of society as a whole.”).

³⁷⁵ *See, e.g., Chemerinsky, supra* note 112 at 545 (“Schools cannot teach the importance of the First Amendment and simultaneously not follow it.”).

³⁷⁶ *See Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America* 9-10 (1986) (arguing that free speech promotes self-restraint and tolerance of diverse views).

newspapers, as well as professional media outlets, also implement the checking function of the First Amendment by acting as a watchdog and informing the community about the activities of teachers and other school officials.³⁷⁷

That public high school students may also possess an individual interest in a curricular-based student publication arguably was acknowledged in *Hazelwood*, but only to the extent that the Court required that limitations on school-sponsored student speech be reasonably related to legitimate pedagogical concerns. The Court may have implicitly recognized the hybrid nature of school-sponsored student speech by obliging school officials to provide some minimal justification to control it. By then applying this “reasonableness” test with such great deference to the judgment of school authorities,³⁷⁸ however, the Court granted full recognition to the government speech interests presented by school-sponsored speech, and provided next to nothing in the way of First Amendment protection to the student portion of the hybrid equation.

Part IV calls for courts to apply a genuine hybrid speech analysis, rather than the government speech doctrine, in cases involving both the student press and public employees. Using this approach, courts should recognize that while truly valid pedagogical concerns may justify official control of K-12 school-sponsored publications, student journalists’ First Amendment rights should be paramount at the public university level. Likewise, while public employees who are “hired to speak from a government manifesto”³⁷⁹ may have little individual interest in their speech, those who choose to report government corruption to their superiors

³⁷⁷ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 521, 529-44 (asserting that a free press promotes the First Amendment value of checking the abuse of official power).

³⁷⁸ The *Hazelwood* Court listed some examples of what would constitute a valid educational purpose in this context, including censorship of student expression “to ensure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for the level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). See Peltz, *supra* note 191 at 508 (stating that after *Hazelwood*, censorship of student media “runs rampant regardless of whether school officials can demonstrate educational objectives”).

³⁷⁹ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1969 (2006) (Souter, J., dissenting).

should not forfeit their citizenship status simply because those reports are made pursuant to their jobs.

IV. A Conclusion in Four Parts: Applying a Hybrid Speech Analysis to Student Journalists and Public Employees

This Article has argued that the Supreme Court has overextended the government speech doctrine to deny First Amendment protection to speech that implicates important private, as well as public, interests. Specifically, the Article has focused on expression by student journalists and public employees, and shown how the Court has applied a government speech rationale to eviscerate individual rights in both contexts. With respect to the student press, lower courts, as well as public school and university administrators, have used the *Hazelwood* ruling to stifle critical and/or controversial student speech. After *Garcetti*, public employees have no First Amendment protection against retaliation when they speak internally as part of their official duties, even when their speech exposes serious government malfeasance. I conclude by outlining how courts should use the hybrid speech concept to strengthen individual First Amendment rights belonging to public-school student journalists at the K-12 and university levels, as well as to public employees who engage in judgment-based speech as part of their official duties. Finally, I provide an alternate reading of *Garcetti* that is consistent with a hybrid speech analysis, and would return citizen status to public employees who engage in true whistleblowing as part of their official duties.

A. *Student Journalism as Hybrid Speech at the K-12 Level*

Instead of deferring exclusively to educators' decisions with respect to school-sponsored expressive activities at the K-12 level, courts should acknowledge a constitutional obligation to provide some meaningful protection for student speech rights in this hybrid context. This could be done within *Hazelwood's* existing legal framework by requiring courts to engage in a serious inquiry into whether school censorship decisions are justified by truly valid educational concerns.³⁸⁰ The pedagogical purpose behind a student newspaper, for example, is to provide hands-on training in journalism: to instruct students to recognize, report and write newsworthy stories. Courts must acknowledge that this purpose cannot be achieved when student journalists are relegated to propagandizing school-approved positions, because real journalism requires independence from official sources as well as the exercise of critical thought.³⁸¹ While teaching budding journalists the importance of accurate reporting, proper grammar, concise writing, and respect for audience members are all bona fide pedagogical objectives, this Article proposes that the First Amendment should prevent school administrators from censoring school-sponsored student expression merely because it reveals accurate and newsworthy information that reflects critically on the school, its policies, or its personnel.

This more rigorous approach was applied in *Dean v. Utica Community Schools*, a federal district court case where a high school principal removed an article from the student newspaper about a lawsuit that had been filed against the school district.³⁸² In the lawsuit, a couple who lived on property adjoining the district's bus garage alleged that diesel fumes from idling buses

³⁸⁰ Note that in its *Hazelwood* decision, the Court carefully examined the reasons advanced by the principal for censoring the student newspaper. *Hazelwood*, 484 U.S. at 274-76.

³⁸¹ See, e.g., *Dean v. Utica Cmty. Schs.*, 345 F. Supp. 2d 799, 804 (E. D. Mich. 2004) ("It is often the case that this core value of journalistic independence requires a journalist to question authority rather than side with authority.").

³⁸² *Id.* at 802-03.

had harmed their health.³⁸³ The student reporter interviewed the plaintiffs, watched a videotape of a school board meeting where the issue was discussed, researched the effects of diesel fume inhalation on the internet, and attempted to interview various school district officials, who all declined to comment.³⁸⁴ The principal forwarded a draft of the article to school district officials, who instructed him to pull it from the newspaper.³⁸⁵ The district argued that the article was inadequately researched, inaccurate, and biased.³⁸⁶

In analyzing the student reporter's First Amendment claim, the district court first concluded that school created the student newspaper as a limited public forum for student expression, and that the article's suppression constituted unconstitutional viewpoint discrimination.³⁸⁷ Alternatively, the court held that even if the newspaper was, in fact, a non-public forum, the district's reasons for censoring the article did not rise to the level of legitimate pedagogical concerns.³⁸⁸ The court pointed out that several factors emphasized by the *Hazelwood* Court in conducting its reasonableness analysis were not at issue here; the article did not present privacy concerns, or contain either sexual "frank talk" or grammatical errors.³⁸⁹ No reasonable reader would attribute the article to the school, the court determined, because the reporter duly noted in the article that school officials declined to comment on the lawsuit, making clear that the reporter herself was neither speaking on the school's behalf nor delivering the school's message.³⁹⁰

As to the journalistic quality of the story itself, a journalism professor and a professional journalist both testified that the story was newsworthy, well written, unbiased, and cited

³⁸³ *Id.* at 802.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 802-03.

³⁸⁶ *Id.* at 809 n. 4.

³⁸⁷ *Id.* at 806, 813.

³⁸⁸ *Id.* at 806, 809-13.

³⁸⁹ *Id.* at 810-11.

³⁹⁰ *Id.* at 813-14.

appropriate sources.³⁹¹ Any lack of balance in the story was the district's own fault, the court observed, because district officials had refused to be interviewed.³⁹² The court found that the only alleged "inaccuracy" in the article was the district's disagreement with the plaintiffs' claim that diesel fume exposure was hazardous to human health. In other words, the article correctly summarized the plaintiffs' legal claim, but the district simply disagreed that the claim was meritorious—a type of "inaccuracy" the court considered immaterial.³⁹³ While not specifically identifying the student article in question as hybrid expression, the court nevertheless properly concluded that the district's desire to minimize publicity about an unfavorable lawsuit did not rise to the level of a valid educational purpose sufficient to justify censorship of school-sponsored student speech.

B. Student Journalism at Public Colleges as Hybrid Speech

At the college level, student expression within a university-sponsored student media outlet also qualifies as a type of hybrid speech; however, it should be clear that the government interest in regulating that speech is entitled to significantly less weight than in the K-12 context. Both the student writers and the intended audience for campus newspapers, yearbooks, literary magazines, and broadcast programs are young adults who are mature enough to have no further need of state protection from potentially sensitive or offensive topics. Whereas compulsory education laws in each state require children to attend school until at least age 16,³⁹⁴ no laws mandate college attendance. Therefore, the state's window of opportunity to teach basic skills and information, or to inculcate values in the nation's youth, has effectively closed. The state's

³⁹¹ *Id.* at 810-12.

³⁹² *Id.* at 810.

³⁹³ *Id.* It should be remembered that Pickering's letter to the editor retained First Amendment protection despite much more serious inaccuracies. See *supra* notes 46 -49 and accompanying text.

³⁹⁴ Mark G. Yudof et al, *Education Policy and the Law* 1 (4th ed. 2002).

interest in shielding young minds has been replaced at the university level with the need to encourage free inquiry, an interest that has been recognized by the Supreme Court as essential for both true scholarship and social progress.³⁹⁵ College journalists, in particular, work for student media outlets as part of their professional training, as a way to gain hands-on, “real world” experience necessary for a career in journalism. The value of that experience, and indeed the overall worth of any college journalism program, would seriously be compromised if college administrators could turn supposedly “independent” student media outlets into mere purveyors of noncontroversial content and officially-approved propaganda.

At the same time that the state’s interest in regulating college-level student speech has diminished, the student’s own right to speak freely has accordingly increased. The great majority of college students have reached the age of 18,³⁹⁶ when they are treated by law as adults for almost all purposes.³⁹⁷ Among other things, typical college students are able to vote, marry, enlist in the armed forces, sign a contract, view a NC-17-rated movie, and live independently from their parents. College students freely choose to continue their education and play a large role in determining their individual course of study. They expect, while at university, to be exposed to a wide range of potentially controversial ideas and opinions, which makes up an essential part of their college experience. Accordingly, the First Amendment rights of college students should be recognized as not only stronger than those of high school students, but co-

³⁹⁵ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267-68 n. 5 (1981) (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”) (citing *Healy v. James*, 408 U.S. 169, 180 (1972)); *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident.... 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.”).

³⁹⁶ According to a U.S. Census Bureau report, only about one percent of college students enrolled as of October 2003 were under 18. See Hyron B. Shin, U.S. Census Bureau, *School Enrollment—Social and Economic Characteristics of Students: October 2003* 10, Table E, “College Enrollment by Selected Characteristics” (2005), available at <http://www.census.gov/prod/2005pubs/p20-554.pdf>.

³⁹⁷ See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“[T]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood.”).

equal to those of adults—positions with which the Supreme Court has already evidenced agreement.³⁹⁸

Furthermore, the disassociation argument advanced in *Hazelwood* is much weaker at the college level, where the public is less likely to misattribute controversial expression in a student media outlet to the university itself. Junior high and even high school newspapers are unlikely to be considered truly independent, given that they are often produced as part of a class and subject to prior administrative review. While college publications and broadcast programs may be funded through student activity fees, housed in campus facilities, and/or overseen by a faculty adviser, they are generally student-operated extracurricular activities that are perceived as expressing student viewpoints. For example, when the University of Illinois student newspaper republished cartoons depicting the Prophet Muhammad in 2006, angry students directed their protests against the paper, with the Muslim Student Association president expressing disbelief that “our own student-based newspaper would be so ignorant and disrespectful.”³⁹⁹ Similarly, after Colorado State University’s student newspaper published a four-word, expletive-containing editorial critical of President George W. Bush, the paper and its editor were praised by some, but also shouldered significant popular indignation.⁴⁰⁰ The newspaper received more than 780 online comments from readers and lost thousands of dollars in cancelled advertising, and student

³⁹⁸ See, e.g., *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n. 4 (2000) (“[T]he right of teaching institutions to limit expressive freedom of students has been confined to high schools whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”).

³⁹⁹ Monica Davey, *Illinois Student Paper Prints Muhammad Cartoons, and Reaction is Swift*, N.Y. Times, Feb. 17, 2006, at A14.

⁴⁰⁰ See Student Press Law Center, *Editorial at Colo. State Curses Bush, Puts Editor’s Job in Jeopardy*, News Flash, Sept. 24, 2007, available at http://www.splc.org/newsflash_archives.asp?id=1612&year=2007; Trevor Hughes, *CSU Collegian Editor Offers No Apology for Editorial*, The Coloradoan, Sept. 27, 2007, available at <http://www.coloradoan.com/apps/pbcs.dll/article?AID=/20070927/CSUZONE01/709270386/1002/NEWS01>.

petitions both supported the editor and called for his removal.⁴⁰¹ This is not to deny that university officials may also receive numerous complaints when student publications engage in questionable behavior or express controversial opinions; however, University officials can effectively distance themselves from student media by releasing statements criticizing those actions and clarifying their own positions, a step which was taken by both the chancellor of the University of Illinois,⁴⁰² and the president of Colorado State⁴⁰³ in the examples mentioned above.

As noted in Part II, most college media outlets will qualify as limited public forums for First Amendment purposes for the very reason that university publication policies often grant substantial control to student editors and staff. The problem with relying on a public forum analysis to protect student journalists' First Amendment rights at the university level, however, is that it allows college administrators to determine the extent of student speech rights by simply manipulating those very publication policies. Public forum precedent establishes that the Court will not hold that a public forum has been created "in the face of clear evidence of a contrary intent."⁴⁰⁴ As a result, college journalists are vulnerable under this rationale to the claim that merely by enacting a prior review policy or exercising content control, university administrators can turn an otherwise student publication into government speech. Assume, for example, that state university officials prohibit the student newspaper from criticizing the university in print, limit student reporters' access to university administration, and then threaten disciplinary action against a student editor who speaks out against those policies.⁴⁰⁵ It is debatable whether courts would consider the newspaper sufficiently independent to constitute a limited public forum,

⁴⁰¹ *Id.*

⁴⁰² See Davey, *supra* note 399, at A14.

⁴⁰³ President Penley's statement objecting to the newspaper editorial is available at http://www.president.colostate.edu/index.asp?page=letter_21sept07.

⁴⁰⁴ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985).

⁴⁰⁵ This example is modeled after a real incident at Quinnipiac University, which, however, is a private college. See Jeff Holtz, *A Student Editor Finds Himself at the Center of the News*, N.Y. Times, Dec. 2, 2007, at ____.

especially given the Sixth Circuit's holding in *Hosty v. Carter* that college newspapers are essentially no different from high school publications, and that the speaker's age is irrelevant to public forum status.⁴⁰⁶

The First Amendment should prevent the government from creating what appears to be a student media outlet while at the same time reserving the right to control speech within that outlet at its discretion. Student speech in university-sponsored student publications should be treated as hybrid expression where significant private speech rights cannot be ignored when the government's asserted speech interest is "less than compelling."⁴⁰⁷ Under this analysis, uninhibited college journalism unquestionably advances a veritable smorgasbord of First Amendment values on behalf of both the student speakers and the intended audience: it furthers autonomy interests by providing an outlet for self-expression, it teaches respect for constitutional ideals and toleration of different viewpoints, it informs the community about current events, it acts as a watchdog by revealing and critiquing activities of both student government and university administration.⁴⁰⁸ Furthermore, a hybrid approach would require courts to recognize—as they did pre-*Hazelwood*—that free expression on college campuses also advances the government's interest in encouraging unfettered debate and scholarship in higher education.⁴⁰⁹ Given that the government's countervailing argument that it must be allowed to disassociate itself from student expression to avoid misattribution of views is much weaker in the college scenario than at the high school or elementary level,⁴¹⁰ a hybrid analysis would entitle

⁴⁰⁶ 412 F. 3d 731, 735 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006). *See supra* notes 225-237 and accompanying text.

⁴⁰⁷ *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., concurring).

⁴⁰⁸ *See supra* notes 372-377 and accompanying text.

⁴⁰⁹ *See supra* notes 372-377 and accompanying text.

⁴¹⁰ *See supra* notes 207-209 and accompanying text.

student journalists at public universities to the full-strength speech rights based on the First Amendment, not the university's benevolence.

This is not to say that a public college that creates an alumni magazine and enlists student writers, as the *Hosty* court hypothesized,⁴¹¹ should be forbidden to control the content of that magazine. An alumni magazine held out as an official university publication will be perceived by the public as speech properly belonging to the school itself, even when student authors are paid or volunteer contributors. The state would therefore possess a compelling interest in controlling its own speech, whereas the student writers would be analogous to the doctors in *Rust v. Sullivan*, who were merely hired to advance a pre-approved government message.⁴¹² Even under a hybrid analysis, then, the state would retain control of official publications that are clearly attributable to the government itself.

C. Discretionary, Duty-Based Speech of Public Employees as Hybrid Expression

Just as student speech in school-sponsored, student media outlets presents both private and governmental interests, employment-related speech by public employees also constitutes a type of hybrid expression. As a result, public employees should not automatically and entirely forfeit their First Amendment rights every time they speak as part of their employment duties. When a public employee reveals official misconduct, fraud or other wrongdoing, even internally as part of his or her employment tasks, the Court should recognize that that employee has come forward as a citizen. As such, his or her speech should be eligible for First Amendment protection if it satisfies the *Pickering-Connick* test.

⁴¹¹ *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006). *See supra* notes 371-373 and accompanying text.

⁴¹² 500 U.S. 173, 193-95 (1991). *See supra* notes 316-317 and accompanying text.

Admittedly, *Garcetti*'s constitutional distinction between speech that is "related to," versus speech that is "required by," a public employee's job responsibilities possesses some superficial appeal. It clearly makes no sense, for example, to allow a public information officer directed to design a state anti-smoking appeal to hide behind the First Amendment after being reprimanded for delivering instead a campaign emphasizing the joys of tobacco. Similarly, requiring courts to perform a full *Pickering-Connick* analysis unquestionably looks like a waste of judicial resources when an assistant attorney general is disciplined for writing a brief in support of the defendant, rather than the state, in a criminal appeal.

While these particular examples would be easily decided in the public employer's favor under *Garcetti*, a hybrid speech analysis would also reach the same common-sense result. When a public employee is hired to advance a specific government message, the state has a compelling interest in ensuring that the resulting work product conforms to its explicit instructions. As long as those instructions are not purposefully designed to cover up fraud or other misconduct, and the scripted message is not misattributed to a private speaker or entity,⁴¹³ a worker employed to develop or deliver that message on the state's behalf has a correspondingly minimal individual interest in the speech. He or she is more appropriately subject to the Court's rule that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."⁴¹⁴

More difficult to resolve are those instances where public employees exercise discretion in fulfilling their assigned tasks, and suffer retaliation related to their reasonable speech choices. The assistant attorney general in the example used above may, in writing the state's brief in a criminal appeal, elect to omit an argument that he or she determines is unsupported by the facts.

⁴¹³ An example of this, I would argue, is the pro-beef message attributed to "America's Beef Producers" in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-64 (2005). See *supra* notes 10-16 and accompanying text.

⁴¹⁴ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

The attorney has used personal and professional discretion in complying with a government employer's expectations. This category obviously would encompass assistant district attorney Ceballos, who wrote his disposition memo in the exercise of his best judgment pursuant only to a duty to act "honestly, competently, and constitutionally."⁴¹⁵ Justice Souter correctly noted in his dissent that because Ceballos was neither employed to "promote a particular policy" nor to "speak from a government manifesto," his speech did not amount to pure government speech as exemplified by *Rust*.⁴¹⁶ An employee has an undeniably stronger individual interest in unscripted or otherwise discretion-based expression, than in predetermined, employment-required speech. However, as Justice Souter recognized, that interest may be outweighed by the employer's need to run an efficient workplace.⁴¹⁷ A hybrid analysis would recognize that when an employee fulfills an assigned, discretionary speech task, the government employer has a substantial managerial interest in being able to discipline that employee if the work is performed incompletely, incompetently, or simply not to the employer's liking. Internal squabbles about the adequacy of an employee's work product amount to mere workplace grievances, and would fail *Connick*'s threshold "public concern" test, or would easily be outweighed under *Pickering* by the employer's efficiency interests.⁴¹⁸

Sometimes, as Justice Stevens noted in his *Garcetti* dissent, a public employer simply may not like an employee's duty-based speech because it reveals fraud or other wrong-doing that the employer would prefer to hide or ignore.⁴¹⁹ When this occurs, the employee's hybrid expression presents significant individual speech interests that should at least raise the possibility of First Amendment protection under the *Pickering-Connick* test. By bringing perceived

⁴¹⁵ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1969 (2006) (Souter, J., dissenting).

⁴¹⁶ *Id.* (Souter, J., dissenting).

⁴¹⁷ *Id.* (Souter, J., dissenting).

⁴¹⁸ See *supra* notes 64-78 and accompanying text.

⁴¹⁹ 126 S. Ct. at 1962 (Stevens, J., dissenting).

misconduct to an internal supervisor's attention, a whistleblower furthers his or her civic duty as a public servant and a responsible employee, and promotes the public interest by advancing true workplace efficiency and accountability. An employee who reveals potential corruption or illegalities to his or her public employer speaks to the government, not as the government, and often does so at great personal risk.⁴²⁰ And unlike *Hazelwood*, an employee who reports wrongdoing internally as part of his or her job can never be misperceived by the public as an official government spokesperson, nor can the speech ever "bear the imprimatur" of the state.

The *Garcetti* Court, of course, ignored the "private" side of the hybrid speech balance sheet, preferring to grant public employers broad discretion to control their operations, and to speed retaliation cases through the courts with minimal judicial oversight. Public employees who uncover workplace corruption should go to the press, the Court suggested, because making public statements is "the kind of activity engaged in by citizens who do not work for the government."⁴²¹ The Court's comparison between private and public sector employees in this context is neither complete nor fair. Private sector employees who take complaints of government misconduct to the press have full First Amendment protection for their speech only because they do not work for the government. A public employee who takes a similar course of action may escape the perils of *Garcetti* but will nevertheless be subject to discipline for insubordination or failure to follow internal reporting procedures under the *Pickering-Connick* test. The Court's conclusion that public employees' individual speech rights are somehow preserved by their ability to take reports of government misconduct to the press is simply disingenuous.

⁴²⁰ See generally Nikki Troia, *Law, retaliation doom whistleblowers, panelists say*, First Amendment Center Online, March 17, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16654> (describing retaliation suffered by whistleblowers).

⁴²¹ 126 S. Ct. at 1961.

In fact, the Court's insistence that its *Garcetti* holding does not diminish the speech rights to which public employees are entitled as private citizens turns out to be entirely insupportable. According to the Court, "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict...the liberties employees enjoy in their capacities as private citizens."⁴²² Nevertheless, the *Garcetti* rule does exactly that—it allows public employers to use their positions of authority to stifle a citizen's right to report government waste or ineptitude to the responsible official. Consider a private sector employee who witnesses or uncovers official misconduct in the course of his or her daily life—what action would a responsible citizen likely take in response? Rather than run straight to the press, that private person would almost certainly first report his or her observations to the appropriate government supervisor or manager. Assume, for example, that through his or her business dealings, a private sector employee discovers evidence of corruption in a local drug task force. That private employee would have not only a right, but perhaps also a duty, to report those suspicions to the local police chief. Or consider a parent who learns through interaction with the school district that district employees engaged in fraudulent procedures when awarding federal disability benefits. Most assuredly that parent would have a First Amendment right to detail those allegations in a letter to the school commissioner.

Under *Garcetti*, however, drug task force members or school district employees who discover the same evidence of wrongdoing and take the same respective actions have no First Amendment protection for their speech.⁴²³ The employee who discloses improprieties to her supervisor in accordance with her job duties risks retaliation under *Garcetti* if she reveals what her employer prefers to hide; the employee who, instead, contacts the press risks dismissal for

⁴²² *Id.* at 1958.

⁴²³ See *Sigsworth v. City of Aurora*, 487 F.3d 506, 507 (7th Cir. 2007); *Bailey v. Dept. of Elementary and Secondary Educ.*, 451 F.3d 514, 520 (8th Cir. 2006), and *supra* notes 271-274 and accompanying text.

being disruptive or failing to follow internal procedures under *Pickering-Connick*; the employee who says nothing risks termination for incompetence. *Garcetti*'s per se rule removes the right a public employee would otherwise possess, as a citizen, to report government misconduct to the appropriate authority. Therefore, contrary to the Court's assertion, *Garcetti*'s holding does indeed infringe on "liberties the employee might have enjoyed as a private citizen"⁴²⁴ and leaves that employee with no viable outlet for speech of potentially great public importance. As shown in Part I, the Court's so-called "powerful network" of whistleblower statutes looks more like a sieve than a safety net,⁴²⁵ and the Court's naïve belief that employers will choose to protect, rather than punish, employees who report wrongdoing has been repeatedly contradicted by the facts of the post-*Garcetti* employment cases discussed in Part II.

A hybrid analysis would allow the Court to recognize that public employees speak both as citizens and employees when their official duty speech reveals potential fraud or other government misconduct. Accordingly, speech reporting possible wrongdoing would not fall completely outside the First Amendment's scope, but would rather be protected pursuant to the *Pickering-Connick* balancing test. Nevertheless, the employee would not, under this approach, be entitled to assert an unlimited right to speech protection even after the employer investigated the underlying claims and found them wanting. As long as the public employer can show that he or she engaged in a bona fide inquiry into the employee's allegations, rather than just a perfunctory dismissal or sham investigation of the claims, the employer's need to control the workplace necessitates that the employer be given the "last word" in resolving any continuing disputes. So, for example, if an employee refuses to revise an official report detailing suspected wrongdoing after her supervisor in good faith determines that no misconduct occurred, the

⁴²⁴ *Garcetti*, 126 S. Ct. at 1960.

⁴²⁵ See *supra* notes 159-166 and accompanying text.

employer must prevail. The employee has now been given specific, scripted instructions regarding how to write her report, and has only a minimal private interest in the content of her speech. If the employee declines to follow those instructions, the employer should be allowed to discipline the employee for insubordination or incompetence without having to invoke the *Pickering-Connick* test.

D. Fitting Garcetti into the Hybrid Mix

Although the Court in *Garcetti* wrongly characterized Ceballos' disposition memo as pure government speech, the result in the case can nevertheless be read in accordance with my suggested approach. Recall that Ceballos' disposition memo to his supervisors recounted what he considered to be serious misrepresentations in a search warrant affidavit prepared by a sheriff's deputy.⁴²⁶ Defense counsel in the case was aware of the affidavit's possible deficiencies, having brought the matter to Ceballos' attention in the first place.⁴²⁷ Based on Ceballos' memo, a "heated" meeting was held among representatives of both the sheriff's department and the district attorney's office to discuss the affidavit.⁴²⁸ Following the meeting, Ceballos' supervisors rejected Ceballos' concerns and elected to continue with the prosecution.⁴²⁹ Ceballos then informed his superiors that he was required by his professional and constitutional obligations as a prosecutor to provide defense counsel with a copy of his memo.⁴³⁰ In other words, Ceballos continued to behave as if the affidavit was fraudulent, even after his superiors had determined otherwise.

⁴²⁶ *Id.* at 1955-56.

⁴²⁷ *Id.* at 1955.

⁴²⁸ *Id.* at 1956.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 1972 (Souter, J., dissenting).

Had Ceballos been subject to retaliation immediately after he delivered his memo alleging misconduct by a deputy sheriff, rather than after his superiors determined that the affidavit was legally sufficient, the Court may have been significantly more sympathetic to his plight. Based on comments by several Justices at oral arguments, the majority saw Ceballos as a whiner, not a whistleblower. At the first set of oral arguments in the case,⁴³¹ Chief Justice Roberts disputed the seriousness of Ceballos' allegations,⁴³² and Justice Breyer expressed some doubt as to their accuracy.⁴³³ At the second set of oral arguments, Justice Alito remarked that, even under the *Pickering-Connick* test, an employee who continued to insist on his own way after being overruled by his employer could be disciplined for insubordination—a telling comment about how he viewed Ceballos' behavior.⁴³⁴ Justice Scalia, too, pounced on Ceballos' attorney when she described Ceballos as having “exposed police misconduct.”⁴³⁵ Justice Scalia responded that “[t]hat’s not established at all. His supervisor obviously thought he didn’t. . . . And as I understood the case, the supervisor said ‘Wow, I don’t want loose cannons around down there who are accusing perfectly honest and respectable police officers of violating the law.’”⁴³⁶ The majority’s per se rule that official duty speech falls outside the First Amendment was an inartfully crafted short-cut, meant to make it easier for employers to discipline insubordinate employees without having to negotiate what the Court perceived as *Pickering-Connick*'s attendant fuss and bother.

⁴³¹ *Garcetti* was first argued in 2005, but was held over for reargument in 2006 after Justice Alito replaced Justice O'Connor on the Court.

⁴³² Transcript of Oral Argument at 53-54, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (No. 04-473) (Oct. 12, 2005) (“[U]nder the supervisor’s view, it may come down to simply whether there were tire tracks or tire rim tracks. And that’s not as serious, in one view, as your client thinks it’s serious.”).

⁴³³ *Id.* at 36 (noting that after examining the record, he concluded that “we have two sides to this argument: the deputies, who might reasonably contend that they did nothing wrong; your client, who thinks they were lying”).

⁴³⁴ Transcript of Oral Argument at 25, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (No. 04-473) (March 21, 2006).

⁴³⁵ *Id.* at 42.

⁴³⁶ *Id.* at 43.

Speculation about the Court's intent aside, the *Garcetti* per se rule cuts too broadly by denying First Amendment protection to genuine whistleblowers, as well as whiners, who speak pursuant to their employment responsibilities. The Court justified this unfortunate result as necessary to avoid creating a "constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." A hybrid speech analysis can provide a middle ground, where an employee who reveals fraud or misconduct in official duty speech is entitled to a presumption that he or she speaks as a citizen, not as the government, and therefore is protected by the First Amendment if he or she can satisfy the *Pickering-Connick* test. If the government concludes, after a bona fide investigation, that the employee's claims are groundless, the employer should then have the ability to discipline an employee who continues to assert those claims in official duty speech. If an employee, such as Ceballos, thereafter brings a First Amendment retaliation claim, the employer's interest in managing its official communications should prevail without the need for a full *Pickering-Connick* evaluation. This approach recognizes that government employees cannot be stripped of their First Amendment rights as citizens to report possible government misconduct to the appropriate authorities, yet gives employers a freer hand to discipline employees who are truly insubordinate.

A hybrid analysis, admittedly, would exact a higher litigation cost than *Garcetti*'s per se rule, given that cases involving alleged retaliation for whistleblowing would still require application of the *Pickering-Connick* test. Even in a case like *Garcetti* where an employer determines that an employee's misconduct claim is groundless, disputes will arise about the adequacy of the employer's investigation. Courts should not simply defer to employers' decisions on that score, but should acknowledge a constitutional obligation to meaningfully review the adequacy of an employer's investigation—just as courts should engage in a serious

inquiry as to whether school censorship of K-12 student media outlets is justified by valid pedagogical concerns rather than school administrators' desire to stifle criticism. Given the undeniable social value of whistleblower speech, the Court should recognize that these litigation costs are easily offset by corresponding gains in public health, welfare and safety, political accountability, public confidence in government, and true workplace efficiency. By restoring citizenship status to public employees who reveal official wrongdoing in the course of their employment duties, the Court would encourage, rather than discourage, public servants to truly serve the public interest. As Chief Justice Roberts himself has observed, without a strong judiciary willing to give it substance, the First Amendment contains "nothing but empty promises."⁴³⁷

⁴³⁷ Chief Justice John Roberts, Keynote Address at the dedication of the Newhouse III building at Syracuse University (Sept. 19, 2007), (transcript available at http://blog.syracuse.com/specialreports/2007/newhouse_iii_audio_of_john_rob.html).