

RESCUING ACADEMIC FREEDOM FROM  
*GARCETTI V. CEBALLOS*:  
 AN EVALUATION OF CURRENT CASE LAW  
 AND A PROPOSAL FOR THE PROTECTION OF  
 CORE ACADEMIC, ADMINISTRATIVE, AND  
 ADVISORY SPEECH

BRIDGET R. NUGENT & JULEE T. FLOOD\*

INTRODUCTION .....116

I. AN EVOLUTION OF SPEECH PROTECTIONS: FROM *PICKERING* TO  
*GARCETTI*.....121

A. The *Pickering* Balancing Test .....121

B. Balancing Revisited: *Connick v. Myers*.....122

C. A Twist of Reasonableness: *Waters v. Churchill* .....123

D. The Latest Words on Employee Speech: *Garcetti v.*  
*Ceballos*.....123

II. THE ORIGINS OF ACADEMIC FREEDOM AND SHARED GOVERNANCE...126

III. SPEECH (UN)SECURED: THE MANY FORMS OF ACADEMIC SPEECH ...130

A. Professors as Teachers and Researchers .....131

1. Professors as Teachers.....131

2. Professors as Researchers .....135

---

\* Bridget R. Nugent, J.D., Notre Dame Law School, 2013. B.A., Georgetown University, 2010. Ms. Nugent is a law clerk in the Southern District of Florida. She would like to thank Professor Nicole Garnett, both for her inspiration and for offering invaluable insight throughout early drafts of this article; Paul Ray, for his unwavering encouragement and keen criticism, and her family, for their constant support.

Julee T. Flood, Ph.D., Educational Leadership and Policy Studies/Higher Education Administration, University of Tennessee, 2012. J.D. University of New Hampshire School of Law, 2003. Dr. Flood is an attorney whose practice, consulting, and scholarship intersect law and policy, with a special focus on higher education governance. She is grateful for the steadfast support of her family.

The authors wish to graciously thank the team that has supported this article’s publication and strengthened its value: Professor John Robinson for his expertise, invaluable insight, and edits; Sheila Prendergast for her timely and encouraging communications regarding deadlines and progress; and the editors and staff members of *The Journal of College and University Law* for their diligence and hard work.

B. Professors as Administrators .....	136
C. Professors as Advisors.....	139
D. Professors as Citizens .....	141
IV. THE NEED FOR FIRST AMENDMENT PROTECTION: CONTRACTS CANNOT WORK ALONE .....	145
V. PROTECTING PROFESSORS: LINE-DRAWING AND TWO MODEST PROPOSALS .....	148
A. An Exception to <i>Garcetti</i> for Academic Speech: Why and Where to Draw a Line?.....	148
B. Carving Out an Explicit Exception for Core Academic Speech.....	151
C. Internal Policies to Protect Administrative and Advisory Speech.....	153
CONCLUSION.....	156

*“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”*<sup>1</sup>

#### INTRODUCTION

Academic freedom is a conceptual chameleon. Sometimes it is thought to be about institutions;<sup>2</sup> sometimes about individuals.<sup>3</sup> When it is thought to be about individuals, sometimes it is thought to be about academics only,<sup>4</sup> sometimes about academics and students.<sup>5</sup> In both of those contexts,

---

1. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

2. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 605, 629 (1967) (court explaining that the university is a traditional sphere of free expression fundamental to the function of society); *Wieman v. Updegraff*, 344 U.S. 183, 194–198 (1952) (Frankfurter, J., concurring). Joined by Justice Douglas, Justice Frankfurter laid out the case for protecting universities as centers of independent thought and criticism. *Id.*

3. *See generally*, J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *YALE L.J.* 251, 257 (1989) (explaining that the Supreme Court “has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning”).

4. *See, e.g.*, Dahlia Lithwick & Richard Schragger, *Jefferson v. Cuccinelli: Does the Constitution Really Protect a Right to “Academic Freedom”?*, *SLATE* (June 1, 2010, 6:19 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/06/jefferson\\_v\\_cuccinelli.2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/06/jefferson_v_cuccinelli.2.html)

In other words, the core and central enterprise of academic faculty in the university is to exercise First Amendment rights . . . . In performing their core functions, faculty are always engaged in the process of free inquiry. And free

academic freedom is usually thought of as having weight, both with respect to what happens in the classroom and with respect to what is published in academic publications—perhaps even to what is said in debates about academic policy at the institution at which the academic in question is employed, or about what is said in debates about local, national, or global policy by the academic in question.<sup>6</sup> Sometimes, furthermore, it is thought to be a constitutional phenomenon and, for that reason, applicable only to governmentally run institutions and to academics (and to students) at those institutions, as private institutions lack the state-actor feature that is essential to the applicability of most constitutional mandates.<sup>7</sup> Sometimes, however, academic freedom is thought to be a contractual phenomenon (either independent of, or in addition to, academic freedom as a constitutional phenomenon) and, as such, potentially applicable to academics (and perhaps to students) at both public and private academic institutions.<sup>8</sup> Some-

---

inquiry is the central project of the university—the university can't exist without it, as Thomas Jefferson well understood when he founded the University of Virginia.

Whatever the judicial doctrine of academic freedom may mean, at its heart it must protect those exercising core First Amendment rights—like researching, writing, speaking, and teaching. If government officials are allowed to dictate how the faculty exercises those rights, they are surely impinging on free speech.

*Id.* at 2.

5. *See, e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that First Amendment rights of students were violated when a state university refused to pay for the printing expenses of one student publication that expressed a belief in a deity or an ultimate reality, yet paid for the printing expenses of other student publications); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university that made its facilities available for the activities of certain registered student groups violated the First Amendment rights of other students by closing its facilities for religious worship and discussion).

6. *See Univ. of Mich. v. Ewing*, 474 U.S. 226, 226 n.12 (internal citations omitted) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on decisionmaking by the academy itself.”); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (holding that college violated professor’s right to free speech by creating an alternative section of his class and investigating his conduct as a result of articles he wrote and speeches he gave arguing that blacks are less intelligent than whites). *See generally*, Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 827–28 (2010).

7. *See* David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53:3 LAW AND CONTEMPORARY PROBLEMS 227, 229 (Summer 1990) (“Threats to professors from university trustees loomed behind the seminal professional definition produced in 1915 . . . . Threats to universities from the state, arising out of general concerns during the late 1940s and 1950s about the dangers of communism to American society and institutions, prompted the cases that led the Supreme Court to identify academic freedom as a first amendment right.”).

8. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted).

times, finally, academic freedom is thought of (if only rarely by lawyers) as a cultural phenomenon; that is, it is of significant normative value to academics and students at both public and private academic institutions for reasons that are neither literally constitutional nor literally contractual, shielding those academics and those students from adverse action predicated upon their exercise of that freedom.<sup>9</sup> This article focuses on academic freedom with respect to individuals—academics specifically. It engages constitutional and contractual questions regarding academic freedom for public university faculty.

Academic freedom is an essential component of vibrant public colleges and universities.<sup>10</sup> Uncensored speech by university professors facilitates an uninhibited pursuit of truth and the advancement of knowledge, encouraging both innovative scholarship and instruction by enabling scholars to speak candidly about potentially unwelcome or unsettling concepts. Academic freedom's critical importance suggests that it be given constitutional protection under the First Amendment; however, current constitutional law does not reflect this understanding.<sup>11</sup>

---

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

*Id.*

9. See FREDERICK P. SHAFFER, A GUIDE TO ACADEMIC FREEDOM (2011), available at <http://agb.org/sites/agb.org/files/u1525/A%20GUIDE%20TO%20ACADEMIC%20FREEDOM.pdf>; CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM 26 (2010) ("Much as we might like to imagine that academic freedom is a stable unchanging value, a kind of Platonic form, in truth it is under constant pressure to redefine its nature, its scope, and its application. The need to clarify academic freedom anew, to elaborate on its implications, and to respond to its critics is never ending. It is important to remember in this context that both the AAUP itself and its classic statements of principle developed in specific historical contexts and reflect specific cultural and political struggles.").

10. In *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (internal citations omitted), Justice Powell explained, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* See also *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In *Sweezy*, Justice Frankfurter summarized the four essential freedoms that constitute institutional academic freedom, explaining that it was the business of a college or university to provide that atmosphere which is most conducive to experimentation and creation by determining for itself (1) who may teach, (2) what may be taught, (3) how it shall be taught, and (4) who may be admitted to study. *Id.*

11. See Byrne, *supra* note 3, at 252–53 ("Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom . . . generally result in

This paper is inspired by the leading case on free speech in the workplace, *Garcetti v. Ceballos*.<sup>12</sup> In *Garcetti*, the Supreme Court held that the First Amendment does not protect the speech of governmental employees who speak out pursuant to job responsibilities, stating that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>13</sup> However, the Court said in dicta that an academic freedom exception to this limit may exist, explaining:

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. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>14</sup>

In the eight years since the *Garcetti* decision, the Court has declined to provide any guidance for this hypothetical academic freedom exception, or even to clarify whether it exists. Of those lower courts that have provided guidance or clarified whether it exists, few have agreed on the boundaries of the exception.<sup>15</sup> These inconsistencies threaten to chill First Amendment freedom of speech by leaving educators in a state of doubt about the degree to which their controversial statements in publications, in the classroom, in the faculty lounge, and in the public sphere are protected.

In order to allow academic speech to thrive in its fullest form, the Supreme Court should establish a clear academic freedom exception to the public employee speech doctrine articulated in *Garcetti*. There should be spaces and times in which a public university professor is assured the right to speak freely and without consequence to his position. This paper discusses the parameters of such an exception. Its primary mission is not to argue that an academic freedom exception should *exist*; although it addresses in context the necessity of an academic freedom exception to the “pursuant to official duties” standard, an extensive literature already details the need for an exception to the *Garcetti* holding for academics.<sup>16</sup> This pa-

---

paradox or confusion. The cases . . . are inconclusive, the promise of rhetoric re-proached by the ambiguous realities of academic life. . . . There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it.”). See also Rabban, *supra* note 7, at 237.

12. 547 U.S. 410 (2006).

13. *Id.* at 421.

14. *Id.* at 425.

15. See *infra* notes 119–126, 141–156, 160–161, 197–206 and accompanying text.

16. Larry D. Spurgeon, in particular, has explored the dichotomy of professors as citizens and professors as academics. See Larry D. Spurgeon, *The Endangered Citizen*

per's mission, rather, is two-fold: first, to illustrate trends across circuits following *Garcetti* regarding the treatment of academic speech, distinguishing the treatment of speech within enumerated roles that public university faculty assume; and second, to argue for a distinction between the protection of speech related to the roles of teaching and researching from that related to the roles of administrator and advisor.<sup>17</sup>

Part I outlines the relevant First Amendment law surrounding free speech in the workplace, ending with the *Garcetti* decision. Part II discusses the development of constitutional protections for academic freedom and the practice of shared governance in academia. Part III analyzes the application of *Garcetti* to the various roles that professors assume—specifically, the roles of teacher, researcher, advisor, administrator, and citizen—and the divergent approaches to *Garcetti* in the academic context. Part IV explains why an academic freedom exception is still relevant in light of contractual provisions in public college and university faculty contracts. Finally, in Part V, the paper develops the policy concerns implicit in strict public employee speech analysis, as applied to public college and university faculty. It distinguishes the imperative of protecting speech related to the roles of teaching and researching from that related to the roles of administrator, advisor, or citizen. It then offers two proposals for the protection of academic freedom, the first describing areas of speech that should be assured protection by the courts, the other suggesting areas of speech of which academics

---

*Servant: Garcetti Versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405 (2013). He distinguishes professors as experts versus citizens, and professional academic freedom versus constitutional academic freedom, which clashes with the *Garcetti* rule. However, whereas Spurgeon's thesis is that the *Garcetti* rule damages the public interest in free speech, this paper explains that *Garcetti* need not be overruled. Instead, we argue that there is a way to analyze and differentiate the speech existing within academia and the exceptions. Where Spurgeon argues that the Court should recognize and respect most all speech in academia, due to academic institutions' being so very different from other governmental institutions, we delineate speech that is unique to academia, and speech that is more alike that within non-academic governmental institutions. This article is especially cognizant that some issues in academia are best dealt with in the cultural context and not in the courts. Thus, it suggests policy issues that should be addressed by academia itself.

17. This piece specifically discusses individual academic freedom; it does not speak to institutional academic freedom. In 1957, in the Court's first discussion of institutional academic freedom, Justice Frankfurter defined academic freedom as the freedom of universities to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). Then, in 1978, Justice Powell suggested that academic institutions might be entitled to academic freedom (sometimes confused with "autonomy") under the First Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). On the basis of the *Regents* and *Sweezy* opinions, several other Supreme Court Justices, federal appellate judges, and commentators have come to assume that the Court has held that the First Amendment protects the "academic freedom" (or "autonomy") at least of public universities. *See Richard H. Hiers, Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLIN L. REV. 1, 21 (2007).

themselves are the most appropriate guardians.

### I. AN EVOLUTION OF SPEECH PROTECTIONS: FROM *PICKERING* TO *GARCETTI*

In *Garcetti*, the United States Supreme Court announced that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>18</sup> Thus, the Court vindicated managerial prerogative while providing a disincentive for an employee to speak out pursuant to job-related duties. In dissent, Justice Souter argued that this new rule conflicted with academic freedom because academic personnel both lecture and produce scholarly work—activities long thought to be protected by academic freedom—in accordance with their official duties.<sup>19</sup> Writing for the majority, Justice Kennedy explained that the Court was not deciding whether the new rule was applicable to “speech related to scholarship or teaching.”<sup>20</sup> Accordingly, to understand the boundaries of academic freedom, one must look to the framework in place prior to *Garcetti*: one in which speech by a public employee was protected if it (1) involved a matter of public concern, and (2) outweighed the public employer’s justification for limiting that speech.<sup>21</sup>

#### A. The *Pickering* Balancing Test

The watershed case on the scope of protected speech for government employees is *Pickering v. Board of Education*.<sup>22</sup> In *Pickering*, a high school teacher named Marvin Pickering was fired for publishing a letter criticizing his school board as to its approach to athletic funding.<sup>23</sup> The Court held that Pickering was speaking as a citizen about an important public issue.<sup>24</sup> The fact that he was a teacher did not preclude him from invoking this right because the letter was not directed at anyone with whom he would come into contact at work.<sup>25</sup> Without proof that Pickering knowingly or recklessly made false statements, the Court explained, his speech on “issues of public importance” could not furnish the basis for his dismissal from public employment.<sup>26</sup> The Court did not rely upon the concept of aca-

---

18. *Garcetti*, 547 U.S. at 421.

19. *Id.* at 438–39 (Souter, J., dissenting).

20. *Id.* at 425.

21. *See* *Connick v. Myers*, 461 U.S. 138, 146–52 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 568 (1968).

22. 391 U.S. 563 (1968).

23. *Id.* at 564.

24. *Id.* at 574.

25. *Id.* at 569–70.

26. *Id.* at 574.

democratic freedom in its determination. Instead, recognizing that government employers may object to critical statements made by their employees in an “enormous variety of fact situations,”<sup>27</sup> Justice Marshall, writing for the majority, deemed it appropriate to balance the interests belonging to the employee “as a citizen, in commenting upon matters of public concern,” with those belonging to the government employer “in promoting the efficiency of the public services it performs through its employees.”<sup>28</sup>

#### B. Balancing Revisited: *Connick v. Myers*

The *Pickering* balancing test was modified in *Connick v. Myers*.<sup>29</sup> Sheila Myers was an assistant district attorney who had been fired for soliciting the views of other employees about office morale, the level of confidence in supervisors, and whether employees felt compelled to work on political campaigns.<sup>30</sup> Myers brought a § 1983 action alleging that her speech was protected.<sup>31</sup> The district court agreed, ordering Myers to be reinstated, and the Fifth Circuit Court of Appeals affirmed.<sup>32</sup>

The Supreme Court reversed the decision, however, distinguishing Myers’ speech from that which could be characterized as relevant to matters of public concern. The Court noted that in all of *Pickering*’s progeny, “the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs.”<sup>33</sup> Speech on public issues “occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”<sup>34</sup> The *Connick* court concluded that it was unnecessary to scrutinize the reasons for Myers’ discharge if her questionnaire could not be fairly characterized as constituting speech on a matter of public concern. Put another way, *Connick* adds a threshold requirement to the *Pickering* test. When a public employee speaks as an employee on matters of only personal interest, and not as a citizen, courts are not the appropriate fora in which to review personnel decisions.<sup>35</sup>

Together, *Pickering* and *Connick* stand for the principle that unless em-

---

27. *Id.* at 569.

28. *Id.* at 568.

29. 461 U.S. 138 (1983).

30. *Id.* at 141.

31. *Id.* A § 1983 lawsuit is a means for bringing civil claim against government officials and government agencies for violations of the U.S. Constitution and other federal laws. It is a type of civil rights lawsuit and is based on the Civil Rights Act of 1871, now codified as Section 1983 of Title 42 of the United States Code. 42 U.S.C. § 1983 (2006).

32. *Connick*, 461 U.S. at 142.

33. *Id.* at 144–145.

34. *Id.* at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

35. *Id.* at 146; see also Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 897 (2005).



ployee expression can be fairly considered as relating to some matter of political, social, or community concern, government officials may manage their offices without intrusion by the judiciary in the name of the First Amendment.<sup>36</sup> The *Connick* court read *Pickering* to hold that this burden of proof in these cases “varies depending upon the nature of the employee’s expression.”<sup>37</sup> The Court also emphasized the importance of giving “a wide degree of deference to the employer’s judgment” about the context of the speech, with a “stronger showing necessary if the . . . speech more substantially involve[s] matters of public concern.”<sup>38</sup>

### C. A Twist of Reasonableness: *Waters v. Churchill*

In *Waters v. Churchill*,<sup>39</sup> the Supreme Court assessed whether an employee’s speech should be evaluated as the employer understood it, or whether the fact-finder should independently collect and determine the factual basis of the claims. In this case, Cheryl Churchill was fired after co-workers told their supervisor that she had made negative comments about work conditions.<sup>40</sup> Churchill claimed that her comments were intended to improve patient care.<sup>41</sup> The Seventh Circuit found that the speech was a matter of public concern, that it was not disruptive, and that the employer should have conducted an investigation to determine what Ms. Churchill had, in fact, said before it fired her.<sup>42</sup> The Supreme Court rejected the Seventh Circuit’s approach, finding that such an investigation would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. Instead, the Court held that an employer must reach its conclusion in good faith, rather than as a pretext, and the trial court should look into the reasonableness of the employer’s conclusions.<sup>43</sup>

### D. The Latest Words on Employee Speech: *Garcetti v. Ceballos*

In a major elaboration on the doctrine emanating from *Pickering*, *Connick*, and *Waters*, the Court held in *Garcetti v. Ceballos*<sup>44</sup> that the First Amendment does not protect a government employee from discipline based

---

36. *Connick*, 461 U.S. at 147.

37. The Court criticized the district court’s decision to place the burden of proof on the employer, a burden that required the employer to “‘clearly demonstrate’ that the speech involved ‘substantially interfered’ with [Myers’] official responsibilities.” *Id.* at 150.

38. *Id.* at 152. The Court also noted that private expression may “bring additional factors to the *Pickering* calculus.” *Id.* at 152–53.

39. 511 U.S. 661 (1994).

40. *Id.* at 665.

41. *Id.* at 666.

42. *Id.* at 667.

43. *Id.* at 677.

44. 547 U.S. 410 (2006).

on speech made pursuant to the employee's official duties. Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, was overruled in a meeting with various supervisors with regard to his recommendation to dismiss a criminal case.<sup>45</sup> The meeting at which his supervisors rejected his recommendation reportedly became quite heated. Ceballos later sued the office, alleging that in the aftermath of these events he was subjected to a series of retaliatory employment actions, such as reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.<sup>46</sup>

Justice Kennedy's majority opinion opened by acknowledging that "[t]he Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment."<sup>47</sup> He reiterated that the First Amendment protects a public employee's right to speak as a citizen when addressing matters of public concern, explaining that, "[as] long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."<sup>48</sup> The First Amendment interests at stake, the opinion explains, "extend beyond the individual speaker."<sup>49</sup> There is a public interest in "receiving the well-informed views of government employees engaging in civic discussion."<sup>50</sup>

The Court also explained that, despite First Amendment interests, a government entity needs discretion to restrict speech when it acts in its role as employer because that speech could potentially affect the entity's entire operations.<sup>51</sup> Thus, when a citizen enters government service, the citizen by necessity must accept certain limitations on his freedom of speech. Applying these principles in the case at hand, the Court held that Ceballos had expressed his view inside his office, rather than publicly.<sup>52</sup> Whether Ceballos' speech touched on a matter of public concern was not dispositive, the Court said. Instead, the controlling factor in Ceballos' case was that his expressions were made pursuant to his duties as a calendar deputy.<sup>53</sup> This "pursuant to duty" test was the Court's important elaboration on the *Pickering/Connick* line of decisions. In the words of the Court:

[T]he fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor . . . distinguishes Ceballos' case from those in which the First Amendment provides protection

---

45. *Id.* at 414.

46. *Id.* at 415.

47. *Id.* at 417.

48. *Id.* at 419.

49. *Id.*

50. *Id.*

51. *Id.* at 418.

52. *Id.* at 420.

53. *Id.* at 421.

against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.<sup>54</sup>

Ceballos said what he did because that was what he was employed to do, and restricting 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." Rather, the restriction simply "reflects the exercise of employer control over what the employer itself has commissioned or created."<sup>55</sup> The Court added that Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. The fact that his duties sometimes required him to speak or write did not mean, as far as the Court was concerned, that his supervisors were prohibited from evaluating his performance.<sup>56</sup>

In a strongly worded dissent, Justice Souter worried that the decision could have important ramifications for academic freedom:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'<sup>57</sup>

Justice Kennedy, in his majority opinion, acknowledged this concern, recognizing that the *Garcetti* ruling "may have important ramifications for academic freedom, at least as a constitutional value."<sup>58</sup> His next two sentences have been the source of academic and judicial debate and confusion:

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. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>59</sup>

The import of these words has yet to be determined, as the Court has yet to embrace the academic speech exception to the *Garcetti* doctrine contem-

---

54. *Id.*

55. *Id.* at 422.

56. *Id.*

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

58. *Id.* at 425.

59. *Id.*

plated by Justice Kennedy, or to provide any suggestion of the possible contours of such an exception. Justice Kennedy's comments in *Garcetti* suggest, however, that the Court may, at some point in the future, search for ways to honor its commitment to academic freedom while adhering to its First Amendment jurisprudence.

Since the *Garcetti* decision, lower courts have alternatively applied its per se rule to professorial speech, or, recognized spaces in which professors can speak without employer censorship or retaliation.<sup>60</sup> In the absence of clear guidance from the Court, the concept of academic freedom in higher education is more opaque than crystalline: lower courts' opinions defining the parameters of a professor's "official duties" are growing increasingly disparate.<sup>61</sup> In light of these developments, the legacy and meaning of *Garcetti* is as gray and mercurial now as it has ever been. This article argues that the best way for the Court to fix the problem is by recognizing an exception to *Garcetti*'s "official duties" rule for core academic speech.

Any discussion of the future implications of *Garcetti* should be set against the historical protections developed with respect to academic freedom and the development of shared governance. In Part II, this paper sets forth the legal and non-legal developments of academic speech protection in the United States. This establishes a foundation on which to assess the jurisprudence that has followed *Garcetti* and to extrapolate the varying forces that compete within the contemporary legal battleground for professors' academic freedom in public colleges and universities.

## II. THE ORIGINS OF ACADEMIC FREEDOM AND SHARED GOVERNANCE

The American Association of University Professors ("AAUP") developed the United States' first robust conception of academic freedom in the early years of the twentieth century. Well into the 1900s, the faculty members of prestigious colleges and universities limited themselves to diffusing already-accepted knowledge.<sup>62</sup> As science began to take the place of reli-

---

60. See *infra* Part III.

61. The parties in *Garcetti* did not dispute the official nature of the activity in that case, so the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. They have even reached different results as to whether the "official duties" inquiry is a generally a question of law for the court, or one of fact. Compare *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1130 (9th Cir. 2008) ("Agreeing with the Third, Seventh, and Eighth Circuits, we hold that after *Garcetti* the inquiry into the protected status of speech presents a mixed question of fact and law, and specifically that the question of the scope and content of a plaintiff's responsibilities is a question of fact."), with *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007) ("[Determinations as to] whether the employee [has spoken] 'pursuant to [his] official duties.' . . . are to be resolved by the district court . . . [and not] the trier of fact.").

62. AM. ASS'N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915) [hereinafter 1915 DECLARATION], available

gious instruction in a number of colleges and universities, however, faculty members started performing original research and developing scholarly expertise in a variety of disciplines, complementing accepted theories with their own as they continued teaching. Publicized conflicts between faculty members and university governing boards arose at Stanford,<sup>63</sup> the University of Wisconsin,<sup>64</sup> Vanderbilt,<sup>65</sup> and the University of Pennsylvania,<sup>66</sup> among others, as instructors increasingly introduced free thought into their classrooms and laboratories. The AAUP was founded in 1915 in response to conflicts of this sort between faculty and university administrators; that same year, the AAUP issued its Declaration of Principles on Academic Freedom and Academic Tenure (“1915 Declaration”).<sup>67</sup> Modern scholars consider the 1915 Declaration to be the seminal statement of American academic freedom, as it developed within the culture of colleges and universities.<sup>68</sup>

The 1915 Declaration broadly defined academic freedom from a cultural perspective to encompass speech within a professor’s professional capacity.<sup>69</sup> It viewed the basic job of professors as sharing the results of their in-

at <http://www.aaup.org/file/1915-Declaration-of-Principles-on-Academic-Freedom-and-Academic-Tenure.pdf>.

63. Edward Ross’ public advocacy of free silver and opposition to the exploitation of foreign labor offended Mrs. Leland Stanford, the sole surviving trustee of the University in 1897. She demanded that the president of Stanford fire Professor Ross. The president forced Ross out in 1900. See ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY FIVE YEARS* 326–78 (1937).

64. Professor Richard Ely in 1894 was tried by a committee of the Regents of the University of Wisconsin for advocating strikes and boycotts. See Theodore Herfurth, *Sifting and Winnowing: A Chapter in the History of Academic Freedom at the University of Wisconsin*, in *ACADEMIC FREEDOM ON TRIAL: 100 YEARS OF SIFTING AND WINNOWING AT THE UNIVERSITY OF WISCONSIN-MADISON* 58, 59–67 (W. Lee Hansen ed., 1998).

65. In one of the first American disputes over the teaching of evolution, a local bishop serving as ex officio president of the governing board of Vanderbilt hired Alexander Winchell, a respected geologist and known evolutionist. After a number of religious journals accused Professor Winchell of attempting to destroy the truths of the Gospel, he was dismissed in 1878. See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 330–32 (1955).

66. Scott Nearing’s contract as an assistant professor at the Wharton School of the University of Pennsylvania was not renewed in 1915. Although the trustees denied that they acted because of Nearing’s support of legislation to limit child labor, faculty members were not persuaded. See LIGHTNER WITMER, *THE NEARING CASE: THE LIMITATION ON ACADEMIC FREEDOM AT THE UNIVERSITY OF PENNSYLVANIA BY ACT OF THE BOARD OF TRUSTEES* 3–14 (1915).

67. See HOFSTADTER & METZGER, *supra* note 65, at 474–77.

68. See, e.g., Byrne, *supra* note 3, at 276 (calling the Declaration “the single most important document relating to American academic freedom”); Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, at 61, 64 (Beshara Doumani ed., 2006) (deeming the Declaration “[t]he first systematic and arguably the greatest articulation of the logic and structure of academic freedom in America”).

69. See 1915 DECLARATION, *supra* note 62.

dependent and expert scholarly investigations with students and the general public.<sup>70</sup> Adapting the German concept of academic freedom to the American context, the 1915 Declaration identified three elements of academic freedom: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”<sup>71</sup> Academic freedom, the 1915 Declaration explained, serves the fundamental purposes of educating youth: it provides instruction to students and develops experts for public service.<sup>72</sup>

The 1915 Declaration identified both university boards of trustees and legislatures as threats to academic freedom. It explained that trustees are in a position to act as autocratic employers, using the power of dismissal to impose their personal ideological and pedagogical views on professors.<sup>73</sup> The 1915 Declaration warned against this practice, explaining that professorial opinions lose value if they are not the product of free inquiry. The Declaration further warned of the dangers to academic freedom from state legislatures, which control the state’s purse strings and can thereby manipulate the academic inquiries of professors if scholarly interests conflict with established governmental policies or respected societal values.<sup>74</sup> Whatever the pressures on academic freedom, the 1915 Declaration stated that the university must be a place of refuge for intellect and independent scholarly investigation.<sup>75</sup>

In 1940, the AAUP and the Association of American Colleges (“AAC”), an organization of presidents of undergraduate institutions, collaborated to condense and revise the 1915 Declaration.<sup>76</sup> At its heart, the 1940 Statement endorsed the same core principles as the 1915 Declaration: academic freedom and a fair hearing for faculty facing dismissal or disciplinary measures.<sup>77</sup> The 1940 Statement has since been widely adopted: over 200 learned societies and higher education associations formally endorse it and its Comments.<sup>78</sup> Moreover, it has been relied upon by courts and been in-

---

70. *See id.*

71. *Id.* at 292.

72. *Id.* at 296.

73. *Id.* at 293–294.

74. *Id.* at 297.

75. *Id.* The committee of professors that drafted the 1915 Declaration made a special point of dissociating academic freedom from other forms of expression and conduct. The committee asserted that teachers who failed to meet standards of competence, or who abused their positions to indoctrinate students, could not claim the protection of academic freedom and were subject to discipline.

76. *See* AM. ASS’N OF UNIV. PROFESSORS & ASS’N OF AM. COLLEGES, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940) [hereinafter 1940 STATEMENT], available at <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

77. *Id.* at 3–4.

78. *Id.* at 7–11.

corporated in hundreds of faculty contracts.<sup>79</sup> A notable distinction between the 1915 Declaration and the 1940 Statement is the description of faculty roles. The 1940 Statement describes university instructors as “educational officers”<sup>80</sup> rather than as “employees,” as did the 1915 Declaration. This language in the 1940 Statement implies that the roles of faculty members encompass managerial and governing tasks as well as academic matters. It was not for another twenty years, however, that any professional organization would explicitly name and describe academia’s long-standing practice of shared governance.

Then, in 1966, the AAUP, the American Council of Education, and the Association of Governing Boards of Universities and Colleges crafted the Statement on Government of Colleges and Universities (“1966 Statement”).<sup>81</sup> The 1966 Statement endorsed shared responsibility for governance between boards, faculties, and administrators. It acknowledged that “the variety and complexity of the tasks performed”<sup>82</sup> by modern colleges and universities require governing boards to “entrust[] the conduct of administration to the administrative officers [and] teaching and research to the faculty.”<sup>83</sup> The 1966 Statement explained, however, that “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process” should be overseen primarily by the faculty.<sup>84</sup> The Statement said that university boards should override faculty decisions about such academic matters “only in exceptional circumstances,” such as when the institution faced budgetary and logistical challenges.<sup>85</sup> In the decades since the release of the 1966 Statement, the practices and values of shared governance have been evidenced within the major accredited public colleges and universities.<sup>86</sup> In

---

79. See, e.g., *Vega v. Miller*, 273 F.3d 460, 476 (2d Cir. 2001) (Cabranes, J., dissenting) (“The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic freedom and tenure.”); *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981) (“American court decisions are consistent with the 1940 Statement of Principles on Academic Freedom and Tenure widely adopted by institutions of higher education and professional organizations of faculty members.”); AM. ASS’N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE INVESTIGATIVE REPORTS (2013), available at <http://www.aaup.org/report/freedom-classroom> (listing universities following policies drawn from the 1940 Statement).

80. 1940 STATEMENT, *supra* note 76, at 3.

81. Am. Ass’n Association of Univ. Professors, 1966 Statement on Government of Colleges and Universities, in AAUP POLICY DOCUMENTS & REPORTS 135–40 (10th ed. 2006).

82. *Id.* at 135–36.

83. *Id.* at 138.

84. *Id.* at 139. Faculty also should establish “the requirements for the degrees offered in the course, determine[] when the requirements have been met, and authorize[] the president and board to grant the degrees thus achieved.” *Id.*

85. *Id.*

86. See Gabriel E. Kaplan, How Academic Ships Actually Navigate, in GOVERN-

colleges and universities across the country, faculty members participate in the governance of academic matters through standing committees, joint ad hoc committees, and membership of faculty members on administrative bodies.<sup>87</sup>

Specifically addressing issues pertaining to public colleges and universities, the United States Supreme Court has noted that academic freedom is a “special concern of the First Amendment,”<sup>88</sup> and lower courts have shown varying levels of respect for some contours of academic freedom.<sup>89</sup> Even so, its protections remain largely grounded in cultural rather than constitutional principles. Part III of this article sets forth the modern treatment of academic freedom by the Supreme Court and by lower federal courts. Primarily examining circuit court decisions in the wake of *Garcetti*, this next Part divides the different roles professors assume into four categories and evaluates the treatment of each category’s correlative speech and the relation of each type of speech to academic freedom. It analyzes the ways in which courts have diverged on protecting academic speech since *Garcetti*, identifying the trends within the case law with respect to the different “official duties” of public college and university professors.

### III. SPEECH (UN)SECURED: THE MANY FORMS OF ACADEMIC SPEECH

The decision in *Garcetti* was grounded on the idea that a government employer may control what it has created—speech included.<sup>90</sup> To ensure the effectiveness and efficiency of a government workplace, the government enjoys far greater power to regulate the speech of its employees than it does of its citizens generally.<sup>91</sup> Professors are of course citizens, and as a citizen, a professor’s extramural speech should be legally protected equally to that of any other citizen. However, professors at public universities are precariously poised within the context of free speech analysis because of the nature of academic work. Construing speech related to scholarship or research as pursuant to “official duties” under the *Garcetti* standard runs the risk of inhibiting the free pursuit of unpopular or socially charged ideas—precisely what the First Amendment was designed to protect.

In the absence of guidance from the Supreme Court, lower courts have

---

ING ACADEMIA 165, 172 (Ronald G. Ehrenberg ed., 2004). Accredited colleges and universities have adopted policies designating faculty members to contribute to or directly determine curriculum content, review the appointments of full-time faculty, and make tenure decisions. *Id.* at 202.

87. *Id.* at 201–207.

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

89. *See infra* Part III.

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

91. *Id.* at 418. There is an ongoing debate about whether professors are employees or quasi-managers, or even independent contractors. It is beyond the scope of this paper to enter the debate, and for its purposes, this paper assumes that professors employed by a public institution are employees of the state.



yet to develop any consensus regarding the boundaries of speech protection enjoyed by a professor speaking pursuant to his official duties. Within the context of higher education, however, it is probably fair to start with the assumption that the official duties of a professor include teaching and research. Relying on the tradition of shared governance, a professor's official duties may also extend to actions in his capacity as an administrator. Moreover, professors are frequently under contract to act as advisors to their students, both formally and informally; thus, advising actions could also be considered official duties. Finally, professors can be prolific citizens, writing in newspapers, blogs, etc., or speaking through other fora. In a given situation, the distinction between "official" and "unofficial" speech can be imprecise. This Part reviews the professor's roles as teacher, researcher, administrator, advisor, and citizen and examines when the speech relevant to these roles should receive special First Amendment protection.

#### A. Professors as Teachers and Researchers

##### 1. Professors as Teachers

The courts of the United States have long recognized that the inquiry and ideas of educators deserve special protection under the law. As Justice Frankfurter said, teachers are the "priests of our democracy."<sup>92</sup> It is the "special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens."<sup>93</sup> They cannot carry out this "noble task if the conditions for the practice of a responsible and critical mind are denied to them."<sup>94</sup> That is precisely why Justice Souter expressed concern about the impact of the *Garcetti* per se rule on academic freedom.<sup>95</sup> It is also the reason Justice Kennedy acknowledged the possibility of different constitutional protection for speech related to "academic scholarship or classroom instruction."<sup>96</sup> When speaking on matters within their disciplines, professors are speaking as experts, educating the citizenry.

---

92. See *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

93. *Id.*

94. *Id.* Justice Frankfurter adds:

To regard teachers . . . as the priests of our democracy is therefore not to indulge in hyperbole. . . . They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

*Id.* at 196–97.

95. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

96. *Id.* at 425.

However, the constitutional treatment of academic speech often yields a different result from what may be commonly accepted under principles of academic freedom as articulated in the university setting. There is a twist of irony in many of the results, in that the more some courts interpret a professor's speech as "academic" (that is, related to their subject area), the less that speech is constitutionally protected. A cultural understanding of academic freedom rights would yield just the opposite result. Such an understanding would demand that academics are granted the most protection when speaking *in their subject area*—i.e., when their speech is most related to their "official duties." Courts' constitutional interpretations are thereby not always aligned with interpretations based on cultural principles of academic freedom.

Some courts have strictly applied the *Garcetti* standard to classroom activities, ruling that the more a professor's speech is related to his expertise, the more it can be regulated; others have been mindful of the reservations expressed in *Garcetti* as they decide speech cases involving public university instruction, ruling that professorial speech within one's discipline deserves the highest protection. In the recently released *Demers v. Austin*, the Ninth Circuit Court of Appeals highlighted the concern that if *Garcetti* applied to teaching and academic writing, it would directly conflict with First Amendment values.<sup>97</sup> As a matter of first impression, the Ninth Circuit determined that the *Pickering* test, not the *Garcetti* test, applies to teaching and writing on academic matters by state-employed teachers.<sup>98</sup> The issue in *Demers* was whether the plaintiff, David Demers, a tenured associate professor at Washington State University, suffered retaliation by the university in response to two writings.<sup>99</sup> One writing, called *The 7-Step Plan*, addressed departmental restructuring; the other was a draft of his book, *The Tower of Babel*. Demers argued that his writing and distributing *The 7-Step Plan* and *The Tower of Babel* were not done pursuant to his official duties, and thus did not come under the purview of *Garcetti*.<sup>100</sup> Moreover, he claimed that even if he wrote both publications pursuant to his official duties, the *Garcetti* holding did not extend to speech and academic writing by a publicly employed teacher.<sup>101</sup> The Ninth Circuit ruled that both publications were part of Demers' official duties because it was "impossible" to separate out Demers' writing as private or public. The court then stated:

Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees 'pursuant to their official duties' are not protected by the First Amendment. But teaching and academic writing are at the core of the official

---

97. *Demers v. Austin*, No. 11-35558, 2013 WL 4734033 (9th Cir. Sept. 4, 2013).

98. *Id.*

99. *Id.* at \*3.

100. *Id.* at \*4.

101. *Id.*

duties of teachers and professors. . . . We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.<sup>102</sup>

The Court held that *Garcetti* does not apply to teaching and writing on academic matters by teachers employed by the state. Rather, such writing is governed by *Pickering*.<sup>103</sup>

However, not all Circuits have come as close to equating the academic freedom of scholarship with First Amendment protections. For example, in *Nichols v. University of Southern Mississippi*, the court strictly applied *Garcetti* to yield an unfavorable result for a university professor.<sup>104</sup> Dr. Nichols, a non-tenured faculty member, sued after the University of Southern Mississippi's School of Music decided not to renew his contract after complaints over his classroom speech regarding homosexuality.<sup>105</sup> The district court applied *Garcetti* and held that the speech was not protected because the comments were made in the classroom by a professor to a student.<sup>106</sup> The court ruled that the speech in question was best characterized as being made pursuant to the professor's "official capacity" and could not be afforded First Amendment protection under *Garcetti*.<sup>107</sup>

On similar facts in *Piggee v. Carl Sandburg College*, however, the Seventh Circuit concluded that *Garcetti* was inapplicable because the speech in question did not relate to the instructor's official duties.<sup>108</sup> In *Piggee*, a part-time cosmetology instructor at a community college placed religious pamphlets in a smock of a student she believed to be gay.<sup>109</sup> The student was offended and complained to the director of the cosmetology program.<sup>110</sup> The college decided not to renew Piggee's contract, and she filed suit, alleging infringement of her First Amendment rights.<sup>111</sup> In reviewing the case, the Seventh Circuit referred to the right of faculty members to engage in academic debate.<sup>112</sup> Holding without elaboration that *Garcetti* "is not directly relevant to our problem," however, the court determined that, while Piggee's speech occurred in her classroom and in the context of instruction, it "was not related to her job of instructing students in cosmetol-

---

102. *Id.* at \*6 (internal citations omitted).

103. *Id.*

104. 669 F. Supp. 2d 684 (S.D. Miss. 2009).

105. *Id.* At the end of a voice lesson in his classroom, the professor had spoken negatively about homosexuals and homosexual activity. *Id.* at 689.

106. *Id.* at 698.

107. *Id.* at 699.

108. 464 F.3d 667 (7th Cir. 2006).

109. *Id.* at 668–69.

110. *Id.*

111. *Id.* at 669.

112. *Id.* at 671.

ogy.”<sup>113</sup> Ultimately, the court ruled for the college, determining that “we see no reason why a college or university cannot direct its instructors to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic.”<sup>114</sup>

Other courts have been similarly reluctant to apply *Garcetti*. In *Sheldon v. Dhillon*,<sup>115</sup> an adjunct biology instructor’s contract was not renewed after a student complained about offensive statements the instructor made in response to a question in the classroom.<sup>116</sup> The subject matter was the genetic basis of homosexuality, and course material related to that subject.<sup>117</sup> Similar to the Seventh Circuit’s determination in *Piggee*, the Northern District of California held that the classroom conversation was protected speech,<sup>118</sup> but instead of characterizing the conversation as being outside of a professor’s official duties, the court instead concluded that it did not have to apply the *Garcetti* analysis because the majority in *Garcetti* “reserved the question of whether its holding extends to scholarship or teaching-related speech.”<sup>119</sup> The court read *Garcetti* as indicative of judicial reluctance to apply a public-employee speech rule in the context of academic instruction and ruled accordingly.<sup>120</sup>

The Southern District of Ohio has also shown deference to the Court’s reluctance to extend the *Garcetti* rule to classroom instruction. In *Kerr v. Hurd*,<sup>121</sup> an obstetrician/gynecologist and professor named Dr. Elton Kerr alleged retaliation because of his teaching about the unnecessary nature of certain cesarean procedures and because of his advocacy of vaginal delivery.<sup>122</sup> Dr. William Hurd, his department chair and one of the defendants in the case, argued that Kerr was acting in the course of his official duties as an employee of the university during this instruction, rendering his speech (with its religious and moral undertones) subject to *Garcetti* analy-

---

113. *Id.* at 672.

114. *Id.* at 673.

115. No. C-08-03438 RMW, 2009 WL 4282086 (N.D. Cal. Nov. 25, 2009).

116. *Id.* at \*2.

117. *Id.* at \*1. June Sheldon taught a course in human genetics. *Id.* During class a student asked Ms. Sheldon to explain how heredity does or does not affect homosexual behavior in males and females. *Id.* Sheldon “answered the student’s question by noting the complexity of the issue, providing a genetic example mentioned in the textbook, and referring students to the perspective of a German scientist,” named Dr. Gunter Dörner, who had “found a correlation between maternal stress, maternal androgens, and male sexual orientation at birth,” while cautioning that his “views were only one set of theories in the ‘nature versus nurture’ debate.” *Id.* She briefly described what the students would learn later in the course, that “homosexual behavior may be influenced by both genes and the environment.” *Id.*

118. *Id.* at 3–4.

119. *Id.* at 3.

120. *Id.*

121. 694 F. Supp. 2d 817 (S.D. Ohio 2010).

122. *Id.* at 834.

sis.<sup>123</sup> After the court acknowledged, “Dr. Kerr’s speech as to vaginal deliveries was within his ‘hired’ speech as a teacher of obstetrics,”<sup>124</sup> it concluded that the Supreme Court left undecided the application of *Garcetti*’s per se rule in an “academic setting.”<sup>125</sup> The court ruled for Kerr, holding that “[a]t least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level.”<sup>126</sup>

## 2. Professors as Researchers

Faculty at public colleges and universities—like professors at private colleges and universities—teach, engage in innovative research, administer academic programs, and contribute to policy debates, both in academia and in the public square. In some respects, it is even more important to protect the free pursuit of new ideas than it is to shield the dissemination of those ideas within a university.<sup>127</sup>

Since the decision in *Garcetti*, however, courts have not consistently protected the research interests of public university faculty. The Seventh Circuit had no hesitation in applying the *Garcetti* official duty rule in *Renken v. Gregory*.<sup>128</sup> In this case, tenured professor Kevin Renken became involved in a dispute with his dean over the administration of a National Science Foundation (NSF) grant and the use of its funds. During the course of the disagreement, Renken sent written correspondence concerning his situation to a member of the board of regents and others within the institution, alleging harassment and discrimination by the dean’s office.<sup>129</sup> When Renken refused an agreement proposed by the dean outlining use of the funds, the grant was returned to NSF.<sup>130</sup> Renken sued, alleging reduction in

---

123. *Id.* at 843.

124. *Id.*

125. *Id.*

126. *Id.* at 844 (footnote omitted).

127. The disastrous impact on Soviet agriculture of Stalin’s enforcement of Lysenko orthodoxy in biology stands as a strong lesson to those who would discipline university professors for not following the “party line” in their research. Trofim Denisovich Lysenko was director of Soviet biology under Joseph Stalin. His experimental research in improved crop yields earned the support of Joseph Stalin; in 1940, Stalin appointed him director of the Institute of Genetics within the USSR’s Academy of Sciences. Under Stalin, scientific dissent from Lysenko’s theories of environmentally acquired inheritance was formally outlawed; if anyone dared to criticize Lysenko’s theory regarding the heritability of acquired characteristics, they were purged from academic and scientific positions and imprisoned. Lysenko’s work was officially discredited in the Soviet Union in 1964, leading to a renewed emphasis on Mendelian genetics. The Soviet Union quietly abandoned Lysenko’s agricultural practices in favor of modern agricultural practices in the 1960s, after the crop yields he promised consistently failed to materialize. See DAVID JORAVSKY, *THE LYSENKO AFFAIR* 12–17 (1970).

128. 541 F.3d 769 (7th Cir. 2008).

129. *Id.* at 772.

130. *Id.* at 773.

pay and retaliation for exercising his speech rights.<sup>131</sup> Applying *Garcetti*'s official duty rule, the Seventh Circuit held that his complaints about the grant conditions were made pursuant to his official job duties and therefore not protected.<sup>132</sup> In applying *Garcetti*, the court emphasized the fact that Renken had applied for the grant in the course of official research, and that the funding would have allowed expansive research and a reduction in teaching load.<sup>133</sup>

On a superficial level, the Seventh Circuit's treatment of faculty speech in Renken seems to conflict with its speech-favorable treatment in *Piggee*. Looking to the reasoning of the opinions, however, both decisions consistently strain to apply the *Garcetti* court's holding, in light of the court's reservations about extending protection to academic speech pursuant to a professor's official duties. The outcomes of these cases turn on their facts and circumstances: the type of speech and its relevance to the academic area in which the faculty member worked. While the Seventh Circuit was averse to applying the *Garcetti* rule to the academically-unrelated classroom speech in *Piggee*, the *Renken* court applied the *Garcetti* rule to activity related to scholarship.<sup>134</sup> The *Piggee* court did not characterize the speech as being pursuant to official duties.<sup>135</sup> Because her speech was not related to her job—teaching students about cosmetology—the court ruled in favor of the defendants, stating, “we see no reason why a college or university cannot direct its instructors to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic.”<sup>136</sup> In contrast, the *Renken* court *did* find the research in question to be part of a professor's official duties and therefore held the professor accountable for his remarks.<sup>137</sup> The Seventh Circuit's two decisions are consistent and neither employs an approach sympathetic to academic speech.<sup>138</sup>

#### B. Professors as Administrators

Due to the sustained tradition of shared governance, a public college or university faculty member's assigned duties often include a specific role in administering their institution's policy. *Garcetti* may apply to faculty member's speech when expressed in the course of those duties. Unfortunately, courts have done little to clarify the treatment of the administrative speech of public college and university faculty since the *Garcetti* decision in 2006.

---

131. *Id.*

132. *Id.* at 775.

133. *Id.* at 774.

134. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006); *Renken*, 541 F.3d at 773–74.

135. *Piggee*, 464 F.3d at 673–74.

136. *Id.* at 673.

137. *Renken*, 541 F.3d at 774–75.

138. *See Piggee*, 464 F.3d at 673–74; *Renken*, 541 F.3d at 775.

In 2008, the D.C. Circuit heard *Emergency Coalition to Defend Educational Travel v. Department of Treasury*,<sup>139</sup> in which an association of professors challenged federal regulations regarding the Cuba trade embargo,<sup>140</sup> alleging the regulations restricted what they could teach.<sup>141</sup> The *Emergency Coalition* court dodged any *Garcetti*-clarifying discussion and merely concluded that the regulations were content neutral and did not violate the First Amendment.<sup>142</sup>

Other circuit courts, however, have outright rejected arguments that administrative speech is worthy of constitutional protection. In *Abcarian v. McDonald*,<sup>143</sup> for example, the head of the Department of Surgery at the University of Illinois College of Medicine at Chicago argued that his speech, including complaints about “risk management, faculty recruitment, compensation and fringe benefits, . . . and medical malpractice insurance premiums,”<sup>144</sup> was protected due to the reservations expressed in *Garcetti*.<sup>145</sup> The Seventh Circuit rejected this “unsupported assertion” because his speech “involved administrative policies that were much more prosaic than would be covered by principles of academic freedom.”<sup>146</sup> The court emphasized that Dr. Abcarian was not merely a staff physician with limited authority.<sup>147</sup> He was, among other things, the Service Chief of the Department of Surgery at the University of Illinois Medical Center as well as Head of the Department of Surgery at the University of Illinois College of Medicine.<sup>148</sup> The court concluded that Abcarian had significant authority and responsibility over a wide range of issues affecting the surgical departments at both institutions and, therefore, had a broader responsibility to speak prudently in the course of his administrative employment obligations.<sup>149</sup>

Similarly, the Ninth Circuit affirmed the district court’s decision in *Hong v. Grant*<sup>150</sup> that the administrative concerns of a chemistry professor were expressed in the course of his official duties and were therefore unprotected.<sup>151</sup> During a mid-tenure review, Hong complained that too many department courses were taught by lecturers, and opposed a colleague’s pay

---

139. 545 F.3d 4 (D.C. Cir. 2008).

140. *Id.* at 6.

141. *Id.* at 12.

142. *Id.* at 12–13.

143. 617 F.3d 931 (7th Cir. 2010).

144. *Id.* at 933.

145. *Id.* at 935; *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

146. *Abcarian*, 617 F.3d at 938 n.5.

147. *Id.* at 937.

148. *Id.*

149. *Id.*

150. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d*, 403 F. App’x. 236 (9th Cir. 2010).

151. *Id.* at 1169–70.

increase and another faculty appointment.<sup>152</sup> After being denied a merit-based salary increase, Hong concluded that the decision was an act of retaliation over his criticisms.<sup>153</sup> He brought suit against his department at the University of California, Irvine (“UCI”), but the district court granted summary judgment to the defendants,<sup>154</sup> explaining that Hong’s official duties were not limited to classroom instruction and professional research; rather, they included a “wide range of academic, administrative and personnel functions in accordance with UCI’s self-governance principle.”<sup>155</sup> Consequently, Hong’s reservations were subject to the *Garcetti* rule, as they were expressed out of his “professional responsibility to offer feedback, advice and criticism about his department’s administration and operation . . . .”<sup>156</sup>

Federal district courts, too, have refused to give protection to administrative faculty speech. In *Miller v. University of South Alabama*,<sup>157</sup> for example, a district court in Alabama concluded that comments at a faculty meeting by Moira Miller, a tenure track assistant professor, were not protected.<sup>158</sup> Miller alleged that she had not been reappointed because of statements she had made expressing concern about the lack of diversity among faculty candidates.<sup>159</sup> The *Miller* court failed to extend First Amendment protection, reasoning that Miller was speaking pursuant to the duties of her job.<sup>160</sup> Most recently, a district court in 2012 failed to protect a group of Idaho State University professors in their attempts to use a university mass-mail email service for speech dissemination.<sup>161</sup> The university president had instructed a provisional faculty senate to develop a new constitution and bylaws to be approved by the president and the State Board of Education.<sup>162</sup> When the senate tried to send a draft constitution to the entire faculty for an upcoming vote through the university email service, the Vice President of Academic Affairs objected, arguing that use of the email service “would give the mistaken impression that the poll was sanctioned by the Administration.”<sup>163</sup> His objection prevailed, so the faculty employees sought injunctive relief. The district court denied this request,

---

152. *Id.* at 1162–64.

153. *Id.* at 1164.

154. *Id.* at 1170.

155. *Id.* at 1166.

156. *Id.* at 1167.

157. No. 09-0146-KD-B, 2010 WL 1994910 (S.D. Ala. May 17, 2010).

158. *Id.* at \*11.

159. *Id.* at \*3.

160. *Id.* at \*11.

161. *Idaho State Univ. Faculty Ass’n for the Pres. of the First Amendment v. Idaho State Univ.*, No. 4:12-cv-00068-BLW, 2012 WL 1313304, at \*1 (D. Idaho Apr. 17, 2012).

162. *Id.*

163. *Id.* at \*1–2.



concluding that *Garcetti* precluded protection because the senate members were acting in the course of their official duties.<sup>164</sup>

These holdings, unlike the disparate decisions found in the arena of research and instruction, indicate that courts since *Garcetti* are thus far averse to protecting the “official” governance activities of faculty members. Although administrative hiring and advice on college and university academic policies are part of a longstanding tradition of shared governance in higher education, courts have held that speech made pursuant to the exercise of these responsibilities is outside of the protections they are willing to extend to other types speech on the part of public college and university professors.

### C. Professors as Advisors

Public faculty members also assume various roles as advisors. When a professor is serving in the capacity of a formal advisor, he is acting as neither an instructor nor an administrator, but his relationship with a student or group of students is nonetheless based on his affiliation with a college or university. The holdings of cases addressing speech protections of professors acting in an advisory capacity are likely to be driven by facts and circumstances. In *Gorum v. Sessoms*,<sup>165</sup> for example, a tenured professor at Delaware State University was dismissed after being accused of changing student grades without departmental approval.<sup>166</sup> Despite having found misconduct of a “damning nature,” a grievance committee did *not* recommend termination of his employment due to what it cited as a lax and permissive academic atmosphere on the campus.<sup>167</sup> Notwithstanding the committee’s recommendation, however, the university’s president moved forward with termination procedures.<sup>168</sup> *Gorum* argued that his dismissal was actually in retaliation for a series of events unrelated to his grade changing, alleging that he had incurred disapproval for declining an invitation from the president to a university breakfast and for his role in advising a sanctioned football player.<sup>169</sup> When he sought protection under the First Amendment, the U.S. District Court for the District of Delaware held that *Gorum*’s advisory actions fell within the scope of his official duties and were therefore unprotected expressions.<sup>170</sup>

On appeal, the Third Circuit held that student advising fell within the scope of *Gorum*’s official duties because it related to his knowledge and

---

164. *Id.* at \*7.

165. 561 F.3d 179 (3d Cir. 2009).

166. *Id.* at 182.

167. *Id.* at 183.

168. *Id.*

169. *Id.* at 183–84.

170. *Id.* at 184.

experience with Delaware State University's disciplinary code.<sup>171</sup> In *Gorum's* case, his revocation of the president's speaking invitation to a fraternity's Martin Luther King, Jr. breakfast and his advising of individual students were both pursuant to official duties because the university's by-laws articulated an expectation for professors to act as mentors and advisors.<sup>172</sup> In a footnote, the court explained that the "full implications" of *Garcetti* were unclear, but that *Gorum's* particular instances of speech were so related to articulated official duties that the First Amendment could not protect them.<sup>173</sup>

The advisory speech by a tenured professor in *Capeheart v. Hahs*<sup>174</sup> also failed to warrant protection under the First Amendment. In *Capeheart*, Loretta Capeheart, a tenured associate professor of Justice Studies at Northeastern Illinois University ("NEIU") in Chicago, advocated on behalf of student protesters who were members of student organizations she had advised.<sup>175</sup> She criticized campus police for arresting some of the students at a peaceful protest, and criticized the university for failing to attract more Latino students.<sup>176</sup> When she was subsequently denied a promotion within her department, she filed suit in the United States District Court for the Northern District of Illinois, alleging violation of her right to free speech.<sup>177</sup> The district court dismissed her lawsuit, applying *Garcetti* and holding that her political activity was pursuant to her "official duties" and therefore not protected by the First Amendment.<sup>178</sup> Unlike the Third Circuit in *Gorum*, however, the *Capeheart* court did not acknowledge the Supreme Court's reservation about the applicability of the official duties standard articulated in *Garcetti*. The court merely explained, "since *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties."<sup>179</sup> The district court concluded, therefore, that Capeheart's protestations regarding the university's treatment of students were not protected under the First Amendment.<sup>180</sup> The *Gorum* and *Capeheart* decisions, taken together, indicate judicial reluctance to accord faculty speech in an advisory capacity the same protections that (at least some) courts have given speech in the context of scholarship or teaching.<sup>181</sup>

---

171. *Id.* at 185–86.

172. *Id.* at 186.

173. *Id.* at 186–87 n.6 (comparing *Renken v. Gregory*, 541 F.3d 769, 773–75 (7th Cir. 2008) with *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695 (4th Cir. 2007).

174. No. 08 CV 1423, 2011 WL 657848 (N.D. Ill. Feb. 14, 2011).

175. *Id.* at \*1–2, \*4.

176. *Id.*

177. *Id.*

178. *Id.* at \*4.

179. *Id.*

180. *Id.*

181. It is worth noting that an exception to this trend is seen in a recent opinion of

#### D. Professors as Citizens

Of course, by its own terms, the per se rule in *Garcetti* does not apply to speech made by professors that is not pursuant to their official duties. Courts are not consistent, however, in their evaluations as to whether a professor is acting in accordance with his official duties or as a citizen. In *Dixon v. University of Toledo*,<sup>182</sup> for example, Crystal Dixon, the Associate Vice President for Human Resources at the Medical College of Ohio, wrote a letter to a newspaper criticizing an opinion piece comparing the struggle for homosexual rights to the African-American experience.<sup>183</sup> In the letter, she did not identify herself by her job title.<sup>184</sup> Negative response to her letter led to her being placed on leave, however, and the university president, speaking on behalf of the university, publicly repudiated Dixon's opinion.<sup>185</sup> Dixon was terminated, and she filed suit alleging violations of her First and Fourteenth Amendment rights.<sup>186</sup> Notably, the district court concluded that Dixon's speech was not made pursuant to official duties and thereby not subject to *Garcetti*'s per se rule.<sup>187</sup> That conclusion did not help Dixon, however, because the court also found that Dixon's statements failed to warrant protection under the *Pickering* balancing test.<sup>188</sup> The court held that her free speech interests did not outweigh the efficiency interests of the government as her employer under the *Pickering* test since her article directly contradicted the university's policies granting homosexuals civil rights protections and could have done serious damage to the university by disrupting the human resources department and making homosexual employees uncomfortable or disgruntled.<sup>189</sup>

In *van Heerden v. Louisiana State University*,<sup>190</sup> however, the determination that a professor's public activity was not pursuant to "official duties" led to protected speech. In *van Heerden*, an associate professor was selected by the Louisiana Department of Transportation to lead a group of scientists in determining the cause of flooding in New Orleans after Hurricane

---

the Ninth Circuit. See *Demers v. Austin*, No. 11-35558, 2013 WL 4734033 (9th Cir. Sept. 4, 2013). Though courts have generally been averse to protecting administrative speech, the *Demers* court found *Demers' Plan* to be a governance issue. See *id.* at \*4. If the court had found his writings purely administrative, or had separated the writings out between scholarly (*The Bell Tower*) and administrative (*The 7-Step Plan*), perhaps the court's analysis would have been different, and this article's treatment of the case would fit better under the administrative/*Garcetti* purview. *Id.* See discussion *supra* Part III.

182. 842 F. Supp. 2d 1044 (N.D. Ohio 2012).

183. *Id.* at 1047.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1049–50.

188. *Id.* at 1050–53.

189. *Id.*

190. No. 3:10–CV–155–JJB–CN, 2011 WL 5008410 (M.D. La. Oct. 20, 2011).

Katrina.<sup>191</sup> Before and after his appointment, van Heerden was outspoken in his criticism of the U.S. Army Corps of Engineers.<sup>192</sup> Louisiana State University (“LSU”) administrators feared losing federal funds and ordered him to stop making public statements about the Corps.<sup>193</sup> When he continued undeterred, the university stripped him of his teaching duties and did not renew his contract.<sup>194</sup> In response, van Heerden sued LSU for a variety of claims, including defamation, retaliation based on his protected First Amendment speech, and breach of contract.<sup>195</sup>

In reviewing the case, the District Court of the Middle District of Louisiana extolled the importance of academics’ ability to express unpopular opinions, but did not expressly recognize an academic freedom exception to *Garcetti*.<sup>196</sup> Instead, the court merely suggested that a categorical application of *Garcetti* to the type of facts presented could lead to a whittling-away of academics’ ability to express opinions that are unpopular, uncomfortable or unorthodox.<sup>197</sup> It instead concluded, “although it is a close question, van Heerden was not acting within his official job duties.”<sup>198</sup> LSU’s change of van Heerden’s job description “to focus solely on research” reflected an attempt by the university to “disavow itself of van Heerden’s statements regarding the cause of levee failure.”<sup>199</sup> As a result, the court held that van Heerden’s statements were protected expressions of a citizen.<sup>200</sup> As of the date of this writing, a number of his claims have been dismissed on partial summary judgment, and his First Amendment claim was ultimately settled out-of-court for nearly half a million dollars.<sup>201</sup>

A similar result occurred in *Adams v. Trustees of the University of North Carolina-Wilmington*.<sup>202</sup> In *Adams*, a tenured assistant professor of criminology applied for promotion to full professor.<sup>203</sup> Professor Adams had become a prolific Christian commentator on religious and political topics, and listed publications as well as media appearances and speeches to support

---

191. *Id.* at \*1.

192. *Id.* at \*5.

193. *Id.* at \*1.

194. *Id.*

195. *Id.* at \*2.

196. *Id.* at \*6.

197. *Id.*

198. *Id.* at \*5.

199. *Id.* at \*6.

200. *Id.* at \*7 (“[B]ased on the facts presented here, the Court finds that, even applying the *Garcetti* test to van Heerden, he was not acting within his official job duties for the speech at issue here, which precludes summary judgment for defendants.”).

201. See *Van Heerden v. Bd. of Sup’rs of La. State Univ. & Agric. & Mech. Coll.*, No. 10–155–JJB, 2012 WL 1493834 (M.D. La. April 27, 2012); Bill Lodge, *LSU settles van Heerden Case for \$450,000* (Feb. 27, 2013), <http://theadvocate.com/home/5294342-125/lsu-settles-van-heerden-case>.

202. 640 F.3d. 550 (4th Cir. 2011).

203. *Id.* at 553.

his application.<sup>204</sup> After being denied the promotion, Adams brought § 1983 action against the university, alleging that the university had retaliated against him on the basis of his speech.<sup>205</sup> The district court relied on *Garcetti* and granted summary judgment to the university, holding that Adams' research and commentary had been performed in his official capacity and therefore fell under the umbrella of expression that could be subject to his employer's review.<sup>206</sup>

On appeal, the Fourth Circuit concluded that the district court had incorrectly applied *Garcetti*.<sup>207</sup> The court noted that a *Garcetti* analysis might be appropriate in the instances in which a public university faculty member's assigned duties included a "specific role in declaring or administering university policy, as opposed to scholarship or teaching[,]” but distinguished Adams' commentary from those circumstances because “Adams' speech was intended for and directed at a national audience on issues of public importance . . . .”<sup>208</sup> The court was concerned that applying *Garcetti* to the “academic work of a public university faculty member” could preclude many forms of public speech or service in which academics engage and concluded that *Garcetti* was inapplicable because Adams' commentary focused on issues of public policy unrelated to his teaching duties or any other university employment assignments.<sup>209</sup> In refusing to apply *Garcetti*'s per se rule, the court explained:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.<sup>210</sup>

In ruling that Adams' speech was not tied to any professorial duty, the court found the “thin thread” relating his speech to his official duties was insufficient to judge his expressions under the *Garcetti* standard.<sup>211</sup> Rather, the court concluded that Adams' speech, which related to such issues as academic freedom, abortion, feminism, and religion, was made as a citizen speaking on matters of public interest, and should have been analyzed by the district court under the *Pickering/Connick* standard, not the *Garcetti*

---

204. *Id.* at 554–55.

205. *Id.* at 556.

206. *Id.* at 561.

207. *Id.*

208. *Id.* at 563–64.

209. *Id.*

210. *Id.* at 564.

211. *Id.*

test.<sup>212</sup>

As the collective holdings of *van Heerden*, *Dixon*, *Demers*, and *Adams* exemplify, one of the ramifications of *Garcetti*'s logic is that faculty members may secure constitutional speech protections if they manage to portray their speech as being as far away from classroom and research duties as possible. At the same time, administrators are incentivized to go through just as much trouble to characterize all kinds of faculty speech as related to their official duties. The cultural understanding of academic freedom, which affords maximum protection of speech when it is most related to the official duties of teaching and scholarship, is thus at odds with recent case law, which extends the greatest First Amendment protection to those speaking as citizens on matters distant from classroom and research duties. This forces courts to grapple with the applicability of *Garcetti* to the myriad contexts of the educational environment. Speech relevant to a professor's role as a scholar or instructor is sometimes protected, but subject to censorship when *Garcetti* is applied inflexibly.<sup>213</sup> Despite the tradition of shared governance, a faculty member's administrative speech is almost never protected.<sup>214</sup> Similarly, expression relevant to a professor's advisory role has been subjected to the strict *Garcetti* analysis.<sup>215</sup> Only extramural speech—expression characterized as delivered in a professor's capacity of a citizen, and not as a faculty member—has any predictable chance of protection, precisely because it is not viewed as made pursuant to the professor's official duties.<sup>216</sup>

Upon reviewing the spectrum of post-*Garcetti* case law, speech directly relevant to course instruction and speech markedly distant from the ivy-covered walls are the types most likely to be given First Amendment protection. Between these two extremes, *Garcetti* is a strong tool for would-be censors. In this gray area, lower courts remain disjointed in their application of the *Garcetti* standard to public faculty speech—this is highlighted especially in a growing Circuit split between the Ninth and Fourth Circuits, which hold that *Garcetti* does not apply to academic speech, and the Third, Sixth, and Seventh Circuits, which aver that *Garcetti* prohibits public college faculty members from claiming illegal retaliation for certain types of speech related to their job. Ultimately, the varied opinions reveal substantial questions that the Supreme Court should resolve: Are research and scholarship entitled to special First Amendment protection? Is a faculty member's administrative or advisory speech, relating to and arising from the faculty member's employment, different from other forms of public employee speech at all? The next two Parts address these concerns.

---

212. *Id.* at 565.

213. See discussion *supra* Part III.A.1–2.

214. See discussion *supra* Part III.B.

215. See discussion *supra* Part III.C.

216. See discussion *supra* Part III.D.

#### IV. THE NEED FOR FIRST AMENDMENT PROTECTION: CONTRACTS CANNOT WORK ALONE

A clarification of *Garcetti*'s holding is necessary for the protection of academic speech despite the fact that public colleges and universities can include academic freedom protections in contracts. As the AAUP has recognized, one means of protecting academic freedom is by crafting contractual relationships between colleges and universities and faculty members that enshrine the principles recognized in the 1940 Statement.<sup>217</sup> However, while tenured faculty members tend to possess contractual rights granting them significant freedom in their teaching and research,<sup>218</sup> tenured professors make up an ever-diminishing proportion of the academic landscape.<sup>219</sup> The majority of faculty members teaching today are not on a tenure-track, and their freedom to teach and research may not be protected adequately under contract.<sup>220</sup> Furthermore, to claim that a professor's core academic speech can be adequately "protected by contract" assumes that every professor's contract is well written, up to date with all policies, and fully tailored to an individual's unique position and needs. This assumption runs contrary to realities exposed by contemporary lawsuits and surveys of the content of contractual provisions used within public colleges and universities regarding academic freedom.<sup>221</sup>

In the eight years since *Garcetti*, college and university contracts have not proven to adequately protect expressions of faculty members.<sup>222</sup> With

---

217. See 1940 STATEMENT, *supra* note 76.

218. See Joan DelFattore, *Defending Academic Freedom in the Age of Garcetti*, ACADEME, Jan.–Feb. 2011, at 18, available at <http://www.aaup.org/AAUP/pubsres/academe/2011/JF/Feat/delf.htm>.

219. For example, almost twenty-five percent of the public two-year faculty members are at colleges that do not offer tenure. About ninety percent of all full-time lecturers and nearly fifty percent of all full-time instructors at four-year colleges and universities are non-tenure track. Among part-time faculty, slightly more than half (52.7%) are employed at the instructor rank, while another quarter (27.6%) are employed either as lecturers or with miscellaneous titles or none at all. Over half of these public institutions do not contractually extend academic speech protections to part-time faculty. See *The Status of Non-Tenure-Track Faculty*, REPORT BY THE COMM. ON PART-TIME AND NON-TENURE-TRACK APPOINTMENTS (AAUP, Washington, D.C.), Jun. 1993, available at <http://www.aaup.org/report/status-non-tenure-track-faculty>.

220. *Id.* at 160–161.

221. See, e.g., *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, REPORT BY THE COMM. ON ACADEMIC FREEDOM AND TENURE (AAUP, Washington, D.C.), Nov. 2009, at 67 [hereinafter, *Protecting an Independent Faculty Voice*], available at <http://www.aaup.org/report/protecting-independent-faculty-voice-academic-freedom-after-garcetti-v-ceballos> (reviewing contracts at various public colleges and universities and evaluating areas for improvement; reporting on cases following *Garcetti* that indicate institutions that need improved academic freedom protections).

222. See, e.g., *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009) (professor's speech made in support of student at disciplinary hearing and speech made in withdrawing president's invitation to speak at a fraternity's prayer breakfast not covered

tenure comes the ability to speak freely, but for non-tenured faculty members, “[o]pen mouths lead to closed doors.”<sup>223</sup> Over seventy percent of non-tenured faculty members report that their contracts lack even bare-bones protections for classroom speech and extracurricular expression.<sup>224</sup> If these instructors say something out of line, all an institution has to do is decline to renew their contracts. No explanations are required; no grievance procedures provided. Under such conditions, “people fall like sparrows,” claims Richard Moser, the coordinator for adjunct faculty interests at the AAUP.<sup>225</sup> Sometimes adjuncts who are “on the outs” with administrators are told that their courses have been canceled, or enrollment has dropped, or the department is retrenching—if they are told anything at all.<sup>226</sup> Adjuncts are infrequently given warning before their termination.<sup>227</sup> For example, Steven Bitterman, an adjunct at Southwestern Community College, claims that he was simply fired over the phone after telling his class that people could “more easily appreciate the biblical story of Adam and Eve if they considered it a myth.”<sup>228</sup> Similarly, adjunct June Sheldon alleges that she was fired from San José Community College after a student complained that Sheldon’s answer to the student’s question about homosexual behavior was “offensive.”<sup>229</sup> Her course, Human Heredity, confronted the issue of nature vs. nurture regarding the origins of human sexuality. Sheldon claims that after one student complained, the dean fired Sheldon for commenting that there were no female homosexuals.<sup>230</sup>

---

under his contract and not protected by the First Amendment); *Nuovo v. Ohio State Univ.*, 726 F. Supp. 2d 829 (S.D. Ohio 2010) (statements made by physician employed as professor at state university medical center regarding accuracy of certain medical tests that were conducted by university’s pathology laboratory not protected by First Amendment and not protected under his contract). *See also* Robert J. Tepper, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125 (2009) (review of cases in which professors have been found unprotected by contractual provisions since *Garcetti*).

223. Alison Schneider, *To Many Adjunct Professors, Academic Freedom is a Myth*, CHRONICLE HIGHER EDUC. A18 (Dec 10, 1999), available at <http://chronicle.com/article/To-Many-Adjunct-Professors/24384/>.

224. *See* Robin Wilson, *Adjuncts Fight Back Over Academic Freedom*, CHRONICLE HIGHER EDUC. A11–A19 (Oct. 3, 2008), available at <http://chronicle.com/article/Adjuncts-Fight-Back-Over/22742>.

225. *See* Schneider, *supra* note 223.

226. *Id.*

227. *Id.*

228. *See* Wilson, *supra* note 224, at A19.

229. *Sheldon v. Dhillon*, No. C-08-03438 RMW, 2009 WL 4282086, at \*2 (N.D. Cal. Nov. 25, 2009); *See* Scott Jaschik, *Teaching or Preaching?*, INSIDE HIGHER EDUCATION (July 15, 2010), <http://www.insidehighered.com/news/2010/07/15/illinois#ixzz2RRawItf9>.

230. Ultimately, in exchange for dropping the lawsuit, the District paid Ms. Sheldon \$100,000 and expunged from her personnel file any record of her termination. *See Sheldon v. Dhillon resource page*, ALLIANCE DEFENDING FREEDOM (JULY 22, 2010), <http://www.adfmedia.org/News/PRDetail/153>.



Even non-tenured faculty members who enjoy contractual protections for academic freedom typically receive less protection than do tenured faculty members.<sup>231</sup> Frequently, expansive speech protections will not apply to those who contract with a college or university for short periods of time (e.g., adjunct professors).<sup>232</sup> For instance, a survey of the contractual protections extending to the speech of non-tenured faculty in the areas of teaching and research in 2011 indicates that adjunct professors who are given academic freedom protections largely lack the freedom to speak on subjects outside of pre-specified course material in their classrooms.<sup>233</sup> Terri Ginsberg is an example. She alleges that in 2010, she was told that she would be considered for a tenure-track opening at North Carolina State University if she came to the campus for a full-time, nine-month position in its cinema program.<sup>234</sup> It did not appear that the university considered her for the tenure-track job, and did not reappoint her to her program position at the end of her nine months. Ginsberg claims that she failed to secure a more permanent position because the university's administrators and faculty members did not approve of her pro-Palestinian views—she describes that she received particular criticism for her decision to screen a Palestinian-made film in a Middle Eastern film series she curated.<sup>235</sup> Her pre-approved curriculum apparently did not extend to the showing of films outside of specific genres and production units, rendering her ineligible to bring an administrative grievance review.<sup>236</sup> The relevance of these kinds of academic freedom constraints for adjunct and other non-tenure track faculty members is significant. Non-tenure track professors, including those who teach part time and those who teach full time but are not on tenure-track career paths, accounted for about half of all faculty appointments in American higher education during 2011; such teachers will likely continue to comprise a majority of faculty positions as long as state budgets are tight and public universities can cut costs by hiring non-tenure track instructors.<sup>237</sup>

---

231. See, e.g., Chris Jay Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C. & U.L. 669, 707 (2001) (reviewing contracts of tenured and non-tenured faculty members at top public institutions in the United States).

232. See LAWRENCE WHITE, EMERGING ISSUES AFFECTING ACADEMIC FREEDOM AND TENURE 18 (2011); Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

233. WHITE, *supra* note 232, at 13.

234. See Nora Barrows-Friedman, *Fight Continues for Academic Freedom in the US*, THE ELECTRONIC INTIFADA, Dec. 15, 2011, <http://electronicintifada.net/blogs/nora/fight-continues-academic-freedom-us>.

235. *Id.*; see also Ginsberg v. Bd. of Governors of Univ. of N.C., 718 S.E.2d 714, 715 (N.C. Ct. App. 2011).

236. Barrows-Friedman, *supra* note 234.

237. *Id.*; see also John W. Curtis & Saranna Thornton, *The Annual Report on the Economic Status of the Profession 2012–13*, ACADEME, Mar.–Apr. 2013, at 4, 7, 17–18.

Even tenured professors are challenged by academic freedom constraints. There are so many different employment situations and institutions that it is impossible to say confidently that contracts provide needed protection for tenured faculty members in all, or even most, situations in which they find themselves in the academy. A tenured professor's contract, which is formed by a letter of appointment, usually provides a default academic freedom provision.<sup>238</sup> However, default contract provisions can fail to account for the idiosyncrasies of each faculty member's work.<sup>239</sup> Even when professors have the opportunity to review contracts and modify them, a lack of legal training leads to oversight and can result in a lack of adequate speech protection. The more entrepreneurial, diverse, and complex a college or university faculty becomes, the more difficult it is to address every possible situation—or even most situations—in a contractual format that protects needs and interests of individual members. As a result, core academic speech is in peril. Contractual provisions need to be supported by First Amendment protections in those cases in which the employing college or university is a state actor so that the judiciary can protect the rights of governmentally employed professors to engage in truth-seeking, knowledge-building speech.

## V. PROTECTING PROFESSORS: LINE-DRAWING AND TWO MODEST PROPOSALS

### A. An Exception to *Garcetti* for Academic Speech: Why and Where to Draw a Line?

When a professor speaks as a teacher or scholar, administrator, or advisor, much of the speech reflects elements of that professor's expertise. Whether serving on a curriculum committee, voting on a departmental budget, or interviewing a potential colleague, the tasks may be deemed primarily administrative; even so, with each duty performed—and countless others that reflect the reality of the shared governance structure found in most higher education institutions—the so-called administrative tasks are infused with issues and decisions that rely on, or are at least related to, a scholar's expertise. The very concept of choosing curriculum that is "appropriate" undoubtedly enters the realm of a professor's expertise for discerning content and credibility. Affirming a budget requires knowledge of resources that pertain to the scholarly mission and goals of a department. Choosing a colleague necessitates a professional assessment of a candidate's qualifications and the fit of that candidate to the department and its

---

238. See AM. ASS'N OF UNIV. PROFESSORS, THE STATUS OF NON-TENURE-TRACK FACULTY 28 (2013). See Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 HAMLIN L. REV. 467, 469–70 (1999).

239. See *id.* at 499. See generally JOHN K. WILSON, PATRIOTIC CORRECTNESS: ACADEMIC FREEDOM AND ITS ENEMIES 68 (2008).

needs. In an institution where the core mission is the education of students, most professorial functions, and the speech made pursuant to those functions, can in some way be connected to the college or university's mission.

In our opinion, administrative and advisory forms of speech, however, do *not* rise to the level of core academic speech meriting an exception from the purview of the “pursuant to their official duties” rule set forth in *Garcetti*.<sup>240</sup> We believe that while administrative and advisory speech may be the product of a professor's expertise, neither administrative nor advisory speech is crucial to truth-seeking in teaching and scholarship, the kind of speech that fosters a wide exposure to that “robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”<sup>241</sup> Simply put, speech required to challenge and explore unpopular or unchartered areas—the kind that sometimes leads to improved economic theories, innovative scientific discovery, or philosophical debates about social reform—is special in a way that speech related to allocating funding or managing a student group is not. Forms of administrative and advisory speech are not sufficiently bound to the “truth-seeking, instructive character” of core academic speech to warrant special constitutional protection.

We believe that the kind of academic speech that should receive special First Amendment protection is that which feeds directly into the “free and unfettered interplay of competing views . . . essential to the institution's educational mission.”<sup>242</sup> Administrative and advisory speech, in contrast, forwards logistical purposes. While these forms of speech are important, they aim primarily at advancing the operational capacities of a college or university. When a faculty member is complaining about leave policy, or procedural decisions as to how teaching assistants are subsidized, or how funding is allocated between departments, this speech may touch on academic interests but it does not contribute to the quintessential “marketplace of ideas” that merits full, or indeed heightened, First Amendment protection.<sup>243</sup> Allowing it to be subject to review by college or university officials does not, in our opinion, chill “opportunity for free political discussion” in such a way as to threaten “the security of the Republic, the very foundation of constitutional government.”<sup>244</sup>

Indeed, to regard any and all speech made by academics as protected by impervious ivory tower walls would be to provide a bastion in which discrimination could proliferate, contracts could be broken, taxpayer dollars could be misused, and self-interest could abound. Accordingly, courts must determine when administrative or advisory speech—even if it somehow relates to academic concerns—should be protected under the law. Even ten-

---

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

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

242. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

243. *Healy v. James*, 408 U.S. 169, 180 (1972).

244. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

ure decisions, which have received great deference from the courts, cannot be fully assured a hands-off approach when the issue before the court is less about applying professional judgment and more about speaking in a discriminatory or otherwise illegal manner.<sup>245</sup> As explained by the court in *Craine v. Trinity College*, a “university cannot claim the benefit of the contract it drafts but be spared the inquiries designed to hold the institution to its bargain . . . . The principle of academic freedom does not preclude us from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract.”<sup>246</sup> Courts play a crucial role in assuring that institutions comply with the law; to do so requires deeming some speech of scholars to be “pursuant to official duties” and thus not constitutionally protected.<sup>247</sup>

Ultimately, core academic speech is special; when professors speak within the realm of academic disciplines, they are furthering the public interest in freedom to explore ideas. Even though public college or university professors are government employees, they deserve constitutional protection when they are engaged in the practice of expressing speech relevant to their fields and their positions. The nature of a public college or university professor’s role is to generate better teaching and scholarship, constantly striving towards “truth” in each discipline. Academic freedom is worth protecting not because it is exceptionally important to our national well-being; that standard alone would create enhanced First Amendment protection every time speech furthers an important national interest. Rather, academic speech is the kind of speech the First Amendment is designed to protect because the role of a professor in teaching or researching is one in which intellect must be free to safely range and speculate and push inquiry forward. Scientific and philosophical discoveries can be tested, verified and perfected, or analytical rashness rendered innocuous, and error exposed, only by the collision of mind with mind, and knowledge with knowledge.<sup>248</sup>

---

245. See, e.g., *Kyriakopoulos v. George Washington Univ.*, 866 F.2d 438, 447 (D.C. Cir. 1989) (“This case does not involve a judicial recalculation of the University’s evaluation of a professor’s scholarly merit. The factfinder’s scrutiny need extend only far enough to ensure that the University perform its contractual duty . . . .”); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201–02 (1990) (holding that neither evidentiary privilege nor First Amendment academic freedom protects peer review materials that pertain to discrimination charges in tenure decisions).

246. 791 A.2d 518, 540 (Conn. 2002) (quoting *Kyriakopoulos v. George Washington Univ.*, 866 F.2d 438, 447 (D.C. Cir. 1989) (internal quotation marks omitted)).

247. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

248. See *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013) (“Where, as here, a statement is made as part of an ongoing scientific discourse about which there is considerable disagreement, the traditional dividing line between fact and opinion is not entirely helpful . . . .” “[S]tatements about contested and contestable scientific hypotheses constitute assertions about the world that are in principle matters of verifiable “fact,” for purposes of the First Amendment and the laws relating to fair competition and defamation, they are more closely akin to matters of opinion . . . .”).

Currently, the speech of public college and university faculty members is endangered by the willingness of some courts to apply *Garcetti*'s per se rule to core academic speech and chilled by professors' uncertainty as to whether that rule will be applied to the particular facts of their case. Supreme Court guidance on this topic is of paramount importance to protect free inquiry and discourse. In modern institutions of higher education, there will often be blurred lines when trying to discern which professorial functions involve pure professional expertise, such as teaching and scholarship, and which are more administrative or advisory, such as providing committee service. Notwithstanding the fact-intensive nature and challenge of line-drawing between professorial duties, however, courts need more clarity and consistency in jurisprudence related to faculty speech; the line must be drawn somewhere. The U.S. Supreme Court's clarification of *Garcetti*'s official duties test and its application to academic speech is essential to the intellectual growth of the nation. This paper next presents two proposals: one suggesting types of speech that should be assured protection from the courts, the other outlining areas of speech for which academics themselves are the most appropriate guardians.

#### B. Carving Out an Explicit Exception for Core Academic Speech

Without the assurance of an exception for core academic speech, many faculty members will be discouraged from taking novel or unpopular positions. Important ideas will never be advanced; intellectual debate and advancement will suffer.<sup>249</sup> Scholarship cannot flourish in an atmosphere of chilled speech. Justice Kennedy's reservation in *Garcetti* offers space in which the Court may explicitly articulate how the First Amendment can protect faculty speech that relates to instruction and research. Building on the past eight years of speech cases in the lower courts, the Supreme Court can forge an exception to *Garcetti*'s rule for the core academic speech of faculty members at public colleges and universities while keeping intact the heart of the decision with regard to governmental employees.

Due to the burgeoning *Garcetti* progeny<sup>250</sup> and the special nature of core academic speech,<sup>251</sup> the Court should limit an academic speech exception to scholarship and instruction. The reservation in *Garcetti* and its subsequent interpretation within the lower courts speaks clearly to the need to protect core academic speech, or that which is directly relevant to research and course-related discussion. It would be prohibitively difficult, and likely confusing, to attempt to extend an exception for administrative or advisory

---

249. As the late Chief Justice Earl Warren wrote, "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

250. See discussion *supra* Part III.

251. See discussion *supra* Part V.A.

speech to faculty members in light of *Garcetti*'s articulation of the governmental interest in controlling employee expression in the course of their official duties. In typical public workplaces, the government is understandably concerned with efficiency and employee morale.<sup>252</sup> Colleges and universities need to be efficient as well, of course, even if their primary goals are research and teaching. Administrative debate that is an accepted, and even necessary, part of the creation of strong faculty and academic curriculum can still be presented in ways that are disruptive; so can speech given in the process of advising certain students and student groups.

A teaching-and-research exception would be consistent with pre-*Garcetti* treatment of academic speech. Prior to *Garcetti*, many courts already distinguished the protections for speech related to teaching and research from other forms of professorial speech.<sup>253</sup> While courts intervened in administrative or advisory speech that created unfair or unjust situations, they practiced judicial deference in matters closely related to teaching and scholarship.<sup>254</sup> Courts linked the rationales for judicial deference in academia to policies of autonomy, judicial respect for academic governance, and the judiciary's lack of expertise in the complex matters of academia.<sup>255</sup> These rationales reflected the reality that nowhere are the matters of academia more complex than when a professor speaks within the scope of his expertise. Although any professor's relationship with his institution is likely to be contractual, and ultimately overseen by an administrator, the content and format of instruction is significantly determined by the profession-

---

252. See *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

253. See, e.g., *Linnemeier v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001) ("Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide [the content of] classroom instruction . . ."); *Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) ("[L]aw schools promote an environment characterized by the active exercise of [a professor's] First Amendment rights. Indeed, free and open debate on issues of public concern are essential to a law school's function."); *Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 629 (7th Cir. 1985) (noting "both the freedom of the academy . . . and the freedom of the individual teacher").

254. See, e.g., *Gupta v. New Brit. Gen. Hosp.*, 687 A.2d 111, 121–22 (Conn. 1996) (distinguishing between employment terms and educational terms of residency agreement and holding that resident could be dismissed because decision was evaluation of resident's employment); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 230 (1985) (noting judicial deference to academic professionals on matters of substantive due process and concluding that university officials did not violate the student's substantive due process rights); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 95–96 (1978) (separating academic dismissals from disciplinary dismissals, and holding that formal hearings before decision-making bodies need not be held in the case of academic dismissals).

255. See R.M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?* 36 J.C. & U.L. 729, 734–35 (2010). See also *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) (internal citations omitted) (explaining, in the context of race-sensitive admissions policies, that judicial deference is due when academic decisions are "reasoned [and] principled," "integral" to a university's mission, and "based on [the university's] experience and expertise").

al judgment of a professor. Professors, within the parameters of administrative and/or departmental curricular decisions, develop their courses. Courts recognize that the expertise inherent to teaching and research, and speech associated with such activities, are complex areas into which the judiciary should not ordinarily intrude.<sup>256</sup>

For areas of professional activity in which the judiciary may be less restrained in their review, such as administrative and advisory tasks, professors should receive institutional policy-based protection from punitive action by college and university officials for certain speech made pursuant to their responsibilities as administrators and as advisors. Due to the tradition of shared governance and the import of an informed college and university administration, a lack of protection in this arena would be inconsistent with development of critical intellectual faculties and the advancement of knowledge. Both administrative and advisory activities of university professors provide for the dissemination of knowledge by academics and the protection of a capable and accomplished faculty. In the absence of First Amendment protection for these types of speech, internal policies can safeguard them.

### C. Internal Policies to Protect Administrative and Advisory Speech

To protect forms of administrative and advisory speech, public institutions should expand and revitalize campus policies in recognition of the role that this speech plays in fostering a robust academic environment. Indeed, the *Garcetti* court itself implicitly recognized that these kinds of mechanisms might protect professors who speak out pursuant to official duties.<sup>257</sup> Forms of institutional protections for faculty speech already exist within the academic arena; as discussed in Part IV of this article, many public institutions already maintain some internal protections for the speech of their academic personnel.<sup>258</sup> While internal policies usually provide less robust safeguards than the First Amendment protection, which speech in the context of teaching and research should receive, they still provide valuable protections for administrative and advisory speech that, for the reasons given above, is not eligible for First Amendment protection.

Springing from a tradition of shared governance, many public colleges and universities already have internal provisions that protect expression within the scope of administrative and advisory governance.<sup>259</sup> Giving fac-

---

256. O'Neil, *supra* note 255, at 729.

257. *Garcetti v. Ceballos*, 547 U.S. 410, 425–26 (2006) (referencing cases involving safeguards in the form of rules of conduct and constitutional obligations apart from the First Amendment).

258. MATTHEW FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 48 (2009).

259. The 2001 Survey of Higher Education Governance is one of the few research studies to look in-depth at the subject. It surveyed 1321 four-year institutions. See Kaplan, *supra* note 86, at 172. Those surveyed reported that 89.9% of the faculties had

ulty members responsibility for reviewing budgetary and tenure decisions increases their buy-in to the college or university mission and is a way to strengthen their commitment to the production and dissemination of knowledge. A faculty that trusts the administration is likely to support it and work for both the letter and the spirit of a department's policies.

Public colleges and universities have many options by which to strengthen existing, or to create new, academic freedom policies protecting administrative and advisory speech. The AAUP is one organization offering boilerplate language for such a policy, and policies can be tailored by individual colleges and universities to reflect the values and purposes of each institution.<sup>260</sup> For those who enjoy tenure, AAUP's sample regulations provide that "[a]dequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens."<sup>261</sup> The regulations further declare that "[a]ll members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the 1940 Statement . . . ."<sup>262</sup> The AAUP regulations further require that colleges and universities provide a hearing procedure in the event that a faculty member alleges that a decision not to reappoint him or her was based upon considerations that violate academic freedom.<sup>263</sup> These principle-based policies protect non-tenured and tenured faculty members alike, ensuring protections for administrative speech and guaranteeing academic due process for alleged violations.<sup>264</sup>

Tenure can serve to protect all forms of academic speech.<sup>265</sup> By limiting

---

determinative or joint authority with the administration on content of the curriculum; on faculty appointments, it was 69.9% of the faculties; on tenure, it was 66.1%. *Id.* at 184. Participation in governance of academic matters has increased over time. In 1970, faculties determined the content of curriculum at 45.6% of the institutions, and they shared curricular authority with the administration at another 36.4%. *Id.* at 201–02. By 2001, faculties determined curriculum content at 62.8% of the institutions, and they shared authority at 30.4%. In 1970, faculties determined the appointments of full-time faculty in 4.5% of the institutions, and they shared authority at 26.4%. *Id.* By 2001, faculties determined appointments of full-time faculty in 14.5% and shared authority in 58.2% of the institutions. *Id.*; see also Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 235, 251 (Ronald G. Ehrenberg ed., 2004).

260. See *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf> (last visited Oct. 8, 2013).

261. *Id.* at 4.

262. *Id.* at 6.

263. *Id.* at 6–7.

264. See Foreword to *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf> (last visited Oct. 8, 2013).

265. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Free-*



the ability of the college or university to fire or otherwise take adverse actions against faculty members, tenure provides protection for faculty members to teach and write as they choose. As Professors Brown and Kurland explain, “a system that makes it difficult to penalize a speaker does indeed underwrite the speaker’s freedom.”<sup>266</sup> A tenured faculty member can take a position on an administrative policy knowing that it is unpopular without worrying that it will lead to reprisals. Tenure offers both procedural and substantive protections. Procedurally, tenure means that a faculty member is entitled to continuing employment unless the college or university initiates an action against the faculty member and succeeds in proving “cause” for termination.<sup>267</sup> It is the college or university that must begin the proceedings to terminate a tenured faculty member and that must bear the significant burden of proving the justification for its proposed action.<sup>268</sup> Substantively, tenure means that only specific, narrowly defined circumstances will constitute “cause” sufficient for termination or other adverse employment actions.<sup>269</sup> Although the definition of “cause” varies by college or university, in general there must be serious violations of the law or of principles of academic honesty to meet the standard.<sup>270</sup>

For untenured professors, contracts can provide protection for administrative and advisory speech equivalent to the procedural and substantive protections afforded by tenure. Long-term contracts coupled with a grievance procedure that would need to be followed before a faculty member could be terminated, could provide job security in the form of contractual protections and procedural safeguards in the nature of grievance hearings and decisions by faculty panels. A contract could have language something like this:

Faculty members have the right to express views on educational policies and institutional priorities of their schools without the imposition or threat of institutional penalty, subject to duties to respect colleagues and to protect the school from external misunderstandings.<sup>271</sup>

This language protects administrative and advisory speech, but protects colleges and universities from speech that could be construed as reflecting

---

*dom*, 53 LAW & CONTEMP. PROBS. 325, 331 (1990).

266. *Id.* at 329.

267. *Id.* at 325.

268. *Id.* at 328–30.

269. *Id.*

270. *See id.*

271. This suggestion is based on a similarly drafted proposal by J. Peter Byrne in a 1997 AAHE working paper. J. Peter Byrne, *Academic Freedom Without Tenure?*, in INQUIRY #5, AAHE NEW PATHWAYS WORKING PAPER SERIES (1997). For a detailed critique of Byrne and contractual guarantees of academic freedom, see Erwin Chemerinsky, *Is Tenure Necessary to Protect Academic Freedom?* (Occasional Papers from the Center for Higher Education Policy Analysis, 1997).

an institution's viewpoint and ensures the priority of collegial respect among faculty members.

As a resource for colleges and universities, the AAUP offers general strategies as to how to respond to alleged violations of academic freedom; it recommends that in most instances, a formal investigation and report should occur.<sup>272</sup> Alternative suggestions offer the use of peer-based administrative remedies, in which faculty members cannot assert certain rights until internal administrative mechanisms are exhausted.<sup>273</sup>

A final important step that tenured and non-tenured faculty can take to protect academic freedom is to invoke state constitutional or statutory provisions. For example, a faculty member could file a claim under the state's equivalent of the First Amendment, and a state court might not be inclined to adopt the *Garcetti* limitation or may have a more expansive view of academic freedom than under the First Amendment to the United States Constitution.<sup>274</sup> It is possible that First Amendment-related rights of public college and university faculty members may be more strongly protected through certain interpretations of state constitutional provisions than they might be through the federal constitution.<sup>275</sup> Likewise, a state may guarantee due process, both procedural and substantive.<sup>276</sup> This tactic may work well when a state court signals that it is open to arguments of free speech, procedural due process, and protection against arbitrary action. State courts might conceivably have differing interpretations of the *Garcetti* per se rule's application to matters of academic freedom.

#### CONCLUSION

*Garcetti*, if applied to core academic speech, portends an ominous future for public college and university professorial expression. It is imperative that the Supreme Court, drawing on its reservation in *Garcetti*, craft an ex-

---

272. See *Recommended Institutional Regulations on Academic Freedom and Tenure*, *supra* note 264, at 9.

273. See, e.g., *Reilly v. City of Atlantic City*, 532 F.3d 216, 235–36 (3d Cir. 2008); *Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004); *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

274. See, e.g., Article II, section 17 of the New Mexico Constitution, which provides affirmative protection by allowing individuals to “freely speak, write and publish.” N.M. CONST. art. II, § 17.

275. See, e.g., *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1437 n.4 (C.D. Ill. 1996) (holding that plaintiff's liberty interest was the same under both the state and federal constitutions); *Mills v. W. Wash. Univ.*, 208 P.3d 13, 20–21 (Wash. Ct. App. 2009) (analyzing academic freedom under both federal and state law), *rev'd*, 246 P.3d 1254 (Wash. 2011).

276. See, e.g., *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *State v. Germane*, 971 A.2d 555 (R.I. 2009). Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner. *State v. Thompson*, 508 S.E.2d 277, 282 (N.C. 1998).

ception to the public employee speech doctrine for the speech of academics and address the parameters of such an exception. If it does not do so, lower courts will increasingly diverge in their application of *Garcetti* to various types of academic speech, thus chilling the speech of professors who are unable to guess the framework that will be applied to the facts of their particular situations. Core academic speech is special; when professors speak within the realm of academic disciplines, they are pushing inquiry forward and furthering the public interest. It is the kind of speech the First Amendment is designed to protect because the role of a professor in teaching or researching is one in which intellect must be free to safely range and speculate. Academic speech should not be suppressed because of its content.

While administrative and advisory speech may not be eligible for First Amendment protection, the tradition of shared governance recommends a degree of extra-judicial protection for such speech. College and university officials and faculty members should collaborate to use internal mechanisms to protect these forms of speech. With rights of shared governance for faculty members come responsibilities, and faculty members themselves can strengthen protections for freedom of speech in their varied roles. The well-being of a college or university relies on many forms of official expression by both administrative personnel and faculty members, so it is in the interest of both college and university officials and professors to cooperate to establish protections for respectful but candid speech in the exercise of administrative and advisory responsibilities. In sum, with the protection of an academic speech exception to *Garcetti*'s "pursuant to official duties" rule and internal policies reflecting the traditions of shared governance, public college and university faculty members will remain free to preserve the "transcendent value" of academic freedom to society.<sup>277</sup>

---

277. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . .").