Note

Reconciling the Public Employee Speech Doctrine and Academic Speech After *Garcetti v. Ceballos*

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The public university is the quintessential marketplace of ideas.[1] Consequently, the public university occupies a unique position in society.[2] Despite this distinction, courts do not differentiate between academics employed by public universities and the traditional public employee when determining the applicability of the First Amendment to public employee speech.[3] In 2006, the Supreme Court held in *Garcetti v. Ceballos* that public employees are not entitled to First Amendment protection for speech arising from their official duties.[4] The Court

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1. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (explaining the importance of academic freedom and the existence of a marketplace of ideas in the public university); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (explaining the importance of intellectual freedom within the public university).

2. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("[U]niversities occupy a special niche in our constitutional tradition."). Most other public institutions do not adhere to this principle. *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1516–20 (2007) (noting that courts may defer to the decision-making processes of the public university because of its unique values, capabilities, and goals).

3. *Cf.* Horwitz, *supra* note 2, at 1524 (noting that the First Amendment differentiates between public and private employees).

4. 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as

specifically declined to decide whether *Garcetti*'s holding would apply to academic speech.[5] Many people question the effect this case will have on academic speech made in public colleges and universities.[6]

The Court explained that the facts in *Garcetti* did not require it to address whether the holding applies to academic speech,[7] but lower federal courts have utilized *Garcetti* to restrict the First Amendment rights of faculty employed by public universities and colleges.[8] It is plausible that federal courts will eventually uniformly apply *Garcetti* to faculty members who engage in teaching and scholarship in public institutions of higher education.[9] Such an application would frustrate the fundamental purposes of the public university.[10]

The placement of academic speech within the public employee speech doctrine demonstrates the inflexibility of the doctrine in recognizing the varying characteristics of public employee speech. The doctrine blindly places speech within a

citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

5. *Id.* at 425.

6. *See, e.g.*, Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the* Pickering-Connick *Doctrine and Public Higher Education Faculty after* Garcetti, 33 J.C. & U.L. 313, 351–52 (2007) (considering possible legal approaches to academic speech); Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 164–67 (2007) (examining the "future landscape [of] academic freedom after *Garcetti*").

7. *Garcetti*, 547 U.S. at 425.

8. *See* Renken v. Gregory, 541 F.3d 769, 775 (7th Cir. 2008) (holding that a professor's criticism of a university's handling of funds was made "pursuant to his official duties and therefore was not protected by the First Amendment"); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006) (discussing the influence of *Garcetti* on the court's decision to refuse First Amendment protection to a cosmetology instructor's speech condemning homosexuality); Hong v. Grant, 516 F. Supp. 2d 1158, 1168 (C.D. Cal. 2007) (holding that a professor's remarks regarding faculty review were made "pursuant to his official duties as a faculty member and therefore [deserving of] First Amendment protection").

9. *See* Leonard M. Niehoff, *Peculiar Marketplace: Applying* Garcetti v. Ceballos *in the Public Higher Education Context*, 35 J.C. & U.L. 75, 97 (2008) ("*Garcetti* may prove particularly important in the higher education environment . . . .").

10. *See* Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 62 (2003) ("At the college level, the [public employee speech] doctrine does not respond well to the function of the institution of public higher education that is based upon the concept and practice of teaching and research freedom, an intellectual marketplace of ideas and an experiment station of the mind.").

dichotomy, thereby classifying speech as either public employee speech or nonpublic employee speech.[11] The public employee speech doctrine, though, is inappropriate for determining the amount of First Amendment protection afforded to academic speech in the public university.[12] When the government creates a public university, the government inherently creates an institution where academic freedom is present, regardless of whether the government bargained for it.[13] This institution fosters discussion of competing ideas.[14] Courts prevent this from occurring when they apply the public employee speech doctrine to academic speech.

This Note argues that applying the public employee speech doctrine to academic speech is inappropriate because a public university is more akin to a forum for the dissemination of ideas than a traditional public employer, which the government created for the purposes of disseminating a coherent government message. Part I discusses the *Garcetti* decision along with the government speech and public forum doctrines as tools for regulating academic speech within the public university. This Part also considers the Supreme Court's use of the principle of academic freedom to treat the public university differently from other public institutions. Part II critiques federal courts' application of the public employee speech doctrine to academic speech. Part III uses the public forum doctrine to create a framework that would allow the public university to regulate the speech of its faculty members while simultaneously affording faculty necessary First Amendment rights. Unlike the public employee speech doctrine, a public forum approach to academic speech balances the interests of both the public university and individual faculty members, and is more consistent with existing First Amendment jurisprudence.

11. *See* Ramona L. Paetzold, *When Are Public Employees Not Really Public Employees? In the Aftermath of* Garcetti v. Ceballos, 7 FIRST AMENDMENT L. REV. 92, 95–97 (2008) (explaining that the public employee-private citizen dichotomy created by the public employee speech doctrine poses substantial interpretation problems in public employee speech cases).

12. *See, e.g.*, Ailsa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond* Pickering *and* Connick, 53 STAN. L. REV. 915, 937–47 (2001) (discussing the insufficiency of the public employee speech doctrine in the public university context).

13. *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (suggesting the academic freedom inherent in "scholarship [and] classroom instruction" is a constitutional value).

14. *E.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (discussing academic institutions as a marketplace of ideas).

I. THE FIRST AMENDMENT AND PUBLIC EMPLOYEE SPEECH

The First Amendment provides that the government "shall make no law . . . abridging the freedom of speech . . . ."[15] Despite this seemingly simple prohibition on government conduct, First Amendment jurisprudence is exceedingly complex.[16] This jurisprudence carves out different doctrines for assessing the amount of First Amendment protection afforded to speech.[17] These doctrines give varying levels of protection to speech depending on factors such as the identity of the speaker, the location of the speech, and the inherent value of the speech to society.[18]

The Supreme Court created the public employee speech doctrine to determine the amount of First Amendment protection afforded to speech made by public employees.[19] While individuals do not shed their First Amendment rights when they work for the government,[20] the government has the right to limit individuals' right to free speech when these individuals become public employees.[21] This Part discusses the public employee speech doctrine both prior to and after *Garcetti* and the Court's use of the government speech doctrine to reason that public employee speech belongs to the government. This Part also discusses courts' use of the government speech and public forum doctrines to regulate speech made within public universities. Finally, this Part considers the concept of academic free-

15. U.S. CONST. amend. I.

16. *See, e.g.*, Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2154 (2009) ("[G]overnment speech . . . is a complex and muddled area of First Amendment jurisprudence . . . .").

17. *See, e.g.*, *Garcetti*, 547 U.S. at 422–23 (discussing the public employee speech doctrine); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) (discussing the government speech doctrine); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (discussing the public forum doctrine); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980) (providing a balancing test to determine whether speech is prohibited under the commercial speech doctrine); Miller v. California, 413 U.S. 15, 24 (1973) (providing a multifactor test to determine whether speech is prohibited under the obscenity doctrine).

18. *Cf. Garcetti*, 547 U.S. at 420–21 (calling both the location and subject matter of the speech "nondispositive").

19. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The problem . . . is to arrive at a balance between the interests [of a] citizen, in commenting upon matters of public concern[,] and the interest of the State . . . .").

20. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

21. *Cf. Garcetti*, 547 U.S. at 417 (explaining that public employees do not surrender all of their First Amendment rights).

dom, which grants unique protection to academic speech, and its importance within First Amendment jurisprudence.

A. THE EVOLUTION OF THE PUBLIC EMPLOYEE SPEECH DOCTRINE

Prior to the Supreme Court's decision in *Garcetti*, courts followed the *Pickering-Connick* test to determine when public employee speech is protected under the First Amendment.[22] In *Pickering v. Board of Education*, a school district fired a teacher for writing a letter to a local newspaper critical of the school board's proposed tax increase to raise education revenue.[23] The Court set forth a balancing test to decide when government employers could discipline public employees for their speech without violating the First Amendment.[24] Under this test, courts must balance the free speech interests of the public employee discussing matters of public concern with the interests of the government "in promoting the efficiency of the public services it performs through its employees."[25] The Court did not explicitly state what constituted a matter of public concern.[26] Nonetheless, in applying this test, the Court considered whether the employee spoke on a matter of public concern.[27] If the employee did not speak on a matter of public concern, the government employer is free to discipline the public employee without fear of violating the employee's First Amendment rights.[28] But if the employee spoke on a matter of public concern, then the court must inquire whether the employer had "an adequate justification for treating the employee differently" from a private citizen.[29] If adequate justification does not exist, the speech is entitled to First Amendment protection.[30]

22. *See id.* at 417–20 (discussing the *Pickering-Connick* test).

23. 391 U.S. at 564.

24. *See id*. at 568 (discussing the Court's balancing test used to determine when the interests of the government outweigh the free speech interests of the public employee).

25. *Id.*

26. *See id.* at 571–72 (confirming only that school system funds are of public concern).

27. *See id.* at 574 (concluding the teacher's speech arose from his membership in the general public).

28. *See id.* (discussing the interplay between dismissal from employment and inhibiting speech); *see also* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("A government has broader discretion to restrict speech when it acts in its role as employer . . . .").

29. *Garcetti*, 547 U.S. at 418.

30. *Id.* (restricting employee speech only as "necessary for their employers

A lingering question left by *Pickering* was whether the decision established a threshold test when it explained the First Amendment protects public employee speech on matters of public concern.[31] The Court quelled this uncertainty over two decades later in *Connick v. Myers* by answering this question in the affirmative.[32] The *Connick* Court noted that public employers should "enjoy wide latitude in managing their offices" without fear of violating the First Amendment when public employees do not speak on "matter[s] of political, social, or other concern to the community."[33] In determining whether government employees' speech is of public concern, courts must consider the "content, form, and context" of the speech.[34] Even though the *Connick* Court provided some clarification on the public concern requirement under the public employee speech doctrine, federal courts continue to have difficulty determining what constitutes a matter of public concern.[35]

Since the Supreme Court's creation of the *Pickering-Connick* test, lower federal courts also struggled with the unanswered question of whether speech made by a public employee in the course of his official duties deserved First Amendment protection.[36] The Court resolved this question in *Garcetti* by holding that employees are not entitled to First Amendment protection for speech arising from their official duties.[37] In *Garcetti*, Richard Ceballos worked as a calendar deputy in the Los Angeles County District Attorney's Office.[38] As

to operate efficiently and effectively").

31. *See, e.g.*, Joseph O. Oluwole, *The* Pickering *Balancing Test and Public Employment Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 140 (2008) (discussing the preliminary determination future courts had to make before applying the *Pickering* test).

32. 461 U.S. 138 (1983).

33. *Id.* at 146.

34. *Id.* at 147–48.

35. *See, e.g.*, Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 996 (1997) ("To the great consternation of lower courts . . . the Court has failed to provide a clear definition of 'public concern.'").

36. *Compare* Ceballos v. Garcetti, 361 F.3d 1168, 1176 (9th Cir. 2004) (rejecting a per se rule prohibiting public employees from seeking First Amendment protection for statements made during the course of their official duties), *with id.* at 1188 n.2 (O'Scannlain, J., concurring) ("In any event, such deep confusion within the circuits over the scope of *Connick*—indeed, over the scope of their own cases interpreting *Connick*—seems a clarion call for higher review.").

37. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).

38. *Id.* at 413.

part of his duties, defense attorneys often requested that Ceballos investigate portions of pending cases.[39] In this case, a defense attorney asked Ceballos to investigate the adequacy of a search warrant.[40] Ceballos determined there were substantial inadequacies in the search warrant, and he informed his superiors of these inadequacies in a memo.[41] In a meeting with district attorneys, Ceballos defended his memo and an argument ensued.[42] The district attorney's office subsequently disciplined Ceballos for his remarks.[43] The Court held that Ceballos was not entitled to First Amendment protection for his speech because he made the speech pursuant to his official duties as a calendar deputy; therefore, he was not acting as a private citizen.[44]

The *Garcetti* Court discussed several reasons for holding that government employees have no First Amendment protection for speech arising from their official duties.[45] First, public employees "by necessity must accept certain limitations on . . . [their] freedom" when they assume government employment.[46] These limitations are permissible because there is no constitutional right to government employment.[47] Second, government employers need to control the actions of their employees in order to maintain efficiency.[48] Public employers cannot spend time defending every adverse employment action taken against a public employee for an employee's speech.[49] Third, unlike private employees, public employees "often occupy trusted positions in society," and employees can impair this trust when they deviate from a prescribed government message.[50] Finally, regulation of public employee speech is important because public employees "can express views that contravene governmental policies or impair the proper performance of

39. *Id.* at 414.
40. *Id.* at 413.
41. *Id.* at 414.
42. *Id.*
43. *Id.* at 415.
44. *Id.* at 424.
45. *See id.* at 418.
46. *Id.*
47. *See, e.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (holding the petitioner had "no constitutional right to be a policeman").
48. *Garcetti*, 547 U.S. at 418.
49. *Id.* at 418–19 (citing Connick v. Myers, 461 U.S. 138, 143 (1983)).
50. *Id.* at 419.

governmental functions."[51] Requiring public employees to disseminate predetermined government messages prevents the deliverance of inconsistent messages.[52]

Justice Souter wrote a dissent in *Garcetti* and explained that the Court's decision could have serious implications for academic speech because academics employed by public universities engage in teaching and scholarship pursuant to their official duties.[53] Scholars have echoed Justice Souter's concerns.[54]

Generally, the Supreme Court's refinement of the public employee speech doctrine over the past several decades suggests the Court's willingness to narrow the free speech rights of public employees and defer to public employers in matters pertaining to the daily operations of government institutions.[55] This deference to public employers is partially the result of the *Garcetti* Court's use of the government speech doctrine to justify government regulation of public employee speech.[56] Under this doctrine, the government can regulate the viewpoint of speech belonging to the government without violating the First Amendment.[57]

B. THE GOVERNMENT SPEECH DOCTRINE

The *Garcetti* Court used the government speech doctrine to reason that public employees are not entitled to First Amendment protection for speech made pursuant to their official du-

51. *Id.*

52. *See id.* at 422–23 (discussing employers' interest in consistent official communication).

53. *Id.* at 438 (Souter, J., dissenting).

54. *See, e.g.*, Elrod, *supra* note 10, at 62 (arguing that courts should create a "separate standard for academic speech within the pantheon of free speech jurisprudence"); Chang, *supra* note 12, at 937–47 (discussing undesirable implications of applying another version of the public employee speech doctrine in academic contexts).

55. *See* Connick v. Myers, 461 U.S. 138, 147 (1983) ("[A]bsent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

56. *See Garcetti*, 547 U.S. at 422 ("Our holding . . . is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations [and thus official employee speech].").

57. *See id.* at 423 ("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.").

ties.[58] Under the government speech doctrine, the First Amendment does not apply to speech when the speech belongs to the government.[59] In *Johanns v. Livestock Marketing Association* the Court explained that speech belongs to the government "[w]hen . . . the government sets the overall message to be communicated and approves every word that is disseminated."[60] The development of the government speech doctrine is still in its early stages.[61] As a result, the Court has not articulated a clear definition of government speech.[62] This may explain why the *Garcetti* Court discussed the application of the doctrine to public employee speech in dicta.[63] Federal circuits currently disagree over what factors to emphasize when classifying speech as either private or government speech.[64] These circuits agree, though, that government speech has "a clearly governmental source" to facilitate attribution of this speech.[65]

In *Garcetti*, the Court implicitly relied on *Rust v. Sullivan*,[66] a government speech decision decided over a decade earlier by the Court, to explain that public employees are not entitled to First Amendment protection for speech made pursuant to their official duties.[67] In *Rust*, recipients of Title X funds challenged the constitutionality of the government funding as viewpoint discrimination because it forbade recipients from counseling patients on abortion as a means of family planning

58. *See id.* at 421; *see also* Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1709 (2009) (discussing the Court's use of the government speech doctrine in *Garcetti*).

59. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 611–15 (2008) (describing the government speech doctrine); *see also* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 597–98 (2008) (discussing when speech is considered government speech).

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

61. *See, e.g.*, Corbin, *supra* note 59, at 611 (calling the government speech doctrine a "recent development").

62. *See id.* at 612 ("While the existence of the government speech doctrine is firmly established, its contours are not.").

63. *See Garcetti*, 547 U.S. at 421–22.

64. *See* Lilia Lim, Comment, *Four-Factor Disaster: Courts Should Abandon the Circuit Test for Distinguishing Government Speech from Private Speech*, 83 WASH. L. REV. 569, 585–94 (2008).

65. Norton, *supra* note 59, at 598.

66. 500 U.S. 173 (1991).

67. The majority decision in *Garcetti* does not explicitly state that it is relying on *Rust*. Rather, *Garcetti* relies on the Court's decision in *Rosenberger v. Rector & Visitors of University of Virginia*, which relied on *Rust*. *See Garcetti*, 547 U.S. at 422 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

or referring patients to abortion providers.[68] The Court held the restrictions did not violate the recipients' First Amendment rights because the speech was government speech.[69] This speech was government speech because the government paid for the speech and controlled the messages delivered by funding recipients through regulations on Title X funding.[70]

Similar to the federal government in *Rust*, the county paid for Garcetti's speech because Garcetti made the speech while in the course of his official duties. His speech therefore "ow[ed] its existence" to his job as a public employee instead of his status as a private citizen and merely demonstrated what the county attorney's office created.[71] The county also selected the message that calendar deputies were to deliver through their prescribed duties.[72] Consequently, the Court reasoned the speech was government speech, thereby removing it from the purview of First Amendment protection.[73]

In contrast to *Rust*, the Court did not apply the government speech doctrine in *Legal Services Corp. v. Velazquez* because the government provided funding to private speakers to convey *private* messages instead of a government message.[74] In *Velazquez*, Congress provided funds under the Legal Services Corporation to organizations that "hire and supervise lawyers to provide free legal assistance to indigent clients."[75] If organizations accepted the funding, the lawyers could not argue before a court "that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution."[76] A group of attorneys sued, claiming the condition violated their First Amendment free speech rights because the condition imposed a viewpoint restriction on their speech.[77] The Supreme Court held the condition on funding violated the attorneys' First Amendment rights because the attorneys' speech was private and not governmental in nature even though the govern-

68. *Rust*, 500 U.S. at 179–80.
69. *See id.* at 193–94.
70. *See id.*
71. *Garcetti*, 547 U.S. at 421–22.
72. *See id.* at 421.
73. *See id.* at 421–22.
74. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001).
75. *Id.*
76. *Id.* at 537.
77. *Id.*

ment paid for the speech.[78] Overall, given the Court's reasoning in *Velazquez*, the applicability of the government speech doctrine hinges on whether the government funded a speaker's private message or a government message. The First Amendment protects only the former messages.

Federal courts are beginning to use the *Garcetti* Court's dicta regarding government speech as the basis for holding that speech made pursuant to a public employee's official duties is unprotected by the First Amendment.[79] In *Khan v. Fernandez-Rundle*, the Eleventh Circuit held that an assistant state attorney was not entitled to First Amendment protection for statements he made in court because he was an agent of the government and not a private citizen when he made the statements.[80] The state owned the speech since Khan's speech existed merely because of "his role as the government's lawyer."[81] The state could therefore regulate the speech at its discretion.[82] The Third Circuit used similar reasoning in *Reilly v. City of Atlantic City* when it held that a police officer did not speak pursuant to his official duties when giving testimony related to an investigation of department misconduct and therefore did not foreclose his speech to First Amendment protection.[83]

The government speech doctrine is unique because it allows the government to regulate speech based on its viewpoint.[84] The First Amendment does not usually permit this type of regulation.[85] The *Rust* Court explained the government could decide to fund a program "it believes to be in the public interest" while not funding an alternative program.[86] The Court stated that when the government decides to choose one program over another, the government's actions do not conflict with the First Amendment.[87] The government "has merely cho-

78. *Id.* at 542 ("[T]he salient point is that . . . the [Legal Services Corporation] program was designed to facilitate private speech, not to promote a governmental message.").

79. *See* JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post*-Garcetti *Jurisprudence*, 63 U. MIAMI L. REV. 761, 789 (2009).

80. 287 F. App'x 50, 53 (11th Cir. 2007).

81. *Id.*

82. *Id.*

83. 532 F.3d 216, 228 (3d Cir. 2008).

84. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991).

85. *See* Sheldon Nahmod, *Academic Freedom and the Post*-Garcetti *Blues*, 7 FIRST AMENDMENT L. REV. 54, 69 (2008).

86. *See Rust*, 500 U.S. at 193.

87. *Id.*

sen to fund one activity to the exclusion of the other."[88] Under this reasoning, if courts classify academic speech made within the public university as government speech, then the government could regulate the viewpoint of academic speech.[89]

Overall, the public employee speech doctrine, relying on the government speech doctrine, allows the government to regulate public employee speech. Courts, though, often discuss the government speech doctrine in conjunction with the public forum doctrine because the government creates forums in which speech can exist. Courts frequently subject speech made within the public university to the public forum doctrine. Therefore, a discussion of government speech is not complete without a discussion of the public forum doctrine.

C. THE PUBLIC FORUM DOCTRINE

This section provides a brief overview of the public forum doctrine, the Supreme Court's use of this doctrine in educational settings, and the regulation of the quality of speech within a forum.

1. The Public Forum Analysis

The *Garcetti* Court used the government speech doctrine to justify public employers' regulation of public employee speech. But courts frequently rely on the public forum doctrine to regulate speech in the public university context because the public university often creates forums within the institution.[90] Under the public forum doctrine, the level of First Amendment protection afforded to speech within the forum depends on a forum's characteristics.[91] Courts often divide forums into three types: public, limited, and nonpublic.[92] Courts consider context when

88. *Id.*

89. *Cf.* Nahmod, *supra* note 85, at 69 ("The First Amendment consequence is that the government should not be allowed to engage in viewpoint discrimination by punishing faculty because of what they say in the classroom or write in their scholarship.").

90. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (using a public forum analysis to determine the constitutionality of viewpoint discrimination within a student fee system); Widmar v. Vincent, 454 U.S. 263 (1981) (using a public forum analysis to prohibit content discrimination of student organization access to university facilities).

91. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

92. *See id.* at 45–46.

classifying the forum created by the government.[93] This evaluation considers the forum's purpose, the government's intention to open the forum to public speech, and the location of the forum.[94]

The public forum provides speakers with the most First Amendment protection.[95] Individuals traditionally use this forum for "purposes of assembly, communicating thoughts between citizens, and discussing public questions."[96] Common examples of public forums include streets and parks.[97] The government can place time, place, and manner restrictions on speech made in a public forum, as long as these restrictions are content-neutral and narrowly tailored to serve a compelling state interest.[98] The state can also place content restrictions on speech made within this forum, but these restrictions must be subject to strict scrutiny.[99]

On the opposite side of the spectrum is the nonpublic forum.[100] The nonpublic forum is a forum the government has not designated to be public.[101] The government can place reasonable time, place, and manner restrictions on speech within this forum.[102] The government can also regulate content within this forum as long as the regulation is reasonable and viewpoint neutral.[103] Courts classify the public school classroom as a nonpublic forum.[104]

Somewhere between the public forum and the nonpublic forum is the limited public forum.[105] The limited public forum is traditionally open to speech like a public forum, but occasionally, the government regulates speech within this forum.[106] The government is able to apply reasonable time, place, and man-

93. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679–80 (1992).

94. *See id.* at 679–80.

95. *See Perry*, 460 U.S. at 45.

96. *Id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.* at 46.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (holding that a school publication is a nonpublic forum).

105. *See Perry*, 460 U.S. at 45.

106. *See id.* at 45–46.

ner restrictions on speech made within this forum as long as the government narrowly tailors content regulations to serve a significant government interest.[107] Courts frequently classify public universities as limited public forums because these institutions are often open to public speech but the university sometimes limits speech within this forum. For example, in *Widmar v. Vincent*, the Supreme Court held that a university that opens its facilities to student groups could not engage in content discrimination by excluding religious groups from using its facilities unless the university narrowly tailored the restriction to serve a compelling state interest.[108]

A limited public forum within a public university can be more than meeting spaces. In *Rosenberger v. University of Virginia*, the University of Virginia created a funding system that required students to pay a mandatory student activity fee.[109] When a religious student newspaper applied for student activity funds, the university denied the student organization's request because of a policy prohibiting the funding of religious promotion.[110] The Court held that the denial of funds violated the students' First Amendment rights because the university engaged in viewpoint discrimination within a limited forum.[111] The university created a limited public forum through the student fee system because "the University [did] not itself speak or subsidize transmittal of a message it favors but instead expend[ed] funds to encourage a diversity of views from private speakers."[112] In essence, while the public university can engage in content discrimination within a limited public forum, provided such restrictions are narrowly tailored to serve a compelling interest, the university cannot engage in viewpoint discrimination within this forum.

2. Forums in an Educational Setting

Courts frequently apply the public forum doctrine to the educational setting. These courts designate forums within colleges as public or limited public forums and forums within elementary and secondary schools as limited public or nonpublic

107. *See id.* at 46.
108. 454 U.S. 263, 267–68 (1981).
109. 515 U.S. 819, 824 (1995).
110. *Id.* at 825.
111. *See id.* at 837.
112. *Id.* at 834.

forums.[113] This differentiation is permissible because children are minors while college students are usually adults.[114] The government may limit the First Amendment rights of children, but it must afford the full protection of this amendment to adults.[115] In *Tinker v. Des Moines School District*, the first case to address student free speech rights, Justice Black famously stated that children do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."[116] In this same case, though, the Supreme Court held that schools could limit student speech when the speech causes a substantial disruption to the classroom environment or the speech infringes on the rights of other students.[117]

Unlike most public institutions, elementary and secondary schools can regulate the content of students' speech because courts often classify forums within these schools as nonpublic forums as long as the regulation is reasonable.[118] In *Hazelwood School District v. Kuhlmeier*, a group of students participating on the student newspaper, *Spectrum*, wrote stories pertaining to student pregnancies and students' experiences with their parents' divorces.[119] Before the newspaper went to print, the faculty advisor of the newspaper removed the stories from the newspaper, explaining the stories were inappropriate for the student newspaper.[120] The students claimed that the school violated their First Amendment rights by removing the stories.[121] The Supreme Court, applying a public forum analysis, held that the student newspaper was a nonpublic forum, and therefore, the school could exercise editorial control over the news-

113. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

114. *See* Alison Lima, Note, *Shedding First Amendment Rights at the Classroom Door?: The Effects of* Garcetti *and* Mayer *on Education in Public Schools*, 16 GEO. MASON L. REV. 173, 173 (2008) ("First Amendment rights for students and teachers have always been more limited in schools than in public generally, as schools have legitimate interests in maintaining order, discipline, and productive pedagogical environments.").

115. *See id.*

116. 393 U.S. 503, 504 (1969).

117. *See id.* at 509, 513.

118. *See Hazelwood Sch. Dist.*, 484 U.S. at 267 (holding that speech restrictions do not have to be viewpoint-neutral when in a nonpublic forum and related to a legitimate pedagogical purpose).

119. *See id.* at 263.

120. *See id.*

121. *See id.* at 264.

paper as long as there was a legitimate pedagogical purpose for the regulation.[122]

College students are often afforded more speech rights than grade school students. In *Papish v. Board of Curators of the University of Missouri*, the Supreme Court held the University of Missouri violated a graduate student's First Amendment rights when it disciplined the student for publishing a newspaper with a front cover containing a "political cartoon previously printed in another newspaper depicting policemen raping the Statute of Liberty and the Goddess of Justice" and expletives.[123] While the University claimed that the speech was "indecent," the Court held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus [sic] may not be shut off in the name alone of 'conventions of decency.'"[124] The Court decided *Papish* before its extensive use of the public forum doctrine, but the case demonstrates the greater amount of free speech rights afforded to college students when compared to grade school students.

3. Regulating the Quality of Speech Within the Forum

In addition to regulating content, a public forum analysis approach to academic speech may allow universities to regulate the *quality* of academic speech. In *National Endowment for the Arts v. Finley*, the Supreme Court considered the constitutionality of a federal grant program created by Congress and administered by the National Endowment for the Arts (NEA) to award funds to artists in an effort to promote the arts.[125] The Court, deviating from its analytical scheme in *Rosenberger*, did not decide whether the government created a forum when it created the selection process employed by NEA.[126] Instead, the *Finley* Court distinguished the case from *Rosenberger* by explaining that unlike the student fee distribution process within

122. *See id.* at 273.

123. 410 U.S. 667, 667 (1973) (per curiam).

124. *Id.* at 670.

125. 524 U.S. 569, 573 ("The enabling statute vests the NEA with substantial discretion to award grants; it identifies only the broadest funding priorities, including 'artistic and cultural significance, giving emphasis to American creativity and cultural diversity,' 'professional excellence,' and the encouragement of 'public knowledge, education, understanding, and appreciation of the arts.'").

126. *See* Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 788 (2009).

a university, the NEA employed a "competitive process" whereby the NEA is required to make judgments regarding the quality of the work.[127] The Court explained that the federal government "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake."[128] As a result, any use of content considerations is merely a "consequence of the nature of arts funding."[129] Overall, *Finley* provides a way for the government to regulate the quality of speech without violating the First Amendment so long as the government provides clearly articulated criteria to determine the quality of such speech, and the nature of the speech requires the government to make decisions based on the quality.[130]

Courts use the government speech and public forum doctrines to regulate speech made or facilitated by the government, respectively. Sometimes, though, the Supreme Court recognizes that regulation of speech may be deserving of greater scrutiny because of the speech's value to society. The Court used the principle of academic freedom to justify why it can treat the public university differently than other public institutions.

D. ACADEMIC FREEDOM AND THE FIRST AMENDMENT

Academic freedom is essential to the functioning of the public university.[131] In 1915, the American Association of University Professors (AAUP) released its seminal statement on the existence of academic freedom in the university. The statement declared that "[a]cademic freedom . . . comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural ut-

127. *Finley*, 524 U.S. at 586 ("The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*."); s*ee also* Lackland H. Bloom, Jr., NEA v. Finley*: A Decision in Search of a Rationale*, 77 WASH. U. L.Q. 1, 12 (1999) (discussing how the Court in *Finley* distinguished its decision from *Rosenberger*).

128. *Finley*, 524 U.S. at 587–88.

129. *Id.* at 585.

130. *See id.* at 585–88; *see also* Scott Ahmad, Comment, *Can the First Amendment Stop Content Restriction in State Film Incentive Programs?*, 16 UCLA ENT. L. REV. 395, 427 (2009).

131. *See* AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 292 (1915), *available at* http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550C006B5B224E7/0/1915Declaration.pdf.

terance and action."[132] Thirty-five years later, the AAUP reiterated the role of academic freedom at colleges and universities with another release.[133] Despite these statements, the Supreme Court did not address the concept of academic freedom until the 1950s. Since then, the Court has strongly noted the importance of academic freedom and the marketplace of ideas within public universities.

The Court first discussed the importance of academic freedom in *Sweezy v. New Hampshire*.[134] The Court explained that the necessity of academic freedom to academics within a public university is obvious because "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[135] The Court noted there were four essential freedoms of public universities. These freedoms include the freedom to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[136] The Court reiterated its view of academic freedom in *Keyishian v. Board of Regents*.[137] In *Keyishian*, the Court explained that the public university is a "marketplace of ideas" and because of this, academic freedom is a "special concern" of the First Amendment.[138] The Court also noted that courts should closely scrutinize laws that restrict this freedom.[139]

The Court has clearly acknowledged and embraced the existence of academic freedom within the public university. However, within the last few decades, scholars have debated whether academic freedom is a constitutional right.[140] The

132. *Id.*

133. *See* AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940), *available at* http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf.

134. 354 U.S. 234, 250 (1957).

135. *Id.*

136. *Id.* at 263 (citation omitted).

137. 385 U.S. 589 (1967).

138. *See id.* at 603.

139. *See id.*

140. *See, e.g.*, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 256–58 (1989) (discussing the struggle of courts to define the right of academic freedom); Todd A. DeMitchell & Vincent J. Connelly, *Academic Freedom and the Public School Teacher: An Exploratory Study of Perceptions, Policy, and the Law*, 2007 BYU EDUC. & L.J. 83, 83 ("Despite academic freedom's influence on policy, there is no black letter law definition of this right.").

Court has not addressed this issue.[141] Regardless of its classification, academic freedom appears to be a notion that provides some deference to the public university.[142] The Court's relatively recent decision in *Grutter v. Bollinger*[143] solidifies the Supreme Court's recognition of academic freedom in higher education.[144] In *Grutter*, Justice O'Connor, writing for the Court, explained: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[145] This special preference afforded to academic freedom existed prior to *Grutter*. In *Regents of the University of California v. Bakke*, Justice Powell explained, that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[146]

Overall, the government can regulate speech using the government speech and the public employee speech doctrine. But courts must use caution when applying these doctrines to speech occurring within the public university because of the principle of academic freedom. This Note proceeds with the understanding that regardless of whether academic freedom is a constitutional right, the First Amendment grants special preference to academic freedom. As such, courts must use caution when applying First Amendment jurisprudence in the same manner to both the public university and other public institutions.

141. *See* DeMitchell & Connelly, *supra* note 140, at 84.

142. *See* Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 18–20 (D.C. Cir. 2008) (Silberman, J., concurring) (explaining that academic freedom is not a constitutional right but rather a doctrine that allows courts to provide deference to the public university as an institution).

143. 539 U.S. 306 (2003).

144. *See* J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 116–18 (2004) (discussing the impact of Justice O'Connor's opinion for the Court in *Grutter* on the academic freedom debate occurring in the nation's colleges and universities).

145. *Grutter*, 539 U.S. at 328–29.

146. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

II. RECONCILING THE PUBLIC EMPLOYEE SPEECH DOCTRINE AND ACADEMIC SPEECH

This Part analyzes the application of the public employee speech doctrine to academic speech. In determining its applicability, this Part discusses an important question: is the public university a disseminator of a coherent message[147] or more akin to a forum for the dissemination of various ideas?[148] This Part concludes that the application of the public employee speech doctrine to academic speech is inappropriate because academic speech is not government speech. Accordingly, this Part proceeds by considering the problems with the existing public employee speech doctrine as applied to academic speech and then analyzes the application of the government speech and public forum doctrines to academic speech.

A. PROBLEMS WITH THE EXISTING PUBLIC EMPLOYEE SPEECH DOCTRINE

This section explains the difficulties of applying the public employee speech doctrine to academic speech. While the difficulties discussed in this section are not necessarily unique to academic speech, this discussion demonstrates the broader difficulties of applying this doctrine to public employee speech. These difficulties arise in the context of the public employee speech doctrine's public concern and official duties tests and viewpoint discrimination.

1. Public Concern Test

It is unclear what constitutes a matter of public concern under the public employee speech doctrine.[149] This is particu-

147. *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1436 (2001) ("The very idea of university or government speech makes no sense unless the message thus communicated is the university's own view and a product of its purposeful efforts to communicate it as such . . . [and] one might well conclude that many of the acts engaged in by universities will not constitute government speech."); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1813 (2007) ("[N]o one would seriously argue that public university professors are hired to parrot a particular government message.").

148. *See* Nahmod, *supra* note 85, at 69 ("The university classroom is an intentionally created educational forum for the enabling of professorial (and student) speech, per the rationale of *Rosenberger*.").

149. *See, e.g.*, Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75 (1988) (discussing the difficulty in applying the public concern test to employee speech).

larly true in matters pertaining to academic speech because courts have not adequately addressed when academic speech constitutes a matter of public concern.[150] The *Garcetti* Court emphasized they were not going to "constitutionalize the employee grievance."[151] As such, when faculty members at public universities raise matters regarding, for example, tenure and promotion decisions of an academic department,[152] the administration of a government grant,[153] or the administration of a presidential search committee,[154] federal courts have considered these matters to be employee grievances instead of matters of public concern.[155] These statements would therefore not be entitled to First Amendment protection.

In *Hong v. Grant*, a federal district court held that a professor was not entitled to First Amendment protection for remarks made during promotion and hiring decisions within the department.[156] The professor made several remarks critical of the department's tenure, salary increase, and hiring decisions, and the department allegedly disciplined him for the remarks.[157] The professor argued the statements were matters of public concern because "they exposed government waste and mismanagement."[158] But the court concluded these statements were merely "internal administrative disputes which have little or no relevance to the community as a whole."[159] Such remarks

150. *See* R. Weston Donehower, Note, Boring *Lessons: Defining the Limits of a Teacher's First Amendment Right to Speak Through the Curriculum*, 102 MICH. L. REV. 517, 528 (2003).

151. Connick v. Myers, 461 U.S. 138, 154 (1983).

152. *See, e.g.*, Hong v. Grant, 516 F. Supp. 2d 1158, 1169–70 (C.D. Cal. 2007) (holding that a professor's remarks made during promotion and hiring decisions within the department were not protected by the First Amendment because they were not on matters of public concern).

153. *See, e.g.*, Renken v. Gregory, 541 F.3d 769, 775 (7th Cir. 2008) (holding that a professor's speech was not protected by the First Amendment because criticizing a university for the handling of a grant was not a matter of public concern).

154. *See, e.g.*, Gorum v. Sessoms, No. 06-565, 2008 WL 399641, at *5 (D. Del. Feb. 12, 2008) (holding that a professor's remarks regarding the selection of the university president did not warrant First Amendment protection).

155. *See, e.g.*, *Renken*, 541 F.3d at 775; *Hong*, 516 F. Supp. 2d at 1169–70.

156. *See Hong*, 516 F. Supp. 2d at 1161–64, 1168.

157. *See id.* at 1161–64.

158. *Id.* at 1169.

159. *Id.* (citing Colburn v. Trs. of Ind. Univ., 973 F.2d 581, 587 (7th Cir. 1992)).

are not matters of public concern, and therefore, not worthy of First Amendment protection.[160]

Hong represents a trend among federal courts regarding the application of the public concern requirement of the public employee speech doctrine. Federal courts are unlikely to find a professor engaged in speech on matters of public concern when engaging in duties as a professor outside of academics' mainstream teaching and scholarship requirements.[161] This is troubling because even if the speech did not arise from employees' official duties, the speech must still be on a matter of public concern. Professors must therefore proceed at their own risk when raising concerns about departmental matters and the self-governance process, as courts could view this speech as nothing more than employee grievances that fail to constitute a matter of public concern.

2. Official Duties Test

After *Garcetti*, public employees are not entitled to First Amendment protection for speech arising from their official duties.[162] This raises two equally important problems in the academic speech context. First, it is difficult to define a faculty member's official duties.[163] Second, applying the official duties test to academic speech could potentially produce a "chilling effect" on academic speech if private speech is subsumed into an academic's official duties.[164]

The Supreme Court provided almost no guidance for defining when public employees make speech pursuant to their official duties. The *Garcetti* Court explained it was not going to outline a "comprehensive framework" for determining when an employee speaks pursuant to their official duties.[165] But the Court explained that courts should engage in a practical analy-

160. *Id.*

161. *See, e.g.*, Renken v. Gregory, 541 F.3d 769, 775 (7th Cir. 2008); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006); *Hong*, 516 F. Supp. 2d at 1169–70.

162. *See* Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

163. *See* Robert M. O'Neil, *Academic Speech in the Post*-Garcetti *Environment*, 7 FIRST AMENDMENT L. REV. 1, 18 (2008) ("When it comes . . . to 'official duties,' the clarity with which a court can determine the responsibilities of an assistant district attorney (or for that matter a non-faculty university employee like the outspoken Georgia financial aid counselor) simply does not apply to college professors.").

164. *See* Spurgeon, *supra* note 6, at 140 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

165. *Garcetti*, 547 U.S. at 424.

sis and avoid adhering strictly to formal job descriptions to demonstrate an employee spoke pursuant to an official duty, as employees' job duties often deviate from this description.[166] Under the Court's reasoning in *Garcetti*, employers could potentially include an endless amount of tasks under an employee's official duties.

This definitional problem is not unique to the academic speech context.[167] But the nature of an academic's job amplifies the problem. Unlike other types of public employment, it is difficult to define the official duties of an academic employed by a public university because the duties of a professor could vary widely and extend beyond what the employment contract states.

The problems associated with defining an official duty become apparent as federal courts increasingly apply *Garcetti* to academic speech. Recently, the Third Circuit, in handling a case of academic speech, explained that speech could arise from an individual's official duties "if it relates to 'special knowledge' or 'experience' acquired through his job."[168] This definition of official duties is problematic for academics who participate in scholarly activities outside the public university. For example, academics, especially law professors, are expanding the traditional mediums of scholarship to include electronic means such as blogs.[169] A reason for this expansion includes the ability to disseminate the material to a larger audience.[170] Many believe blogs are making a positive contribution to legal scholarship,[171] especially when they allow professors to participate in public

166. *See id.* at 424–25.

167. *See, e.g.*, Joseph O. Oluwole, *Public Employment-Free Speech Jurisprudence: A New Constitutional Test for Disciplined Whistleblowers*, 19 U. FLA. J.L. & PUB. POL'Y 421, 443 (2008) (discussing the Court's failure in *Garcetti* to define what constitutes an employee's official duties).

168. Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009) (holding that a professor's speech, which included remarks made before a student-disciplinary committee and student advising, was not protected by the First Amendment because the speech arose out of his official duties).

169. *See* Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J.L. & TECH. 5, ¶ 4 (2007) ("Law professors use blogs to reach out to their students and other faculty, and to engage in a discourse on the nuances and developments within their specialties.").

170. *See id.* ¶ 5.

171. *See, e.g.*, Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1127–28 (2006) (explaining that blogs created and maintained by law professors can provide a positive addition to the legal community by allowing law professors to become "public intellectuals" and participate in public debates).

debates outside of the ivory tower's walls.[172] Courts, though, could classify this speech as relating to expertise obtained from the academic's job.[173] Under the Third Circuit's interpretation of *Garcetti*, an academic would therefore make this speech pursuant to his official duties.[174] Unfortunately, under this reasoning, almost anything could fall under a professor's official duties, therefore rendering anything academics say or write devoid of First Amendment protection.

In addition to the definitional problem, the official duties test could have a significant chilling effect on academic speech by classifying an academic's activities as part of her official duties as long as the activities have some reasonable relationship with the academic's position with the public university. When faculty members engage in scholarship and teaching, which are part of their official duties, the purpose of the public university is frustrated if the public university disciplines faculty members for their speech. The government could suppress a significant amount of speech when an academic's private activities have a relationship to the academic's official duties as faculty member.[175] This scenario is dangerous because public universities are the quintessential marketplace of ideas.[176] When the public university suppresses ideas, it becomes difficult to find another public forum to test competing ideas.

3. Viewpoint Discrimination

The application of the public employee speech doctrine to academic speech is also problematic because it would allow the government to regulate academic speech based on its viewpoint. The First Amendment prohibits viewpoint discrimination.[177] When the government is the speaker, though, the government can regulate speech based on its own viewpoint.[178] In

172. *Cf. id.* at 1128.

173. *See Gorum*, 561 F.3d at 185 ("[A] claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience' acquired through the job." (quoting Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007))).

174. *See id.*

175. *See id.* at 185.

176. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

177. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

178. *See* Rust v. Sullivan, 500 U.S. 173, 193–94 (1991) (allowing recipients of government funds to discriminate based on the scope of the government grant).

Garcetti, the Court explained that public employee speech is government speech because the government pays for the speech and controls the message delivered by the public employee.[179] But public universities hire academics *because* of their speech. A primary duty of an academic employed by a public university is to engage in scholarship and the dissemination of ideas,[180] and thus academics would find it difficult to engage in an exchange of ideas when their ideas could be subject to viewpoint discrimination.

Overall, the public employee speech doctrine poses numerous problems in the context of public universities. The constraints placed on academic speech by the public employee speech doctrine have the ability to stifle speech, thereby frustrating the principle of academic freedom within the public university.

B. APPLYING THE GOVERNMENT SPEECH DOCTRINE TO ACADEMIC SPEECH

In *Garcetti*, the Court explained that public employee speech is government speech because the government paid for the speech and the government selected what message to deliver.[181] While the Court appeared to rely on *Rust* to support this view,[182] Justice Souter, in his dissent, critiqued the Court's use of the government speech doctrine.[183]

Justice Souter explained that while some public employee speech may be government speech, other public employee speech does not fall into this category.[184] Notably, "[s]ome public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to

179. *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

180. *See* O'Neil, *supra* note 163, at 18.

181. *See Garcetti*, 547 U.S. at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created."); *see also* Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 834 (2009) (explaining that in public school "government speech cases, the government is not regulating the speech of those outside the government—it is just choosing the message that it wants to adopt").

182. *See Garcetti*, 547 U.S. at 422 (citing *Rosenberger*, 515 U.S. at 833).

183. *Id.* at 436–39 (Souter, J., dissenting).

184. *Id.* at 437.

speak from a government manifesto."[185] Souter explained the facts in *Garcetti* and *Rust* varied regarding the duties of each employee.[186] The government in *Rust* required fund recipients to espouse a "substantive position prescribed by the government in advance" while the government in *Garcetti* did not require its employees to promote such a message.[187] In *Garcetti*, Ceballos worked as a deputy district attorney, and there was no prearranged government message for him to present.[188] Conversely, in *Rust*, there was a coherent government message which all recipients were to follow.[189] Specifically, health care workers receiving Title X funds were required to espouse a certain message prescribed by the government regarding abortion and birth control.[190]

Academic speech is less analogous to the speech of traditional public employees because universities do not hire academics to promote a specific government message.[191] Universities provide funding to academics to teach and produce scholarship.[192] Universities do not exercise control over academic scholarship and teaching the way a traditional public employer exercises control over its employees.[193] Indeed, contrary to *Garcetti,* an academic's status as a public employee is more similar to the public funding of lawyers described in *Velazquez*, where the government provided federal funding to lawyers offering free legal services to indigent clients.[194] The Court explained that the lawyers receiving the government funding were not speaking as agents of the government because

185. *Id.*

186. *Id.*

187. *See id.*

188. *Id.*

189. *See* Rust v. Sullivan, 500 U.S. 173, 178–81 (1990).

190. *See id.*

191. *See* Bezanson & Buss, *supra* note 147, at 1436 (observing that academic tenure is a process "clearly not governed by an intention of the [university] to speak an independent message through the voices of approved faculty scholarship"); Secunda, *supra* note 147, at 1813 ("[N]o one would seriously argue that public university professors are hired to parrot a particular government message.").

192. *See* Bezanson & Buss, *supra* note 147, at 1435.

193. *See* Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 911 (2006) ("[A]n employee of the district attorney's office . . . might be required in the course of her job as a lawyer to make certain arguments and avoid others . . . [but] such restrictions may not be constitutionally permissible for academics when engaged in their academic activities . . . .").

194. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536 (2001).

Congress gave the money to the lawyers to convey private messages.[195] Academics employed by public universities are also not speaking as agents of the government because the university provides them with a salary to convey private messages in the form of their scholarship.[196]

The Court also noted in *Velazquez* that government restrictions on the speech of lawyers receiving federal funding prevented these lawyers from engaging in their "traditional role" as an advocate.[197] Similar to *Velazquez*, when the government is able to exercise complete control over academic speech, it destroys the fundamental function of a university—to advance academic freedom.[198]

Moreover, analyzing academic speech closely under the government speech doctrine, it is apparent that academic speech does not represent true government speech because the university does not disseminate a coherent message.[199] Instead, the government is funding faculty to act as private speakers and to create private messages through their scholarship.[200] In the public employee speech context, the government hires public employees to promote a governmental message, and the government regulates this message.[201] For example, in a state attorney general's office, the state does not hire assistant attorneys general to promote their own policy preferences or objectives, but rather to assist the attorney general in carrying out the policies of the office and the interests of the state.[202]

195. *See id*. at 540–43.

196. *See* Elrod, *supra* note 10, at 64 ("[Professors] are paid to develop theories and to speak, write, and teach about their intellectual labors in all steps of the creation, dissemination, and reformulation of those ideas.").

197. *See Velazquez*, 531 U.S. at 544 ("Restricting [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys . . . .").

198. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995) (explaining that universities serve as "vital centers for the Nation's intellectual life").

199. *See* Elrod, *supra* note 10, at 63 ("The university environment is one that invites and encourages verbal exchanges, including those that are filled with disagreement and disputations between and among those who work, visit, and study there.").

200. *See id.* at 64.

201. *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

202. This fact pattern is similar to the situation in *Garcetti*, in which the

The public employer continuously regulates the content of its employees' speech to ensure that assistant attorneys general align their speech with the policies of the office.[203] Contrary to this situation, when public universities hire faculty, these faculty are not hired for the sole purpose of speaking for the government—specifically, the public university.[204] While faculty members may be required to assist the government in promoting and fostering an environment of scholarly learning, the public university hires them with the intent that they will teach and engage in scholarship.[205]

Applying the principles of academic freedom, the university often does not regulate the content of faculty members' teaching and scholarship.[206] Although the university regulates the teaching and scholarship of academics in terms of tenure and promotion decisions, the regulation of an academic's work is not subject to the same kind of scrutiny as public employees working in other government entities. If academics' scholarship were subject to regulation by the government, academic freedom—something the Supreme Court has acknowledged as existing within the public university—would be jeopardized.[207]

In addition to considering the amount of control government employers have over the messages disseminated by public employees, it is also important to consider why such control is necessary in most government entities, but not in the public university. The Court explained in *Garcetti* that editorial control is necessary to ensure that the government can clearly communicate its policies without interference from subordinate employees and that the government can effectively carry out its

public employee was a deputy district attorney. *See id.* at 422 ("When [Ceballos] went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.").

203. *See id.* at 423–24.

204. *See* Elrod, *supra* note 10, at 64.

205. *See id.*

206. *See* Schauer, *supra* note 193, at 911 ("It is often claimed that a teacher or professor has an individual right against her public educational institution to teach (and *a fortiori*, to write) what she pleases in the classroom, regardless of instructions to the contrary from department chairs, principals, deans, presidents, and even . . . faculty committees.").

207. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (explaining the importance of academic freedom and the existence of a marketplace of ideas in the public university); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (explaining the importance of intellectual freedom within the public university).

public services.[208] The public employee speech doctrine fails to consider the fact that the policies of the public university may differ from those of other government entities.

The public university is vastly different from any other government entity.[209] When students attend a public university, they enter with the intent to receive an education.[210] The university serves as a marketplace of ideas.[211] Within this institution, academics present students with a "robust exchange of ideas" in an effort to further this marketplace.[212] If this is the purpose of the modern public university, then government control over the ideas presented by academics makes no sense. For these reasons, it is difficult to conclude that the university acts as a coherent messenger for the purposes of disseminating a specific message.

C. USING THE PUBLIC FORUM DOCTRINE TO REGULATE THE CONTENT OF SPEECH

The government cannot engage in viewpoint discrimination when it creates a public forum.[213] But the government can engage in permissible content regulation when this regulation preserves the purpose of the forum.[214] When considering the amount of control universities can exercise over speech within the institution, courts often resort to a forum analysis because the university most closely represents a public forum created by the government.[215] Using a forum analysis, the government can engage in permissible content discrimination.[216]

208. *See Garcetti*, 547 U.S. at 418–19.

209. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that given the important purpose of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

210. *See Keyishian*, 385 U.S. at 603.

211. *See id.*

212. *Id.*

213. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (explaining that the state may not engage in viewpoint discrimination in a "limited public forum . . . of its own creation").

214. *See id.* at 830 ("[C]ontent discrimination . . . may be permissible if it preserves the purposes of [a] limited forum . . . [unlike] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

215. *See, e.g.*, *id.* at 829–30 (applying a forum analysis to a university student activities fee system).

216. *See id.* at 830.

Public universities have tenure requirements for their faculty members, and when academics employed by these institutions do not meet such requirements, the universities can terminate their employment.[217] Public universities must be able to regulate the quality of the scholarship produced by faculty members or else public universities would be forced to continue to employ mediocre faculty.[218] Content regulations allow the university to regulate the quality of academic speech. The university tenure process is similar to the process employed by the NEA in *Finley* in that both institutions consider the quality of an applicant's work in determining whether to convey tenure or a grant, respectively.[219]

Finley does not provide a clean analogy to the university tenure situation, however, because the Court did not address whether Congress created a forum when it created funding for the arts.[220] *Finley* suggests, though, that the government can make distinctions based on the content of speech in certain circumstances.[221] Like the competitive grant-application process in *Finley*, university tenure and promotion decisions are also a competitive process. Further, as in *Finley*, the use of content-based considerations within the tenure process is a consequence of the process itself. Professors within academic departments must make subjective evaluations of fellow professors' tenure applications. While these evaluations often use certain fixed criteria, the nature of the process leads to content-based evaluations.

217. *See* Bezanson & Buss, *supra* note 147, at 918.

218. *See id.* (arguing that there is "little doubt" that a public university would be able to deny employment or tenure to a professor who taught conspiracy theories about *Brown v. Board of Education*).

219. *See* Randall P. Bezanson, *Performing Art:* National Endowment for the Arts v. Finley, 60 FED. COMM. L.J. 535, 574 (2008) ("Public university faculties make tenure decisions in much the same fashion as the NEA panels, and those decisions are explicitly focused on the quality of published scholarship (including art or music or dance) and the quality of (the art of?) teaching."); Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finley *and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 978 (1998) ("[T]he NEA's claim was even closer to that of a university selecting faculty for tenure, a highly discretionary judgment deeply imbedded in process, distributed to assigned decision makers, and geared toward favoring certain forms of quality and content in the expressive interest of pursuing the institution's teaching or research goals.").

220. *See* Brownstein, *supra* note 126, at 788 (discussing the "nonforum analysis" used by the Court in *Finley*).

221. *See id.*

In general, applying the public speech doctrine to academic speech is inappropriate because the university acts more like a public forum for the dissemination of various messages articulated by academics instead of a coherent messenger of a government message. Given the university's strong resemblance to a public forum in this regard, it makes sense that courts should treat speech occurring within this forum-like setting differently than public employee speech.

III. USING THE PUBLIC FORUM DOCTRINE TO DETERMINE FIRST AMENDMENT PROTECTION FOR ACADEMIC SPEECH

The public employee speech doctrine is not an appropriate doctrine for regulating academic speech in public universities, as academic speech does not represent pure government speech. Academic speech does not represent pure government speech because the public university does not act as a coherent messenger requiring its faculty members to disseminate a specific message. Despite this difference, academic speech is not necessarily private speech, as the public university is a government entity, and the government provides faculty members with a forum in which to disseminate their speech. Drawing on public forum jurisprudence, this Part proposes a model for government regulation of academic speech. This Part explains that the public forum doctrine, instead of the public employee speech doctrine, should regulate academic speech. A forum approach to academic speech would balance the interests of both the government and academics by allowing the public university to regulate the *content* and *quality* of faculty members' speech but not the viewpoint of such speech.[222] Finally, this Part contends that using the public forum doctrine to regulate academic speech is more consistent with First Amendment jurisprudence.[223]

222. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

223. *See* Nahmod, *supra* note 85, at 68 ("[A] lack of First Amendment protection [for professional academic freedom] would be inconsistent with the democracy-promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge.").

A. THE PUBLIC FORUM MODEL AND ACADEMIC SPEECH

Academic speech requires a substantial amount of protection under the First Amendment, but there are legitimate reasons for government regulation of this speech. The public university hires faculty to teach specific courses, and it expects faculty to teach these courses.[224] The public university also should not grant tenure to or promote an academic who does not produce scholarship that meets the scholarly standards of the academic's respective discipline.[225] Given the public university's interest in supervising academic speech and protecting academics' First Amendment interests, any model regulating academic speech must balance these competing interests. Under the public forum model, the type of forum would dictate the level of constitutional scrutiny given to restrictions placed on academic speech by a public university. Often, faculty will find themselves in a limited public forum.[226] Using the Court's reasoning in *Rosenberger* and *Finley*, the university can impose content and quality regulations on speech within this forum, but the university cannot discipline faculty for their viewpoints.[227]

The need for a distinction between viewpoint regulation and content or quality regulation is important.[228] Content regu-

224. William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 218–19 (1999) ("Of course, no one argues that when I am hired to teach Constitutional Law, I may go into the classroom . . . and teach Estate Planning.").

225. *See* Nahmod, *supra* note 85, at 73 ("[T]here are also legitimate educational constraints on professorial scholarship under the First Amendment. Perhaps the main constraint is scholarly standards. The university as employer is surely entitled to evaluate a professor's fitness through the application of well-established scholarly standards.").

226. *See, e.g.*, *Rosenberger*, 515 U.S. at 828–30 (holding that a public university created a limited public forum when it created a student fee system to fund student organizations); Widmar v. Vincent, 454 U.S. 263, 267–68 (1981) (holding that public university facilities are limited public forums when the university opens these facilities to student groups).

227. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 571 (1997) (finding that a "content-based [artistic] 'excellence' threshold" in public arts funding does not threaten impermissible viewpoint discrimination); *Rosenberger*, 515 U.S. at 830 ("[C]ontent discrimination . . . may be permissible if it preserves the purposes of [a] limited public forum . . . [unlike] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

228. *See* Elrod, *supra* note 10, at 4 ("[I]f the principles of academic freedom, the fundamental democratic values of the First Amendment, the purposes of public higher education, and the functions of a professor are to coexist meaningfully, then the speech of public university academics, directly related to

lations would allow the university to discipline the faculty member who does not teach material related to the specific course they are required to teach.[229] The obvious situation would be when a university hires a law professor to teach civil procedure and they teach business associations instead.[230] A more subtle and common situation occurs when the university hires a law professor to teach constitutional law, but instead, he or she decides to spend most of the time discussing criminal rights.[231] Further, quality regulations would allow a public university to discipline or terminate the employment of a faculty member whose scholarship does not meet the scholarly requirements of his or her respective discipline[232] or whose teaching does not meet an acceptable level of quality.[233]

There are at least three notable benefits to using a forum analysis to regulate academic speech. First, a forum analysis does not require scholars and jurists to determine whether academic freedom is a constitutional right. Though a significant amount of literature debates the merits of academic freedom as a constitutional right,[234] the public forum analysis only requires that academics not disseminate a coherent message from the government. If academics' messages became coherent mes-

their area of scholarship, must be afforded ample 'breathing space,' even if this requires a new or unique subcategory of speech: academic speech."); Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1082 (2003) ("After finding that the academic speech lies within the state's managerial domain, a court should ask whether the restriction of the professor's speech is functionally necessary to accomplish the university's goals.").

229. *See* Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 967 (2006) ("By definition, curricular decisions are a form of subject matter discrimination. A university's requirement that its chemistry professors teach organic chemistry, and not political science, is content based . . . .").

230. *See id.*

231. *See id.*

232. *See id.* ("Universities and professors also regularly engage in all sorts of content discrimination in the evaluation of the work of the faculty and the student body.").

233. *See id.*; Schauer, *supra* note 193, at 917 ("A university could certainly take adverse employment action against a professor who is inarticulate and confusing in his classroom delivery or whose scholarly arguments are gibberish, illogical, or not based on sound research. That is surely content-selectivity—it involves base discrimination against bad teaching, poor research, and incoherent writing.").

234. *See, e.g.*, Byrne, *supra* note 140, at 256–58; DeMitchell & Connelly, *supra* note 140, at 83.

sages attributed to the government, then the speech would fall under the purview of the government speech doctrine.[235]

Second, a forum analysis avoids the complications posed by creating an exception to *Garcetti* for academic speech. Even with such an exception, academics would still have to contend with the public concern test established by *Pickering* and *Connick*.[236] Such a restriction could compromise academic speech. A forum analysis avoids this problem.

Third, existing First Amendment jurisprudence supports using a public forum analysis to regulate academic speech. Courts frequently apply a forum analysis to consider whether public university regulation of speech, especially student speech, is permissible under the First Amendment.[237] Consideration of the government speech doctrine clearly demonstrates that academic speech does not fall within the purview of this doctrine, as the public university is not a coherent messenger of a government message. Rather, the public university is more akin to a forum where the government funds academics to disseminate private messages. The public forum doctrine, therefore, is a more appropriate doctrine for regulating academic speech.

Despite these benefits, the use of a public forum analysis is not without criticism. Critics of a distinction between viewpoint and content regulations for academic speech explain that public university administrators should be able to discipline professors for espousing views that are contrary to generally accepted ideas,[238] even if this results in viewpoint discrimination.[239] Under this view, for example, a public university could discipline a

235. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006); Rust v. Sullivan, 500 U.S. 173, 193–94 (1990).

236. *See* Connick v. Myers, 461 U.S. 138, 146 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968).

237. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995).

238. *See* Schauer, *supra* note 193, at 918 (explaining how a distinction between content and viewpoint regulation of academic speech would mean that "a law professor may be sanctioned for teaching torts in her Constitutional Law class [but not] be sanctioned for teaching that *Plessy v. Ferguson* was rightly decided or that the First Amendment is a fundamentally bad idea").

239. *See id.* ("Consider the case in which, whether in class or in an academic book or article, a professor argues that the decision in *Brown v. Board of Education* was the product of a conspiracy among the Communist Party, the NAACP, and the Jews. There should be little doubt that espousing such a viewpoint would be permissible grounds for non-hiring, and permissible grounds for non-tenuring.").

faculty member who discussed in his courses and scholarship that the United States government carried out the terrorist attacks on September 11th.[240] Under a forum analysis, this would be an instance of viewpoint discrimination, even if this idea were contrary to the generally accepted fact that terrorists carried out the events of September 11th. Therefore, the university could not regulate this speech.[241] There are problems with this critique, though. By contrast, if public universities are able to suppress the speech of those who express ideas contrary to generally accepted ideas, then the university is guilty of silencing the "marketplace of ideas."[242] Often, if an idea is not widely accepted, superior ideas will eventually silence it as an inferior idea.[243] More directly, the forum analysis also allows dissident ideas within a discipline to be overcome. Moreover, when the university considers the academic expressing the dissident idea for tenure or promotion, the university will be able to engage in content and quality discrimination when evaluating the academic's scholarship and teaching in accordance with the discussion above.[244]

B. APPLYING THE PUBLIC FORUM MODEL TO OTHER INSTITUTIONS

Using a public forum model to balance the First Amendment interests of faculty members and the interests of the public university would still allow the government to exercise an extensive amount of authority over speech in other public educational settings such as elementary and secondary schools. The interests and functions of elementary and secondary schools are vastly different from the functions of the public university.[245] Current First Amendment jurisprudence recog-

240. *See, e.g.*, Melissa Sowry, *Lecturer Under Fire for 9/11 Conspiracy Belief*, ABC NEWS, July 25, 2006, http://abcnews.go.com/US/Story?id=2233348&page=1.

241. *See Rosenberger*, 515 U.S. at 828–30 (barring viewpoint discrimination in a limited public forum).

242. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Teachers and students must always remain free to inquire, to study and to evaluate . . . .").

243. *See id.*

244. *See* Chen, *supra* note 229, at 967.

245. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 117 (1998) ("Although not all, and not even most, educational institutions are research universities, a wide sociological, cultural, and functional gulf exists between the primary or secondary school and the research university.").

nizes these differences and uses them to regulate speech within these two different settings accordingly.[246] Consequently, the government will always be able to regulate the content of speech within grade schools.

Courts frequently classify forums within elementary and secondary schools as nonpublic forums because schools often limit speech within these schools.[247] This limitation is appropriate because the age of the students within these schools gives the government a legitimate reason to limit speech therein.[248] This classification limits the speech of both students and teachers. In regards to students, the Supreme Court restricted students' speech rights in nonpublic forums when it held in *Hazelwood* that school publications were nonpublic forums, and therefore, the school could regulate the content within these publications as long as the regulation reasonably related to "legitimate pedagogical concerns."[249] Lower federal courts also use the reasoning in *Hazelwood* to limit the free speech rights of secondary school teachers.[250] As a result, the speech of secondary school teachers, unlike speech in public universities, is more likely to be the speech of the government.[251] Unlike academics in public universities, teachers in elementary and secondary schools do not have a significant amount of control over the curriculum within their classroom.[252] State legislatures and

246. *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 238 n.4 (Souter, J., concurring) ("[C]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in higher education." (citations omitted)).

247. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–70 (1998).

248. *See id.* at 271 ("Educators are entitled to exercise greater control over . . . student expression [in high school sponsored activities] to assure that . . . [student] readers or listeners are not exposed to material that may be inappropriate for their level of maturity.").

249. *See id.* at 273.

250. *See* Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 66–67 (2008) ("*Hazelwood* has often served as a basis for substantially restricting teachers' First Amendment rights in the classroom.").

251. *See, e.g.*, R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 825 n.180 (2007) (identifying major cases in which federal courts deemed elementary and secondary teachers' speech to be government speech).

252. *See* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) ("[N]o court has found that [primary and secondary school] teachers' First Amendment rights extend to choosing their own curriculum . . . in contravention of school policy or dictates.").

local school boards make most curricular choices in elementary and secondary schools.[253] These curricular choices include textbook selection and course content. Conversely, at the university level, individual faculty members handle most of these decisions.[254] Given the limited free speech rights of elementary and secondary education teachers, there is not a strong basis to argue that grade schools create forums for teachers to deviate from the established curricular plan or to integrate their own views into the classroom.

CONCLUSION

Applying the public employee speech doctrine to academic speech is inappropriate. When the government creates a public university, part of the bargain is academic freedom. Although the source of academic speech is the government because the government paid for the speech, academic speech is not necessarily analogous to traditional public employee speech. The public university is not a coherent messenger of government speech, but rather, more like a public forum for the dissemination of various private messages. Consequently, courts should apply a public forum analysis instead of the public employee speech doctrine to academic speech to determine whether regulation by public universities of academic speech is permissible under the First Amendment. A public forum approach to academic speech is more appropriate under current First Amendment jurisprudence. Overall, this approach balances the interests of both the public university in regulating its employees and the First Amendment interests of academics while safeguarding the important principle of academic freedom.

253. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) ("This Court has long recognized that local school boards have broad discretion in the management of school affairs.").

254. *See* Chen, *supra* note 229, at 967.