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Teaching for America: Unions and Academic Freedom

Charlotte Garden

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INTRODUCTION

MUCH of the current controversy regarding the rights and responsibilities of public-sector employees and their unions has focused on elementary and secondary school teachers. On one side of that controversy, critics of teachers and their unions argue that teachers are overpaid civil servants and that their unions' focus on wages and working conditions comes at the expense of students' learning. On the other side, teachers' unions and their supporters focus on the unique role educators play in forming the next generation of citizens and the need to adequately support teachers in fulfilling that role. Implicit in this discourse are two distinct characterizations of teachers: as governmental employees following directives laid down by school boards and principals; and as semi-free agents charged with expertly carrying out a democratic mission. While these characterizations are not mutually exclusive, they implicate different values that can stand in tension with one another. For example, if teachers are characterized primarily as governmental employees, employers' directives will be paramount in determining how teachers should perform their jobs, even when they are ill-advised; on the other hand, if teachers are characterized primarily as agents of democracy, students' interests, together with those of society writ-large, will be the focus.

These discursive strands are also present in courts' treatment of teachers' First Amendment rights. Some decisions focus on teachers as employees whose work performance is subject to employer control. Others find significance in teachers' democratic role and focus on the fact that teachers are charged with implementing the vision and values of their communities as articulated by elected school board members. Many courts combine these two strands to articulate a particularly narrow scope of teachers' First Amendment rights, disregarding tensions between the strands.

These decisions are of great relevance to the present debate regarding the proper role of teachers. First, the decisions themselves reflect the competing values implicated in that debate. Second, the limits that courts impose on

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teachers' speech rights in and out of the classroom affect the educational goals that teachers may choose to pursue and the means they use to achieve them. Teachers' classroom performances can alter public (and judicial) expectations regarding the role of teachers more generally, leading to a self-reinforcing cycle. Third, if teachers can no longer unionize and bargain with their employers to protect their speech in the classroom, the First Amendment's floor of protection will become increasingly important.

I begin this article by describing the existing First Amendment protection for teachers' curricular speech by exploring three cases upholding school districts' decisions to punish teachers for teaching controversial material. I then suggest that because existing precedent does not offer meaningful protections for teachers' speech, collectively bargained protections for academic freedom may be the best available method for shielding teachers who make reasonable pedagogical decisions delegated to them by school administrators. Finally, I conclude the article by proposing that collectively bargained academic freedom provisions can serve the best interests of not just teachers, but also students, parents, and school boards.

I. THE DEBATE OVER TEACHERS AND TEACHERS' UNIONS

Public-sector employees generally—and especially teachers—are increasingly under public scrutiny. Much of this scrutiny has focused on teacher tenure, a phrase that encompasses a set of due-process protections for teachers, including the provision that they can be fired only for cause.[1] For example, such diverse media outlets as *The New Yorker*[2] and the *Wall Street Journal*[3] have criticized teacher tenure as protecting incompetent—or worse, abusive—teachers. Other media attention has focused on whether teachers' pay and benefits are inflated compared to what they might receive in comparable private sector jobs.[4] Relatedly, teachers and teachers' unions are losing their position as valued political constituencies, or at the very least, many politicians have concluded that the benefits of pursuing policies that teachers oppose are worth risking losing teachers' support. For example, New Jersey governor Chris Christie made political hay out of his bad relationship with the New Jersey

1. BLACK'S LAW DICTIONARY 1481 (7th ed. 1999) (defining "tenure" as "a status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause").

2. *See* Steven Brill, *The Rubber Room: The Battle Over New York City's Worst Teachers*, NEW YORKER, Aug. 31, 2009, at 20.

3. *See* Fran Tarkenton, *What if the NFL Played by Teachers' Rules?*, WALL ST. J., Oct. 3, 2011, at A17.

4. *E.g.*, Andrew G Biggs & Jason Richwine, *Average Public School Teacher Is Paid Too Much*, U.S. NEWS & WORLD REP., Nov. 9, 2011, http://www.usnews.com/debate-club/are-teachers-overpaid/average-public-school-teacher-is-paid-too-much; John Stossel, *20/20: Myth: Teachers Are Underpaid* (ABC television broadcast May 12, 2006), http://abcnews.go.com/2020/Stossel/story?id=1955153. *Cf.* Valerie Strauss, *Are School Teachers Paid Too Much?*, WASH. POST, Nov. 1, 2011, at B2.

teachers' union,[5] and got spontaneous applause after he told a teacher that if she was unhappy with her salary, she should quit her job.[6] Republicans are not alone in alienating teachers—under President Obama, Education Secretary Arne Duncan has implemented a series of plans, including the showcase Race to the Top Initiative, which the National Education Association has condemned as "appall[ing]."[7]

Closely related to this phenomenon, a number of states are pursuing reform efforts that would limit or eliminate teacher tenure, reduce teachers' pay and benefits (often along with the benefits of other public-sector employees), require teachers to work longer hours, and limit the abilities of teachers and public-sector employees to bargain collectively.[8] In Illinois, Governor Pat Quinn recently signed a law requiring teachers to work a longer school day and making it more difficult for teachers to vote to strike.[9] In Providence, Rhode Island, the mayor fired all 1,926 public school teachers—though many could expect to be rehired,[10] the symbolism behind this gesture was unmistakable.[11] Florida enacted a bill that, among other things, excludes new teachers from "just cause" protections from firing, limits teachers' collective-bargaining rights, and ties teacher compensation to student performance on statewide tests.[12] Perhaps the most well-known reform effort, Wisconsin's so-called "Budget Repair Bill," substantially limited collective bargaining rights for select public-sector workers, including teachers.[13] And in Ohio, Senate Bill 5—later repealed by voters—would have limited teachers' and other public-sector workers' collective bargaining rights, banned public employee strikes, and imposed benefit cuts,

5. Bradley Blackburn, *New Jersey Governor Chris Christie Calls His State's Teachers Union "Political Thugs,"* ABC NEWS (Apr. 6, 2011), http://abcnews.go.com/Politics/jersey-governor-chris-christie-calls-teachers-union-political/story?id=13310446#.Tr165_Qr2so.

6. The Moderate Voice, *Chris Christie Tells Teacher She Doesn't Have to Teach*, YOUTUBE (May 26, 2010), http://www.youtube.com/watch?v=aw0aBkt8CPA&feature=player_embedded.

7. Amy Bingham, *Teachers' Union Endorses Obama Despite Hating His Politics*, ABC NEWS (July 6, 2011), http://abcnews.go.com/Politics/obama-passes-teachers-testbarely/story?id=14003658.

8. 115 ILL. COMP. STAT. ANN. 5/13(b)(2.10) (LexisNexis 2011) (requiring a strike vote of 75% of bargaining unit members); Trip Gabriel, *Teachers Wonder, Why the Scorn?*, N.Y. TIMES, Mar. 3, 2011, at A1, *available at* http://www.nytimes.com/2011/03/03/education/03teacher.html?emc=eta1; S.B. 736, 2011 Leg., 113th Sess. (Fla. 2011) (enacted).

9. 115 ILL. COMP. STAT. ANN. 5/13(b)(2.10).

10. Amanda Paulson, *Rhode Island School to Rehire Fired Teachers, Shelving Drastic Plan*, CHRISTIAN SCI. MONITOR, May 17, 2010, http://www.csmonitor.com/USA/Education/2010/0517/Rhode-Island-school-to-rehire-fired-teachers-shelving-drastic-plan.

11. Gabriel, *supra* note 8, at A1.

12. S.B. 736, 2011 Leg., 113th Sess. The Florida Education Association has filed a lawsuit claiming that the law violates Florida's Constitution. *See generally* Complaint, Robinson v. Robinson, Case No. 2011-CA-2526 (Fla. Cir. Ct. Sept. 14, 2011), *available at* http://www.meyerbrookslaw.com/documents/Robinson%20vs%20Robinson/Robinson_v_Robinson_Complaint.pdf.

13. A. 40, 2011-2012 Leg. (Wis. 2011) (enacted); *Wisconsin Act 10*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Wisconsin_Act_10,_the_%22Scott_Walker_Budget_Repair_Bill%22_%282011%29 (last visited Mar. 19, 2012).

among other measures targeted at teachers' pay and working conditions.[14] While reform attempts in these states were among the most publicized, they were far from the only state-law reforms targeting public-sector employees; such measures were either proposed or enacted in a number of other states.[15]

As teachers' statutory and contractual protections—including their statutory rights to bargain collectively with their employers—are eroded, their constitutional rights will become increasingly relevant. In other words, as it becomes less likely that teachers will benefit from protections beyond those established by the Constitution, the precise location of the constitutional floor becomes more important.

In the next section, I will trace the contours of a teacher's First Amendment rights, which will become increasingly relevant as various legal reforms render teachers' unions unable to negotiate contractual protections for teachers' classroom speech.

II. THE LAW GOVERNING TEACHERS' SPEECH RIGHTS

One might expect the federal Constitution to play a significant role in protecting teachers' classroom speech. After all, it is well-established that public employees do not give up their First Amendment rights in exchange for their paychecks.[16] And, compared to other public-sector employers, it is intuitively more likely that teachers will need to invoke their First Amendment rights: not only do teachers speak for a living, but parents may be particularly attuned to perceived professional missteps regarding their children's education, and therefore more likely to report teachers' arguably poor performance than that of other public employees.

Unsurprisingly, there exists a substantial body of law regarding teachers' First Amendment rights.[17] Cases involving teachers and the First Amendment have arisen most often in the context of curricular speech, which is the primary focus of this article.

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14. S.B. 5, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted but overturned by voter referendum), *available at* http://www.legislature.state.oh.us/BillText129/129_SB_5_EN_N.pdf. *See also* Laura A. Bischoff, *Stakes High for Both Sides in SB 5 Battle*, DAYTON DAILY NEWS, Sept. 18, 2011, http://www.daytondailynews.com/news/politics/stakes-high-for-both-sides-in-sb-5-battle-1255054.html (describing provisions of SB 5).

15. *See, e.g.*, Trip Gabriel & Sam Dillon, *G.O.P. Governors Take Aim at Teacher Tenure*, N.Y. TIMES, Feb. 1, 2011, at A1, *available at* http://www.nytimes.com/2011/02/01/us/01tenure.html ("Governors in Florida, Idaho, Indiana, Nevada and New Jersey have called for the elimination or dismantling of tenure."); Neil King, Jr. et al., *Political Fight Over Unions Escalates*, WALL ST. J., Feb. 22, 2011, at A1, *available at* http://online.wsj.com/article/SB10001424052748703800204576158851079665840.html.

16. *E.g.*, Garrity v. New Jersey, 385 U.S. 493, 500 (1967) ("[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.").

17. *See generally* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968); Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332 (6th Cir. 2010); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007); Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998).

A. *Background: Public Employees' First Amendment Rights Generally*

The scope of public employees' First Amendment rights has evolved considerably since Justice Holmes—then speaking for the Supreme Judicial Court of Massachusetts—famously stated that a police officer who lost his job after having engaged in political activity "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[18] In this section, I will review briefly modern Supreme Court case law assessing the extent to which public employee speech is generally protected by the First Amendment.

1. Pickering v. Board of Education

The Court's modern doctrine begins with *Pickering v. Board of Education of Township High School District 205*.[19] *Pickering* involved a teacher who successfully submitted a letter for publication to the editor of a local newspaper.[20] The letter arrived on the editor's desk in the wake of four public votes on a series of proposed bond initiatives and tax increases designed to raise money for the public school district.[21] Only one of the four passed, and the money raised as a result had been earmarked to build two new schools.[22] The last of the four votes had been contentious, and in the lead-up to it, the local paper had published "a variety of articles attributed to the District 205 Teachers' Organization," which encouraged the public to vote in favor of the proposal.[23]

Mr. Pickering's letter addressed this chain of events.[24] Among other things, it insinuated that the School District had misused funds allocated through the second bond initiative to build a school auditorium and athletic field.[25] It also charged that the letters attributed to the District 205 Teachers' Organization had misstated some key facts and omitted others, and that in any event, they did not represent the views of most teachers.[26] Finally, Pickering launched a broad attack on the School District's priorities, suggesting that District 205 prioritized athletics over ensuring that teachers had adequate resources with which to meet

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18. McAuliffe v. Mayor and Bd. of Alderman of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

19. *See generally Pickering*, 391 U.S. 563.

20. *Id.* at 575-78.

21. *Id.* at 565-66.

22. *Id.*

23. *Id.* at 566.

24. *Id.* at 575-76.

25. *Id.* The letter specifically noted:

> Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky.

Id.

26. *Id.* at 576.

students' basic instructional needs.[27] He closed his letter by charging that the Board of Education was "trying to push tax-supported athletics down our throats."[28] He also explained that he was signing his letter in his capacity as a citizen, rather than a teacher, because "that freedom [to sign letters critical of the school district in his capacity as a teacher] has been taken from the teachers by the administration."[29]

Unsurprisingly, the School Board of District 205 was displeased by Pickering's letter, and it fired him from his teaching position shortly after discovering the letter.[30] Following a mandatory hearing, the Board (which itself conducted the hearing) concluded that Pickering's termination was justified because the letter contained false statements of fact, which would damage the reputation of school officials and administrators and could disrupt teacher discipline.[31] However, the District did not find that the letter had *already* disrupted school discipline or that the letter had any particular effect on the community or the school district.[32]

Pickering unsuccessfully appealed his termination up through the Illinois state courts, before reaching the United States Supreme Court.[33] The Supreme Court reversed, holding that the decision to terminate Pickering in retaliation for his letter to the editor violated his First Amendment rights.[34] The Court's holding rested primarily on two conclusions: first, that Pickering's letter was "greeted ... with massive apathy and total disbelief;"[35] and second, that "the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration ... cannot, in a society that leaves such questions to popular vote, be taken as conclusive."[36] Thus, the Court summarized the case, and its holding, as follows:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public

27. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 577-78 (1968) (reporting that the District was providing free lunches for athletes on game days, paying to transport teams to and from matches, and paying for coaches' salaries and sports equipment while "neglecting the wants of teachers" and failing to make needed physical improvements to school facilities).

28. *Id.* at 578.

29. *Id.*

30. *Id.* at 566.

31. *Id.* at 567.

32. *Id.*

33. *Id.*

34. *Id.* at 575.

35. *Id.* at 570.

36. *Id.* at 571.

> debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[37]

Put another way, the *Pickering* Court concluded that when a public school teacher speaks in his capacity as a citizen, his employer may not punish him in his capacity as teacher, at least when the speech does not disrupt the orderly administration of government.[38] When the same speech disrupts the employer's operations, however, then courts must balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[39]

Thus, the *Pickering* decision accomplished two key things. First, it established that public employees sometimes speak as citizens, and sometimes speak as public employees—and on which side of that line a particular utterance falls is critical to determining whether the speaker can be punished by his or her employer. Second, even when public employees speak in their capacities as citizens, their governmental employers can nonetheless punish their speech if it is sufficiently disruptive.

On the other hand, *Pickering* left open at least two important questions. First, upon which subjects might public employees' speech qualify as matters of public concern? Second, what protection is available to individuals who speak in their capacities as employees? The Court turned to those questions in two subsequent cases.

2. Connick v. Myers

Whereas *Pickering* started with a teacher writing a letter to an editor, *Connick* started with an Assistant District Attorney in New Orleans, Shelia Myers, circulating a questionnaire to her officemates.[40] She did so after learning that she was to be transferred to prosecute cases in a less desirable section of the criminal court.[41] After hearing of the impending transfer, Myers attempted to obtain relief from her supervisors.[42] However, when that failed, she prepared and circulated within her office a questionnaire seeking her co-workers' views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[43] Myers's supervisors quickly learned that she had distributed the questionnaire, an act that one supervisor referred to as "creating a

37. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 572-73 (1968).

38. *Id.* at 574 ("Absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

39. *Id.* at 568.

40. Connick v. Myers, 461 U.S. 138, 140-41 (1983).

41. *Id.* at 140.

42. *Id.* at 140-41.

43. *Id.* at 141.

'mini-insurrection.'"[44] Myers was then fired, in part for resisting the transfer, but also because her distribution of the questionnaire was deemed insubordinate.[45]

The Supreme Court began by addressing whether Myers's questionnaire was speech on a matter of public concern,[46] which was to be determined based on "the content, form, and context of a given statement, as revealed by the whole record."[47] Conducting that inquiry, the Court concluded that, "with but one exception,"[48] Myers's questionnaire fell short of addressing matters of public concern:

> We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court.... [W]e do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celèbre.[49]

Thus, the Court gave at least a partial answer to the first question left open in *Pickering*: matters of public concern include, at minimum, the performance of elected officials; allegations that governmental entities are failing to discharge their duties; breaches of the public trust; and whether an agency is efficiently performing its duties. Accordingly, the Court concluded that Myers's question about whether employees ever felt pressured to work on political campaigns

44. *Id.*
45. *Id.*
46. *Id.* at 143.
47. *Id.* at 147-48.
48. *Id.* at 148.
49. *Id.*

addressed an issue of public concern.[50] In contrast, matters of purely private concern include individual employees' workplace disputes with their managers.[51]

Because Myers's questionnaire included some material that spoke to a matter of public concern, the Court engaged in *Pickering* balancing.[52] There, the Court concluded that Myers's side of the scale was light: her speech involved a matter of public concern only tangentially, and moreover, her questionnaire was distributed only at her workplace, during working hours.[53] Further, it was fueled by a workplace dispute instead of "purely academic interest."[54] Thus, the Court concluded that the District Attorney acted within his rights when he fired Myers.[55]

Accordingly, *Myers* established that, subject to limited exceptions, speech about employment disputes receives very little protection—only rarely will it be deemed a matter of public concern. This is consistent with the Court's conclusions in other First Amendment contexts that speech about work—especially speech about pay and other working conditions—is of less social significance than speech about other types of social issues.[56]

3. Garcetti v. Ceballos

Finally, in *Garcetti v. Ceballos*, the Court addressed speech falling within the scope of a public employee's job duties.[57] The dispute that gave rise to the case began when Richard Ceballos, a deputy district attorney for Los Angeles County, came to believe that an affidavit used to obtain a search warrant was flawed and possibly based on misrepresentations.[58] Ceballos informed his superiors about his concerns and recommended in a written memorandum that

50. Connick v. Myers, 461 U.S. 138, 149 (1983) (reasoning that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights," and thus that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service.").

51. In this regard, the Court also differentiated personal workplace disputes from those where "an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately." *Id.* at 148 n.8 (citing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979)).

52. *Id.* at 149-50.

53. *Id.* at 152-53.

54. *Id.*

55. *Id.*

56. *Id.* at 146 (noting matters of public concern include "any matter of political, social, or other concern to the community."). I have elsewhere documented that the Court regards speech about working conditions, including speech that occurs when unions publicize labor disputes with employers, as meriting less First Amendment protection than the speech in which other social movements engage. *See generally* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617 (2011); Charlotte Garden, *Citizens, United &* Citizens United*: The Future of Labor Speech Rights?*, 53 WILLIAM & MARY L. REV. 1 (2011).

57. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

58. *Id.* at 414.

the case be dismissed.[59] In response to this memorandum, a meeting was convened at which Ceballos and other representatives of the DA's office, along with members of the Los Angeles Sheriff's office, were present. That meeting became heated, but did not result in dismissal of the charges that arose from the problematic affidavit.[60] Ceballos was later called as a witness for the defense at a motion hearing. At that hearing, Ceballos testified about his concerns, but the defense's motion was denied.[61]

Following these events, Ceballos was reassigned to a different position within the DA's office, transferred to work in another courthouse, and denied a promotion.[62] He then filed suit, alleging that these actions were taken to retaliate against him because he voiced his concerns about the affidavit to his superiors and then, as a consequence, at the court hearing.[63]

Thus, *Garcetti* presented a different issue than *Myers*, as Ceballos's speech was almost unquestionably a matter of public concern. Not only did his speech concern possible police misconduct, but it did so at a time when corruption within the Los Angeles Police Department was already in the news: around the same time Ceballos wrote his initial memorandum, the Rampart Independent Review Panel released a report faulting the LAPD for providing lax supervision, which had resulted in massive police misconduct.[64] However, Ceballos's speech was different in character than either Pickering's or Myers's—whereas their speech unquestionably fell outside the scope of their job duties,[65] his speech was part of what he was paid to do.

The Court began by clarifying the relevant inquiries under *Pickering*: "The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises."[66] The first step turned out to be dispositive—Ceballos was not speaking "as a citizen," when he "wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do."[67] The Court reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[68]

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59. *Id.*

60. *Id.*

61. *Id.* at 414-15.

62. *Id.* at 415.

63. *Id.*

64. *Frontline Rampart Scandal Timeline*, PBS (Mar. 18, 1997), http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html.

65. Myers's speech took place at work, but was nonetheless unquestionably unauthorized.

66. *Garcetti*, 547 U.S. at 418 (citations omitted).

67. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

68. *Id.* at 421-22.

Notably for purposes of this article, the Court did allow for the possibility that the analysis might be different in the context of public education: "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[69] However, the Court left for another day both the likely validity of that argument or the scope of the possible "additional constitutional interests."

Thus, where an employee speaks pursuant to his or her official job duties, the speech is essentially attributable to the government and is therefore subject to governmental control. Moreover, this is the case even if the speech relates to a matter of public concern and is not actually or potentially disruptive, as was true of Ceballos's speech. Finally, this analysis is subject to the caveat that, in an academic setting, there might be additional considerations that are relevant to the First Amendment calculus.

While the Supreme Court has not set forth a comprehensive analysis of teachers' First Amendment rights, the issue has arisen in the lower courts. Those cases are the subject of the next section.

B. Curricular Speech

Consider the following three examples, each of which involves a teacher fired from her job after school administrators received complaints about the teacher's in-class speech.

First, a respected drama teacher selects a play for her class to perform at a state-wide competition.[70] The play "depicts the dynamics within a dysfunctional, single-parent family—a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child."[71] After receiving a complaint from a parent, the school principal transfers the teacher to a different school, in part because of her failure "to follow the school system's controversial materials policy" in staging the play.[72]

Second, in response to a student's question, a teacher informs her class that she honks her car horn in support of protestors calling for an end to the Iraq war. Parents complain to the school administration, which instructs teachers not to take sides in political controversies. The teacher is then fired, apparently in retaliation for her in-class comment.[73]

And third, parents complain that their children were assigned a controversial book. Despite the fact that the school board had purchased the book in the first place, the school decides not to renew the teacher's appointment for the following school year.[74]

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69. *Id.* at 425.

70. Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 366 (4th Cir. 1998).

71. *Id.*

72. *Id.* at 367.

73. Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 478 (7th Cir. 2007).

74. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 335-36 (6th Cir. 2010).

In each of these cases, a federal appeals court held that the school district was entitled to punish the teacher's speech. However, as will be explained in greater detail below, each court's reasoning articulated a slightly different view of the appropriate First Amendment analysis and, in particular, the relevance of the fact that the public-employee plaintiff was a teacher.

1. Boring v. Buncombe County Board of Education

In 1991, Margaret Boring, a high school drama teacher in North Carolina, assigned the play *Independence* to students enrolled in her advanced acting class.[75] The students performed the play at a regional competition where they won 17 of the available 21 awards.[76] Then, before reprising their performance in a state-wide competition, the students performed the play for an English class at Boring's school.[77] Though Boring informed the teacher of that class that the play dealt with mature themes and suggested that students get their parents' permission before seeing the play, a parent of one of the students in the English class nonetheless later complained to the school principal about the play's content.[78] The principal responded by requiring Boring to eliminate portions of the play from future performances; Boring complied with this edict.[79]

But this was not the end of the School District's response; Boring was later transferred to another school for the following school year.[80] Before the transfer was effectuated, she received a hearing before the Board of Education.[81] That hearing was the subject of much public debate, and some participants in that debate expressed the view that "the play was obscene and that she was immoral."[82] After the Board upheld the transfer, Boring sued, claiming First Amendment retaliation.[83] The district court dismissed Boring's complaint, and Boring appealed to the Fourth Circuit.[84] That court initially reversed the district court, but then accepted the case for rehearing *en banc*.[85]

By a narrow majority, the Fourth Circuit affirmed the district court.[86] The majority began by stating that Boring's selection of *Independence* "does not present a matter of public concern and is nothing more than an ordinary employment dispute."[87] Thus, the court concluded that there was no need to perform *Pickering* balancing and based that conclusion on the fact that the

75. *Boring*, 136 F.3d at 366.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 366-67 (4th Cir. 1998).
81. *Id.* at 367.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 368. The majority opinion was written by Judge Widener and joined by six other judges; six judges dissented. *Id.* at 365.
87. *Id.*

dispute—the legality of the decision to transfer Boring to another school—concerned the terms of Boring's employment.[88] The court presumably deemed irrelevant and thus did not assess whether the appropriateness of *Independence* for high school students was a matter of public concern.

The conclusion that the case was nothing more than a private employment dispute was itself a sufficient basis on which to affirm the district court. Nonetheless, the majority went on to consider the legal significance of the fact that Boring was a teacher. It began by rejecting the view that teachers have a First Amendment right to "participate in the makeup of the high school curriculum."[89] The court reasoned that while it was true that "[s]omeone must fix the curriculum,"[90] it preferred to vest that responsibility in "local school authorities who are in some sense responsible, rather than to the teachers."[91] While the majority did not say to whom the local school authorities were responsible, both context and the concurring opinions suggest the answer—local school authorities must answer to voters, who generally elect school board members.[92]

This conclusion is somewhat surprising because the school district did not select the play to be performed by Boring's advanced acting class. To the contrary, it implicitly delegated that decision to Boring, who followed her usual practice of selecting a play and informing the school principal of the play's name (but no other information about the play).[93] Further, at least at the motion to dismiss stage, the Fourth Circuit was required to assume that Boring violated no school policy in selecting the play.[94] Thus, the *Boring* majority did not conclude simply that teachers could be required to follow the curriculum chosen by school administrators. Rather, it must have also concluded that school boards could delegate curricular decisions to teachers and then punish those teachers for selecting materials with unpopular messages—even if the materials were pedagogically appropriate (or even award-winning). In the words of the *Boring* dissenters, the School District was free to "target[] Margaret Boring as a scapegoat and use[] her to shield them from the 'heat' of the negative outcry resulting from the performance of Independence."[95]

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88. *See id.* at 369 ("Since plaintiff's dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection.").

89. *Id.* at 370.

90. Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 371 (4th Cir. 1998).

91. *Id.*

92. In particular, West Virginia school board members are elected. *Selection of Local School Boards*, NSBA, http://www.nsba.org/SchoolLaw/Issues/Governance/electionschart.pdf (last updated June 2009). *See also Boring*, 136 F.3d at 371-72 (Wilkinson, C.J., concurring) ("The curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them.").

93. *Boring*, 136 F.3d at 366.

94. *See id.* at 367 (explaining that the School District alleged Boring had violated the school's policy on "controversial materials," but that Boring alleged that at the relevant time, that policy did not cover dramatic presentations).

95. *Id.* at 374 (Hamilton, J., dissenting).

2. Mayer v. Monroe County Community School Corp.

Deborah Mayer, a probationary elementary school teacher, answered a student's question by stating that she "honked for peace" when she passed anti-war demonstrators.[96] After receiving complaints from parents, the principal at Mayer's school first instructed teachers "not to take sides in any political controversy," and then terminated Mayer's employment at the end of the school year.[97] Like Margaret Boring, Mayer sued, claiming that the school district's decision violated her First Amendment rights.[98]

Unlike *Boring*, *Mayer* reached the appeals court after the Supreme Court's decision in *Garcetti*.[99] Applying that case, the Seventh Circuit concluded that "the school system does not 'regulate' teachers' speech as much as it *hires* that speech."[100] Thus, Mayer's status as a public employee, coupled with the fact that her remark about honking for peace came in the context of teaching a lesson, doomed her claim.

Like the Fourth Circuit, the *Mayer* court also concluded that the fact that this case arose in the context of public education only served to underscore the need for school board control over Mayer's speech:

> Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues.[101]

Thus, the *Mayer* court recognized that a probable outcome of its holding was that school boards, facing pressure from parents, would be inclined to punish teachers who expressed unpopular views in the classroom,[102] even when, as here, the relevant speech was pedagogically appropriate and had not been proscribed by the school. Yet, the court held that this outcome was preferable to any alternative, because it reflected a democratically-elected body's responsiveness to some portion of the electorate.[103]

96. Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 478 (7th Cir. 2007).
97. *Id.*
98. *Id.*
99. *Id.* at 477; Garcetti v. Ceballos, 547 U.S. 410, 410 (2006).
100. *Mayer*, 474 F.3d at 479.
101. *Id.* at 479-80.
102. *Id.*
103. *Id.*

3. Evans-Marshall v. Board of Education

In *Evans-Marshall*, the most recent of the three examples outlined in this section, the appeals court arrived at a similar conclusion via a slightly different route. Shelley Evans-Marshall taught English to high school students. As part of her ninth grade class, she "distributed a list compiled by the American Library Association of the '100 Most Frequently Challenged Books'" and asked groups of students to "pick a book from the list, [] investigate the reasons why the book was challenged and to lead an in-class debate about the book."[104] Two groups of students chose *Heather Has Two Mommies*, and when the parents of one of the students complained, the school principal told Evans-Marshall to tell the students to choose a different book.[105] Evans-Marshall also assigned her students to read *Siddhartha*, which she used for in-class discussions about "spirituality, Buddhism, romantic relationships, personal growth, [and] familial relationships."[106] Significantly, the School District itself had purchased copies of that book several years earlier for use in classrooms.[107]

At two subsequent school board meetings, parents complained about Evans-Marshall's assignments; the second meeting was attended by "[n]early 100 parents, as well as the local news media."[108] Later, a group of parents presented the board with a 500-signature petition calling for "decency and excellence" in the classroom.[109] That year, the school principal evaluated Evans-Marshall's performance and criticized her for "[u]se of material that is pushing the limits of community standards."[110] Then, Evans-Marshall was told that she would not be invited back at the end of the school year.[111] She sued, claiming her First Amendment rights were violated, but lost in the district court on summary judgment.[112]

The Sixth Circuit noted that it faced "two competing intuitions:" first, that teachers "have the First Amendment right to choose [their] own reading assignments;" and second, that "a school board ha[s] the final say over what is taught."[113] To resolve those intuitions, the Court began with the *Pickering* analysis. It concluded that Evans-Marshall's speech was a matter of public concern in large part *because of* its curricular nature, as evidenced by the large number of parents in attendance at the second school board meeting.[114] Thus, unlike the *Boring* court, which focused on the subsequent employment dispute in

104. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 335 (6th Cir. 2010).

105. *Id.*

106. *Id.*

107. *Id.* at 339.

108. *Id.* at 335.

109. *Id.*

110. *Id.* at 336.

111. *Id.*

112. *Id.* at 336-37.

113. *Id.*

114. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 338-39 (6th Cir. 2010).

assessing whether Boring's speech was a matter of public concern, the *Evans-Marshall* court focused on the underlying curricular dispute. After concluding that Evans-Marshall spoke on a matter of public concern, the court conducted *Pickering* balancing and concluded that there was at least an issue for trial as to whether the school district's interests in having Evans-Marshall refrain from teaching a book that the district itself had previously purchased outweighed Evans-Marshall's First Amendment interests.[115]

Nonetheless, the court ruled against Evans-Marshall once it got to the *Garcetti* analysis.[116] Citing *Mayer*, the Sixth Circuit concluded that Evans-Marshall had no right to "dictate the school's curriculum," and therefore her First Amendment claim failed.[117] The Sixth Circuit's focus was on the need for community control of curriculum:

> State law gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them—their children's education—by giving them control over membership on the board.[118]

Thus, in a merging of the "democratic control" and the "public employee" themes, the Sixth Circuit concluded that the democratically-elected school board was Evans-Marshall's employer, and therefore the First Amendment "ha[d] nothing to say about" its decision to fire her.[119]

These cases illustrate courts' approaches to the question of the scope of teachers' First Amendment rights. Specifically, courts analyze the relationship between schools and teachers through two lenses. First, teachers are employees, and therefore their on-the-job speech is subject to control by their school district employers. To some judges, like the majority in *Boring*, this analysis means that teachers' curricular speech does not rise to the level of a matter of public concern. Second, schools—and by extension, teachers—are charged with implementing the vision of the local electorate. Therefore, courts often conclude, democratic accountability requires that school boards be able to transfer or terminate teachers in response to public outcry. Thus, the fact that teachers are carrying out an important democratic mission means that even if the *Pickering-Connick-Garcetti* analysis did not divest teachers of First Amendment protection for their curricular speech, their First Amendment rights could nonetheless be sacrificed at the altar of popular control of public schools.

The latter point is particularly interesting in light of the *Garcetti* Court's observation that it was at least a possibility that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests

115. *Id.* at 339.
116. *Id.* at 340.
117. *Id.*
118. *Id.* at 341.
119. *Id.* at 342.

that are not fully accounted for by this Court's customary employee-speech jurisprudence."[120] The clear implication of that statement is that teachers' speech might enjoy *greater* First Amendment protection than that of other public employees because of the social values associated with academic freedom.[121] However, post-*Garcetti* courts have generally concluded that the opposite is the case in the context of K-12 education—local democratic control over elementary and secondary public education implicates a special need for *increased* employer control over teachers' speech.

In sum, the First Amendment is an unlikely vehicle for courts to overturn elected school boards' decisions to fire or discipline teachers because of their speech. This is for at least two independent reasons: first, the Court's decision in *Garcetti v. Ceballos*; and second, school boards' responsibility to reflect the desires of the electorate. In the next section, I will discuss an alternative route towards protecting teachers' reasonable pedagogical choices: collective bargaining.

III. UNIONS AND TEACHERS' ACADEMIC FREEDOM

As the *Boring*, *Mayer*, and *Evans-Marshall* cases illustrate, current doctrine permits school districts to discipline or fire teachers for their curricular choices even when those choices are both the result of an explicit or implicit delegation of authority, and pedagogically sound. And, as the same three cases illustrate, this doctrine means that school districts are free to discipline or fire teachers in order to appease vocal subsets of the voting public.

It is perhaps conceivable that the Court will clarify its dicta in *Garcetti* regarding the special First Amendment interests that may be implicated in the context of teachers' speech. The Court may conclude that teachers have broader First Amendment rights than the lower courts have discerned. However, that outcome seems unlikely at best, particularly in the context of elementary and secondary education.

An alternate route to the same endpoint—protections from discipline or firing for teachers who make legitimate pedagogical choices that do not contravene school rules—could be achieved through collective bargaining, at least in those school districts where bargaining is permitted.[122] Thus, unions can and do negotiate "academic freedom" provisions that protect teachers' curricular choices in at least some situations. For example, NEA affiliates have negotiated

120. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

121. For example, the American Association of University Professors defines the purpose of academic freedom as the promotion of the common good, which "depends upon the free search for truth and its free exposition." *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AM. ASS'N OF UNIV. PROFESSORS, *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm (last visited Mar. 19, 2012).

122. *Cf.* Ann C. Hodges, *Lessons From the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, CORNELL J.L. & PUB. POL'Y 735, 751-54 (2009) (describing activities and accomplishments of public sector unions in Virginia, where binding collective bargaining in the public sector is not permitted).

a variety of academic freedom provisions, ranging from general affirmations of the importance of maintaining classroom atmospheres that "invite[] in-depth study of the critical issues of the day" to a set of specific procedures governing teachers' decision-making authority relating to curriculum issues, community members' challenges to those decisions, and the like.[123] These provisions generally seek to balance the interests of teachers, students, and community members, and make clear that they do not abrogate school boards' authority to set curriculum.[124]

I propose that collectively bargained provisions[125] protecting teachers who make delegated curricular decisions without violating other school policies strike an appropriate balance between the interests of teachers, parents, students, and school administrators. In particular, protecting teachers under these circumstances would vindicate the same interests that are identified in the cases addressing teachers' free speech rights, and at little cost. Those interests include both the retention of school boards' abilities to set curriculum (and the ability of the electorate to influence that curriculum), and the provision of competent and professional instruction to students. Additionally, other benefits would likely result, including improved predictability regarding what can be taught, a decreased "chilling effect" that might otherwise dissuade teachers from broaching important yet controversial subjects, and improvement in teachers' abilities to train students for democratic citizenship. I will briefly discuss these interests.

First, a collectively bargained academic freedom provision like the one I describe above would preserve school board prerogative by protecting only those teachers who act according to both the dictates of the school board and their professional training. Teachers would not be free to disregard established curriculum, but would be protected when, for example, they fill gaps in the curriculum by adding age-appropriate reading material. Thus, school districts would retain the authority to set curriculum prospectively, and to do so according to the wishes of the electorate. That forward-looking authority could also be flexible enough to extend to situations like the one that arose in *Boring*, in which the principal responded to brewing public controversy by requiring Boring to eliminate certain scenes from future performances of *Independence*. In other words, disapproving parents and school administrators might lose the opportunity to see teachers subjected to discipline, but they would retain the ability to

123. E-mail from Carolyn York, Nat'l Educ. Ass'n, to author (Dec. 19, 2011, 17:52 PST) (on file with the author) (providing sample academic freedom provisions from existing collective bargaining agreements).

124. *Id.*

125. To be sure, academic freedom provisions vary, and I do not purport to analyze the benefits and drawbacks of particular language to which unions and school boards might agree. For examples of the type of provisions that might be negotiated, the NEA has compiled a list of academic freedom provisions contained in collective bargaining agreements applicable to higher-education settings. NAT'L EDUC. ASS'N, ACADEMIC FREEDOM IN COLLECTIVE BARGAINING AGREEMENTS: SUMMARY AND ANALYSIS (Aug. 2006), *available at* http://www.nea.org/assets/docs/HE/acadfreedom.pdf. While these provisions all come from the tertiary education context, they nonetheless provide instructive examples.

advocate that particular material not be taught in the future, and even to intervene in ongoing classroom activities.[126]

Importantly, the limited academic freedom protections described above would not extend so far as to cover unreasonable classroom decisions. For example, had Margaret Boring assigned *Independence* to a class of third-graders, or failed to assign any play to her advanced drama class (perhaps in favor of allowing the students more time to work on their homework for other classes), school administrators would be free to take appropriate disciplinary action. That is to say, school boards and communities are entitled to expect that teachers will make delegated decisions by exercising their best professional judgment, and to react to instances in which teachers' decisions are pedagogically inappropriate.[127]

Additionally, freeing teachers to make delegated decisions will promote predictability and reduce the risk that teachers will be dissuaded from presenting controversial material even when it is appropriate to do so. For example, Margaret Boring could not have anticipated her involuntary transfer to a different school when she selected *Independence*, particularly after she followed protocol in selecting the play and her students took second place in the state drama competition. That outcome resulted from an unanticipated outpouring of anger from the parents of students who were not even in the advanced drama class. Likewise, the school superintendent's observation in *Evans-Marshall* that the school board's purchase of *Siddhartha* "ma[de] it difficult to criticize Evans-Marshall for teaching [it]"[128] nonetheless did not prevent the same school board from firing Evans-Marshall, apparently to appease a group of angry parents. These outcomes implicate not only fairness, but also the educational choices that other teachers will make in the future. Specifically, they are bound to have a chilling effect, preventing teachers from using their professional judgment to decide what material to present in the classroom, to the detriment of students.[129]

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126. Relatedly, protecting teachers in the limited circumstances outlined above could actually serve the interests of school board members by limiting the pressure on them to take the extreme step of dismissing a teacher, while still preserving their incentives to respond to community interests. All other things being equal, rational school districts will likely prefer to retain the services of dedicated, competent teachers who happen to incur community ire. If school districts are precluded by collective bargaining agreements from punishing a given teacher for making a pedagogically sound choice that he or she was free to make, it reduces the pressure on school board members to choose between firing a teacher and saving their own seats on the school board. At the same time, school boards will generally be free to preclude the teacher from making the same choice in the future by affirmatively setting the curriculum in the area—thus vindicating community interests in controlling what children are taught.

127. This is not to suggest that it will always be clear whether a particular decision is pedagogically appropriate. However, the due process procedures to which teachers accused of presenting inappropriate material in the classroom should be entitled is beyond the scope of this article.

128. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 335 (6th Cir. 2010).

129. Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 1015, 1024 (2003) (arguing that school reform efforts, including that of increasing professionalization of teachers, suggest that teachers' speech should be more robustly protected

Finally, giving teachers room to teach controversial (but age-appropriate) material without fear of discipline could better prepare students for deliberative citizenship.[130] If it is "commonplace that in this country, schools are supposed to prepare young people to live and participate in a liberal democracy,"[131] then surely it is worthwhile for public school teachers to expose students to the types of issues over which they will be expected to deliberate once they become full participants in public life.[132] Not only would students benefit from engaging in civil discussion of controversial material among themselves, but they may also have the opportunity to witness ensuing community discussion and school board reaction, which would necessarily take place pursuant to the procedural rules and limitations set forth in documents including the collective bargaining agreement.

Thus, collectively bargained protections for teachers' academic freedom are consistent with the interests articulated in cases discussing First Amendment protections for teachers. Additionally, they could yield several other benefits that inure to parents and students, as well as teachers themselves.

CONCLUSION

In this article, I explore some of the ways in which the First Amendment, as interpreted by the Supreme Court and the Courts of Appeals, provides sub-optimal protection for teachers' speech. Specifically, courts' deference to elected school boards permits school districts to punish teachers for making reasonable curricular decisions that later prove to be unpopular. This deference is detrimental to not only teachers but also many students and parents, and even the long-term interests of the districts themselves. However, it need not be this way: public school teachers' speech could receive additional protection through collectively bargained academic freedom provisions. Thus, the continuing public debate over the appropriate role of public-sector unions should take into account the ability of unions to negotiate provisions that not only provide needed protections for public employees, but also promote the public interest.

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under the First Amendment). Relatedly, students may benefit by the improved retention of qualified teachers who might otherwise be fired, or even quit due to demoralization.

130. The empirical basis for this claim is beyond the scope of this article. However, other scholars have made a strong case for this proposition. *See generally* AMY GUTMANN, DEMOCRATIC EDUCATION (1999); Betsey Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Jeffrey J. Pyle, *Socrates, the Schools, and Civility: The Continuing War Between Inculcation and Inquiry*, 26 J.L. & EDUC. 65 (1997).

131. Steven D. Smith, *Educating for Liberalism*, 42 U.C. DAVIS L. REV. 1039, 1041 (Feb. 2009).

132. Hinckley A. Jones-Sanpei, *Public School Segregation and Social Capital*, 12 J. GENDER RACE & JUST. 329, 334 (2009) ("A functioning democracy relies on the ability of its members to show mutual respect, tolerance, and deliberation—skills that promote social capital. Students traditionally practice civic skills, taught in schools and homes, at school ....").