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Teacher Speech: *Pickering's* Application Fails to Consider Context *and* Content of Teacher Speech

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Abstract

Teachers walk a fine line every day they enter the classroom and speak about controversial topics. Academic environments, however, should be a place where students and teachers feel comfortable to express unpopular viewpoints. Controversial topics such as race and racial discrimination could threaten teachers' speech and the way these issues are presented in the classroom. This research reviews teacher speech cases in both secondary and post-secondary education, identifies where courts have inconsistently applied legal precedent, and recommends a framework that mirrors the well-established parameters for protected student speech. The courts have used *Pickering v. Board of Education* 391 U.S. 563 (1968) to create the Pickering test, which requires that protected teacher speech must first be speech that is related to matters of public concern, and second, that the speech not outweigh the school's pedagogical interests. This test does not allow courts to consider the wide breadth of teacher speech because *Pickering* was decided based on prior defamation cases, not public employee speech. Since the Supreme Court's 2006 decision in *Garcetti v Ceballos*, teacher speech has been regarded as public employee speech. *Garcetti* held that any speech made while performing formal duties as a public employee is not protected speech. Since 2006, the lower courts have inconsistently applied the Pickering test and the *Garcetti* case. A more comprehensive legal test is needed, one that defines educational interest, and views schools as a "marketplace of ideas" where teachers are protected as facilitators of that exchange. This conclusion is based on a review of legal cases and law journals.

Keywords: Legal Rights, Teacher Speech, Pickering Test

1. Problem of Teacher Speech Rights

Protests at Yale University, Missouri University, and Ithaca College have attracted the public eye, opening up conversations between students, faculty and administrators to consider racial bias and discrimination on their campuses. The courts have considered and established tests concerning students' rights to speak on campuses and classrooms. In contrast, while the courts have created legal tests for teacher speech, these tests do not adequately consider the wide breadth of teacher speech. The courts have created tests that are too narrow to consider all types of content and context teachers speak about in their roles as a public employee. Considering the controversial topics that have arisen on college campuses about race, it is important to consider the legal rights of professors and teachers to speak about these issues within the classroom and on the campus. Therefore, this paper will examine the history of teacher speech rights in order to shed light on the current rights of teachers, and how these rights could be expanded to better match student speech. It will also examine the legal precedent concerning teacher speech and attempt to frame these cases within the light of real racial content issues in order to further understand how these precedents fail to guide teachers. This paper will consider the effects of legal precedent at the different levels of

education, secondary education and postsecondary education; and will conclude with possible alternatives to change teacher speech tests to mirror the tests established for student speech.

Numerous cases have look at the speech of students, and used similar, but not the same tests to determine the constitutionality of the speech. The key cases are *Tinker v. Des Moines School District*, *Bethel School District v. Fraser*, and *Hazelwood v. Kuhlmeier*.[1] In *Tinker,* when students passively spoke by wearing armbands in protest, the court established that, so long as school speech does not disrupt the learning environment, then that speech cannot be suppressed by the school. *Fraser* expanded this rule, when a student actively used sexual words in a school speech, that obscene speech, because is it offensive, disrupts the learning environment and can be suppressed. *Kuhlmeier,* where student speech was neither passive nor obscene, found that if a school sponsors the speech, such as in a newspaper, they have the right to regulate the speech of students. In each case the court considered not only precedent, but the different facts unique to each case and decided the case according to the fundamental principles of the Free Speech Clause in the First Amendment. It is this type of consideration that judges *should* use when ruling in teacher speech cases.

2. Early Teacher Speech Cases

Because of the flexibility and guidelines used in student speech cases, it becomes easier to understand how judges will rule regarding student speech in recent racial conversations on college campuses. However, in order to understand how judges would rule on teacher free speech related to current racial issues on college campuses, legal precedent must be considered. The first cases that courts have rendered concerning teacher speech are, *Pickering v. Board of Education*, *Kirkland v Northside Independent School District*, and *Boring v Buncombe County Board of Education*.[2] Once *Pickering* established a test for teacher speech, the courts continued to rule using only this test.

The *Pickering v. Board of Education* case established precedent for teacher speech in 1968. Mr. Pickering, a science teacher, wrote a letter in a newspaper criticizing the Board's allocation of funds. Pickering was dismissed from his teaching position for expressing his concerns because the board found these statements to be false and "detrimental to the efficient operation" of the school.[3] The court needed 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."[4] What this case considered is a difference of opinion that "concerns issues of general public interest;" and whether statements made "impeded the teacher's proper performance of his daily duties" or "interfered with the regular operation of the schools generally."[5] This court defined public interest as "having free and unhindered debate on matters of public importance-the core value of the Free Speech Clause of the First Amendment."[6] Thus, the *Pickering* test established that teacher speech must first, be speech that is related to matters of public concern, and second, that the speech did not outweigh the school's pedagogical interests in restricting the teacher's speech. The court, after considering these two issues, ruled in favor of Pickering, arguing that the allocation of school funds is a public issue, and regardless of the truth value of the speech, teachers have the right to speak about matters of public concern; the court also ruled that the speech did not disrupt the operation of the school. Therefore, this speech was protected by the First Amendment.

The court in *Pickering* used the *New York Times Co. v Sullivan* case to test the defamation of the speech made by Pickering.[7] This caused a problem with establishing the *Pickering* test as a test for all teacher speech cases; *Pickering* was argued based on prior defamation cases, not public employee speech. The main issue the courts considered in this case was not the fact that a teacher was expressing viewpoints to students, but that the teacher was disgruntled towards his employers, and wrote false statements about his employers. Furthermore, this case concerned speech that was made outside of the classroom. Many of the following cases that cite the *Pickering* test involve teacher speech made in the classroom. Because of these two issues, *Pickering* should not be the main precedent for teacher speech cases, however the courts have continued to use is.

The court used *Pickering* in 1989, when the 5th Circuit court considered the case *Kirkland v. Northside Independent School District*, as a free speech case concerning a teacher who attempted to create his own reading list.[8] Kirkland was a history teacher who used a non-approved reading list for his world history class, the following year, he not renewed a as teacher. This case asked the court to decide if public school teachers are allowed to teach their own readings lists in substitution of the one provided by the school curriculum. The court used the *Pickering* test and argued that if school officials are not provided the opportunity to approve of or reject the reading list, then this is not a matter of public concern, it is a matter of private speech; and thus, the teacher can be punished by the school district. The court concluded that "the First Amendment does not vest public school teachers with authority

to disregard established administrative mechanisms for approval of reading lists" and public schools have a legitimate pedagogical interest in shaping the school's curricula.[9] The court argued that Kirkland had the opportunity to get his list approved, or make this speech public by suggesting these readings during school board meetings, but he did not, and therefore, his speech is not protected by the First Amendment, and he can be punished by the school.[10]

Following *Kirkland*, in 1998, a similar case, *Boring v Buncombe County Board of Education* was decided in the 4th circuit.[11] Boring, an acting teacher, chose the play "Independence" for four students to perform in an annual statewide competition. She notified the school principal of the name of the play, but gave no other information, such as its content: a single-parent family, a lesbian, and a pregnant woman. Boring was transferred to another school as a result of selecting this play, and sued claiming her First Amendment rights had been violated. The court concluded that this was a school-sponsored event, and similarly to *Kuhlmeier*, this speech was characterized as part of the school curriculum. The court believed that this case is similar to the *Kirkland* decision, in that "the performance of a play [is] under the auspices of a school… which is a part of the curriculum of the school... [and] is a legitimate pedagogical concern."[12] The court concluded that the curriculum is the responsibility of the school authorities, not the teachers, and thus, used *Pickering* to determine this was an issue of private concern. Because the court concluded that it was private speech, Boring's speech was not protected under the First Amendment.

These two cases, *Kirkland* and *Boring*, demonstrate that the bureaucracy of public secondary schools, and the schools boards' authority to create curriculum, outweigh the teacher's freedom of speech in suggesting, or using books or plays in their classes. These two cases continued to use the *Pickering* test as a way to establish teacher free speech rights. Because of this, their speech was not considered as having an educational purpose, but as a dispute between employer, the school board, and employee, the teacher.[13] These cases only demonstrate that a teacher cannot supplement his/her own curriculum for that of the school board, but it does not take into consideration the rights of a college professor to establish their own course syllabus. Therefore, there must be a distinction between secondary and postsecondary teacher free speech rights. The court, however, has failed to make this distinction by continuing to use the *Pickering* test.

3. Post-Secondary Teacher Speech

In 2001, the court decided an issue of teacher speech at the college level in the 6th Circuit, in the case *Hardy v. Jefferson Community College*.[14] In 1998 Hardy gave a lecture in his Introduction to Interpersonal Communication course on language and social constructivism. He had students examine how language is used to marginalize minorities and other oppressed groups in society. The students expressed the words, "girl," "lady," "faggot," "nigger," and "bitch" as examples of such terms. One student complained that this exercise was against the classroom policy, outlined in the syllabus, prohibiting the use of offensive language in class. The following semester, Hardy was not given another contract to teach at the college.

The district court once again used the *Pickering* test to determine the free speech rights of Hardy. The court applied *Pickering* and concluded that he complied with the first prong of the test. The speech was related to matters of public concern, because the Supreme Court has ruled that a public employee has the right to speak about issues of public concern, and found that racial and gender epithets are a matter of public concern. In considering the second prong, that the speech did not outweigh the College's pedagogical interests in restricting the teacher's speech, the court concluded that this lecture did not undermine Hardy's ability to continue his regular duties. Therefore, he passed both prongs of the *Pickering* test, and could be reinstated as a professor. However, what distinguished this case from *Kirkland* and *Boring* is that the court consistently cited a post-secondary level of education case, *Dambrot v. Central. Michigan University*.[15] The court cited *Dambrot* to prove that academic freedom promotes informed, knowledgeable citizens, which is a value that the First Amendment seeks to protect. Thus, considering the *Dambrot* and *Hardy* cases only college professors are protected in their free speech, because they do not report to a school board.

However, in 2006, an employee free speech case would change the precedent options for future teacher speech cases. In *Garcetti v. Ceballow*, a lawyer criticized the legitimacy of a warrant and was denied a promotion. Garcetti sued, claiming her First Amendment free speech right was violated. [16] This court considered how acting as a public employee impacts the right to speak, and used the *Pickering* test to decide this issue. The court concluded that,

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.[17]

The court used the precedent of a teacher speech case to determine that public employees can only speak about issues of public concern when performing their duties. If the speech is a matter of public concern, this speech cannot disrupt the employer's operations, if it does, than the speech can be suppressed. It is critically important to note that in this case, the court specifically stated, "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[18] This statement should have left the rights of teachers to speak in the classroom under the *Pickering* test alone. However, later cases have used only the *Garcetti* ruling, and not *Pickering* to rule on teacher speech rights.

The 2012 case *Savage v. Gee* is a recent example of the court using *Garcetti,* and not *Pickering* to decide a teacher speech case.[19] Savage was the Head of Reference and Library Instruction the Ohio State University Bromfield Library. In 2006, Savage was part of a committee formed to choose a book that would be assigned to all incoming freshman. He suggested assigning, *The Marketing of Evil* by David Kupelian, in which one chapter discusses homosexuality as aberrant human behavior. A series of emails discussing Savage's viewpoints with other members at the college ensued and both parties filed harassment cases against each other. In June 2007 Savage resigned. The courts considered these cases as harassment suits, but in his appeal, Savage argued that the district court erred in granting summary judgment on the First Amendment claim. He argued that his speech was "related to academic scholarship or classroom instruction" and should be exempt under the First Amendment analysis.[20] This court argued that the curricular choice of a teacher was not protected speech because it is connected with the official duties as a teacher. This court however, did not side with Savage and said that "Savage's speech does not fall within the realm of speech that might fall outside of *Garcetti's* reach." The court also reasoned that because there was no retaliatory discharge, Savage has no damages for which to sue. Therefore, the court ruled in favor of Gee, arguing that the Garcetti rule does apply in this case because Savage was acting in his duties when he voiced this speech, and therefore, it is not protected under the first amendment.

However, in the 2014 case *Demers v. Austin* the court using *Pickering,* and not *Garcetti* to decide a teacher speech case.[21] Demers is a faculty member at Washington State University and teaches journalism and communications. In 2008 he began to voice his criticisms of the college by publishing articles and books on these issues. The school gave him a lower performance rating and subjected him to an internal audit; Demers sued, claiming that these actions were punishments for his speech. The court of appeals for the 9th Circuit ruled that the *Pickering* precedent governs this case, not *Garcetti,* because the *Garcetti* analysis does not apply to "speech related to scholarship or teaching." The court concluded that the speech by Demers was addressing a matter of public concern within the meaning of *Pickering,* and was therefore, remanded to the lower courts for further consideration.

4. Real World Applications

The lower courts have inconsistently applied the *Pickering* test, choosing to use the *Garcetti* case as precedent in free speech cases concerning teachers at the higher education level. This is a concern that the Supreme Court needs to consider. Since the *Garcetti* case, the rights of teachers to speak at institutions of higher education have become unclear.[22] It is not just these case that are cause for concern, but recent instances of racial speech in higher education further point out how the *Pickering* test and the *Garcetti* case complicate the understanding and meaning of free speech for teachers.

Yale University has had instances where teachers have spoken out on issues concerning Halloween costumes on campus. During October 2015, Yale's Intercultural Affairs Committee sent out an email to the student body asking that students avoid wearing, "culturally unaware and insensitive" costumes.[23] Faculty member and administrator for student residence, Erika Christakis, a "child development specialist" and former preschool teacher, responded to concerns from students with an email. In this email she writes:

> I suppose we could agree that there is a difference between fantasizing about an individual character vs. appropriating a culture, wholesale, the latter of which could be seen as (tacky)(offensive)(jejune)(hurtful), take your pick. But, then, I wonder what is the statute of limitations on dreaming of dressing as Tiana the Frog Princess if you aren't a black girl from New Orleans? Is it okay if you are eight, but not 18? I don't know the answer to these questions; they seem unanswerable....Is there no room anymore for a child or young person to be a little bit obnoxious… a little bit inappropriate or provocative or, yes, offensive? American universities were once a safe space not only for maturation but also for a certain regressive, or even transgressive, experience; increasingly, it seems, they have become places of censure and prohibition...if you don't like a costume someone is wearing, look away, or tell them you are offended. Talk to each other. Free speech and the ability to tolerate offence are the hallmarks of a free and open society.[24]

While this happened at a private university, and therefore, does not fall under the protection of the first amendment, if this issue were to go to court, it could be decided as a free speech case. The courts would have to consider the issue: should Erika Christakis' speech be protected under the First Amendment, and if any action was taken against her for this speech, was it constitutionally permissible? If this case would go to the court now, it could either be governed by the *Pickering* test or the *Garcetti* test. The *Pickering* test requires that this issue be a matter of public concern, and considering that the *Hardy* case, and the *Kirkland* case, has deemed race an issue of public concern, this Yale professor's speech could pass the first prong as protected speech. The second prong requires that the speech not disrupt the pedagogical functions of the school. Because this speech occurred outside the classroom, in the form of an email the court could conclude that it did not disrupt the schools' function, and is thus, fully protected speech under the first amendment. However, if the court were to use the *Garcetti* case, the court would have to consider that the speech was made while the teacher was performing her duty as an administrator for student residence. Because her duty as a faculty member requires sending emails to students, she was acting as a public employee when she sent this email, and because this speech could disrupt the operation of the school, this speech could be deemed as not protected by the First Amendment. Because the Supreme Court has not decided a case concerning teacher speech since *Pickering*, the court created a system where the 6th and 9th Circuits can disagree on how to treat teacher speech cases; it is this inconsistence that needs to be settled by a higher court.

It is not only the instance at Yale, but issues on other campuses that may create a teacher speech case the Supreme Court might hear. Students at Ithaca College have begun to protest incidents of racial bias on campus, and faculty members are noticing and conversing with students about these issues. These conversations might take place in a classroom setting, where for example, students can voice concerns about current issues. As conversations continue professors might begin to discuss their own concerns about the college they work, the experiences that they have had, and the issues they face regarding teaching on a racially diverse campus. If one of the professors were punished for doing so, the professor could sue, claiming a violation of First Amendment rights. The court would then be faced with the following issues: Are these types of conversations allowed in a classroom setting? At what point can professors share personal viewpoints and experiences in order to enrich the learning environment, or are they barred from having these types of conversations in a classroom with students?

The court could answer these questions using either the *Pickering* test, or the *Garcetti* case. According the *Pickering* test, the court would consider the first prong, that the issue must be a matter of public concern. Again, based on the *Hardy* and *Kirkland* cases, racial issues are a matter of public concern. Again, based on the *Hardy* and *Kirkland* cases, racial issues are a matter of public concern, therefore, faculty speech at Ithaca College would pass the first prong of the *Pickering* test. The second prong, that the speech not disrupt the pedagogical function of the school, is more difficult to rule on. If the teacher can prove his/her speech enlightens the teaching function of the classroom, and can connect it to larger issues of the course, then the court could rule that this does serve the function of the school. However, if the teacher is not serving a pedagogical function, for example, using class as a forum to spread personal viewpoints, then this speech would fail the second prong. Therefore, the *Pickering* test cannot provide a clear rule on this type of teacher speech. It is this issue that the courts need to make clearer.

The second possible precedent the court could use to decide this case would be the *Garcetti* case. Because the professor is speaking in the classroom, he/she is performing duties as a public employee, and any speech done while performing a public duty that disrupts the operation of its function is not protected speech under the First Amendment. Therefore, this professor could be reprimanded by the school. This poses a serious problem: professors walk a fine line in classrooms every day when they speak about racial issues.

5. Possible Solutions to Teacher Speech Tests

Considering how precarious teacher and professor speech has become with the use of these two precedents, many scholars have considered other means of testing teacher speech in relation to First Amendment rights. Vanessa A. Wernicke and Emily Holmes Davis offer two different solutions to this issue. Wernicke, a member of the 2002-2003 University of Cincinnati Law Review discusses teacher speech with the understanding that a classroom can be a means of creating a "marketplace of ideas." She argues that teachers facilitate this within a classroom, and thus, should be free to express multiple viewpoints in order to expose students to these ideas based on the ideals of a democratic society. Wernicke outlines the different cases concerning teacher speech, including *Pickering*, and argues that the circuits became split on the teacher speech issue when deciding the *Kirkland* case and the *Boring* cases. What Wernicke argues is that the "Important issues influencing the regulation of teacher speech include the appropriateness of the content of speech, the traditional right of local schools to determine curricula, and the role of the classroom as a 'marketplace of ideas.'"[25] She argues that the local school boards for secondary levels of education address the concern of what topics and viewpoints should be addressed by teachers in the classroom, and that this reflects the democratic values of the constitution, found in the Free Speech Clause of the First Amendment. Wernicke concludes that previous teacher speech cases have considered the context of the speech too heavily and not the content, which has led to inconsistent results. She argues instead for a four factor approach, expanding the *Pickering* test, for teacher speech to include: 1) teacher's interest is a matter of public concern, 2) there is an educational value of the speech 3) the teacher's speech does not disrupt the school's curriculum, and 4) the speech is substantively and procedurally appropriate.[26]

Davis, a Juris Doctor Candidate in 2006, discussed the issue of teacher speech and argues that the Supreme Court has not addressed issues of in-class speech. She considers the *Pickering* test, and how it has been applied to secondary schools, and postsecondary schools in ways that created confusion. Davis states that "When courts conduct the public concern threshold test, they consider the role of the speaker and the 'content, form and context' of the speech in question."[27] This allows the court to make content-based speech restrictions, which Davis argues "ignores a teacher's role, which is to discuss certain subjects in the school's curriculum regardless of whether they address matters of public concern."[28] Instead she argues for an alternative test in which, "the school must prove as a threshold matter that the teacher's classroom speech caused an actual or potential substantial disruption."[29] This suggested test seems to mirror the way the courts decided the Tinker and Fraser student speech cases.

Considering that the courts have ruled on free speech issues concerning students based on the facts of each case alone, using precedent merely as a guide, the courts should do the same for teacher speech cases. Strictly adhering to the *Pickering* case has caused teacher speech cases to be clouded with inconsistence. If the court were to use *Pickering* merely as a guide, then the facts of each teacher case will be better revealed.

One reporter sheds light on this issue as it refers to recent racial concerns on college campuses, arguing that college should be a place where students can voice their concerns and underprivileged students can share their opinions. He writes, "Yes, universities should work harder to be inclusive. And, yes, campuses must assure free expression, which means protecting dissonant and unwelcome voices that sometimes leave other people feeling aggrieved or wounded."[30] All academic environments should be a place where students *and* teachers feel comfortable to express unpopular viewpoints. In order to create this type of environment, it is important to clearly establish what rights a teacher has within a classroom to share issues concerning race. It is their job to provide an environment that promotes the free "marketplace of ideas." Currently, the *Pickering* test does not allow this freedom for teacher speech, and should be replaced with a more all encompassing test.

6. Acknowledgements

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7. References and Endnotes:

1 *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). *Bethel School District v. Fraser*, 478 U.S. 675 (1986). And *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

2 *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Kirkland v Northside Independent School District* 890 F.2d 794 (5th Cir. 1989). *Boring v Buncombe County Board of Education* 136 F.3d 364 (4th Cir. 1998).

3 *Pickering*, 391 U.S. at 563.

4 *Pickering*, 391 U.S. at 567.

5 *Pickering*, 391 U.S. at 567-568.

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

7 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

8 *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989).

9 *Kirkland*, 890 F.2d at 799.

10 Interestingly the court noted in *Kirkland* that "materials that 'unfairly, inaccurately, or viciously treat a particular race, sex, ethnic group, age group, [or] religion' cannot be selected unless a 'legitimate educational purpose' is demonstrated." Therefore, when considering the speech of teachers regarding issues of race, the court should use this as precedent in its decision, as the court has already stated that issues of race must have a "legitimate educational purpose" in order to be included in classroom discussion.

11 *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998).

12 *Boring*, 136 F.3d at 367.

13 For another viewpoint on the role of teachers to talk about controversial topics see Angela Mae Kupenda and Tiffany R. Paige, *Why Punished for Speaking President Obama's Name with the Schoolhouse Gates? And can Educators Constitutionally Truth-en Marketplace of Ideas about Blacks?* 35 T. Marshall L. Rev. 57 (2009). This paper argues that speech within a classroom, regarding race, should be only positive or neutral. The authors come to this reasoning by citing instances in which teachers were forbidden to speak Obama's name on school grounds. They argue that speech should be protected "unless such expression interferes with the teaching of a particular class or disrupts some other educational function." They argue that the "educator has a constitutional supported and, perhaps, affirmative duty to reject passive acceptance of the marketplace status quo on race speech and to promote positive race speech." Cases such as Roe v Wade and Rust v Sullivan are instances where the government funded a particular viewpoint and this was found constitutionally acceptable, therefore, the government should also fund schools to promote positive and neutral race speech. These two authors however, disagree about the lawfulness of an academic mandate for the government to promote neutral and positive speech about race.

14 *Hardy v. Jefferson Community College*, 260 F. 3d 671 (6th Cir. 2001).

15 *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995). See also *Whitfield v. Chartiers Valley School Dist* 707 F. Supp 2d 561 (W.D. Pa. 2010), *Adams v. University of North Carolina-Wilmington* 640 F.3d 550 (4th Cir. 2011), *Sheldon v. Dhillon* C-08-03438 (N.D.Cal. 2009), and *Lane v. Franks* 189 L. Ed. 2d 312 (U.S. 2014).

16 *Garcetti v. Ceballow*, 547 U.S. 410 (2006).

17 *Garcetti v. Ceballow*, 547 U.S. at 414.

18 *Garcetti v. Ceballow*, 547 U.S. at 415.

19 *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012).

20 *Savage*, 665 F.3d at 733.

21 *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

22 The issue has also been unclear at the secondary level of education. Consider the case *Mayer v. Monroe County School Corp.*, 474 F.3d 477 (7th Cir. 2007). The court continued to use the *Pickering* test to determine a teacher's free speech rights. A student asked Mayer whether she participated in political demonstrations, and she replied that when she passed a demonstration against military operations in Iraq and saw a sign saying, "Honk for Peace," she honked to show support. Mayer believes that this incident led to the school dismissing her as a teacher. The district court used the *Pickering* test and concluded that military intervention in Iraq is an issue of public concern, and this interfered with her official duties. Mayer disagreed saying that the current-events topics of the classroom were apart of her official duties, and "that principles of academic freedom supersede." This court discussed their decision using the case *Webster v New Lenox School District no. 122*, 917 F.2d 1004 (7th Cir. 1990), and stated that a social-studies teacher does not have the right to introduce his own views on a subject, and must

stick to the prescribed curriculum. The *Mayer* court argued that "the school system does not 'regulate' teachers' speech as much as it *hires* that speech;" and thus, a teacher is not free to change the curriculum in order to express their views. Because students are required to go to school, they are a captive audience and therefore, should not be subjected to indoctrination by one teacher's viewpoints. This court decides the case stating, "It is enough to hold that the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."

23 Stack, Liam, "Yales Halloween Advice Stokes a Racially Charged Debate" *New York Times*, November 8, 2015, http://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html?_r=0 (last visited on May 17, 2016).

24 Fire, "Email From Erika Christakis: 'Dressing Yourselves,' email to Silliman College (Yale) Students on Halloween Costumes," *The Fire*, October 30, 2015, https://www.thefire.org/email-from-erika-christakis-dressing-yourselves-email-to-silliman-college-yale-students-on-halloween-costumes/ (last visited on May 17, 2016).

25 Vanessa A. Wernicke *Teacher's Speech Rights in the Classroom: An Analysis of Cockrel v Shelby County School District* 71 U. Cin. L. Rev. 1471 (2003).

26 Id. at 13.

27 Emily Holmes Davis *Protecting the "Marketplace of Ideas": The First Amendment and Public School Teachers' Classroom Speech* 3 First Amend. L. Rev. 335 (2005).

28 Id. at 8.

29 Id.

30 Kristof, Nicholas, "Mizzuo, Yale and Free Speech," *New York Times*, November 11, 2015, http://www.nytimes.com/2015/11/12/opinion/mizzou-yale-and-free-speech.html?_r=0 (last visited on May 17, 2016).