INCULCATION INTO INDOCTRINATION PREDICTING JUSTICE SOTOMAYOR'S IMPACT ON TEACHERS' SPEECH IN THE PUBLIC SCHOOL CLASSROOM

I. INTRODUCTION

Beginning with *Tinker v. Des Moines Independent Community School District*,[1] the Supreme Court has provided a full array of First Amendment jurisprudence regarding a student's right to free speech in public schools.[2] Furthermore, the Court has also provided comprehensive opinions concerning a public employee's right to free speech in the workplace.[3] Yet,

1. 393 U.S. 503, 514 (1969) (holding that student's speech in public schools is protected unless school officials reasonably "forecast substantial disruption of or material interference with school activities").

2. *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (differing from *Tinker*, the Court held that, in regard to "school-sponsored expressive activities," public school authorities do not violate the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–85 (1986) (finding that public schools may also regulate speech that is vulgar, lewd, indecent, or plainly offensive).

3. *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968) (establishing a balancing test for public employees between a citizen's right to comment on matters of public concern and the State's interest in promoting the efficiency of public services); Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (adding to the *Pickering* balancing test that "when public

the Supreme Court has thus far avoided addressing the scope of First Amendment protection for public school teachers' speech in the secondary classroom.[4]

Accordingly, there is a circuit split over the appropriate standard governing teachers' First Amendment protection in the classroom.[5] From the circuit split, two predominant constitutional standards emerge for determining the proper First Amendment analysis to apply to teachers' classroom speech: the *Hazelwood* standard and the *Pickering* standard.[6] The *Hazelwood* standard assumes that teachers' speech is school-sponsored speech; therefore, restrictions on teachers' speech do not violate the First Amendment as long as the restrictions "are reasonably related to legitimate pedagogical concerns."[7] The *Pickering* standard first considers whether the teacher "is engaging in speech on a matter of public concern";[8] if so, the *Pickering* balancing test—whether the right to comment on matters of public concern is outweighed by the state's interest in promoting effective government institutions—should be applied.[9] However, since the split was defined in *Chiras v. Miller*, the Seventh Circuit has adopted the Supreme Court's recent decision in *Garcetti v. Ceballos*[10] to apply to teachers' speech in the classroom.[11] In *Mayer v. Monroe County Community School*, the court found that "school officials should be able to control and limit *completely* the speech of teachers in the classroom" because teachers are speaking in their official capacity as state employees.[12]

While the benefits and harms of the *Hazelwood*, *Pickering*, and *Garcetti* standards have been extensively discussed,[13] the impact of Justice Sonia Sotomayor's First Amendment jurisprudence on the Court has yet to be analyzed in the context of teachers' First Amendment protection in the classroom. Although Justice Sotomayor has not specifically supplied a preference for one of these standards, her First Amendment opinions ap-

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employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes").

4. Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 1 (2001); *see also* Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 62–63 (2008).

5. *See* Chiras v. Miller, 432 F.3d 606, 617 n.29 (5th Cir. 2005) (defining the split).

6. Daly, *supra* note 4, at 1–2; Hutchens, *supra* note 4, at 63.

7. *Hazelwood*, 484 U.S. at 273.

8. Hutchens, *supra* note 4, at 67.

9. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 572–75 (1968).

10. 547 U.S. 410 (2006).

11. Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).

12. Hutchens, *supra* note 4, at 51–52 (emphasis added) (citing *Mayer*, 474 F.3d at 480).

13. *See, e.g.*, Daly, *supra* note 4; Todd A. DeMitchell, *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece"*, 31 J.L. & EDUC. 473 (2002); Hutchens, *supra* note 4; Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of* Tinker*ing with Teachers' First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285 (2009).

pear to favor the *Pickering* standard[14] and may extend as far as the *Garcetti* standard.[15] More importantly, Justice Sotomayor's First Amendment jurisprudence may differ significantly from the Justice she replaced, Justice Souter, thus altering the First Amendment balance on the Supreme Court.[16] Ultimately, a comprehensive analysis of Justice Sotomayor's First Amendment jurisprudence is needed to determine where the new Justice will likely fall in the debate over teachers' First Amendment protection in the classroom.

Part II of this Note will first review the basic principles of the debate over teachers' classroom speech including an analysis of the *Pickering*, *Hazelwood*, and *Garcetti* standards as applied by the circuit courts. Part III will address Justice Sotomayor's First Amendment jurisprudence, focusing specifically on her decisions that utilize the *Pickering* and *Garcetti* standards. The third Subpart will also attempt to predict the standard favored by Justice Sotomayor in the context of teachers' classroom speech. Part IV will consider potential variations between Justice Souter and Justice Sotomayor's First Amendment jurisprudence in this context. Moreover, Part IV will briefly analyze the potential benefits and dangers of Justice Sotomayor's First Amendment jurisprudence in the arena of teachers' speech in the classroom.

II. THE CURRENT CONSTITUTIONAL PROTECTIONS OF TEACHERS' CLASSROOM SPEECH

The debate concerning teachers' classroom speech can be divided into two competing ideological camps. The first camp considers teachers as "'a vehicle for teaching American youth shared values and norms.'"[17] This camp believes that teachers should essentially "function as speech proxies for state and local school boards" and rarely, if ever, "engage in independent in-class speech."[18] This ideology is generally based on the compulsory nature of primary and secondary education and trust in the elected school board to provide "a sort of democratic vetting process for the information that students are required to receive."[19] As seen by the Seventh Circuit's *Mayer* decision upholding the Supreme Court's logic in *Garcetti*, the current trend is an elimination of teachers' free speech protection in the classroom.[20]

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14. *See* Rosario v. John Does 1–10, 36 F. App'x 25, 27 (2d Cir. 2002).
15. *See* Porr v. Daman, 299 F. App'x 84, 85 (2d Cir. 2008).
16. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006) (Souter, J., dissenting).
17. Hutchens, *supra* note 4, at 72 (quoting Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform*: *Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 965 (2003)).
18. *Id.*
19. *Id.*
20. *Id.* at 73.

The opposing ideological camp perceives the school as a marketplace of ideas.[21] This camp believes that teachers play a significant and independent role "in helping students develop into critical thinkers capable of meaningful participation in a democratic society."[22] Certain circuits utilizing this ideology, through different approaches to the *Pickering* and *Hazelwood* standards, provide at least some First Amendment protection for teachers' classroom speech.[23] Both ideological camps make compelling arguments, and the validity of these arguments will be discussed in the fourth section of this Note. However, this Part will review the circuit courts' use of the *Pickering*, *Hazelwood*, and *Garcetti* standards while considering the ideological leanings of the different approaches.

A. The Pickering *Standard*

The Supreme Court, in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*,[24] considered the free speech rights of a teacher who was dismissed from his position after writing a letter to the local newspaper opposing certain school board policy decisions. [25] The threshold question addressed by circuits who utilize the *Pickering* standard is whether teachers' speech in the classroom actually constitutes "commenting upon matters of public concern."[26] At least two circuits have stopped their analysis at this threshold question and found that teachers' in-class speech does not address a matter of public concern and is therefore not afforded any constitutional protection. The Fourth Circuit found that a high school drama teacher's selection of a controversial play for drama students to perform did not present a matter of public concern because it was a curriculum-based decision.[27] Accordingly, the teacher was merely "an employee" commenting "'upon matters of personal interest,'" which is not afforded constitutional protection.[28] Moreover, the Third Circuit held that a teacher's in-class advocacy of a particular teaching method does not address a matter of public concern and is thus not protected by the First Amendment.[29] As such, these two circuits appear to have adopted the ideology that teachers' in-class speech relating to

21. *Id.* at 72.
22. *Id.*
23. *Id.* at 70–71.
24. 391 U.S. 563 (1968).
25. *Id.* at 564.
26. *Id.* at 568. The issue of what speech touches on a "matter of public concern" is essential for the *Pickering* test. If the speech does not touch on a matter of public concern, then it is not afforded First Amendment protection. *See* Connick v. Myers, 461 U.S. 138, 146 (1983).
27. Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998).
28. *Id.* (quoting *Connick*, 461 U.S. at 147).
29. Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).

the school's curriculum is not a protected form of speech because teachers must adhere to the curriculum prescribed by local school boards.

Yet, assuming that some in-class speech does address a matter of public concern, *Pickering* requires a balancing test.[30] The Court established 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 public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[31] Thus, the *Pickering* standard should supposedly allow First Amendment protection for teachers' speech in the classroom if the state's interest in promoting efficient public schools does not outweigh the teacher's comments in the classroom as a citizen.

Accordingly, some circuits have interpreted the *Pickering* standard to grant certain First Amendment protection for teachers' in-class speech. More specifically, the Sixth Circuit utilized a traditional application of the *Pickering* test when it upheld a teacher's First Amendment right to use in-class materials such as the movie-adaptation of *Romeo and Juliet* and the novels *Fahrenheit 451*, *To Kill a Mockingbird*, and *Siddhartha*.[32] The teacher obtained permission by the school board to use these materials but was then allegedly dismissed after parental complaints about the subject matter of these works.[33] The court first inferred that the teacher's assignment of these works of literature was designed to teach the themes found in the works; as such, the court determined that the teacher's speech did address an issue of public concern because "'the speech relate[d] to matters of "political, social, or other concern to the community," as opposed to matters "only of personal interest."'"[34] Furthermore, the court applied the *Pickering* balancing test and focused specifically on the school board's prior approval of the controversial material.[35] Essentially, the court found that the teacher's interest in commenting on matters of public concern outweighed the school board or state's interest in promoting the efficiency of public services because the school board had previously permitted the teacher to engage in the controversial speech. In other words, the court would not let this general interest in efficiency "'tilt the *Pickering* scale in favor of the government . . . when the disruptive consequences of the employee speech can be traced back to the government's express decision'"

30. *See Pickering*, 391 U.S. at 568; *see also* Hutchens, *supra* note 4, at 67.

31. *Pickering*, 391 U.S. at 568.

32. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223, 230 (6th Cir. 2005) ("[T]he assignment by a public school teacher of protected materials is itself 'speech' within the meaning of the First Amendment.").

33. *Id.* at 231–32.

34. *Id.* at 229 (quoting Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) (quoting Connick v. Myers, 461 U.S. 138, 146, 147 (1983))).

35. *Id.* at 231–32.

allowing that speech.[36] Yet, although the ultimate result of the *Evans-Marshall* decision may have protected the teacher's right to free speech through the use of a *Pickering* analysis, the reasoning behind the Sixth Circuit's decision probably derived more from a desire to protect a teacher who had been given prior approval to discuss certain matters of public concern by the local school board.

Similarly, the Tenth Circuit, in *Cary v. Board of Education of Adams-Arapahoe School District 28-J, Aurora, Colorado*,[37] considered "a conflict between the school board's powers over curriculum and the teachers' rights to classroom expression."[38] In *Cary*, high school teachers challenged the school board's prohibition of certain books from the curriculum of three elective literature classes.[39] The *Cary* court, expressing the substance of the *Pickering* standard, provided that "[c]ensorship or suppression of expression of opinion, even in the classroom, should be tolerated only when there is a legitimate interest of the state which can be said to require priority."[40] However, the *Cary* court determined that there is a legitimate state interest "for the curriculum of the school district to reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs."[41] Accordingly, the court attempted to provide some First Amendment protection for teachers in the sense that they could "mention" these books in class and discuss the books as "examples."[42] Yet, the court ultimately decided that, since public education is a creature of the state, it did not see any "basis in the constitution" to free these teachers from the "personal predilections" of the local school board.[43] Ultimately, the *Pickering* standard, as applied by the circuit courts, appears to favor restrictions on teachers' in-class speech if it conflicts with decisions made by local school boards. Conflicting expressions and opinions of teachers in the classroom are not protected under the First Amendment because local school boards have a legitimate state interest in determining what is taught to students.

B. The Hazelwood *Standard*

In *Hazelwood School District v. Kuhlmeier*,[44] the Supreme Court considered the censorship of a student-run high school newspaper by school officials. The censored articles concerned high school students' expe-

36. *Id.* at 231 (quoting *Cockrel*, 270 F.3d at 1054–55).
37. 598 F.2d 535 (10th Cir. 1979).
38. *Id.* at 542.
39. *Id.* at 536.
40. *Id.* at 543.
41. *Id.*
42. *Id.* at 544.
43. *Id.*
44. 484 U.S. 260 (1988).

riences with pregnancy and divorce.[45] The Court discussed the conflicting interests between students who "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'"[46] and schools who "need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[47] Furthermore, discussing the public school atmosphere, the Court held that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations."[48] Therefore, public schools are generally not "public forums," and, as such, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."[49] Perhaps more importantly, the Court in *Hazelwood* distinguished between a student's speech that reflects "personal expression" and speech that "members of the public might reasonably perceive to bear the imprimatur of the school."[50] Ultimately, the Court found that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities *so long as their actions are reasonably related to legitimate pedagogical concerns*."[51]

Numerous circuit courts have adopted the *Hazelwood* standard in the context of teachers' speech in the classroom. In *Miles v. Denver Public Schools*,[52] the Tenth Circuit determined that the *Hazelwood* standard more aptly applied to teachers' speech in the classroom than the *Pickering* standard.[53] The court provided that "[a]lthough the *Pickering* test accounts for the state's interests as an employer, it does not address the significant interests of the state as [an] educator."[54] The court found a significant distinction between the classroom environment and the typical public employment environment. More specifically, the state bears certain responsibilities in the public education context such as assuring "'that participants

45. *Id.* at 263.
46. *Id.* at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
47. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).
48. *Id.* at 267 (citation omitted) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46–47 (1983)). Full First Amendment protection is generally given to speech that occurs in a "public forum." *Perry*, 460 U.S. at 45.
49. *Hazelwood*, 484 U.S. at 267.
50. *Id.* at 271. The Court determined that the school's censorship was reasonably related to a legitimate pedagogical concern because the school official could have reasonably concluded that the student newspaper authors had not sufficiently mastered "the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and 'the legal, moral, and ethical restrictions imposed upon journalists within [a] school community.'" *Id.* at 276.
51. *Id.* at 273 (emphasis added).
52. 944 F.2d 773 (10th Cir. 1991).
53. *Id.* at 777.
54. *Id.*

learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.'"[55] In accordance with *Hazelwood*, the court held that the classroom is not a public forum; therefore, it found "no reason to distinguish between the classroom discussion of students and teachers."[56] Thus, the Tenth Circuit considered whether the school's reprimand of a teacher who insinuated rumors about certain students was reasonably related to legitimate pedagogical interests.[57] Affirming the district court's decision, the Tenth Circuit found that (1) "ensuring that teacher employees exhibit professionalism and sound judgment" and (2) "providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers" were legitimate pedagogical interests.[58]

Similarly, the Second Circuit utilized a traditional *Hazelwood* approach to censure speech of a guest lecturer.[59] As the lecture took place in a classroom, the court determined that *Hazelwood* was appropriate and reiterated that "educators may limit the content of school-sponsored speech so long as the limitations are 'reasonably related to legitimate pedagogical concerns.'"[60] The Second Circuit also provided guidance as to what exactly constitutes a legitimate pedagogical concern. The court found that future courts should consider, "'among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation.'"[61]

Although utilizing similar principles as the Tenth and Second Circuits, the First Circuit applied a variation of the *Hazelwood* standard where a teacher was dismissed for discussing abortion-related issues in the classroom.[62] In *Ward v. Hickey*, the court held that a school "may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited."[63] In diverging from the tradi-

55. *Id.* (quoting *Hazelwood*, 484 U.S. at 271).
56. *Id.*
57. *Id.* at 778.
58. *Id.*
59. Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994). The court noted that the same standard that applies to teachers also applies to the speech of guest lecturers. *Id.*
60. *Id.* at 722 (quoting *Hazelwood*, 484 U.S. at 273).
61. *Id.* at 723 (quoting Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993)). The *Silano* court upheld the disciplinary action of the school officials because the guest lecturer "had no First Amendment right to use a film-clip showing bare-breasted women in a lecture to a tenth-grade mathematics class intended to explain the 'persistence of vision.'" *Id.* at 724.
62. *Ward*, 996 F.2d at 450–53.
63. *Id.* at 452 (citation omitted).

tional *Hazelwood* standard, the First Circuit required that teachers receive notice of prohibited conduct. The court maintained the principle that a classroom is not a public forum; however, the court proscribed retaliatory action against teachers' classroom speech that is not first expressly prohibited, reasoning that teachers should not "fear retaliation for every utterance."[64] Therefore, "'[t]he danger of that *chilling effect upon the exercise of vital First Amendment rights* must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.'"[65] Finally, the court asserted that this notice requirement is fulfilled if it is "reasonable for the school to expect the teacher to know that her conduct was prohibited."[66] The First Circuit's notice requirement provides an important First Amendment protection that is lacking from the other circuits' *Hazelwood* analysis. While the state's interest in promoting a certain curriculum is undoubtedly a legitimate pedagogical concern, notice of proscribed communications provides a significant safeguard against a potential chilling effect for teachers. The notice requirement demonstrates that there is some legitimacy to a marketplace of ideas in the classroom—as long as the marketplace is approved by the local school board.

C. The Garcetti *Standard*

Most recently, in *Garcetti v. Ceballos*,[67] the Supreme Court provided that when a public employee makes statements pursuant to his official duties as a public employee, such speech is not protected by the First Amendment.[68] In *Garcetti*, the Court reaffirmed the conflict between public employees' speech "as citizens on matters of public concern" and "the needs of government employers attempting to perform their important public functions."[69] The Court decided that when this conflict concerns speech made pursuant to duties of the public employees, the employer's needs must be favored and the employee's speech not protected; in other words, the restriction of "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."[70] The Court reasoned that this does not prevent public employees from engaging in public discourse outside of their official duties, but First Amendment protection

64. *Id.* at 453.
65. *Id.* (emphasis added) (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 604 (1967)).
66. *Id.* at 454.
67. 547 U.S. 410 (2006).
68. *Id.* at 421.
69. *Id.* at 420.
70. *Id.* at 421–22.

"does not invest them with a right to perform their jobs however they see fit."[71]

In 2007, the Seventh Circuit adopted the *Garcetti* standard to analyze First Amendment protection of teachers' speech in the classroom. In *Mayer v. Monroe County Community School Corp.*,[72] the Seventh Circuit considered whether the First Amendment protected a teacher who advocated her viewpoint on an antiwar demonstration in the classroom. The court determined that as the teacher's "current-events lesson was part of her assigned tasks in the classroom[,] *Garcetti* applies directly."[73] Moreover, the Seventh Circuit accepted the argument that no *Pickering* balancing test is needed when the teacher's speech relates directly to the provided curriculum.[74] Rather, the court found that "the first amendment [sic] does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."[75] Thus, under *Mayer*, regardless of any consideration of pedagogical interests, teachers' speech in the classroom that departs from the mandated curriculum is not protected by the First Amendment. The Seventh Circuit's utilization of *Garcetti* in the classroom blatantly demonstrates the ideology that teachers should essentially function "as speech proxies for state and local school boards" and rarely, if ever, "engage in independent in-class speech."[76] As provided by the analysis in *Mayer*, this ideology is generally based on the compulsory nature of primary and secondary education.[77] Moreover, the court accepts the argument that if potential indoctrination is to be prevented, "the power should be reposed in someone the people can vote out of office, rather than tenured teachers."[78] In other words, "[a]t least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues."[79]

Ultimately, in the context of teachers' speech in the classroom, most circuit courts have favored the interests of maintaining the curriculum provided by the local school board. However, unlike the Seventh Circuit, other circuits, through the use of the *Pickering* or *Hazelwood* approach, have been willing to consider some First Amendment protections for teachers' speech in the classroom. A Supreme Court ruling is needed on

71. *Id.* at 422. It must be noted that the Court in *Garcetti* expressly stated that it was not deciding "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425.
72. 474 F.3d 477 (7th Cir. 2007).
73. *Id.* at 480.
74. *Id.* at 478–79.
75. *Id.* at 480.
76. Hutchens, *supra* note 4, at 72.
77. 474 F.3d at 479.
78. *Id.* at 479–80.
79. *Id.* at 480.

this issue to provide teachers with a definitive standard defining their right to free speech in the classroom. Assuming that the Court accepts this issue while Justice Sotomayor is sitting on the bench, her vote may have significant and lasting implications for the public school classroom.

III. JUSTICE SOTOMAYOR'S FREE SPEECH JURISPRUDENCE

During her tenure on the Second Circuit, Justice Sotomayor did not specifically address the issue of teachers' classroom speech. However, she did provide decisions applying or discussing the *Pickering*, *Hazelwood*, and *Garcetti* standards. A comprehensive analysis of these decisions is needed to determine what standard Justice Sotomayor is likely to apply if the issue of teachers' classroom speech reaches the Supreme Court. Furthermore, this analysis will provide insight with which ideological camp, discussed *supra*, that Justice Sotomayor is likely to align.

A. Pickering *and* Garcetti *Application: Restricting First Amendment Protections*

As established in *Pickering*, prior to applying the balancing test for a government employee's speech, the court must first decide whether the speech touches upon a matter of public concern. In *Singh v. City of New York*,[80] Justice Sotomayor provides a concise definition of speech that touches on a matter of public concern. Justice Sotomayor held that "[e]mployee expression is not a matter of public concern when it 'cannot be fairly considered as relating to any matter of political, social, or other concern to the community.'"[81] Accordingly, "'when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision.'" [82] In *Singh*, Justice Sotomayor determined that the plaintiff's speech concerning the city's policy "to carry inspection documents to and from work and its policy of retaining inspectors in 'provisional' status for longer than nine months" did not touch upon a matter of public concern.[83] Justice Sotomayor found that this speech related "only to internal employment policies of the City and made only in his capacity as an employee and not as a citizen."[84] Adhering to the precedent in *Connick*,[85] Justice Sotomayor's definition of speech that touches upon a matter of

80. 524 F.3d 361 (2d Cir. 2008).
81. *Id.* at 372 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
82. *Id.* (quoting *Connick*, 461 U.S. at 147).
83. *Id.*
84. *Id.*
85. 461 U.S. at 147.

public concern is fairly broad. The plaintiff in *Singh* was complaining, as an employee, about internal policies of his employer. Conversely, similar to the Sixth Circuit's decision in *Evans-Marshall*,[86] controversial speech made by teachers in the classroom will almost certainly relate to a "'matter of political, social, or other concern to the community.'"[87]

As certain teachers' classroom speech would probably touch upon Justice Sotomayor's definition of matters of public concern, her application of the *Pickering* balancing test must next be considered. The substantial majority of Justice Sotomayor's *Pickering* analysis favors the restrictions imposed by the government entity. Specifically, in *Inturri v. City of Hartford*, Justice Sotomayor agreed with the majority that the city and police chief could lawfully order police officers to cover spider-web tattoos on their elbows while on duty. [88] Citing a variation of the *Pickering* test, the court found that "the First Amendment rights of public employees are significantly more limited than those of the general public."[89] Furthermore, the court stated that "'[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government.'"[90] Affirming the district court's summary judgment order for the city and police chief, the Second Circuit reasoned that "[a] police department has a reasonable interest in not offending, or appearing unprofessional before, the public it serves."[91]

Similarly, in *Vanderpuye v. Cohen*, the Second Circuit affirmed the district court's decision that the *Pickering* balance weighed in favor of the government.[92] In *Vanderpuye*, the plaintiff alleged that she was terminated from her job with the New York City Department of Health based on retaliation for various constitutionally protected discussions with coworkers about a potential conflict of interest in the municipal bidding process.[93] The Second Circuit assumed that plaintiff's speech did touch on a matter of public concern and that she was terminated based on this speech; yet, the court established that a government employer may justify such termination "'if: (1) the employer's prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the . . . action not in retaliation . . . but because of the potential for disruption.'"[94] Essentially, the plaintiff in *Vanderpuye* was openly insubordinate to her supervisor,

86. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223, 229 (6th Cir. 2005).
87. *Singh*, 524 F.3d at 372 (quoting *Connick* , 461 U.S. at 146).
88. 165 F. App'x 66, 68–70 (2d Cir. 2006).
89. *Id.* at 69.
90. *Id.* (quoting Brown v. Glines, 444 U.S. 348, 356 n.13 (1980)).
91. *Id.*
92. 94 F. App'x 3, 6 (2d Cir. 2004).
93. *Id.* at 4.
94. *Id.* at 4–5 (quoting Johnson v. Ganim, 342 F.3d 105, 114 (2d Cir. 2003)).

whom the plaintiff believed possessed a significant conflict of interest by "improperly 'steering' the bidding process toward her former employer."[95] The court held that this insubordination created a reasonable prediction of disruption which outweighed the plaintiff's "abstract concern" about a particular subject.[96] Thus, the court relied on the second prong of this test, the *Pickering* prong, to find that "the potential for disruption outweighed the value of [plaintiff's] speech."[97]

Moreover, in *Blackman v. New York City Transit Authority*[98] the Second Circuit held per curium, with Justice Sotomayor on the panel, that the *Pickering* balancing test favored the government's interest over an employee who commented that Transit Authority supervisors who had recently been murdered "'deserve[d] what they got for getting [a Transit Authority employee] fired.'"[99] The court assumed that the employee's comment addressed a matter of public concern[100] but held that "'the Government as an employer, and hence as a consumer of labor, must retain some freedom to dismiss employees who do not meet the reasonable requirements of their jobs.'"[101] Accordingly, the court applied the *Pickering* test to balance the interests of the government employee as a citizen, "'commenting upon matters of public concern,'" and the interests of the state "'in promoting the efficiency of the public services it performs through its employees.'"[102] Under the totality of the circumstances, the court found that the employee had previously threatened a supervisor and was "a person of violent disposition, who was potentially deeply disruptive of the workplace."[103] Thus, "the government's interests in firing him were especially weighty."[104]

Furthermore, *Rosario v. John Does 1–10*[105] and *Porr v. Daman*[106] follow the trend of allowing government restrictions on speech and are highly significant for the current analysis on teachers' speech in the classroom. In *Rosario*, the Second Circuit, with Justice Sotomayor on the panel, issued a Summary Order that considered a substitute teacher's prayer in the class-

95. *Id.* at 5.
96. *Id.*
97. *Id.*
98. 491 F.3d 95 (2d Cir. 2007).
99. *Id.* at 98.
100. The court provided that whether or not this speech touched upon a matter of public concern was "a close one." *Id.* at 99. However, the court provided that under the circumstances, the "better approach" for free speech claims is to assume *arguendo* that the speech does touch upon a matter of public concern and then apply the *Pickering* balancing test. *Id.* at 97.
101. *Id.* at 96 (quoting Locurto v. Giuliani, 447 F.3d 159, 163 (2d Cir. 2006)).
102. *Id.* (quoting Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).
103. *Id.* at 100.
104. *Id.*
105. 36 F. App'x 25 (2d Cir. 2002).
106. 299 F. App'x 84 (2d Cir. 2008).

room. After an announcement was made about the death of a student, the plaintiff, a substitute teacher, "spoke for several minutes about her religious views."[107] The plaintiff then "approached each student, placing her hand on their foreheads, and asked God to protect them and their families."[108] Although the plaintiff did not force students to participate, a formal complaint was lodged against the plaintiff by a student's mother.[109] The local school board held a hearing and eventually terminated the plaintiff for this action. The plaintiff subsequently filed the lawsuit, and the district court granted summary judgment for the school board on the plaintiff's First Amendment retaliation claim.[110] The plaintiff appealed to the Second Circuit; however, the Second Circuit affirmed the district court's order.[111] This case entailed strong Establishment Clause implications; therefore, it may not be truly indicative of Justice Sotomayor's views on teachers' free speech protections in the classroom. However, the Second Circuit's structural analysis in *Rosario* appears to follow the *Pickering* test. The court assumed that the plaintiff's religious speech addressed a matter of public concern and noted that the district court failed to perform this introductory inquiry.[112] The court then provided that "the School Board's 'strong, perhaps compelling interest in avoiding Establishment Clause violations' justified its actions in terminating Rosario."[113] Although the court did not cite *Pickering*, it balanced the employee's speech as a citizen against the school board's interest in effective governance via public education.

Similarly, in *Porr*, the Second Circuit, with Justice Sotomayor siding with the majority, held that the plaintiff, a public school teacher, failed to state a claim for First Amendment retaliation.[114] The plaintiff in *Porr* alleged that he was terminated after he expressed certain grievances concerning the lack of discipline at the school and about the school's allegedly inadequate response to a fire alarm.[115] In their analysis, the Second Circuit affirmed the district court's ruling that the statements regarding a lack of discipline did not address a matter of public concern and noted that, under the local school board rules, teachers have a duty to report fire safety issues to the principal.[116] Therefore, the court found that under *Garcetti*,[117] the plaintiff's speech concerning an inadequate fire alarm response was

107. *Rosario*, 36 F. App'x at 26.
108. *Id.*
109. *Id.*
110. *Id.* at 27.
111. *Id.* at 28.
112. *Id.* at 27.
113. *Id.* (citation omitted).
114. Porr v. Daman, 299 F. App'x 84, 85 (2d Cir. 2008).
115. *Id.*
116. *Id.* (citing Connick v. Myers, 461 U.S. 138, 143–51 (1983)).
117. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

made pursuant to his official duties as a public employee and was not constitutionally protected speech.[118] Although this decision does not concern teachers' speech in the classroom, it is significant that Justice Sotomayor agreed to bring *Garcetti* into public schools. While it is unclear whether Justice Sotomayor would consider utilizing *Garcetti* to the extent the Seventh Circuit did in *Mayer*,[119] the majority of Justice Sotomayor's jurisprudence does allow speech restrictions on public employees, and the Supreme Court in *Garcetti* extended the government's ability to place speech restrictions on its employees. Although Justice Sotomayor subtly applied the *Pickering* test to teachers' classroom speech in *Rosario*, the *Porr* opinion may reveal her preference for an application of *Garcetti* to teachers' classroom speech.

Although the heavy majority of Justice Sotomayor's *Pickering* balancing allows government restrictions, it must be noted that Justice Sotomayor's dissent in *Pappas v. Giuliani* applied the *Pickering* balancing test in favor of the government employee.[120] In *Pappas*, a police officer with the New York City Police Department was fired for anonymously replying to charitable solicitations with "offensive racially bigoted materials" that included "printed fliers conveying anti-black and anti-semitic messages."[121] The majority held that the *Pickering* balancing test weighed in favor of the city and affirmed the district court's grant of summary judgment for the defendants.[122] Justice Sotomayor issued a dissenting opinion that weighed the *Pickering* balance for the plaintiff based primarily on the plaintiff's lack of significant responsibilities in relation to the government entity.[123] Justice Sotomayor provided that "[a] court must consider not only the agency's mission in relation to the nature of the speech, but also the employee's responsibilities in relation to that mission."[124] Furthermore, Justice Sotomayor specified that "'expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion.'"[125] Moreover, Justice Sotomayor considered it significant that the plaintiff "did not purport to speak for the NYPD."[126] Although speaking *for* the government does not always force the *Pickering* balance in the government's favor, the governmental "interest is higher with respect to 'employees who purport

118. *Porr*, 299 F. App'x at 85.
119. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).
120. Pappas v. Giuliani, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting).
121. *Id.* at 144–45.
122. *Id.* at 144.
123. *Id.* at 156.
124. *Id.*
125. *Id.* (quoting McEvoy v. Spencer, 124 F.3d 92, 103 (2d Cir. 1997)).
126. *Id.* at 157.

to speak for the government.'"[127] Finally, Justice Sotomayor addressed the fact that the plaintiff's "speech occurred away from the office on the employee's own time."[128] Justice Sotomayor provided that "[t]he fact that speech takes place in private and away from the workplace favors the employee on both sides of the balancing test: First, it reduces the likelihood of disruption. Second, it enhances the free speech interests at stake because the employee is speaking in his capacity" as a member of the public.[129]

Justice Sotomayor's dissent in *Pappas* is significant for teachers' speech in the classroom because of the three factors that she is likely to address when applying a *Pickering* balance. All three factors will probably favor the school board's restrictions on a teachers' classroom speech, and the application of these factors may equate the substance of the *Garcetti* standard as applied in *Mayer*.[130] First, Justice Sotomayor asked the question of whether the employee holds "some high-level, 'supervisory,' 'confidential,' or 'policymaking' role."[131] As the head of the classroom, a teacher is probably considered a high-level employee in the school context with a supervisory role. Moreover, the teacher interacts with students in a confidential manner to the extent that the teacher is an authoritative and powerful figure in the classroom. Second, the teacher essentially speaks *for* the public school.[132] This is the underlying assumption taken by the circuits who apply the *Hazelwood* standard to teachers' classroom speech.[133] Finally, speech inside the classroom clearly does not take place in private.[134] Essentially, the substantial factors that Justice Sotomayor relies on in her individual *Pickering* analysis appear to weigh in favor of restrictions on teachers' classroom speech. Although Justice Sotomayor's dissent in *Pappas* favored the government employee, her analysis, applied in the negative to teachers' speech, will probably tip the *Pickering* balance in favor of restrictions on teachers' in class speech.

B. Hazelwood *Application: A Student's Right to Free Speech*

Justice Sotomayor has not directly applied the *Hazelwood* standard to teachers; however, Justice Sotomayor joined two significant and seemingly contradictory decisions regarding the free speech of students.[135] Further-

127. *Id.* (quoting Moore v. City of Wynnewood, 57 F.3d 924, 933 (10th Cir. 1995)).
128. *Id.* at 158.
129. *Id.* (citation omitted).
130. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 478–80 (7th Cir. 2007).
131. *Pappas*, 290 F.3d at 156.
132. *See id.* at 157.
133. *See* Hutchens, *supra* note 4, at 66–67.
134. *See Pappas*, 290 F.3d at 158.
135. Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006).

more, both of these decisions address and explore the parameters of the *Hazelwood* standard. In *Guiles*, the Second Circuit held that the censorship of a student's shirt, criticizing President George W. Bush,[136] violated that student's free speech rights.[137] The court discussed the three primary standards for student speech in schools—*Tinker*, *Fraser*, and *Hazelwood*.[138] The court asserted that the *Hazelwood* standard applies "if the speech at issue is 'school-sponsored,' [and] educators may censor student speech so long as the censorship is 'reasonably related to legitimate pedagogical concerns.'"[139] Moreover, the court distinguished *Hazelwood* from *Tinker* by asserting that *Hazelwood* applies to school-sponsored speech as opposed to "student speech that happens to occur on school grounds."[140] Finally, the court found that *Hazelwood* also applies "when a reasonable observer would believe [the speech] to be [school] sponsored."[141] Finding that a reasonable person would not have considered the shirt school-sponsored and that the shirt was not plainly offensive under *Fraser*, the Second Circuit ultimately applied the *Tinker* standard and held that the student's shirt did not substantially or materially disrupt the school environment.[142]

Contrary to *Guiles*, where she upheld a student's freedom of expression, Justice Sotomayor also joined an opinion that harshly restricted students' freedom of speech.[143] The student/plaintiff in *Doninger* brought a First Amendment claim against the school when she was barred from running for class secretary after posting a derogatory blog comment[144] on an independent website about the school's cancellation of an upcoming social event.[145] The plaintiff posted the comment outside of school on a personal computer.[146] The court found no constitutional violation for the imposed discipline because the *Tinker* standard included "expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment.'"[147] The court's conclusion concerning *Tinker*'s expansive reach was

136. The t-shirt referred to President Bush as a "chicken-hawk president" and depicted President Bush surrounded by cocaine and alcohol. *Guiles*, 461 F.3d at 321.

137. *Id.* at 331.

138. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("plainly offensive" expression by students may be regulated); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (student expression that causes a substantial disturbance may be regulated).

139. *Guiles*, 461 F.3d at 325 (quoting *Hazelwood*, 484 U.S. at 273).

140. *Id.*

141. *Id.* at 327.

142. *Id.* at 330–31.

143. *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

144. The comment referred to school officials as "douchebags" and asked students to write or call a school official to "piss her off more." *Id.* at 45.

145. *Id.* at 44–47.

146. *Id.* at 45.

147. *Id.* at 48 (quoting Wisniewski v. Bd. of Educ., Granville Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007)).

based in part on language from *Hazelwood*. The court found that control over school-sponsored expressive activities are needed to "'assure 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 their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.'"[148] Essentially, in *Doninger*, the court removed the distinction between in-school and outside-of-school speech and interposed a new distinction between student activity that "'affects matter[s] of legitimate concern to the school community'" and student activity that does not.[149]

When viewed in the context of teachers' classroom speech, the opinions that Justice Sotomayor joined in *Guiles* and *Doninger* also stand for the proposition of needed regulations on teachers' speech. The court did not apply the *Hazelwood* standard in these cases because the speech at issue was clearly not school-sponsored. Yet, considering the language of *Guiles* and other circuits' interpretations of *Hazelwood*,[150] teachers' classroom speech is reasonably regarded as school-sponsored. Accordingly, *Doninger* established that control is needed over school-sponsored speech to prevent student exposure to material that "'may be inappropriate'" for their maturity level and to ensure that a teachers' individual views are not "'erroneously attributed to the school.'"[151]

C. Predicting Justice Sotomayor's Favored Approach

Based primarily on the holding in *Porr v. Daman*[152] and her dissent in *Pappas v. Giuliani*,[153] it can be inferred that Justice Sotomayor would favor applying a *Garcetti*-based[154] standard to teachers' speech in the classroom which absolutely restricts any First Amendment protection. In *Porr*, the Second Circuit, with Justice Sotomayor on the panel, accepted that *Garcetti* applies to teachers acting in their duties as defined by the local school board.[155] A teacher's official duties clearly entail what is taught to students as provided by the local curriculum. Therefore, a teacher is not entitled to constitutional protection in relation to "official" speech in the classroom. As the Seventh Circuit provided, *Garcetti* easily extends to a

148. *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).
149. *Id.* at 48 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979)).
150. *See, e.g.*, Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719 (2d Cir. 1994); Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993); Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991).
151. *Doninger*, 527 F.3d at 48 (quoting *Hazelwood*, 484 U.S. at 271).
152. 299 F. App'x 84 (2d Cir. 2008).
153. 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting)
154. 547 U.S. 410 (2006).
155. *Porr*, 299 F. App'x at 85.

teacher's speech in the classroom "because the school system does not 'regulate' teachers' speech as much as it *hires* that speech."[156]

Yet perhaps more significantly, Justice Sotomayor's approach to the *Pickering* balancing test, applied to teachers' classroom speech, would almost categorically favor the school's interests over the teacher's. This absolute result to *Pickering* mirrors the result of *Garcetti*—where *no* constitutional protection is afforded to teachers' speech in the classroom. Under *Pickering*[157] the Court established 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 public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[158] Justice Sotomayor established in her dissent in *Pappas* that this balancing must consider the level of authority bestowed upon the public employee, whether the employee speaks for the employer, and whether the speech takes place in private or public.[159] All of these factors weigh against teachers' right to free speech in the classroom. The teacher is placed at a level of relatively high authority in the classroom and in the school, especially considering that public school is mandatory for students. Moreover, the teacher is probably assumed to speak for the school as most courts consider teachers' speech "school-sponsored."[160] Finally, the teachers' in-class speech clearly takes place in a public setting.

Thus, regardless of whether Justice Sotomayor would utilize a *Garcetti* or *Pickering* standard, her First Amendment jurisprudence appears to support the conclusion that teachers should not receive First Amendment protection for their in-class speech. Not only are teachers speaking in their official capacity as public employees while in the classroom, but also, a teacher's in-class speech is highly susceptible of disrupting "the efficiency of the public services"[161] based on the factors provided by Justice Sotomayor. This perceived jurisprudence of Justice Sotomayor is not without merit or basis in the law. However, it may contradict the jurisprudence of the Justice she replaced, Justice Souter. Moreover, it must be considered whether refusing this First Amendment protection is in the best interest of public education.

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156. Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).
157. 391 U.S. 563 (1968).
158. *Id.* at 568.
159. Pappas v. Giuliani, 290 F.3d 143, 156–57 (2d Cir. 2002) (Sotomayor, J., dissenting).
160. *See, e.g.*, Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719 (2d Cir. 1994); Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993); Miles v. Denver Public Sch., 944 F.2d 773 (10th Cir. 1991).
161. *See Pickering*, 391 U.S. at 568.

IV. POLICY CONCERNS REGARDING JUSTICE SOTOMAYOR'S FAVORED APPROACH

A. Souter's Garcetti *Dissent and the Marketplace of Ideas*

Justice Souter's dissent in *Garcetti* offers valuable insight against an absolute restriction of First Amendment protections for public employees speaking in their official capacity.[162] Souter asserts that while some government employees are hired to "'promote a particular policy' . . . not everyone working for the government, after all, is hired to speak from a government manifesto."[163] Souter continues by claiming that there is "no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job."[164] More specifically, Souter expresses his concern that the majority's opinion would unconstitutionally extend to the "teaching of a public university professor" and "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[165] While this aspect of Souter's dissent focuses specifically on public *universities*,[166] this language introduces the importance of maintaining a marketplace of ideas in the classroom.[167]

Although *Garcetti* and *Mayer* provide absolute restrictions on protections for teachers' speech in the classroom, "[c]ourts may want to give serious consideration to the desirability of treating teachers . . . as serving only as the speech proxies for school boards."[168] Put differently, "[a] vital First Amendment interest exists in preventing school boards from monopolizing speech in public schools, potentially creating the 'pall of orthodoxy' condemned by the Supreme Court."[169] While no First Amendment protection for teachers may lead to a chilling effect of teacher expression, "[p]rotecting a measure of teacher speech—speech reasonably tied to legitimate educational goals that supplements, goes beyond or even contradicts the school board's message—prevents inculcation from becoming indoctrination."[170] On a grander scale, one commentator suggests that the "rigor of our schools, how challenging the classes are, how innovative the teach-

162. Garcetti v. Ceballos, 547 U.S. 410, 427–44 (Souter, J., dissenting).
163. *Id.* at 437.
164. *Id.*
165. *Id.* at 438.
166. Public colleges and universities "occupy a special niche in our constitutional tradition." *Id.* at 438–39 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003).
167. *See* Daly, *supra* note 4, at 39 n.221 (providing federal case law that introduces the concept of academic freedom to secondary schools).
168. Hutchens, *supra* note 4, at 76.
169. Daly, *supra* note 4, at 46.
170. *Id.*

ers are allowed to be, how free the process is, and how much the vision that new ideas are not to be feared, but embraced . . . each shape not simply our education system, but our nation."[171]

Clearly, the best educational system does not entail unbridled free speech protections for secondary teachers. Teachers must be accountable to schools and, perhaps more importantly, the citizens supporting those schools. Maintaining "the public in public schools"[172] is a legitimate state interest that should not be taken lightly. Accordingly, courts have clearly favored restricting teachers' speech in the classroom based on the interests of the local school boards who are elected by the public. Yet, applying the *Garcetti* precedent uniformly and without question is seemingly dangerous because it eliminates, or at least instills a reasonable fear in, a teacher's ability to present contrary opinions and ideas. This potential chilling effect is intensely magnified when teachers are aware that any speech outside of the explicit curriculum is not given constitutional protection. A more desirable framework "allows the elected school board to establish the curricular framework and set educational goals, while reserving to teachers to [sic] right to fill in that framework by determining which particular lessons and classroom discussions will best meet those goals."[173] Thus, Justice Sotomayor's perceived preference for the *Garcetti* standard may not serve the best interests of our public education system or nation. If the issue of teachers' speech in the classroom reaches the Supreme Court, the precedent must be "recast to support a model of public education that requires tolerance for dissenting views in order to teach students the skills necessary for participation in a pluralistic democracy."[174]

B. Selecting the Appropriate Standard

The *Garcetti* approach applied absolutely to teachers' speech in the classroom is a standard that should not be maintained. Therefore, selecting a standard that better serves the needs of public education is essential. Commentators have expressed concern with circuit courts' application of the traditional *Pickering* and *Hazelwood* standards to teachers' speech in the classroom.[175] Specifically, one commentator alleges that the *Pickering* standard "fails to account for the unique job requirements of public school teachers."[176] While *Pickering* may afford teachers First Amendment protection outside the classroom as "citizens," it sometimes neglects to account for teachers' comments in the classroom that may also address mat-

171. Wohl, *supra* note 13, at 1321.
172. DeMitchell, *supra* note 13, at 479.
173. Daly, *supra* note 4, at 30.
174. *Id.* at 31.
175. *See, e.g.*, Daly, *supra* note 4; Wohl, *supra* note 13.
176. Daly, *supra* note 4, at 10.

ters of public concern.[177] If teachers' speech inside the classroom can never be considered a matter of public concern, then the end result is identical to the *Garcetti* approach—an absolute restriction on First Amendment protections.

Similarly, the *Hazelwood* standard is criticized because it was decided based on protections for student speech—not teacher speech.[178] The *Hazelwood* standard was designed to apply to situations where the student's speech was "school-sponsored"—a situation that is not necessarily inevitable. Conversely, "the very nature and significance of teacher speech within the school means that virtually all teacher speech potentially raises pedagogical concerns."[179] Therefore, as all speech by teachers is "school-sponsored," it is much easier for courts to find "legitimate pedagogical concerns" in the restriction of such speech.[180] Accordingly, the "all-or-nothing" approach to *Hazelwood* "creates the potential for abuse."[181] The "pedagogical concern" standard is often interpreted exceptionally broadly,[182] thus allowing "[t]he expressive rights of teachers [to be] placed on par with those available to students, with school administrators given the power to treat employees as if they were unruly children."[183] Ultimately, the *Pickering* and *Hazelwood* standards have generally been applied to teachers in a manner that divests teachers of freedom in the classroom through defaulting to the school board's understanding of its best interests.

The elected school board's discretion is perhaps justifiably favored by the courts; however, the current trend that eliminates all First Amendment protection for teachers' in-class speech is unacceptable based on the need for a marketplace of ideas in the classroom. "'Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . . .'"[184] To produce this desired result for our public classrooms, some type of balancing test must be utilized that gives teachers comfort that certain speech outside of the prescribed curriculum will be tolerated, yet still preserves strong control by the local school boards. Teachers deserve at least modest First Amendment protections for their in-class speech as professional educators. A limited form of discretion is needed to prevent indoctrination and preserve an open forum for discourse. Furthermore, some form of notice is essential for a working standard. If teachers' in-class speech is to receive some First Amendment

177. *Id.*; *see, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3rd Cir. 1990).
178. Wohl, *supra* note 13, at 1309–10.
179. *Id.* at 1310.
180. *Id.*
181. Daly, *supra* note 4, at 13.
182. *See, e.g.*, Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991).
183. Daly, *supra* note 4, at 16.
184. Wohl, *supra* note 13, at 1321 (quoting Sweezy v. N.H., 354 U.S. 234, 250 (1957)).

protection, teachers must be given notice of what speech will fall into the protected category.[185]

Courts must accept that teachers' in-class speech offers a significant state and pedagogical interest through the implementation of a marketplace of ideas in the classroom. In doing so, use of the *Pickering* or *Hazelwood* standard will provide meaningful protection of teachers' speech that is perhaps not in line with the school board's curriculum but also not subversive to the education of students.

V. CONCLUSION

The issue of teachers' speech in the classroom has received significant attention by both courts and commentators. To the dismay of most commentators, the current trend is moving away from protecting this speech. Moreover, the *Garcetti* decision is predicted by some to signal the end of any First Amendment protection for teachers' classroom speech. Associate Justice Sotomayor replaced a Justice who disfavored this categorical dismantling of protections for public employees' official speech. However, Justice Sotomayor's First Amendment jurisprudence potentially signals an acceptance of these absolute restrictions. If the Court decides to voice an opinion on the proper standard for teachers' in-class speech, it should carefully consider the potential destruction of the marketplace of ideas in the public classroom.

James Conrad Lester

185. *See, e.g.*, Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993).